

# SUPREME COURT OF QUEENSLAND

CITATION: *Astway P/L v Council of the City of the Gold Coast* [2007] QSC 224

PARTIES: **ASTWAY PTY LTD** ACN 010 768 662  
(plaintiff)  
v  
**COUNCIL OF THE CITY OF THE GOLD COAST**  
(defendant)

FILE NO: BS 2825/04

DIVISION: Trial Division

PROCEEDING: Trial

DELIVERED ON: 29 August 2007

DELIVERED AT: Supreme Court, Brisbane

HEARING DATE: 8 August 2007

JUDGE: Wilson J

ORDER:

- 1. That the plaintiff's claim be dismissed;**
- 2. That the plaintiff pay the defendant's costs of and incidental to the proceeding on the standard basis.**

CATCHWORDS: PRACTICE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – the defendant made an offer to settle – the plaintiff did not accept the offer – the plaintiff's claim was dismissed following trial – whether r 361 of the *Uniform Civil Procedure Rules 1999* (Qld) applies – whether costs should be awarded on the indemnity basis

*Uniform Civil Procedure Rules 1999* (Qld) r 361, r 689

*Anderson v AON Risk Services Australia Ltd* [\[2004\] QSC 180](#), cited

*Castro v Hillery* [\[2002\] QCA 359](#), cited

*Colgate Palmolive Co Pty Ltd v Cussons Pty Ltd* (1993) 46 FCR 225, cited

*Di Carlo v Dubois* [\[2002\] QCA 225](#), cited

*Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd* [\[2003\] QSC 299](#), cited

*Rathie v ING Life Ltd* [\[2004\] QSC 146](#), cited

COUNSEL: J A Griffin QC and C J Carrigan for the plaintiff  
M D Hinson SC and N Andreatidis for the defendant

SOLICITORS: Short Punch & Greatorix for the plaintiff  
Corrs Chambers Westgarth for the defendant

- [1] **Wilson J:** In reasons for judgment delivered on 8 August 2007<sup>1</sup> I concluded that the plaintiff's claim should be dismissed. The parties have since filed affidavits and made written submissions on costs.
- [2] The defendant has asked for costs on the standard basis to 22 January 2007 and thereafter on the indemnity basis. The plaintiff has submitted that costs should be awarded to the defendant on the standard basis.
- [3] The proceeding was commenced on 29 March 2004. There were amendments to the pleadings and disclosure before a request for trial date was filed on 13 September 2006. In the request for trial date the parties certified (inter alia) that disclosure had been provided as required by the *Uniform Civil Procedure Rules 1999* (Qld).
- [4] On 22 January 2007 the solicitors for the plaintiff received an offer to settle made by the defendant (and dated 18 January 2007) in the following terms –

“**TAKE NOTICE** that the Defendant **HEREBY OFFERS** to consent to the Plaintiff discontinuing this proceeding on the following basis:

1. The Defendant bears its own costs of and incidental to this proceeding.
  2. The Plaintiff bears its own costs of and incidental to this proceeding.
  3. This offer is subject to the Plaintiff agreeing to sign a discharge with respect to the action and executing a Notice of Discontinuance.
  4. This offer is made in accordance with the provisions of Chapter 9 Part 5 of the Uniform Civil Procedure Rules.
  5. This offer is open for acceptance for twenty one (21) days after the date of service hereof but shall then lapse.
  6. Acceptance of this offer must be effected by serving a notice of acceptance on the solicitors for the Defendant.”
- [5] The trial took place on 7 and 8 March 2007. There was limited oral evidence; a large number of documents were tendered.
- [6] The plaintiff complains that it did not have an informed opportunity to assess the chances of either side doing better than the offer<sup>2</sup> because the defendant had not complied with its disclosure obligations.

---

<sup>1</sup> [2007] QSC 205.

<sup>2</sup> cf *Castro v Hillery* [2002] QCA 359, [72]-[77].

