

SUPREME COURT OF QUEENSLAND

CITATION: *Davan Developments Pty Ltd v HLB Mann Judd (SE Qld) Pty Ltd*
[2016] QCA 113

PARTIES: **DAVAN DEVELOPMENTS PTY LTD**
ACN 102 189 864
(appellant)
v
HLB MANN JUDD (SE QLD) PTY LTD
ACN 114 097 648
(respondent)

FILE NO/S: Appeal No 5920 of 2015
DC No 4338 of 2013

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Order

ORIGINATING COURT: District Court at Brisbane – [2015] QDC 121

DELIVERED ON: 29 April 2016

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Gotterson and Morrison and Philip McMurdo JJA
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

ORDER: **The appellant pay the respondent's costs of the appeal to be assessed upon the standard basis.**

CATCHWORDS: PROCEDURE – COSTS – INDEMNITY COSTS –
INFORMAL OFFERS AND CALDERBANK LETTERS –
UNREASONABLE REFUSAL OF OFFER – where the court
dismissed the appeal – where the appeal was unsuccessful but
arguable and the appellant did not act unreasonably – where,
after written submissions were filed in the appeal, the respondent
made an offer to settle on the terms that each party would bear
their own costs of the appeal and that the parties would execute
a deed of settlement releasing, discharging and indemnifying
the respondent – where the respondent contends that the
appellant unreasonably rejected the offer – whether the appellant
was unreasonable in rejecting the offer so as to warrant an
order of costs on the indemnity basis

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

SOLICITORS: No appearance for the appellant
 No appearance for the respondent

- [1] **GOTTERSON JA:** I agree with the order proposed by Philip McMurdo JA and with the reasons given by his Honour.
- [2] **MORRISON JA:** I have read the reasons of Philip McMurdo JA regarding further costs orders in this matter. I agree with those reasons and with the proposed order that the appellant pay the respondent's costs of the appeal to be assessed upon the standard basis.
- [3] **PHILIP McMURDO JA:** On 12 April 2016 the court dismissed this appeal. The remaining question concerns the costs of the appeal. The appellant agrees that it should pay them but the respondent seeks them upon the indemnity basis.
- [4] The appeal, although unsuccessful, was arguable and there was nothing about the conduct of the appeal which could warrant indemnity costs being ordered. The respondent's argument relies upon its offer to settle the appeal after the parties had filed their outlines of argument. There is evidence that the respondent's legal costs, including counsel's fees and disbursements, of the appeal up to the date of the offer, which was made on 31 August 2015, were approximately \$48,000.
- [5] The respondent then offered to pay its own costs of the appeal if the appellant abandoned it. But there were further terms of the offer and the respondent also required the parties to execute a deed of settlement in certain terms. One of those terms was that the appellant would release, discharge and indemnify the respondent "and its related entities" from and against all claims which the appellant "or one of its related entities" had or may have had "relating to or arising directly or indirectly out of the Principal Proceeding and the Appeal".
- [6] In the appellant's submissions, it is said that one possible effect of this clause would have been to affect the respondent's entitlement to payment of fees, which was a matter remaining in dispute having not been determined by the present proceedings. There was no submission for the respondent which contradicted that submission.
- [7] The question is whether the appellant's rejection of this offer was so unreasonable that it should be visited with indemnity costs. This court does not know the extent of the operation of the deed upon other claims or disputes but it is for the respondent to establish the appellant's unreasonableness in rejecting the offer. Nor does this court know anything of the respective merits of those claims or disputes. Therefore it cannot be concluded that the offer was unreasonably rejected. Indemnity costs should not be awarded.
- [8] I would order that the appellant pay the respondent's costs of the appeal to be assessed upon the standard basis.