

# SUPREME COURT OF QUEENSLAND

CITATION: *Lyschome P/L t/a JAT Refrigerated Road Services v Swire Cold Storage P/L (No 2)* [2009] QSC 242

PARTIES: **LYSCHROME PTY LTD trading as JAT REFRIGERATED ROAD SERVICES**  
(plaintiff)  
v  
**SWIRE COLD STORAGE PTY LTD**  
(ABN 14 059 512 150)  
(defendant)

FILE NO/S: 9595 of 2008

DIVISION: Trial Division

PROCEEDING: Costs order

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 21 August 2009

DELIVERED AT: Brisbane

HEARING DATE: 14, 15, 16 June 2009

JUDGE: Dutney J

ORDER: **The defendant pay the plaintiff's costs of and incidental to the action to be assessed on the standard basis**

CATCHWORDS: PROCEDURE-COSTS-GENERAL RULE- COST FOLLOW THE EVENT-COSTS OF WHOLE ACTION-GENERALLY  
Where plaintiff seeks indemnity cost-Where plaintiff sent a letter of offer to settle on terms contained in a lease

COUNSEL: N Cotman SC with him P D Tucker for the plaintiff  
R Derrington SC with him D Chesterman for the defendant

SOLICITORS: Porter Davies as town agents for Dennis & Co for the plaintiff  
McMahon Clarke for the defendant

[1] In this matter I delivered judgment on 15 July 2009. At that time I indicated that I would order the defendant to pay the plaintiff's costs of the action to be assessed on the standard basis.

[2] At the request of the parties I reserved the issue of costs to enable the parties to make submissions.

- [3] The plaintiff seeks indemnity costs on the basis of a letter dated 1 May 2009 which materially reads as follows:
- “Our client instructs us to reject your client’s offer and make the following offer in a final attempt to settle this matter:
1. That the parties enter into a lease in the form prepared by you and delivered to us under cover of your letter of 21 April 2009
  2. That the lease be amended to include the Special Conditions contained in your letter to us of 30 April 2009.
  3. That each party pay their own costs.
- After careful consideration of this matter our client believes that in view of the costs it has been required to incur in this matter as a consequence of your client’s conduct, its willingness not to seek its costs to be paid by your client is a significant compromise on its part.”
- [4] It is not clear to me what form the lease delivered under cover of a letter of 21 April 2009 took. The parties have not made known to me the Special Conditions contained in the letter of 30 April 2009.
- [5] Since the plaintiff’s claim was to enforce the three year option period agreed to, I can only assume that any lease the subject of the settlement offer was of that duration.
- [6] If my assumption is correct, then the outcome of the trial limiting the plaintiff to a lease of the order of 18 months has not been more advantageous for the plaintiff than the offer which it made. There thus seems to be no reason to depart from the ordinary outcome which is that costs be paid on the standard basis.
- [7] The defendant argues that there should be no order as to costs. The basis of this submission is that the plaintiff succeeded on a basis which was not pleaded and which it only developed during the course of submissions in circumstances where a great number of other claims raised by the plaintiff were unsuccessful.
- [8] While, on a close analysis of the plaintiff’s pleading it might be argued that the plaintiff succeeded on a basis which was not pleaded, that really misrepresents the plaintiff’s position.
- [9] The plaintiff’s case in essence was that but for the representation which I found to have been made it could and would have made other arrangements regarding the operation of its business. As things transpired those other arrangements took the form of constructing a purpose built cold storage facility at Lytton in lieu of leasing other premises in the same vicinity. It seems to me that the basis of the plaintiff’s success was within the spirit if not the letter of the pleadings and I do not consider the discrepancy such as would deprive the plaintiff of the ordinary fruits of its victory.
- [10] The case was efficiently conducted by counsel for both sides and I am not persuaded that any of the unsuccessful claims made any material impact on the duration of the hearing. In all of the circumstances it seems to me that this is a case in which the ordinary outcome is appropriate and I order that the defendant pay the plaintiff’s costs of and incidental to the action to be assessed on the standard basis.