

# DISTRICT COURT OF QUEENSLAND

CITATION: *Usher v Palmer (No.2)* [2023] QDC 16

PARTIES: **JONATHAN DAVID USHER**  
(plaintiff)  
v  
**BEN ROBERT PALMER**  
(defendant)

FILE NO/S: 2306/20

DIVISION: Civil

PROCEEDING: Application for costs

ORIGINATING COURT: Brisbane District Court

DELIVERED ON: 17 February 2023

DELIVERED AT: Roma

HEARING DATE: Written submissions received 25 January 2023 and 30 January 2023.

JUDGE: Byrne KC DCJ

ORDER: **The plaintiff is to pay the defendant's costs of the proceeding, including all reserved costs, on the standard basis.**

CATCHWORDS: COSTS - PROCEDURE - UNIFORM CIVIL PROCEDURES RULES - offer to settle under Chapter 9, Part 5 of the UCPR - r 361 of the UCPR - s 40 of the Defamation Act 2005 - general principles and exercise of discretion - offer to settle must contain element of compromise - costs where claim was dismissed for want of prosecution - non-application of r 361 where the plaintiff is wholly unsuccessful- power to order indemnity costs where claim was dismissed for want of prosecution - conduct does not rise to a level to disqualify from partial indemnification - unreasonable offer does not amount to an offer

LEGISLATION: *Uniform Civil Procedure Rules* 1999, Chapter 9, Part 5, r 361, r 681  
*Defamation Act 2005* s40

CASES: *Gramotnev v Queensland University of Technology (No. 2)* [2018] QSC 81  
*Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No. 2)* [2005] 13 VR 435  
*Jones v Millward* [2005] 1 Qd R 498

*Oshlack v Richmond River Council* (1998) 193 CLR 72

*Usher v Palmer* [2023] QDC 003

*Zoef v Nationwide News Pty Ltd (No. 2)* [2017] NSWCA 2

COUNSEL: Mr. R. Anderson KC for the plaintiff.  
Mr. A. Nelson for the defendant.

SOLICITORS: The plaintiff appears for himself.  
Australian Law Partners for the defendant.

### **Introduction**

- [1] These reasons for judgement are concerned with the issue of costs consequent upon my earlier judgment in the substantive dispute, and should be read in light of that judgment.<sup>1</sup>

### **Further background**

- [2] Unsurprisingly there had been correspondence between the parties, both before and after the commencement of proceedings, which variously contained what are said to be offers to settle the proceedings.
- [3] The concerns notice issued on 31 December 2017 contained minimum requirements to make amends, being a written apology, an unreserved retraction of the allegations, and compensation for costs incurred and for hurt, distress and embarrassment caused. Then, a letter from the plaintiff to the defendant dated 28 March 2018 offered to waive a right to claim, which was quantified at just over \$392,000 plus aggravated damages to be assessed, in exchange for an unreserved written apology and an unreserved retraction of the allegations. Neither of these offers are of relevance to the present question.
- [4] On 5 February 2019, shortly after the Notice of Defence had been filed, the defendant's then solicitor wrote a letter to the plaintiff's solicitor headed "Offer to Settle" which indicated a willingness to consent to a discontinuance of the claim. The document was silent on the issue of costs.
- [5] On 3 May 2019 the defendant issued an offer to settle under Chapter 9, Part 5 of the *UCPR*. The terms of the offer required the plaintiff to execute a Notice of Discontinuance and to pay the defendant's costs of the proceeding on the standard basis. On 30 June 2019 the defendant effectively repeated that same offer.
- [6] Obviously, none of the offers were accepted.
- [7] The Claim was ultimately dismissed for want of prosecution rather than having been determined on the merits.

---

<sup>1</sup> *Usher v Palmer* [2023] QDC 003.

### **The parties' submissions**

- [8] The defendant contends that he should receive all costs of the proceeding, including reserved costs, as an application of the rule that costs follow the event. He further contends that the application of r 361 of the *UCPR* and/or s 40 of the *Defamation Act 2005* results in them being ordered on the indemnity basis.
- [9] The plaintiff contends that the reserve costs of the two applications before me should be paid to the defendant on the standard basis, as there is no reason why those costs should be paid on the indemnity basis.
- [10] The plaintiff further submits that, for the costs of the proceeding generally, r 361 has no application where the plaintiff is wholly unsuccessful. If general principles are applied, the rejection of the offers was not unreasonable in all of the circumstances, thereby denying the defendant costs on the indemnity basis. For the same reasons, the rejection of the offers would not engage s 40 of the *Defamation Act*.
- [11] Finally, it is submitted that in the particular circumstances of this matter there are good grounds to order that there be no order as to costs, or otherwise costs should be ordered on the standard basis, but only from the time the offer was made.

