SUPREME COURT OF QUEENSLAND

CITATION:	*Kitchen v Vision Eye Institute Ltd & Anor* [2017] QCA 32
PARTIES:	**DAVID KITCHEN** (appellant) **v** **VISION EYE INSTITUTE LTD** ACN 098 890 816 (first respondent) **ICON LASER (AUST) PTY LTD** ACN 094 059 220 (second respondent)
FILE NO:	Appeal No 4961 of 2015 SC No 10366 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Order
ORIGINATING COURT:	Supreme Court at Brisbane – [2014] QSC 260
DELIVERED ON:	14 March 2017
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Margaret McMurdo P and Fraser JA and Daubney J Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appellant pay the respondents' costs of and incidental to the appeal, those costs to be assessed on the indemnity basis in respect only of costs incurred by the respondents after 5.00 pm on 12 February 2016, and otherwise to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – OFFERS TO COMPROMISE, PAYMENTS INTO COURT AND SETTLEMENTS – INFORMAL OFFERS AND CALDERBANK LETTERS – UNREASONABLE REFUSAL OF OFFER – where the respondents obtained judgment in an action for damages – where the appellant brought an appeal against the primary judgment – where the appeal was dismissed – where the appellant raised numerous grounds of appeal that ultimately were abandoned – where the appellant unreasonably refused two *Calderbank* offers of compromise the respondents made before the hearing of the appeal – where the two *Calderbank* offers were both substantially more favourable to the appellant than the order

of the trial judge – where the parties agree the appellant should be ordered to pay the respondents' costs of the appeal – whether those costs should be assessed on the standard basis or on the indemnity basis

Calderbank v Calderbank [1975] 3 WLR 586; [1976] Fam 93, followed
Comgroup Supplies Pty Ltd v Products for Industry Pty Ltd [2016] QCA 130, followed
Hadgelias Holdings and Waight v Seirlis & Ors [2014] QCA 325, followed
Stewart v Atco Controls Pty Ltd (in liq) [No 2] (2014) 252 CLR 331; [2014] HCA 31, followed

COUNSEL: No appearance by the appellant, the appellant's submissions were heard on the papers
No appearance by the respondents, the respondents' submissions were heard on the papers

SOLICITORS: No appearance for the appellant
No appearance for the respondents

[1] **MARGARET McMURDO P:** I agree with the reasons and proposed order of Fraser JA.

[2] **FRASER JA:** After a trial a judge in the Trial Division gave judgment in favour of the respondents by which, amongst other orders, the appellant was ordered to pay the respondents the sum of $10,845,476. By a subsequent order the appellant and Mrs Kitchen were ordered to pay 95 per cent of the respondents' costs of the proceedings assessed on the indemnity basis. The appellant's appeal ultimately turned upon the proper construction of a contractual provision. The Court dismissed the appeal and gave the parties leave to make submissions about costs.[1] The respondents submit, and the appellant accepts, that the appellant should be ordered to pay the respondents' costs of the appeal. The issue is whether those costs should be assessed on the standard basis or the indemnity basis.

[3] The respondents contend that there are two features of the appeal which justify the exercise of the discretion to depart from the usual position that costs be assessed on the standard basis and order that they be assessed on the indemnity basis. First, the respondents contend that the appellant raised numerous grounds of appeal which ought never to have been raised, and which ultimately were abandoned. The effect of the argument is that the appellant, properly advised, should have appreciated that his appeal was hopeless. The respondents argue that the clearest example of the appellant's abandonment of a hopeless argument was the abandonment at the hearing of an argument that there was no ambiguity in the relevant provisions of the contract. They argue that, once that contention was abandoned, the appellant's argument that the trial judge misconstrued and over-emphasised the significance of the commercial context in which the contract was made became untenable; the relevant context was clearly apparent and it was appropriate for the trial judge to take it into account when construing the admittedly ambiguous provision.

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1 *Kitchen v Vision Eye Institute Ltd & Anor* [2016] QCA 226.

[4] As the respondents submitted, the grounds of appeal were very substantially narrowed before and at the hearing of the appeal.[2] It should also be accepted that until a very late stage the appellant persisted in an untenable argument[3] that the central contractual provision was not ambiguous.The appropriate abandonment of that argument deprived the appellant of one plank of his challenge to the judgment against him, but reference to the Court's consideration of the remaining arguments[4] suggests that, whilst they were not strong, they should not be characterised as so lacking in arguable merit as to justify wholesale departure from the usual rule that costs should be assessed on the standard basis.

