SUPREME COURT OF QUEENSLAND

CITATION:	*Distant v Qld Rail* [2002] QSC 271
PARTIES:	**KEVIN RAYMOND DISTANT** (plaintiff) **v** **QUEENSLAND RAIL** (defendant)
FILE NO:	S52 of 2000
DIVISION:	Trial Division
DELIVERED ON:	11 September 2002
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Mackenzie J

ORDER:

1. **That the order provisionally pronounced on 17 June be vacated**
2. **That the defendant pay the plaintiff's costs of and incidental to the action (including reserved costs if any) on the District Court Scale appropriate to the judgment sum, to be assessed on the following bases:**
    a. **on the standard basis up to and including 31 August 2001;**
    b. **on the indemnity basis on and from 1 September 2001.**

CATCHWORDS: PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – POWERS OF COURT – ORDER FOR COSTS ON AN INDEMNITY BASIS – where prior to trial plaintiff made an offer to settle that was not accepted by the defendant – whether this was a rejection of a reasonable offer - whether costs should be assessed on a standard or an indemnity basis

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – SCALE OF COSTS – SCALE APPLICABLE – where relief obtained by the plaintiff in the Supreme Court proceeding could have been obtained within the jurisdiction of the District Court - whether costs should be assessed on the District Court Scale or the Supreme Court Scale

Uniform Civil Procedure Rules 1999 (Qld) (UCPR);
r 360(1), r 698(1), r 698(3)

Beardmore v Franklins Management Services Pty Ltd [2002] QCA 60; Appeal No 4953 of 2001, 19 March 2002
Ross v Suncorp Metway Insurance Limited [2002] QCA 93; Appeal No 5561 of 2001, 22 March 2002

COUNSEL: G Mullins for the plaintiff
M O'Sullivan, with S Brown, for the defendant

SOLICITORS: Shine Roche McGowan for the plaintiff
Blake Dawson and Waldron for the defendant

[1] **MACKENZIE J:** The plaintiff obtained judgment for $227,191.71 against the defendant. When the judgment was delivered on 17 June 2002 I contingently ordered the defendant to pay the plaintiff's costs, including reserved costs if any, to be assessed, subject to submissions to the contrary being made within a specified time. Both parties have made submissions concerning the costs order.

[2] There were two offers to settle, one by the plaintiff on 10 January 2001 and one by the defendant on 11 April 2002. The trial commenced on 8 May 2002.

[3] The plaintiff's offer to settle was for the sum of $210,000 exclusive of the refund to WorkCover with standard costs on the District Court Scale. The offer was left open for 14 days. The defendant's offer, some 15 months later, was to pay $220,000 inclusive of the refund party and party costs and outlays on the Supreme Court Scale. The defendant's offer was equivalent to about $195,000 when the Workers' Compensation refund was taken into account. The difference between standard costs on the respective District Court and Supreme Court Scales is not quantified in the submissions.

[4] There are two issues involved. The first is whether the costs should be paid on the standard basis or the indemnity basis. The second is whether the scale should be the District Court Scale or the Supreme Court Scale. The parties agreed that the matter could be conveniently decided on the written submissions without further oral hearing.

Standard basis or indemnity basis?

[5] Relevantly, r 360(1) *UCPR* states as follows:

> " If-
>
> (a) the plaintiff makes an offer to settle that is not accepted by the defendant and the plaintiff obtains a judgment no less favourable than the offer to settle;
>
> (b) …
>
> the court must order the defendant to pay the plaintiff's costs calculated on the indemnity basis unless the defendant shows another order for costs is appropriate in the circumstances."

[6] The plaintiff raises a number of issues in the written submissions that are somewhat peripheral to the issue to be decided. The important point for present purposes is that it is not in issue for the purposes of the submissions that it has satisfied the

condition in r 360(1) and is *prima facie* entitled to costs on the indemnity basis. The question is whether some other order should be made.