- [7] The offer expired on 9 February 2007. On that date the defendant provided a supplementary list of documents, and provided a bundle of “background documents”. The documents in the supplementary list were provided three days later; they comprised approximately 1400 pages. The “background documents” comprised approximately 150 pages.
- [8] On 27 February 2007 the solicitors for the defendant provided a draft further amended defence, which was ultimately tendered at trial. However, the pleading amendment was comparatively minor.
- [9] On 1 March 2007 the defendant provided a fourth supplementary list of documents, those documents comprising approximately 600 pages.
- [10] On 6 March 2007 the defendant provided an indexed bundle of 71 documents (in 5 volumes) which it proposed to rely on at trial. Those documents subsequently became exhibit 3. Ultimately 26 of these were referred to in the reasons for judgment; of those 26 only 18 had been previously disclosed.<sup>3</sup>
- [11] On 7 March 2007, before the commencement of the trial, the defendant provided 2 documents which had in fact been disclosed earlier (on 4 August 2006 and 28 June 2004 respectively).
- [12] On the first day of the trial the defendant disclosed three sets of minutes (which subsequently went into evidence) – two of which had been disclosed earlier. The third had not been disclosed previously, although the relevant committee recommendation had been.
- [13] Clearly the defendant had not complied with its disclosure obligation at the time its solicitors signed the request for trial date or at the time the offer was served. Its failure to do so deprived the plaintiff of the opportunity to make an informed assessment of the likely outcome of the litigation during the period the offer remained open.
- [14] The defendant offered to consent to the plaintiff’s discontinuing the proceeding on the basis that each side bear its own costs. By the time the offer was served, the plaintiff could discontinue only with the Court’s leave or the consent of the defendant; had it done so it could have expected to have to pay the defendant’s costs up to the discontinuance.<sup>4</sup> Thus the offer was a meaningful one.
- [15] The plaintiff has submitted that the present case is governed by r 361(1) and (2) of the *UCPR*. Rule 361 provides –

**“361 Costs if offer to settle by defendant**

(1) This rule applies if—

- (a) the defendant makes an offer to settle that is not accepted by the plaintiff and the plaintiff obtains a judgment that is

---

<sup>3</sup> Affidavit of S E Vale, filed 16 August 2007, [12]-[15]; affidavit of C E George, filed 23 August 2007, [11].

<sup>4</sup> *UCPR* rr 304, 307

not more favourable to the plaintiff than the offer to settle; and

- (b) the court is satisfied that the defendant was at all material times willing and able to carry out what was proposed in the offer.
- (2) Unless a party shows another order for costs is appropriate in the circumstances, the court must—
- (a) order the defendant to pay the plaintiff’s costs, calculated on the standard basis, up to and including the day of service of the offer to settle; and
  - (b) order the plaintiff to pay the defendant’s costs, calculated on the standard basis, after the day of service of the offer to settle.
- (3) However, if the defendant’s offer to settle is served on the first day or a later day of the trial or hearing of the proceeding then, unless the court otherwise orders—
- (a) the plaintiff is entitled to costs on the standard basis to the opening of the court on the next day of the trial; and
  - (b) the defendant is entitled to the defendant’s costs incurred after the opening of the court on that day on the indemnity basis.
- (4) If the defendant makes more than 1 offer satisfying subrule (1), the first of those offers is taken to be the only offer for this rule.”

But in my view r 361 is not applicable to this case, because the plaintiff has not obtained any judgment.<sup>5</sup> I think that r 689 applies. It provides –

**“689 General rule about costs**

- (1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court considers another order is more appropriate.
- (2) Subrule (1) applies unless these rules otherwise provide.”

[16] The usual order is for costs on the standard basis, and some special feature warranting a more generous award needs to be established before the Court will award indemnity costs.<sup>6</sup> The defendant has utterly failed to do so in the present case.

<sup>5</sup> *Emanuel Management Pty Ltd (in liq) v Foster’s Brewing Group Ltd* [2003] QSC 299, [36] (Chesterman J); *Rathie v ING Life Ltd* [2004] QSC 146, [46]-[57] (Wilson J); *Anderson v AON Risk Services Australia Ltd* [2004] QSC 180, [10] (P D McMurdo J).

<sup>6</sup> *Di Carlo v Dubois* [2002] QCA 225, [37] (White J); *Colgate Palmolive Co Pty Ltd v Cussons Pty Ltd* (1993) 46 FCR 225, 233 (Sheppard J).

[17] The orders of the Court will be –

- (1) that the plaintiff's claim be dismissed;
- (2) that the plaintiff pay the defendant's costs of and incidental to the proceeding on the standard basis.