[5] The appellant argued that another reason for refusing an order that costs be assessed on the indemnity basis upon the ground of his late abandonment of various arguments was that the narrowing of the issues obviated the need for a second hearing day and economy of this kind was to be encouraged, particularly in appeals. Economy in litigation is certainly to be encouraged, preferably earlier than later (although later is better than never). The more substantial point for present purposes is that the respondents have not established their contention that indemnity costs should be awarded upon all issues on the ground that the appellant should have appreciated that his appeal was without any merit.

[6] The respondents' second argument in support of an order that the costs be assessed on the indemnity basis is that the appellant unreasonably refused two offers of compromise the respondents made before the hearing of the appeal, the acceptance of which would have significantly reduced the appellant's liability to the respondents. The first offer was made by email on 8 February 2016. It was stated to remain open until 5.00 pm on 12 February 2016. This offer was expressed to be "without prejudice save as to costs", as approved in *Calderbank* v *Calderbank*.[5] The offer, which was made to the then appellants (before Mrs Kitchen was removed as an appellant) in full and final satisfaction of the judgment and costs order in the Trial Division, was that the appellants pay the respondents the total sum of $9,000,000 by instalments of $3,000,000 within 60 days of acceptance of the offer and thereafter $1,500,000 on each of the following four anniversaries of the date of the first payment. There were terms of the offer that upon receipt of the appellants' acceptance of the offer, the present appellant would do all things necessary to have the notice of appeal dismissed with no orders to costs, the respondents would do all things necessary to have a bankruptcy notice served upon the present appellant set aside with no orders to costs, and in the event that the appellants defaulted in any of the specified payments the respondents had the right immediately to enter judgment against the appellant by consent for the outstanding amount of the payment sum at the relevant time.

[7] The respondents' second offer was made by email dated 14 February 2016 which was headed "without prejudice". This offer adopted the terms of the first offer save that the amount to be paid by the appellants to the respondents was reduced to $7,000,000, the first instalment of $4,000,000 being due on or before 14 April 2016 followed by instalments of $1,000,000 on 30 June in each of the following three years. That offer remained open for acceptance until 9.00 am on the following

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2 See [2016] QCA 226 at [10].
3 See [2016] QCA 226 at [18].
4 [2016] QCA 226 at [18]-[22], [24]-[30].
5 *Calderbank v Calderbank* [1976] Fam 93.

morning, 15 February 2016, when the appeal was listed for hearing and was in fact heard.

[8] By an email sent by the appellant's solicitors to the Court of Appeal Registry, the appellant objected to the affidavit filed by the respondents which exhibited those and other emails and to the respondents' outline of argument about costs. In a subsequent email from the respondents' solicitors to the Registry, those solicitors asked the Court to disregard identified page numbers of the exhibit to the affidavit filed on behalf of the respondents. The respondents' solicitors made it plain that the respondents did not withdraw their outline of argument or any other part of the affidavit. The evidence which the respondents abandoned did not comprehend the offers of 8 and 14 February 2016. The appellant subsequently filed submissions and an affidavit by a solicitor employed by the appellant's solicitors. Neither the outline nor the affidavit took any objection to the evidence of the respondents' offers. Only the balance of the exhibit to the affidavit filed by the respondents' solicitors should be disregarded, as they requested.

[9] The appellant argued that his conduct in relation to settlement of the appeal could not be characterised as being so unreasonable as to justify the making of an order on the indemnity basis. The appellant argued that his rejection of the respondents' offers was vindicated by the respondents' conduct in subsequently making a lower offer which the appellant accepted. This suggested offer was contained in an email to the appellant dated 13 April 2016, apparently emanating from a representative of the respondents. It states that, "As a compromise I can confirm that VEI is willing to accept payment of **$2,750,580.18** on the following basis…", namely, a payment of $250,580.18 by 30 November 2016 followed by payments of $500,000 by 30 November in each of the following five years. There follow various statements, including that "The above offer is based on the execution all relevant settlement documentation by close of business **Monday 18 April 2016**" and "If agreement can be reached on this basis, we could instruct our respective lawyers to dispose of the appeal and the bankruptcy notice we have issued against you". The appellant replied by email on the same day that he accepted the offer. The affidavit filed on behalf of the appellant also exhibits the appellant's claim filed in the Trial Division for an order for specific performance of what is claimed to be a compromise of the litigation made on 13 April 2016 with reference to communications, including the emails already mentioned. In the respondents' defence, which is also exhibited to the affidavit, the respondents deny that there was a concluded compromise.