[7] The defendant submits that costs on the indemnity basis should not be ordered. It is submitted that at the time the plaintiff's offer was made quantum as disclosed in the statement of loss and damage then current showed that alternative employment then being engaged in by the plaintiff was likely to leave him with little future economic loss if any, and that according to the medical evidence his post-traumatic stress disorder was in remission and unlikely to recur in the absence of a future similar trauma. It was only some months later that evidence of the risk of relapse became apparent.

[8] It was submitted that, as the facts stood, the defendant did not reject a reasonable offer to settle. Reliance was placed on *Ross v Suncorp Metway Insurance Limited* [2002] QCA 93 where the offer was contemporaneous with delivery of the claim and therefore made earlier than that in the present case. However, in common with the present case, it was one where medical reports critical to quantum were yet to be received by the defendant. On the other side of the balance is that about 1 month before the trial, when the medical evidence suggesting that the plaintiff's prognosis was not as good as originally thought had been available for a number of months, an offer significantly less than the plaintiff's original offer was made by the defendant. It is true that the extent of the psychological disability was in dispute at the trial but the risk of a judgment based on the more pessimistic view must by then have been apparent.

[9] The case is not one where fine analysis of competing bodies of medical opinion is necessary to decide whether the circumstances existing at the time the plaintiff's offer was made and expired justified refusal. It is plain enough that on the premises then existing it was not unreasonable not to accept the offer. Since the defendant had not made an offer and still had the capacity to protect itself against indemnity costs by making its first offer at a level exceeding the plaintiff's first offer, but close to trial pitched it considerably lower, it is not unreasonable to order indemnity costs from about the time when the heightened risk of relapse became apparent. Accordingly the order should include that indemnity costs be paid from that time.

Scale of costs

[10] Rule 698(3) relevantly states as follows:

> "If the only relief obtained by a plaintiff in a proceeding in the Supreme Court is relief that, when the proceeding began, could have been given by the District Court, but not a Magistrates Court, the costs the plaintiff may recover must be assessed as if the proceeding had been started in the District Court."

That rule is applicable unless the court otherwise orders (r 698(1)).

[11] The defendant submitted that because of the quantum recovered, it was entitled by virtue of r 698(3) to have the costs assessed on the District Court Scale. The plaintiff submitted that in cases where there is a significant prospect that an award of damages may exceed the jurisdictional limit of the District Court the choice of the appropriate court in which to proceed is difficult. With apparent reference to *Beardmore v Franklins Management Services Pty Ltd* [2002] QCA 60 it was submitted that since the award of damages fell within 20% of the jurisdictional limit

of the District Court there was an appropriate reason for an order for costs on the Supreme Court Scale.

[12] In my view it is incorrect to think that *Beardmore v Franklins Management Services Pty Ltd* is intended to encourage a kind of generalised bracket creep with regard to costs when the award falls close to a jurisdictional boundary. It was simply a decision that in that particular case the damages were within the Magistrates Court jurisdictional limits but exceeded the defendant's offer. In the circumstances an order for costs on the lowest District Court Scale made by the trial judge was a proper exercise of discretion. The justification was that because there was no distinction in the Magistrates Court Scale between standard costs and indemnity costs the "spirit of encouraging acceptance of offers to settle" would have been infringed because the plaintiff would not have obtained any benefit from the refusal to accept a defendant's inappropriately low offer. The reference to the award being less than 20% below the jurisdictional limit of the Magistrates Court was merely a reference to the facts, not an attempt to indicate a threshold to justify exercising the discretion in a particular way. No reason has been demonstrated why costs should not be assessed on the District Court Scale appropriate to the judgment sum.

Disclaimer

[13] What has been said is not intended to suggest that inflexible rules apply or exclude the possibility that there may be cases where the particular circumstances justify a particular outcome outside the general rules laid down in r 360(1) and r 698(3). That is inherent in the fact that there is an element of discretion involved in each rule.

Orders

1. That the order provisionally pronounced on 17 June 2002 be vacated.
2. That the defendant pay the plaintiff's costs of and incidental to the action (including reserved costs if any) on the District Court Scale appropriate to the judgment sum, to be assessed on the following bases:
   (a) on the standard basis up to and including 31 August 2001;
   (b) on the indemnity basis on and from 1 September 2001.