

SUPREME COURT OF QUEENSLAND

CITATION: *Wade Sawmill P/L v Colenden P/L t/a Pilks Pine* [2008] QCA 11

PARTIES: **WADE SAWMILL PTY LTD** ACN 011 062 034
(plaintiff/applicant/appellant/cross-respondent)
v
COLENDEN PTY LIMITED trading as PILKS PINE
ACN 003 669 136
(defendant/respondent/cross-appellant)

FILE NO/S: Appeal No 5253 of 2007
DC No 4174 of 2005

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Order

ORIGINATING COURT: District Court at Brisbane

DELIVERED ON: Judgment delivered 21 December 2007
Further Order delivered 8 February 2008

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: McMurdo P, Keane JA and Daubney J
Judgment of the Court

FURTHER ORDER: **Plaintiff to pay defendant's costs of and incidental to the appeal and cross-appeal on the indemnity basis**

CATCHWORDS: PROCEDURE – COSTS – RECOVERY OF COSTS – where the plaintiff failed to accept an earlier compromise offered by the defendant – where the plaintiff could have achieved a better result by accepting the compromise than that attained on appeal – where the claims made by the plaintiff on appeal were without evidentiary foundation – whether the plaintiff should pay the defendant's costs on the indemnity basis

Di Carlo v Dubois & Ors [2002] QCA 225, applied
Grice v State of Queensland [2005] QCA 298, applied

COUNSEL: W Sofronoff QC SG, with R A I Myers RFD, for the appellant
J K Bond SC, with S McConnel, for the respondent

SOLICITORS: Carswell & Company for the appellant
MBT Lawyers for the respondent

- [1] **THE COURT:** On 21 December 2007 this Court allowed the plaintiff's appeal in this matter but on a basis which reflected the Court's acceptance of the defendant's central contention that the defendant was not obliged to return the chattel in question to the plaintiff without any payment in respect of the value of repair work performed by the defendant. In accordance with the orders of the Court made on that date, the parties have exchanged submissions in relation to the disposition of the costs of the appeal and the cross-appeal.
- [2] On the plaintiff's behalf it is said that it enjoyed substantial success on the appeal in that the obligation imposed on it under the original judgment to pay \$31,483.93 plus \$8,953.48 interest in order to obtain the return of the chattel was reduced to \$3,593.15. On the other hand, it is apparent that the defendant offered the plaintiff a compromise which would have been even more beneficial to the plaintiff.
- [3] The defendant, by its solicitor's letter of 11 July 2007, offered to give up all claims to payment of any money as a condition of the return of the chattel to the plaintiff. The defendant also offered to bear its own costs of the appeal and cross-appeal and of the District Court proceedings. Thus the plaintiff could have achieved for itself a better result by acceptance of the compromise offered by the defendant than by its pursuit of the appeal.
- [4] More importantly for present purposes, it must also be said that the central thrust of the plaintiff's appeal concerned its claim to recover loss of profits allegedly suffered by reason of the detention of the chattel as damages. It emerged clearly at the hearing of the appeal that this claim was without any sufficient evidentiary foundation. The pursuit of this claim on appeal was quite unreasonable. The plaintiff should readily have seen that its claim for loss of profits could not succeed in the absence of evidence that sales had actually been lost to it by reason of the defendant's detention of the chattel and that it had no such evidence other than the assertions of Mr Wade. The plaintiff's counsel expressly abandoned reliance on Mr Wade's evidence at the conclusion of the trial. Thus, even if the plaintiff's claim to the unconditional return of the chattel had been vindicated, there was no sound basis for an award of damages for the detention of the chattel.
- [5] In these circumstances, the plaintiff's insistence on prosecuting the appeal was so unreasonable that it should bear the cost consequences of that insistence to the fullest extent practicable.¹
- [6] Accordingly, the Court orders that the plaintiff should pay the defendant's costs of and incidental to the appeal and cross-appeal on the indemnity basis.

¹ *Di Carlo v Dubois & Ors* [2002] QCA 225 at [35] – [38]; *Grice v State of Queensland* [2005] QCA 298 at [6].