SUPREME COURT OF QUEENSLAND

CITATION:	*McGee v Independent Assessor & Anor [No 2]* [2024] QCA 7
PARTIES:	**DAMIEN McGEE** (appellant) **v** **INDEPENDENT ASSESSOR** (first respondent) **COUNCILLOR CONDUCT TRIBUNAL** (second respondent)
FILE NO/S:	Appeal No 14216 of 2022 SC No 986 of 2020
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Orders
ORIGINATING COURT:	Supreme Court at Townsville – [2022] QSC 257 (North J)
DELIVERED ON:	2 February 2024
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGE:	Bond and Dalton JJA and Cooper J
ORDERS:	**1. Paragraph 2 of the orders dated 26 October 2022 be set aside.** **2. In lieu thereof it is ordered that the first respondent pay the appellant's costs of the appeal and of the proceeding below to be assessed on the standard basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – where the appellant was successful in his appeal – where the appellant applied for the first respondent to pay costs of the proceeding below and the costs of the appeal on the indemnity basis – where *Calderbank* offers made by the appellant to settle the proceedings below and the appeal proceedings – where *Calderbank* offers were rejected by the first respondent – whether *Calderbank* offers unreasonably rejected *Uniform Civil Procedure Rules 1999* (Qld), r 766 *Bignaches Pty Ltd v Access Strata Management Pty Ltd* [2022] VSC 793, cited *Bulsey v State of Queensland* [2016] QCA 158, cited *Calderbank v Calderbank* [1976] Fam 93, applied *Comgroup Supplies Pty Ltd v Products for Industry Pty Ltd*

[2016] QCA 130, considered
DTS Succession Pty Ltd v Survco Pty Ltd (No 2) [2021] QSC 316, cited
Ford v Nominal Defendant [No 2] (2023) 105 MVR 276; [2023] QCA 181, cited
Harbour Radio Pty Ltd & Ors v Wagner & Ors [2020] QCA 83, cited
J & D Rigging Pty Ltd v Agripower Australia Ltd [2014] QCA 23, applied
Jones v Millward [2005] 1 Qd R 498; [2005] QCA 76, cited
Leneham v Legal Services Commissioner [2018] QCA 133, cited
McGee v Independent Assessor & Anor [2023] QCA 225, cited
Nine Network Australia Pty Ltd & Ors v Wagner & Ors [2021] QCA 84, cited
Pensini v Tablelands Regional Council & Anor [2012] QCA 137, cited
S.H.A. Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd (No 2) [2020] QSC 323, cited
Roberts v Prendergast [2013] QCA 89, cited
Sequel Drill & Blast Pty Ltd v Whitsunday Crushers Pty Ltd (No 2) [2009] QCA 239, cited
Stewart v ATCO Controls Pty Ltd (in liq) [No 2] (2014) 252 CLR 331; [2014] HCA 31, applied
Sullivan v Greig (No 2) [2023] QSC 119, cited
Tector v FAI General Insurance Company Limited [2001] 2 Qd R 463; [2000] QCA 426, cited
Thallon Mole Group Pty Ltd v Morton (No 2) [2022] QDC 290, cited
Toohey v Golder (No 3) [2022] QSC 176, cited
Victoria International Container Terminal Ltd v Lunt (2021) 271 CLR 132; [2021] HCA 11, cited

COUNSEL: D A Savage KC, with P A Ahern, for the appellant
S J Keim SC, with M R Wilkinson, for the first respondent
No appearance for the second respondent

SOLICITORS: Connolly Suthers Lawyers for the appellant
Office of the Independent Assessor for the respondent
No appearance for the second respondent

[1] **BOND JA:** I have had the advantage of reading in draft the reasons for judgment of Cooper J on the question of the order which should be made in respect of the costs of the appeal and of the proceeding before the primary judge.

