DISTRICT COURT OF QUEENSLAND

CITATION:	*McKay v Armstrong & Anor* [2020] QDC 146
PARTIES:	**JESSIE FAY ANN MARGARET ROSE MCKAY** (plaintiff) v **CRAIG ROBERT ARMSTRONG** (first defendant) and **RACQ INSURANCE LIMITED (ACN 009 704 152)** (second defendant)
FILE NO/S:	99 of 2017
DIVISION:	Civil
PROCEEDING:	Application
ORIGINATING COURT:	District Court of Queensland, Cairns
DELIVERED ON:	26 June 2020
DELIVERED AT:	Cairns
HEARING DATE:	25 May 2020
JUDGE:	Morzone QC DCJ
ORDERS:	**1. The defendants will pay the plaintiff's costs of the proceeding (excluding the reserved costs of and incidental to the application made on 13 December 2019) to be assessed on the standard basis using the applicable Magistrates Court Scale.**
CATCHWORDS:	COSTS – PROCEDURE – offer to settle – acceptance conditional on signing discharge – whether offer pursuant to the *Uniform Civil Procedure Rules* – whether more favourable than the judgment – judgment award under Magistrates Court jurisdictional limit - disposition of reserved costs - whether alternate costs order appropriate in interests of justice. **Legislation** *Civil Proceedings Act* 2011 (Qld) s 15 *Uniform Civil Procedure Rules* 1999 r 361, 693, 698

Cases
Armstrong v Mitchell-Smith and Allianz Australia Insurance Limited (No 2) [2012] QSC 370
Balnaves v Smith [2012] QSC 408
BHP Coal Pty Ltd v O & K Orenstein & Coppell AG (No. 2) [2009] QSC 64
Binaray Pty Ltd v RAMS Financial Group Pty Limited [2019] QSC 280
Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd [2020] QSC 1
Deeson Heavy Haulage Pty Ltd v Cox & Ors (No 2) [2009] QSC 348
Kilvington v Grigg & Ors (No. 2) [2011] QDC 37
Latoudis v Casey (1990) 170 CLR 534
Oshlack v Richmond River Council (1998) 193 CLR 72
Taske v Occupational & Medical Innovations Ltd [2007] QSC 147

COUNSEL: R J Armstrong for the plaintiff

G C O'Driscoll for the defendants

SOLICITORS: Roati Legal for the plaintiff

Quinlan Miller & Treston Lawyers for the defendants

[1] The plaintiff claimed for damages against a negligent driver who caused her injuries and consequential loss and damage in a car crash that occurred on the afternoon of Valentine's Day in 2014 when she and her partner were returning from an outing.

[2] I found that the plaintiff suffered a predominant injury to her shoulder region with painful symptoms radiating up her neck, with a secondary psychiatric injury of adjustment disorder with anxious and depressed mood minorly attributable to the accident, and otherwise caused by her complex personal and relationship circumstances. The plaintiff continues to have problems in her work and requires treatment in the form of pain relieving and anti-inflammatory medication, physiotherapy, massage and exercises.

[3] I assessed damages and gave judgement to the plaintiff against the defendants for **$**76,123.73.

[4] In the wake of the judgment the parties have provided detailed written outlines of argument and made further oral and written submissions in respect of costs.

[5] The defendant seeks a split costs order on the grounds of delay and that the plaintiff has not obtained judgment more favourable than the offer of $80,000 made on 2 September 2019. The defendant contends that defendant ought to pay the plaintiff's costs assessed on the Magistrates Court Scale to 2 September 2019, and the plaintiff pay the defendant's costs (including reserved costs) assessed on the District Court Scale after 2 September 2019.

[6] The plaintiff contends that the defendant's offer is not more favourable than the judgment because it was conditional upon the plaintiff executing a deed of release and discharge, or alternatively another order is appropriate in the circumstances. The plaintiff seeks an order the defendant should pay her costs, including reserved costs, assessed on the District Court Scale on the standard basis.

