SUPREME COURT OF QUEENSLAND

CITATION:	*Hadgelias Holdings and Waight v Seirlis & Ors* [2014] QCA 325
PARTIES:	**HADGELIAS HOLDINGS PTY LTD** ACN 010 422 983 **PHILLIP JAMES WAIGHT** (appellants/cross respondents) **v** **IMOGEN ELISE SEIRLIS** (first respondent/cross appellant) **MARK STACEY BENGSTON** **JUDITH FAY BENGSTON** **ROBERT ALAN ZIRBEL** **LYNDIS ARRAN ZIRBEL** **VARGAN HILL PTY LTD** ACN 099 656 032 (second respondents/cross appellant)
FILE NO/S:	Appeal No 9351 of 2013 SC No 7430 of 2011
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Order
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	5 December 2014
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Holmes, Gotterson and Morrison JJA Separate reasons for judgment of each member of the Court, each concurring as to the order made
ORDER:	**The appellants pay 80 per cent of the first respondent's and second respondent's costs of the appellants' appeal on the standard basis.**
CATCHWORDS:	APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the first respondent obtained judgment in an action for damages arising out of contraventions by the appellants and the second respondents of the *Trade Practices Act* 1974 and the *Fair Trading Act* 1989 – where all parties brought appeals against the primary judgment – where each of the appeals was dismissed – whether each party should bear their own costs – whether the appellants acted unreasonably in rejecting the first respondent's offer to settle – whether the first respondent's costs should be paid on an indemnity basis

APPEAL AND NEW TRIAL – PROCEDURE – QUEENSLAND – APPEAL COSTS FUND – POWER TO GRANT INDEMNITY CERTIFICATE – WHEN REFUSED – where the appellants' appeal was dismissed – where the appellants contended that the appeal was rejected on a different construction of s 87CD of the *Trade Practices Act* from that of the primary judge, so that if costs were ordered against them, they should be granted an indemnity certificate – whether there exists any power under the *Appeal Costs Fund Act* for the court to grant an unsuccessful appellant an indemnity certificate

Appeal Costs Fund Act 1973 (Qld), s 15
Uniform Civil Procedure Rules 1999 (Qld), r 766(1)(d)

Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2) (2005) 13 VR 435; [2005] VSCA 298, cited
Roberts v Prendergast [2013] QCA 89, applied
Stewart v Atco Controls Pty Ltd (in liq) (No 2) (2014) 88 ALJR 811; [2014] HCA 31, distinguished
Tector v FAI General Insurance Company Ltd [2001] 2 Qd R 463; [2000] QCA 426, applied
Velvet Glove Holdings Pty Ltd v Mount Isa Mines Ltd (2012) 28 BCL 351; [2011] QCA 312, applied

COUNSEL: No appearance for the appellants/first cross respondents, the appellants'/first cross respondents' submissions were heard on the papers
No appearance for the first respondent/cross appellant, the first respondent/cross appellant's submissions were heard on the papers
No appearance for the second respondents/cross appellants, the second respondents'/cross appellants' submissions were heard on the papers

SOLICITORS: Carter Newell for the appellants/first cross respondents
Warlow Scott for the first respondent/cross appellant
Romans and Romans for the second respondents/cross appellants

[1] **HOLMES JA:** The first respondent, Mrs Seirlis, obtained judgment in an action for damages arising out of contraventions by the appellants and second respondents of the *Trade Practices Act* 1974 and the *Fair Trading Act* 1989. The appellants, Mr Waight and Hadgelias Holdings, were contractors appointed to sell an apartment of which the second respondents were the vendors; the relevant contraventions consisted of misrepresentations made to Mrs Seirlis, who was the purchaser. All parties brought appeals against the judgment, which this court has determined. Presently at issue is what costs order should now be made. Rule 766(1)(d) of the *Uniform Civil Procedure Rules* confers this Court's discretion to make the order it considers appropriate as to the costs of an appeal.

The appeals

[2] The first four of the appellants' grounds of appeal asserted error in the trial judge's conclusions that Mr Waight had made a separate misrepresentation to which the

Fair Trading Act applied and that liability could not be apportioned as between Hadgelias Holdings and the vendors under s 87CD of the *Trade Practices Act* 1974 (Cth). The fifth ground concerned quantum: the trial judge had erred in assessing the value of the apartment. The vendors appealed against the damages award only, on a ground identical to the appellants' ground concerning the apartment value, and filed a notice of contention arguing that the trial judge could have found for Mrs Seirlis under s 53A of the *Trade Practices Act*, in which case apportionment of liability as between them and Hadgelias Holdings would not have been available. Mrs Seirlis cross-appealed, arguing that damages had been assessed at too low a figure because the trial judge had valued the apartment at more than it was worth and had not allowed certain borrowing costs. Each of the appeals was dismissed; it became unnecessary to decide the issue raised by the notice of contention, although the court expressed the view, in effect, that it would not have succeeded.