[2] I summarised the relevant principles in relation to *Calderbank* offers deriving from judgments of intermediate courts of appeal in *S.H.A. Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd (No 2)* [2020] QSC 323 at [8]-[14].[1] I still adhere to

[1] Adopted in *Sullivan v Greig (No 2)* [2023] QSC 119 at [4] per Williams J; *Bignaches Pty Ltd v Access Strata Management Pty Ltd* [2022] VSC 793 at [13] per Riordan J; *Toohey v Golder (No 3)* [2022] QSC 176 at [29] per Freeburn J; *DTS Succession Pty Ltd v Survco Pty Ltd (No 2)* [2021]

the accuracy of that summary and I do not apprehend that Cooper J's identification of principle is to different effect.

[3] I agree with Cooper J for the reasons his Honour gives that the circumstances of the present case do not warrant any departure from the usual rule, either in relation to the costs of the appeal or of the costs before the primary judge.

[4] I agree with the orders proposed by Cooper J.

[5] **DALTON JA:** I agree with the costs order proposed by Cooper J and with his reasons.

[6] **COOPER J:** The appellant successfully appealed against the refusal by the primary judge to stay the first respondent's prosecution of a second complaint of misconduct made against him in circumstances where an earlier complaint based on similar conduct was not sustained.[2] As a consequence, the further prosecution of that second complaint has been permanently stayed.

[7] The appeal succeeded on the basis that the referral of the second complaint to the second respondent should be stayed as an abuse of process. That was because the prosecution of the second complaint would have exposed the appellant to re-litigation of the same determinative issue which has already been decided in his favour in the earlier dismissal of the first complaint. The appellant was unsuccessful on an alternative ground of appeal asserting that the first respondent could not have been reasonably satisfied that the appellant's conduct giving rise to the second complaint amounted to misconduct. Two further grounds concerning the adequacy of the primary judge's reasons were not pursued at the hearing of the appeal.

[8] The appellant and the first respondent have filed written submissions addressing the costs of the appeal and of the proceeding before the primary judge.

[9] The appellant seeks orders that the first respondent pay his costs:

(a) of the proceeding before the primary judge, to be assessed on the standard basis until 29 January 2021, and thereafter to be assessed on the indemnity basis;

(b) of the appeal, to be assessed on the indemnity basis, or alternatively to be assessed on the standard basis until 21 November 2022 and thereafter to be assessed on the indemnity basis.

[10] The appellant's application for indemnity costs is founded upon the first respondent's rejection of offers to settle which the appellant made pursuant to the principles in *Calderbank v Calderbank*.[3] The appellant submits that the first respondent acted unreasonably in rejecting those offers to settle.

QSC 316 at [12] per Freeburn J; *Thallon Mole Group Pty Ltd v Morton (No 2)* [2022] QDC 290 at [32] per Muir DCJ.

2 *McGee v Independent Assessor* [2023] QCA 225.

3 [1976] Fam 93 (***Calderbank***).

[11] The appellant does not seek costs against the second respondent because, both in the proceeding before the primary judge and on appeal, the second respondent was excused from appearing and took no active role in the proceeding.

[12] The first respondent accepts that the costs of the appeal should follow the event but submits those costs should be assessed on the standard basis. As to the costs of the proceeding before the primary judge, the first respondent does not dispute that costs should be awarded to the appellant on the standard basis but submits that by reason of the appellant's conduct of the proceeding the order should exclude costs incurred before the resumed hearing before the primary judge on 4 May 2021.

[13] In resisting an order that costs be assessed on the indemnity basis, the first respondent submits that she did not act unreasonably or imprudently in rejecting the appellant's offers to settle. She advances two principal arguments in support of that submission: first, that the offers did not involve a genuine offer of compromise on the appellant's part; secondly, that the public interest in the performance of the first respondent's statutory functions supported her decision to defend both the application heard by the primary judge and the appeal.

The offer to settle the proceeding below

[14] On 29 January 2021, the solicitors for the appellant wrote to representatives of the first respondent in the following terms:

> "Our client instructs us to make an offer that this matter be settled by consent orders as follows:-
>
> 1. The First Respondent's application against the Applicant in the Second Respondent is permanently stayed.
>
> 2. No order as to costs as between the Applicant and First Respondent.
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> This offer is made in accordance with the principles in Calderbank v Calderbank [1975] 3 All ER 333 and will remain open for acceptance by the First Respondent until 4.00 pm on Wednesday 3 February 2021.
>
> If this offer is not accepted our client will rely on this letter on the question of costs upon determination of the Application."