### **Consideration**

- [12] It is uncontentioned that the defendant should receive his costs of the applications that were the subject of the primary judgment. I consider they should be paid on the standard basis. There was nothing in the plaintiff's conduct in the applications that would warrant indemnity costs. The fact there had been no step taken in over two years was the basis of the application. This may, in certain circumstances, provide some support for an order for indemnity costs. However, given that there were matters in the plaintiff's favour in those applications which are elucidated in the primary judgement, it is not appropriate they be paid on that indemnity basis.
- [13] As to the costs of the balance of the proceeding generally, as the defendant does not press complaints about the plaintiff's conduct of those proceedings, that need not be considered as a stand-alone basis for the award of indemnity costs.
- [14] I accept that r 361 of the *UCPR* does not apply where the plaintiff has been wholly unsuccessful.<sup>2</sup> Accordingly, the discretion to be applied is that reflected in r 681 of the *UCPR*, and the criteria outlined in *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No. 2)*<sup>3</sup> are a useful guide.
- [15] I interpolate here that, if consideration of the point was necessary, I would have concluded that at least the second and third offers by the defendant would not have qualified as "offers" for the purposes of r 361 as they do not contain any aspect of

---

<sup>2</sup> *Gramotnev v Queensland University of Technology (No.2)* [2018] QSC 81 and cases cited therein.

<sup>3</sup> [2005] 13 VR 435 [25].

compromise,<sup>4</sup> but in any event they would not have fallen for consideration given they were second and subsequent offers.<sup>5</sup>

- [16] The first offer was made early in the litigation, but was not clear on its terms as it made no reference to costs. If it was intended that the plaintiff pay the defendant's costs, it was a demand to capitulate. If that was not the intention, it was suggesting the plaintiff should discontinue proceedings that, although ultimately rising and falling on the credit assessment of all witnesses, had some prospects of success.<sup>6</sup> I also accept the plaintiff's submissions that the limited nature of the defences pleaded meant that his prospects of success were not hindered by complicated or overly nuanced considerations.
- [17] In any event, the terms of the offer were not clearly expressed, and the offer did not refer to it being relied on for the purposes of costs, whether on the standard or indemnity basis.
- [18] It was not, in my view, imprudent to reject the first offer.
- [19] As for the two later offers, I have already recorded my view that they were each demands to capitulate rather than offers to settle, as properly understood.
- [20] Although each of these "offers" were proffered on the basis of an intention to seek indemnity costs if successful at trial, they did not provide any estimate of the costs incurred to that point in time on the standard basis. While the failure to provide such an estimate will not necessarily be fatal to an application for indemnity costs, it is relevant in determining if the refusal of the offer was imprudent or not.
- [21] In my view, the rejection of the offers was not imprudent. While there are aspects of the plaintiff's conduct that were unhelpful, such as the prolonged failure to take a step in the proceedings, nothing rises to the level of a "*relevant delinquency*".<sup>7</sup>
- [22] For the same reasons, the reliance by the defendant on s 40 of the *Defamation Act* is also misplaced. While the focus of these reasons has been on the reasonableness, or otherwise, of the plaintiff's rejection of the offers, it has been held that an unreasonable offer does not amount to an offer for the purposes of s 40 of the *Defamation Act*.<sup>8</sup> For the reasons earlier expressed I would have found each of the offers to be unreasonable, were such a consideration necessary.
- [23] As for the plaintiff's final submission, I consider that the usual rule has not been displaced. It was due to the plaintiff's default that the proceedings were dismissed. The defendant had been put to expense, as deposed to in an affidavit tendered in the primary applications, over which he had limited control, in the sense that it was not he who launched the proceedings. In failing to take a step, the plaintiff breached his

---

<sup>4</sup> *Jones v Millward* [2005] 1 Qd R 498.

<sup>5</sup> See r 361(4) of the *UCPR*.

<sup>6</sup> Primary judgment at [30].

<sup>7</sup> *Oshlack v Richmond River Council* (1998) 193 CLR 72, 89.

<sup>8</sup> *Zoef v Nationwide News Pty Ltd (No. 2)* [2017] NSWCA 2, [59].

implied undertaking to the Court. He is a solicitor and must be taken to have known that by commencing proceedings there was a risk of an adverse costs order. While not all of the defendant's conduct was itself exemplary, it does not rise to a level to disqualify him from the partial indemnification that an order for costs on the standard basis affords.

- [24] The plaintiff's submission to order the costs only from the time the offer was made (which I have assumed was the time of the first offer) was not developed and for the above reasons is rejected.

### **Order**

- [25] The plaintiff is to pay the defendant's costs of the proceeding, including all reserved costs, on the standard basis.