Offers to settle

[3] The judgment appealed from required the appellants and the second respondents to pay $312,037 including interest accrued to the date of judgment, with costs on the standard basis. On 11 October 2013, immediately after the service of the notice of appeal, Mrs Seirlis offered to settle on the appellants' payment of $310,000 in satisfaction of the judgment, with the costs of the action and of this appeal to be paid to her on the standard basis. The offer was expressed to remain open for a period of 14 days. Mrs Seirlis filed her cross-appeal on damages on 23 October. On 24 February 2014, the appellants and second respondents offered to settle the appeal by payment to Mrs Seirlis of $400,000 including the costs of the action and of the appeal.

The first respondent's submissions on costs

[4] In her submissions on costs, Mrs Seirlis pointed out that quantum was raised by the appellants' appeal; her argument on damages was dealt with as part of her outline in response to the appellants' outline; and she did not make any reply on the issue. The appellants' submissions in reply to her argument were linked to their own appeal ground on damages. The appellants had acted unreasonably. Their pleading denied misleading and deceptive conduct, although their submission at the end of the trial accepted that print advertisements in respect of the property were misleading and deceptive. They should have issued separate proceedings to resolve questions of proportional liability against the vendors; instead they had sought to maintain an appeal on apportionment of liability, involving Mrs Seirlis in the process. (Other submissions were made as to the appellants' choice of valuation witness and the supposed intent of their insurers in appealing. They were unsupported by evidence, and will be disregarded.)

[5] The appellants' whole conduct of the case and their manifestly unreasonable offer, as compared with Mrs Seirlis' reasonable and timely offer, should be considered in determining whether to award Mrs Seirlis' indemnity costs. They should be ordered to pay Mrs Seirlis' costs of the appeal, her cross-appeal and the vendor's cross-appeal on an indemnity basis, or, alternatively, should be ordered to pay her costs of the appeal on an indemnity basis, with no other order for costs being made.

The second respondents' arguments on costs

[6] The vendors submitted that the appellants should pay both their and Mrs Seirlis' costs of the appellants' appeal; that Mrs Seirlis should pay the appellants' and the

vendors' costs of her appeal; and that there should be no order as to the costs of the vendors' appeal. They had been respondents only until some days before the hearing of the appeal, when they gave notice of an intention to cross-appeal on the ground concerning the assessment of the unit's value, so as to avoid being subject to a different assessment of damages from that which the appellants might achieve on appeal. Shortly after, they advised their reliance on a notice of contention. Effectively, they had supported the trial judge's decision, advancing only a further ground in the notice of contention to support the result as to apportionment of liability. The latter had been the subject of an obiter finding only.

[7] The appellants' appeal had been dismissed, as had Mrs Seirlis'. Both should pay costs. The vendors' appeal simply relied on the appellants' argument and did not require any additional attention from Mrs Seirlis. If those orders were not made, there ought instead, be orders that the appellants and Mrs Seirlis pay a substantial percentage – 80 per cent or more – of the vendors' costs.

The appellants' arguments on costs

[8] The appellants contended that each party should bear its own costs. Mrs Seirlis had failed on both arguments made in her cross-appeal as to the value of her unit and her costs of borrowing. Given that outcome, and the basis on which the appellants' appeal was dismissed, no order should be made as to costs. If any other order were made, it should be on the standard basis. Mrs Seirlis' offer was in an amount only $2,000 less than the judgment. The appellants had offered to settle the matter for $400,000 including costs. In the entire context of the appeal, the appellants had not acted unreasonably.

[9] If costs were ordered against the appellants, they should be granted an indemnity certificate because of the basis on which the appeal on apportionment was rejected. This Court's approach to the issue of concurrent liability differed from that of the trial judge, who had found that Hadgelias Holdings and the vendors were concurrent wrongdoers whose acts and omissions were identical, so that their liability was also identical. This Court had found that they were not concurrent wrongdoers so as to attract the apportionment provision at all, but had accepted that if they were, there was an argument that the vendors' responsibility for the loss was greater than that of Hadgelias Holdings. Mrs Seirlis had argued that the appeal, so far as it concerned the apportionment question, should be rejected for the reasons the trial judge had given. The vendors' argument also appeared to adopt the trial judge's finding until, at the earliest, their filing of an amended outline of argument a few days before the hearing. Effectively, the court had dismissed the appeal on late-raised grounds.