[15] The first respondent rejected that offer on 1 February 2021.

The offers to settle the appeal

[16] On 21 November 2022, less than a week after the Notice of Appeal was filed, the appellant made two offers to settle the appeal.

[17] The first was a *Calderbank* offer. The second offer was expressed to have been made pursuant to Chapter 9 Part 5 of the *Uniform Civil Procedure Rules 1999* (Qld) (**UCPR**). The appellant accepts the rules in that part of the UCPR do not apply to offers made to settle appeals. However, he submits that offers to settle appeals which are incorrectly expressed to have been made under those rules may be

considered pursuant to the *Calderbank* principles. That submission is supported by authority in this Court.[4] The first respondent does not submit to the contrary.

[18] In any event, the status of the second offer to settle the appeal does not impact the question of costs because both offers were made on the same basis, namely:

(a) the first respondent be restrained from referring the second complaint for decision by the second respondent;

(b) the prosecution of the second complaint against the appellant be permanently stayed;

(c) the costs order made by the primary judge in favour of the first respondent be set aside and that there be no order as to costs of the proceeding below; and

(d) there be no order as to costs of the appeal.

[19] Both offers to settle the appeal remained open for acceptance for a period of 14 days.

[20] On 5 December 2022, the first respondent rejected both offers to settle the appeal.

Relevant principles

[21] Rule 766(1)(d) of the UCPR provides that this Court may make an order as to "the whole or part of the costs of an appeal it considers appropriate". The wide discretion conferred by this rule is informed by the same principle which governs the award of costs at first instance pursuant to s 681 of the UCPR: that is, the usual exercise of the discretion is that the costs of an appeal follow the event.[5]

[22] The first respondent accepts that a recognised circumstance in which the Court may exercise its discretion in favour of ordering that costs be assessed on the indemnity basis is where the party against whom the order is sought *unreasonably* rejects or fails to accept a *Calderbank* offer. That is, a party's rejection of an offer to settle does not of itself warrant an order for indemnity costs.[6] There is no presumption or predisposition in favour of ordering assessment on the indemnity basis simply because a party to an appeal rejects an offer to settle and subsequently obtains a less favourable judgment.[7]

[23] The principles which govern the exercise of the discretion in circumstances such as those in the present appeal were summarised in *J & D Rigging Pty Ltd v Agripower Australia Ltd*,[8] as follows:

> "[5] The failure to accept a *Calderbank* offer is a matter to which a court should have regard when considering whether to order indemnity costs. The refusal of an offer to compromise does not warrant the exercise of the discretion to award indemnity costs. The critical question is whether the rejection of the

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4 *Roberts v Prendergast* [2013] QCA 89 (***Roberts***), [4], [13] and [26]–[29].

5 *Sequel Drill & Blast Pty Ltd v Whitsunday Crushers Pty Ltd (No 2)* [2009] QCA 239, [3]; *Nine Network Australia Pty Ltd & Ors v Wagner & Ors* [2021] QCA 84, [11]–[12].

6 *Harbour Radio Pty Ltd & Ors v Wagner & Ors* [2020] QCA 83, [3].

7 *Tector v FAI General Insurance Company Limited* [2001] 2 Qd R 463, 464 [5]; *Roberts*, [12].

8 [2014] QCA 23, [5]–[6] (citations omitted).

> offer was unreasonable in the circumstances. The party seeking costs on an indemnity basis must show that the party acted 'unreasonably or imprudently' in not accepting the *Calderbank* offer.
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> [6] In *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)*, the Victorian Court of Appeal stated that a court considering a submission that the rejection of a *Calderbank* offer was unreasonable should ordinarily have regard to at least the following matters:
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> > '(a) the stage of the proceeding at which the offer was received;
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> > (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.'"