[7] In the context of the court's proper discretionary considerations, the determinative issues are:

1. Is the defendant's offer made on 2 September 2019, which was not accepted, caught by the operation of rule 361 of the *Uniform Civil Procedure Rules* 1999?

2. If so, is the judgment more favourable to the plaintiff than the offer?

3. If so, is another order for costs contemplated by rule 361(2) appropriate in the circumstances?

4. How should the court attribute the reserved costs for the application filed on 13 December 2019?

5. Otherwise, what is the appropriate costs order, scale and level of assessment in the interests of justice?

Is the defendant's offer made on 2 September 2019, which was not accepted, caught by the operation of rule 361 of the Uniform Civil Procedure Rules 1999;

[8] The defendant's offer made on 2 September 2019 is a hybrid type comprising a monetary settlement in conventional terms, but acceptance was conditioned on execution of a release and discharge which contained other extraneous terms and binding acknowledgments.

[9] The formal offer was in these terms:

> "In accordance with Chapter 9 Part 5 of the *Uniform Civil Procedure Rules* 1999 the Second Defendant HEREBY OFFERS to the Plaintiff the sum of $80,000.00 plus costs on a standard basis up to and including the day of service of this offer to be agreed upon or assessed in full and final satisfaction of the cause of action in respect of which the Plaintiff claims.
>
> TAKE NOTICE that this offer is open for acceptance for a period of fourteen 14 days after the day of service of the offer on you.
>
> AND TAKE FURTHER NOTICE that if this offer is accepted the Plaintiff is required to sign a Deed of Release/Discharge in terms of the document which is **attached** hereto and marked 'A'.
>
> AND TAKE FURTHER NOTICE that the plaintiff may be liable to pay amounts under the *Health and Other Services (Compensation) Act* 1995 or the *Health And Other Services (Compensation) Care Charges Act* 1995 if the matter settled on the terms set out above."

[10] The attached form of release and discharge included the following terms:

DISCHARGE

"I, Jesse Fay Ann Margaret Rose Mackay of C/- 78 Cartwright Street Ingham in the State of Queensland **ACKNOWLEDGE** that I have agreed to accept from the Dischargees named in the schedule here to the sum of $80,000.00 plus costs to be agreed or assessed on a standard basis:

- inclusive of all statutory refunds;
- exclusive of rehabilitation payments made to date by RACQ Insurance Limited bracket (S51);
- plus costs to be agreed or assessed on a standard basis.

In full satisfaction and discharge of all actions suits claims and demands whatsoever (including court No D99 of 2017 in the Cairns District Court of Queensland) brought by and me against the Dischargees which I, my executives or administrators now or could hereafter have against the said Dischargee and/or there executives, administrators or successors in title arising directly or indirectly out of an accident which occurred on the date and place specified in the schedule hereto and in which I suffered bodily injury and other loss and damage

AND I ACKNOWLEDGE that payment of the said sum is to obviate the expense of litigation and RACQ Insurance limited do not admit injury, loss or damage

AND I FURTHER ACKNOWLEDGE that this discharge may be pleaded in bar to any such action suit claim or demand

AND I FURTHER ACKNOWLEDGE that the said sum is subject to the deduction of any charge pursuant to the provisions of the *Social Security Act* or the *Workers Compensation Acts of Queensland* or the *Worker Cover Queensland Act* or the *Health and Other Services (Compensation) Act* 1995 or the *Health And Other Services (Compensation) Care Charges Act* 1995 or any other statute **AND I HEREBY AGREE** to indemnify the Dischargees against any claims which may hereinafter be made against them in respect of any such charge

AND I FURTHER AGREE to indemnify the Dischargees against any claims which may hereinafter be made against them in respect of the payment hereunder

AND I FURTHER AGREE that the aforesaid sum will not be payable until 21 days after receipt by the Dischargee of a clearance or a notice of charge from WorkCover Queensland, Medicare Australia and Centrelink or other statutory authorities

AND I FURTHER ACKNOWLEDGE that if there is no valid Medicare Australia notice of past benefits the Dischargee intend to make an advanced payment to Medicare Australia of an amount equivalent to 10% of the settlement sum pursuant to section 30B *Health and Other Services Compensation Act* 1995 (Cth)

> **AND I FURTHER AGREE** that the terms of settlement are to remain confidential between the parties and may be disclosed only to the following:
>
> - The parties' accountants or similar professional persons
> - Any body or instrumentality to which such disclosure is compellable by law.
>
> **AND I DIRECT** …."