Conclusions

[10] Given that the appellants' appeal and the cross-appeals by Mrs Seirlis and the vendors on damages were all unsuccessful, none of the parties should recover their costs in that regard. Mrs Seirlis and the vendors should, however, recover the costs of defending grounds 1 – 4 of the appellants' appeal, which concerned liability questions. They represented 80 per cent of the appeal grounds, a proportion which was roughly reflected in the portion of the written and oral submissions devoted to those issues. I would order the appellant to pay the costs of the balance of the appeal, which, on that very broad-brush approach, I would estimate at 80 per cent of Mrs Seirlis' and the vendors' costs of defending the appeal as a whole.

[11] There remains the question of the basis on which Mrs Seirlis' costs should be paid. The court's approach has been to award costs on the standard basis, unless the conduct of the party against whom indemnity costs were sought was "plainly unreasonable".[1] The following factors have been pointed to as relevant in deciding whether a party has acted unreasonably in not accepting an offer:

> "(a) the stage of the proceeding at which the offer was received;
> (b) the time allowed to the offeree to consider the offer;
> (c) the extent of the compromise offered;
> (d) the offeree's prospects of success, assessed as at the date of the offer;
> (e) the clarity with which the terms of the offer were expressed;
> (f) whether the offer foreshadowed an application for an indemnity costs in the event of the offeree's rejecting it."[2]

[12] In the recent case of *Stewart v Atco Controls Pty Ltd (in liq) (No 2)*,[3] the successful appellants in the High Court had made a *Calderbank* offer before the hearing of the appeal (to which they were at that stage the respondents) in the intermediate appellate court. The High Court made this observation:

> "The non-acceptance of a *Calderbank* offer is a factor, in some cases a strong factor, to be taken into account on an application for indemnity costs. The respondent submits that its rejection of the offer was not unreasonable. If that be the test, it 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."[4]

In that case, the court went on to note the terms of the relevant offer, which entailed the appellants, who had a judgment in their favour, not pursuing significant costs for which they had an order and the fact that for the respondent to succeed, it had to distinguish a principle relating to a liquidator's lien as not applying to costs incurred in getting in assets; an argument on which it was ultimately unsuccessful.

[13] In the present case, the appellants' own offer can be put to one side; it seems entirely improbable that the sum of $400,000 would have put Mrs Seirlis in a better position than retention of the judgment sum together with her costs of the trial and the appeal. Mrs Seirlis' offer to the appellants was timely, made shortly after the notice of appeal was filed and before the incurring of costs in connection with preparation for the appeal; it remained open for a short period after Mrs Seirlis had filed her cross-appeal. It was clear in its terms, although it did not foreshadow an application for indemnity costs if rejected.

[14] In my view, however, the appellants had more reason than the "usual prospects of being successful" to refuse the offer. The bringing of the appeal itself was rational and unremarkable: whether and how s 87CD *Trade Practices Act* applied was far from clear on the authorities, and Mrs Seirlis was necessarily involved in the determination of those questions. The compromise offered was not significant, a mere $2,000 on the judgment amount. On the whole, I do not think that the

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1 *Tector v FAI General Insurance Company Ltd* [2001] 2 Qd R 463.

2 *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* [2005] VSCA 298 at 25 in a passage approved in *Velvet Glove Holdings Pty Ltd v Mount Isa Mines Ltd* [2011] QCA 312 at [105]; *Roberts v Prendergast* [2013] QCA 89 at [12].

3 [2014] 88 ALJR 811.

4 At 812.

appellants acted unreasonably in rejecting the offer, given that it offered very little more than the status quo and given there were reasonable arguments to be made as to the effect of the apportionment legislation. They should pay costs on the standard basis.

[15] The appellants sought an indemnity certificate in respect of their costs on the basis that the apportionment question had been decided on a basis different from that adopted by the trial judge. Section 15 of the *Appeal Costs Fund Act* provides:

> "15 Grant of indemnity certificate
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> (1) Where an appeal against the decision of a court –
>
> (a) to the Supreme Court;
>
> …on a question of law succeeds, the Supreme Court may, upon application made in that behalf, grant to any respondent to the appeal an indemnity certificate in respect of the appeal…"

There exists no power under the *Appeal Costs Fund Act* for the court to grant an unsuccessful appellant an indemnity certificate.

Order

[16] I would order that the appellants pay 80 per cent of the first respondent's and second respondents' costs of the appellants' appeal on the standard basis.

[17] **GOTTERSON JA:** I agree with the order proposed by Holmes JA and with the reasons given by her Honour.

[18] **MORRISON JA:** I have read the reasons of Holmes JA and agree with those reasons and the order her Honour proposes.