

SUPREME COURT OF QUEENSLAND

CITATION: *Greenhalgh v Bacas Training Limited & Ors* [2007] QCA 365

PARTIES: **JOHN ROBERT GREENHALGH**
(plaintiff/respondent)
v
BACAS TRAINING LIMITED ACN 092 797 790
(first defendant/first applicant)
BCP HOLDINGS PTY LTD ACN 097 126 111 **trading as**
BUNDABERG TOYOTA
(second defendant/second applicant)

FILE NO/S: Appeal No 3493 of 2007
DC No 21 of 2006

DIVISION: Court of Appeal

PROCEEDING: Application for Leave s 118 DCA (Civil) – Further Order

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: Judgment delivered 5 October 2007
Further Order delivered 26 October 2007

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Keane JA, Cullinane and Lyons JJ
Judgment of the Court

FURTHER ORDER: **The costs order of 5 October 2007 be varied to provide that the costs incurred by the plaintiff before 27 June 2007 be paid on the standard basis and those incurred after 27 June 2007 be paid on the indemnity basis**

CATCHWORDS: PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where defendants' application for leave dismissed – where plaintiff had offered not to seek costs of appeal if defendants withdrew appeal – where defendants failed to accept plaintiff's offer – whether costs after offer should be paid on the indemnity basis

COUNSEL: R J Douglas SC for the applicants
D B Fraser QC, with R B Dickson, for the respondent

SOLICITORS: Carter Newell for the applicants
Payne Butler Lang for the respondent

[1] **THE COURT:** On 5 October 2007, this Court dismissed the defendants' application for leave to appeal. The Court ordered the defendants to pay the

plaintiff's costs on the standard basis.¹ In accordance with Practice Direction No 1 of 2005, the plaintiff was given leave to make written submissions in support of an application that the costs be paid by the defendants on the indemnity basis.

- [2] In support of this application, the plaintiff relies in particular upon the defendants' failure to accept the offer made by the plaintiff in a letter dated 20 June 2007. That offer was that "if the appeal is withdrawn within the next seven (7) days then our client will not seek the costs of the appeal."
- [3] The defendants argue that their failure to accept the offer could not be regarded as so unreasonable or imprudent as to attract an award of indemnity costs against them.² The defendants' first point is that the plaintiff's offer was "vague", and, indeed, "uncertain", as to the proposed disposition of the overall costs of the appeal. The defendants' second point is that the offer was only in relation to the "appeal" and was silent about the costs of the application.
- [4] The defendants' arguments split hairs between the application and the appeal. This distinction is quite without merit in this context. The defendants' appeal lay only with the grant of leave: unless leave were granted there would be no appeal. At the time the letter was written on behalf of the plaintiff, the only proceeding on foot was the application for leave to appeal. There can be no doubt that the defendants well understood that the effect of the plaintiff's offer was that, if the application was withdrawn, no further costs would be sought by the plaintiff from the defendants in respect of the application and any resultant appeal. That the defendants well understood the plaintiff's offer is confirmed by the absence of any suggestion that the defendants raised any query with the plaintiff as to the effect of his offer. The pettifogging casuistry exhibited by the defendants' arguments is to be deprecated.
- [5] We are, therefore, of the opinion that the defendants' failure to accept the plaintiff's offer was unreasonable and imprudent in the sense that, after 27 June 2007, the defendants had no good reason to expect that the plaintiff should be left to bear the substantial cost burden he would be required to bear if he were awarded costs on the standard basis. The defendants chose to continue an application for leave to appeal which had little prospect of success, and should clearly have understood that they did so at their peril so far as the costs of the application were concerned.
- [6] The Court orders that the costs order of 5 October 2007 be varied to provide that the costs incurred by the plaintiff before 27 June 2007 be paid on the standard basis and those incurred after 27 June 2007 be paid on the indemnity basis.

¹ *Greenhalgh v Bacas Training Limited & Ors* [2007] QCA 327.

² *Cf Lawes v Nominal Defendant* [2007] QSC 103.