[11] The plaintiff argues that the offer is uncertain because it is internally inconsistent in that the formal offer proffers costs "*up to and including the day of service of this offer*", whereas the attached release does not set that temporal ceiling. I disagree, there is no inconsistency in the documents. It seems to me when read as a whole with their purpose in mind, such that the general terms in the attached discharge ought to be interpreted to achieve the purpose consistent with the covering form of offer.

[12] Clearly enough the terms of the offer include matters beyond the purview of a court's jurisdiction and adjudication of the proceeding, in particular the condition requiring execution of the release and its terms. I have been referred to several cases regarding hybrid offers mixing court type remedies with other commercial conditional requirements.[1] I prefer the view that the latter extraneous matters do not vitiate the offer or render it non-compliant with the rules. Further, on my reckoning the defendant's offer is clear in its terms and capable of easy and ready comparison with the judgment.

[13] Accordingly, the defendant's offer made on 2 September 2019 is caught by the operation of rule 361 of the *Uniform Civil Procedure Rules* 1999.

Is the judgment more favourable to the plaintiff than the offer?

[14] The rules encourage the parties to take a reasonable approach to the conduct of the case, negotiations, and offers by imposing a sanction on a party who unreasonably fails to accept an offer. Relevantly here, where a plaintiff does not accept a defendant's offer to settle and judgment is not more "favourable" to the plaintiff than the offer, the court must order the defendant to pay the plaintiff's standard costs up to the day of service of the offer and then order the plaintiff to pay the defendant's standard costs after the day of service of the offer unless the plaintiff shows that another order for costs is proper.[2]

[15] In my view both quantitative and qualitative matters are relevant to my consideration of whether the overall effect of the judgment was more favourable, or not, to the plaintiff than the offer pursuant to r 361(1).

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1 *Taske v Occupational & Medical Innovations Ltd* [2007] QSC 147 at [16], *Armstrong v Mitchell-Smith and Allianz Australia Insurance Limited (No 2)* [2012] QSC 370; *Deeson Heavy Haulage Pty Ltd v Cox & Ors (No 2)* [2009] QSC 348, *Balnaves v Smith* [2012] QSC 408 at [22], *Binaray Pty Ltd v RAMS Financial Group Pty Limited* [2019] QSC 280, *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* [2020] QSC 1.

2 UCPR, r 361.

[16] Although the plaintiff accepts that the quantum offered by the defendant was more favourable than the monetary judgment by over $3000, she points to the following hybrid features as rendering the offer less favourable:

1. That acceptance of the offer was conditional upon the plaintiff executing a Deed of Release/Discharge attached;

2. It was a term of the discharge that the terms of settlement were to remain confidential between the parties (subject to limited disclosure which was not a term which a Court would or did order in the circumstances of the case);

3. The discharge further contained indemnity obligations being terms which a Court would not or did order in the circumstances of the case;

4. The discharge further contained a provision that the proposed sum would not be payable until 21 days after receipt "by the discharges of a clearance or notice of charge from WorkCover Queensland, Medicare Australia and Centrelink or other statutory bodies".

[17] Of course, hybrid offers are not merely unfavourable because they contain extraneous matters beyond the relief available in a court. Some of the extraneous matters included in an offer are consistent with the available relief flowing from a court adjudication. For example, in the wake of a judgment parties are barred from bringing future like actions (with rare exceptions), rights are merged in the judgment, and liabilities discharged by the operation of the judgment, executory obligations will include statutory refunds and setting time for payment after clearances.