[24] In addition to the matters referred to in that passage, it is appropriate in exercising the costs discretion to recognise the public interest which motivates the first respondent in the exercise of her statutory functions, however that consideration cannot immunise the first respondent from an indemnity costs order in an appropriate case.[9]

[25] The High Court addressed the effect of a refusal to accept a *Calderbank* offer in *Stewart v ATCO Controls Pty Ltd (in liq) [No 2]*,[10] as follows:

> "This Court has a general discretion as to costs. 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."

[26] In *Comgroup Supplies Pty Ltd v Products for Industry Pty Ltd*,[11] this Court accepted that passage as setting out the law with regards to costs when a *Calderbank* offer has been made. In *Comgroup Supplies*, the rejection of the offer was found to have been unreasonable. On the question of the effect of *Calderbank* offers on the costs of appeals, the Court said:[12]

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9 *Leneham v Legal Services Commissioner* [2018] QCA 133, [21].
10 (2014) 252 CLR 331, 334 [4].
11 [2016] QCA 130 (***Comgroup Supplies***), [2]
12 *Comgroup Supplies*, [8]; See also *Bulsey v State of Queensland* [2016] QCA 158 (***Bulsey***), [76] and [78].

> "Although appeal courts are reluctant to encourage these *Calderbank* approaches in appeals for fear that it might stultify the development of the law, the court concluded that an examination of the merits of the proposed amended notice of appeal showed that it was bound to fail and did not raise any significant questions of law but rather the application of well-established principles of law to the facts of the case."

Consideration

Costs of the appeal

[27] The first respondent accepts that the offers to settle the appeal were made soon after the appeal commenced and were open for a reasonable period. She does not submit that the terms of the offers were unclear.

[28] The offers did not contain an express statement that non-acceptance by the first respondent would found an application for indemnity costs. That is relevant but not determinative.[13] In the circumstances of this case, I would not regard the absence of an express reference to indemnity costs as a sufficient reason to refuse the orders which the appellant seeks if other relevant factors indicate it would be an appropriate exercise of the discretion.

[29] As to the extent of the compromise offered, I do not accept the first respondent's submission that the offers to settle the appeal did not involve any significant compromise by the appellant. Although the offers required the first respondent to accept that the further prosecution of the second complaint would be permanently stayed, that is the consequence of the binary nature of the substantive issue in dispute. As the appellant's reply submissions on costs observe, either the second complaint would proceed to determination by the second respondent or it would not. The substantive relief sought by the appellant was not susceptible of settlement by way of partial compromise.

[30] The compromise contained in the offers concerned costs. The appellant offered to forego any entitlement to the costs of the hearing before the primary judge and in the appeal in the event (as has transpired) his appeal succeeded. In an all or nothing proceeding such as this, the appellant's offer to bear his own costs involved a true element of compromise.[14] The extent of the compromise offered by the appellant on costs is not diminished by the fact that the offers also sought a degree of compromise from the first respondent in giving up the benefit of the costs order made by the primary judge in her favour.

[31] Ultimately, however, I am persuaded that the first respondent did not act unreasonably or imprudently in rejecting the offers to settle the appeal. That is because of the importance of the question raised by the appeal and the public interest in the first respondent exercising her statutory functions in circumstances where, as found by the primary judge and on appeal, it was open to her to be reasonably satisfied that the conduct which gave rise to the second complaint was misconduct and she had in fact formed that state of mind. In my view, those factors constitute reasons for not accepting the offers beyond the usual prospects of being

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13 *Bulsey*, [54]; *Ford v Nominal Defendant [No 2]* (2023) 105 MVR 276, 284 [34].

14 *Jones v Millward* [2005] 1 Qd R 498, 500; *Pensini v Tablelands Regional Council & Anor* [2012] QCA 137, [67].

successful in litigation. Further, although the first respondent's case on the abuse of process ground failed, I do not accept that it was unreasonable for her to proceed with that case on appeal in circumstances where she had succeeded before the primary judge. Unlike the situation in *Comgroup Supplies*, the first respondent's argument on abuse of process was not obviously flawed or unarguable.