[10] For present purposes it is not necessary to discuss the significance, if any, of the respondents' second offer. It is sufficient to refer to the respondents' first offer, the *Calderbank* offer made on 8 February 2016. The following circumstances are significant. The first offer was substantially more favourable to the appellant than the result in the Trial Division; even if the proper amount of the costs and disbursements recoverable by the respondents under the costs order in the Trial Division was not as high as $3,577,143 (excluding GST), as the respondents stated in their first offer, the recoverable amount must have been very substantial; that offer abandoned that substantial amount together with some $1,846,000 of the judgment amount; and it also included the substantial compromise that the appellants would assume liability to pay the settlement sum over four years, instead of immediately as in the case of the existing judgment in the respondents' favour. The first offer was capable of immediate acceptance. It involved no material ambiguity. The first offer was made a week before the first of the two days listed

for the hearing of the appeal. The appellant then should have been readily able to make an informed decision about his prospects of success in the appeal. The provision in the first offer that it would remain open until 5.00 pm on 12 February 2016 allowed a reasonable time for the appellant to decide whether or not to accept it.

[11] In *Stewart v Atco Controls Pty Ltd (in liq) [No 2]*[6] the appellants in the High Court had succeeded at trial but lost in the Court of Appeal of the Supreme Court of Victoria. The High Court restored the trial judge's decision. The appellants had made a *Calderbank* offer three weeks before the hearing in the Court of Appeal, an offer which remained open for acceptance for five days.[7] Like the respondents' offer in this case, that offer was substantially more favourable to the appellants than the trial judge's decision. The High Court decided that the appellants should have their costs of the appeal to the Court of Appeal upon the indemnity basis. The High Court observed that an unsuccessful litigant's failure to accept a *Calderbank* offer "is a factor, in some cases a strong factor, to be taken into account on an application for indemnity costs" and that if the test is whether the rejection of the offer was "not unreasonable", that "would appear to require at the least that the respondent point to a reason for not accepting the offer beyond the usual prospects of being successful in litigation".[8] In characterising the non-acceptance of the *Calderbank* offer by the respondent as not being "reasonable" the High Court noted that the Court of Appeal had accepted the respondent's argument upon the legal point in issue in that matter, observed that the contrary decision made by the High Court was the decision which ought to have been made by the Court of Appeal, and concluded that in those circumstances "it can hardly be said that the respondent's non-acceptance of the offer was reasonable".[9] That decision has been applied in this Court.[10]

[12] The appellant has not identified a reason for not accepting the respondents' first offer. The respondents must have incurred all but a relatively trivial amount of the costs for which they now seek an indemnity long before they are said to have made a substantially lower offer months after the hearing of the appeal. If the appellant had accepted the respondents' first offer his liability under the judgment and costs order in the Trial Division would have been replaced by a contractual liability which was very much more favourable to him than the judgment and costs order. The fact that after the conclusion of the hearing of the appeal the respondents made a yet more favourable offer (if their email of 13 April should be characterised as an offer) is of no relevance in this context.

[13] In the particular circumstances of this case an order for indemnity costs is appropriate but, taking into account the circumstance that the respondents' first offer was made only a week before the hearing of the appeal, the appropriate order is that the appellant pay the respondents' costs of and incidental to the appeal, those costs to be assessed on the indemnity basis in respect only of costs incurred by the respondents after 5.00 pm on 12 February 2016, and otherwise to be assessed on the standard basis.

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6 (2014) 252 CLR 331.
7 (2014) 252 CLR 331 at 332 (in argument), referred to by the Court at [3].
8 (2014) 252 CLR 331 at [4].
9 (2014) 252 CLR 331 at [6].
10 *Comgroup Supplies Pty Ltd v Products for Industry Pty Ltd* [2016] QCA 130 and *Hadgelias Holdings and Waight v Seirlis & Ors* [2014] QCA 325 [12]-[14].

[14] **DAUBNEY J:** I respectfully agree with Fraser JA.