[18] Although the offer exceeded the judgment by over $3000, it contains terms extending beyond the claims in the proceeding and conditional on the agreement of a deed, which in turn imposed on the plaintiff conditions of strict confidentiality and a contradictory acknowledgment that the defendant does "*not admit injury, loss or damage*". Consequently, the terms of the offer sought to burden the plaintiff with a lifelong silence without any acknowledgment of liability for her injury, loss or damage. These extraneous matters did not, and could not, form part of any judgment in the proceeding. The court did not, and could not, compel the plaintiff to execute a form of release and discharge in those terms. As for the acknowledgment that the second defendant does "*not admit injury, loss or damage*", that contradicts the defendants' pleadings and the conduct of the case for the sole purpose of adjudicating causation and consequential loss and damage. Further, the judgment did not restrain the plaintiff from publication or force confidentiality about the nature and effect of the outcome.

[19] The extraneous aspects of the offer, it seems to me, are incongruent with the fundamental attributes of our system of open justice. This is not the sort of rare or unusual case where the court should make a suppression order so the dispute and judgment remain secret and thereby cloth the dispute with confidentiality. It was a personal injuries compensation case with no dispute about liability. The determinative issues in the proceeding were: What is the nature and extent of the plaintiff's injuries caused by the accident? And; what is the assessment of those damages? The plaintiff chose, by rejecting the offer, to test her dispute by a fair trial in open court where the outcome is reasoned and published. The court found

that the plaintiff suffered a predominant injury to her shoulder region with painful symptoms radiating up her neck, with a secondary psychiatric injury of adjustment disorder with anxious and depressed mood minorly attributable to the accident, and otherwise caused by her complex personal and relationship circumstances. I assessed damages and gave judgement to the plaintiff against the defendants for $76,123.73.

[20] In that way, the overall effect of the judgment is to acknowledge the nature and extent of the plaintiff's loss and damage, to attribute liability for her loss caused by the defendant, to quantify compensation, and to acknowledge the defendants' responsibility for the plaintiff's past and future impairment and incapacity.

[21] In the circumstances of this case, I conclude that the plaintiff did obtain a judgment that overall is more favourable to the plaintiff than the offer with the extraneous terms.

Is another order for costs contemplated by rule 361(2) appropriate in the circumstances?

[22] In light of last conclusion, it is unnecessary to answer this question.

[23] Nevertheless, had I found that the offer was favourable, I think another order (to the effect that costs should follow the event to be assessed on the standard basis) would have been appropriate because: the plaintiff faced uncertain medical opinion about the cause, nature and extent of injury; no medical evidence recommended available treatment and rehabilitation for her physical injuries; her past and future working capacity was largely untested and uncertain; the quantum of the offer was barely more favourable than the judgment; the terms of the release and discharge unduly burdened the plaintiff; the offer contained a hybrid of court and out-of-court requirements.

[24] For these reasons, an alternative order was justified so that that costs ought to follow the event to be assessed on the standard basis.

How should the court attribute the reserved costs for the application filed on 13 December 2019?

[25] The costs of a proceeding do not include the costs of an application in the proceeding, unless the court orders otherwise.[3] Reserved costs of an application will follow the event, unless the court orders otherwise.[4]

[26] The plaintiff argues that the defendant should pay the plaintiff's costs of the interlocutory application filed 13 December 2019 or that there be no order as to costs. The defendants also seek those reserved costs or alternatively, there should be no order as to costs.

[27] The defendant brought the application seeking orders to dispense with the request for trial date and list the proceeding for trial. The parties compromised the application and agreed to list the trial but otherwise reserve the question of the application costs to the trial judge. The plaintiff maintains that the application was

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3 UCPR, r. 693.
4 UCPR, r. 698.

pre-mature because disclosure of medical records was not finalised. But the defendant submits in effect that further disclosure was futile, and the plaintiff engaged in delay. In the end, even though the parties exhausted appropriate efforts to complete proper disclosure they were largely unfruitful. I am unable to discern any fault on the part of either party in conduct of the case.

[28] In my view each party should bear their own costs of and incidental to the application filed 13 December 2019.