[32] Consequently, I would order that the first respondent pay the appellant's costs of the appeal to be assessed on the standard basis.

Costs of the proceeding below

[33] The first respondent also relies on her arguments as to lack of genuine compromise by the appellant and the public interest in the performance of her statutory functions in resisting an order for indemnity costs in relation to the proceeding before the primary judge. For the reasons set out above concerning the costs of the appeal, I do not accept that the offer to settle the proceeding below contained no genuine compromise by the appellant. However, I accept that the importance of the issue raised by the appellant's originating application and the public interest in the first respondent exercising her statutory functions submission means that she did not act unreasonably in rejecting the offer to settle the proceeding below. I would order that the first respondent pay the appellant's costs of the proceeding below to be assessed on the standard basis.

[34] The final matter for consideration is whether the order for costs of the proceeding below should exclude costs incurred prior to the resumed hearing before the primary judge on 4 May 2021. In seeking to exclude those costs from the order, the first respondent relies upon statements made by the primary judge as to the conduct of the proceeding before him. The matter first came on for hearing before the primary judge on 5 February 2021. It was apparent from the opening submissions of counsel who appeared for the appellant at that hearing that determination of the application would involve the resolution of a factual dispute as to whether the appellant was told of the existence of the first complaint and the referral of the first complaint for determination before the occurrence of the circumstances which gave rise to the second complaint. At that stage, the appellant relied on the lack of notice of the first complaint as a procedural irregularity which supported his abuse of process argument.[15] At the end of the first hearing, which lasted the whole day, counsel who appeared for the appellant had not concluded his opening. Directions for the further conduct of the application were made on 5 February 2021 and at a further review hearing on 2 March 2021.

[35] The primary judge observed that when the hearing resumed on 4 May 2021, at which Mr Savage QC appeared leading junior counsel for the appellant, the issues between the parties had changed substantially. By that stage there was no longer a factual dispute for the primary judge to resolve. That was the result of the appellant electing to narrow his case because of a High Court decision delivered on 7 April 2021,[16] several weeks before the resumed hearing of the application. At the commencement of the resumed hearing, Mr Savage QC informed the primary judge that the appellant no longer relied on the lack of notice of the existence of the first complaint as part of his abuse of process argument because the effect of the High

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15 ARB vol. 2 p. 430 (4 May 2021, Transcript 1-3:4-29).

16 *Victoria International Container Terminal Ltd v Lunt* (2021) 271 CLR 132.

Court decision was that resolution of that factual dispute in the appellant's favour that would not support an order permanently staying the prosecution of the second complaint.[17] Consequently, it was no longer necessary for the primary judge to determine the factual dispute.

[36] The primary judge observed that the change in the issues to be determined rendered the hearing on 5 February 2021 irrelevant and diminished the utility of the directions made on 5 February 2021 and the review hearing conducted, and directions made, on 2 March 2021.

[37] While that may have been so, I am not persuaded that the appellant's conduct of the proceeding justifies depriving him of an order for costs he incurred prior to the resumed hearing on 4 May 2021. I accept the appellant's submission that the course he adopted in narrowing his case between 5 February 2021 and the resumed hearing on 4 May 2021, and particularly by removing the need to determine the factual dispute, shortened the length of the hearing below. I am not persuaded that, in the circumstances of this case, the fact that the factual issue did not ultimately have to be determined supports a conclusion that the costs of the first hearing on 5 February 2021 or the review hearing on 2 March 2021 were improperly incurred or that there is any other basis upon which to exclude the costs of those hearings, or any other costs incurred prior to 4 May 2021, from a costs order in the appellant's favour.

Conclusion

[38] I would order that:

1. Paragraph 2 of the orders dated 26 October 2022 be set aside.
2. In lieu thereof it is ordered that the first respondent pay the appellant's costs of the appeal and of the proceeding below to be assessed on the standard basis.

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17 ARB vol. 2 p. 430-1 (4 May 2021, Transcript 1-3:29 to 1-4:15).