SUPREME COURT OF QUEENSLAND

CITATION:	*Ballesteros v Chidlow & Anor* [2006] QCA 368
PARTIES:	**MICHELLE THERESE BALLESTEROS** (plaintiff/appellant) **v** **HERBERT HUGH CHIDLOW** (first defendant) **RACQ INSURANCE LIMITED** ACN 009 704 152 (second defendant/respondent)
FILE NO/S:	Appeal No 9344 of 2005 SC No 10080 of 2004
DIVISION:	Court of Appeal
PROCEEDING:	Personal Injury - Quantum Only - Further Order
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Judgment delivered 30 August 2006 Further order delivered 22 September 2006
DELIVERED AT:	Brisbane
HEARING DATE:	31 March 2006
JUDGES:	McMurdo P, Fryberg and Douglas JJ Further Order of the Court
FURTHER ORDER:	**1. Set aside the trial judge's orders as to costs** **2. The respondent to pay the appellant's costs of the action to be assessed on the indemnity basis and of the appeal, including these submissions as to costs, to be assessed on the standard basis**
CATCHWORDS:	PROCEDURE - COSTS - DEPARTING FROM THE GENERAL RULE - ORDER FOR COSTS ON INDEMNITY BASIS - where appellant made offers of settlement - where offers were not accepted - where Court awarded damages no less favourable than offers of settlement - whether respondent should be ordered to pay indemnity costs *Uniform Civil Procedure Rules* 1999 (Qld), r 360(1) *Ibbs v Wooodrow* [2002] QCA 298; Appeal No 11536 of 2001, further order delivered 16 August 2002, considered *Maitland Hospital v Fisher [No 2]* (1992) 27 NSWLR 721, distinguished *Tamwoy v Solomon* [1996] 2 Qd R 93, considered *Tector v FAI General Insurance Co Ltd* [2000] QCA 426;

Appeal No 7391 of 1999, further order delivered 8 December 2000, considered

COUNSEL: M Grant-Taylor SC, with P L Feely, for the appellant
R J Douglas SC for the respondent

SOLICITORS: McInnes Wilson for the appellant
Cooper Grace Ward for the respondent

[1] **THE COURT:** Since the delivery of the Court's reasons in this matter the parties have agreed that the appropriate order with respect to the costs of the action is that the second defendant should pay the plaintiff's costs of the action to be assessed on an indemnity basis.

[2] The appellant also seeks her costs of the appeal on an indemnity basis because she made a formal offer to settle her claim before the trial, on 30 November 2004, for $120,000 plus costs, an offer that was not accepted by the respondent. The respondent made two formal offers, both of $80,000 plus costs, on 20 December 2004 and 26 April 2005 before the trial in May 2005. The result of the appeal was to increase the damages awarded to her from the $99,819 assessed at the trial to $124,979.

[3] The appellant's submission is that because the formal offer was made at the start of the action, if it had been accepted, none of the subsequent costs of the action or of the appeal would have been incurred. Her argument is that her offer should have been accepted when it was made, that the amount of the judgment is modest and the costs to her will be significant. Her counsel rely upon a decision of this Court in *Ibbs v Wooodrow* [2002] QCA 298 where the damages were increased on appeal to a level which took them beyond the original formal offer before trial and the costs of the action and of the appeal were allowed on the indemnity basis. There was no discussion as to whether the discretion should be exercised differently on an appeal as compared to after a trial but the decision referred to r 360(1) of the *Uniform Civil Procedure Rules* 1999.

[4] The appellant relied on that rule. It provides:

> "(1) If -
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> (a) the plaintiff makes an offer to settle that is not accepted by the defendant and the plaintiff obtains a judgment no less favourable than the offer to settle; and
>
> (b) the court is satisfied that the plaintiff was at all material times willing and able to carry out what was proposed in the offer;
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> the court must order the defendant to pay the plaintiff's costs calculated on the indemnity basis unless the defendant shows another order for costs is appropriate in the circumstances."

[5] The respondent resists an order for indemnity costs of the appeal. It does so on the basis that, although the appeal judgment was higher than the appellant's offer, the respondent succeeded, in many of the issues argued on the appeal about particular items of damages, in containing the increases sought by the appellant, wholly in the case of general damages and significantly in respect of the arguments for past economic loss, future care and future economic loss. It argues that the Court's

jurisdiction to make an order for costs in relation to a particular question in or a particular part of a proceeding under r 682 is enlivened because the appellant has only enjoyed partial appellate success and argues that she should receive only 60 per cent of her costs of the appeal on the standard basis.

[6] The respondent also argued that the claim could always have been brought within the District Court's jurisdiction and that the costs of two counsel should not be allowed. Where it is conceded that the costs of the trial should be assessed on the indemnity basis, the issue of what was the appropriate court in which to bring the action assumes less importance. In our view, also, the question whether the costs of two counsel should be allowed is a matter to be determined in the registry rather than by this Court, although, of course, it is a common feature of practice in this Court that two counsel are engaged.

[7] It was conceded by the appellant that r 360 does not bind the exercise of our discretion at the appellate level. That was established by the decision in *Tamwoy v Solomon* [1996] 2 Qd R 93 and applied to the *UCPR* in *Tector v FAI General Insurance Co Ltd* [2000] QCA 426 in a further order made on 8 December 2000 where the Court said:

> "The appeal was instituted on 13 August 1999 so that the *Uniform Civil Procedure Rules* ('UCPR') which came into force on 1 July 1999 apply to this appeal. By r 766(1)(d) the Court of Appeal may make the order as to the whole or part of the costs of an appeal which it considers appropriate. There is no suggestion that the regime governing offers to settle in Chapter 9 Part 4 of the UCPR apply to appeals. That was the conclusion of the Court of Appeal in *Tamwoy v Solomon* [1996] 2 Qd R 93 in respect of O 26 of the *Rules of the Supreme Court* which were replaced by the UCPR and on this point there appears to be no appreciable difference between Chapter 9 Part 4 and O 26."

[8] The decision in *Ibbs v Wooodrow* did not refer to these decisions. One of the bases for the decision in *Tamwoy v Solomon* was that the then equivalent to r 360 could not be made to operate in a reciprocal or even-handed way to both a plaintiff and a defendant on appeal; see at 98. The decision of the New South Wales Court of Appeal in *Maitland Hospital v Fisher [No 2]* (1992) 27 NSWLR 721 that their equivalent rule could continue to apply on appeal in favour of the party who was the plaintiff in the trial was not followed; see at 99 - 100. It is necessary, therefore, to consider the issue of the costs of the appeal divorced from the background of the offer under r 360 that was relevant for the trial.

[9] The appellant succeeded in obtaining a significant percentage increase in her award of damages. That she did not succeed in obtaining an increase to the full extent claimed is not surprising but it was not unreasonable for her to advance the arguments made on her behalf, nor could it be said that the costs of a relatively brief hearing would have been increased notably by the submissions that were not completely successful. We would not reduce the costs order on that basis. There was no evidence of any offer such as a *Calderbank* offer after the trial and before the appeal and no suggestion that the conduct of the appeal by the respondent created the occasion for costs to be assessed on the indemnity basis. Indeed it contained the possible award of damages against it to some extent by rational arguments. In the circumstances it seems to us that the normal costs order should be

made in respect of the costs of the appeal, namely, that costs should be awarded on the standard basis.

[10] Accordingly, in our view, the appropriate order is to set aside the trial judge's orders as to costs and order the respondent to pay the appellant's costs of the action to be assessed on the indemnity basis and of the appeal, including these submissions as to costs, to be assessed on the standard basis.