What is the appropriate costs order and level of assessment in the interests of justice?

[29] The plaintiff seeks costs assessed using the District Court Scale on the standard basis. However, the defendant argues for contrary orders and that the costs ought be assessed using the Magistrates Court Scale.

[30] The court has a broad power to award costs in a proceeding.[5]

[31] The general rule pursuant to r 681 of the *Uniform Civil Procedure Rules* 1999 is that costs of a proceeding are in the discretion of the Court, but follow the event, unless the court orders otherwise.

[32] This statutory conferral of jurisdiction to award costs gives this Court the widest possible power and discretion in the allocation of costs. The discretion must be exercised judicially, that is to say, not arbitrarily, capriciously or so as to frustrate the legislative intent.[6] It follows that costs must necessarily be awarded on principle, not according to whim or private opinion.

[33] The Court should not lose sight of the fundamental principle that costs orders serve a compensatory function, not a punitive one.[7] This fundamental principal was explained by Mason CJ in *Latoudis v Casey*.[8]

[34] Therefore, the Court should act with a degree hesitancy and in an unusual[9] or exceptional case[10] before depriving a successful party of costs, or even order a successful party to pay costs.

[35] The way in which the parties conducted their cases ought to be considered against the background of the overriding obligations of the parties and the Court in rule 5.

[36] Each party properly participated in the proceeding, made proper concessions to facilitate a timely and efficient hearing especially in this CONVID-19 era. The proceedings were not commenced for some improper purpose or ulterior motive.

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5 *Civil Proceedings Act* 2011 (Qld), s 15.

6 *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 81 per Gaudron and Gummow JJ.

7 *Latoudis v Casey* (1990) 170 CLR 534 at 543 per Mason CJ, at 563 per Toohey J, at 567 per McHugh J; 97 ALR 45; BC9002896; *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97; [1998] HCA 11; BC9800310 per McHugh J.

8 *Latoudis v Casey* (1990) 170 CLR 534 at 543 per Mason CJ; at 567 per McHugh J; see also *Oshlack v Richmond River Council* (1998) 193 CLR 72 at 97; [1998] HCA 11; BC9800310 per McHugh J at [65] – [70].

9 *BHP Coal Pty Ltd v O & K Orenstein & Coppell AG (No. 2)* [2009] QSC 64 at [8] per McMurdo J (as his Honour then was), citing Einstein J in *Mobile Innovations Ltd v Vodafone Pacific Ltd* [2003] NSWSC 423 at [4]; *Kilvington v Grigg & Ors (No. 2)* [2011] QDC 37 at [34] per McGill DCJ.

10 *Oshlack v Richmond River Council* (1988) 193 CLR 72 per McHugh J (with whom Brennan CJ agreed).

There was not misconduct that caused delay, costs and inconvenience of the court or other party. The plaintiff was not imprudent in refusing of the defendant's offers of compromise. There were no unnecessary allegations or groundless contentions that unduly prolonged the case, although the plaintiff seemingly had an inflated expectation of the case. I was greatly assisted by appropriate written and oral arguments by both parties.

[37] Costs are ordinarily assessed on the standard basis of the court scale, unless the rules or a court order requires assessment on an indemnity basis,[11] and/or a different jurisdictional scale.

[38] The plaintiff commenced and maintained the proceeding in this court, however, the judgment fell well short of the jurisdictional monetary limit of the Magistrates Court of that of $150,000. There were not realistic prospects on the available evidence for a judgment to exceed that jurisdictional limit. Accordingly, I conclude that costs ought to be assessed on the standard basis but using the Magistrates Court Scale.

Orders

[39] For these reasons, I will order that the defendants will pay the plaintiff's costs of the proceeding (excluding the reserved costs of and incidental to the application made on 13 December 2019) to be assessed on the standard basis using the applicable Magistrates Court Scale.

Judge Dean P Morzone QC

[11] UCPR rr 360 (formal offer by plaintiff), 361 (formal offer by defendant), 701 (standard), 703 (indemnity).