

SUPREME COURT OF QUEENSLAND

CITATION: *Turrisi Properties P/L v LJ & BJ Investments P/L; Turrisi Properties P/L v McVicar; Turrisi Properties P/L v Mulcahy (No 2)* [2010] QSC 349

PARTIES: **TURRISI PROPERTIES PTY LTD**
ACN 093 912 746
(plaintiff)
v
LJ & BJ INVESTMENTS PTY LTD
(defendant)

FILE NO: BS8515/09

PARTIES: **TURRISI PROPERTIES PTY LTD**
ACN 093 912 746
(plaintiff)
v
SHANE TRAVIS McVICAR
(defendant)

FILE NO: BS8738/09

PARTIES: **TURRISI PROPERTIES PTY LTD**
ACN 093 912 746
(plaintiff)
v
TERENCE JAMES MULCAHY
(defendant)

FILE NO/S: BS9160/09

DIVISION: Trial Division

PROCEEDING: Costs applications

ORIGINATING COURT: Supreme Court, Brisbane

DELIVERED ON: 16 September 2010

DELIVERED AT: Brisbane

HEARING DATES: Written submissions on costs 3, 7 September 2010

JUDGE: Margaret Wilson J

ORDER:

In *Turrisi Properties Pty Ltd v LJ & BJ Investments Pty Ltd* BS8515/09:

The court orders:

1. That the Plaintiff's claim be dismissed; and
2. That there be judgment for the Defendant on its counterclaim as follows

The court declares:

3. That by notice given by the Defendant (by its solicitors) to the Plaintiff on 14 July 2009, under s.421(3) of the *Environmental Protection Act 1994* (Qld) the Defendant rescinded the contract entered into by the Plaintiff and the Defendant for the purchase by the Defendant of Lot 7 of "The Ivy" apartment complex located at 141 Sydney Street, New Farm ("the Contract").

And the court orders:

4. That the Plaintiff pay the Defendant:
 - (a) \$5,301.37 in respect of bank fees incurred on and after 14 July 2009 in relation to the bank guarantee provided by the Defendant by way of deposit under the Contract;
 - (b) \$5,478.00 in respect of legal fees incurred by the Defendant in relation to the Defendant's demand for the return of the bank guarantee provided by the Defendant by way of deposit under the Contract;
5. That the Plaintiff pay the Defendant's costs of and incidental to the claim, including reserved costs, if any, on the indemnity basis from and including 21 January 2010 and otherwise on the standard basis; and
6. That the Plaintiff pay the Defendant's costs of and incidental to the counterclaim, including reserved costs, if any, but exclusive of costs of and incidental to the return of the bank guarantee, on the indemnity basis.

In *Turrisi Properties Pty Ltd v Shane Travis McVicar* BS8738/09:

1. That the Plaintiff's claim be dismissed; and
2. That the Plaintiff pay the Defendant's costs of and incidental to the proceeding, including reserved costs if any, to be assessed on the standard basis.

In *Turrisi Properties Pty Ltd v Terence James Mulcahy* BS9160/09:

1. That the Plaintiff's claim be dismissed; and
2. That the Plaintiff pay the Defendant's costs of and incidental to the proceeding, including reserved costs if any, to be assessed on the standard basis.

CATCHWORDS: PROCEDURE – COSTS – GENERAL RULES – DEPARTING FROM THE GENERAL RULE – order for costs on indemnity basis – where claim dismissed – where plaintiff ordered to return bank guarantee and pay bank fees and legal fees on the counterclaim – where defendant made two *Calderbank* letters of offer, expressed as "without prejudice" save as to costs, wherein defendant notified plaintiff that if it achieved a result in court equal to or more favourable than the offers it would apply for indemnity costs from the date of the letter – where the second letter was also expressed as pursuant *Uniform Civil Procedure Rules* 1999 (Qld) r 353 – whether there was a basis for awarding indemnity costs – *Uniform Civil Procedure Rules* 1999 (Qld) rr 360, 361 and 681

PROCEDURE – COSTS – GENERAL RULES – DEPARTING FROM THE GENERAL RULE – order for costs on indemnity basis – where claims dismissed – where one defendant made final offer to forgo cash deposit of \$50,000 if released from the contract – where another defendant made further offer to terminate the contract on the basis that the plaintiff waive any claim over the deposit – whether there was a basis for departing from the general rule about costs in *Uniform Civil Procedure Rules* 1999 (Qld) r 681

Uniform Civil Procedure Rules 1999 (Qld) rr 304, 307, 353, 360, 361, 681

Calderbank v Calderbank [1976] Fam 93, cited

COUNSEL: MD Martin for the plaintiff in 8515/09; 8738/09 and 9160/09
P Tucker for the defendant in 8515/09
KC Kelso for the defendant in 8738/09 and 9160/09

SOLICITORS: ClarkeKann for the plaintiff in 8515/09; 8738/09 and 9160/09
Merthyr Law for the defendant in 8515/09
Michael Drummond for the defendants in 8738/09 and 9160/09

- [1] **Margaret Wilson J:** On 31 August 2010 I gave reasons for judgment in three proceedings – *Turrisi Properties Pty Ltd v LJ & BJ Investments Pty Ltd* (BS 8515/09), *Turrisi Properties Pty Ltd v McVicar* (BS 8738/09) and *Turrisi Properties Pty Ltd v Mulcahy* (BS 9160/09).¹ I have now received written submissions on costs in each.

LJ & BJ Investments Pty Ltd

- [2] I held that the claim against LJ & BJ should be dismissed², and that on the counterclaim *Turrisi Properties Pty Ltd* should be ordered to return the bank guarantee, and to pay bank fees on the guarantee from 14 July 2010 and legal fees

¹ [2010] QSC 325.

² [2010] QSC 325 at [156].

of \$5,874 incurred by LJ & BJ Investments Pty Ltd in relation to the demand for the return of the guarantee.³

- [3] LJ & BJ Investments Pty Ltd made two offers to settle the dispute – the first on 31 July 2009 shortly before the litigation began, and the second on 21 January 2010. Its counsel submitted –
- (a) that Turrisi Properties Pty Ltd should be ordered to pay its costs incurred on and after 31 July 2009 of and incidental to these proceedings (other than the costs it incurred in relation to the demand for return of the guarantee (to which I have already referred) on the indemnity basis;
 - (b) alternatively, that Turrisi Properties Pty Ltd should be ordered to pay –
 - (i) its costs of and incidental to the claim on and after 21 January 2010 on the indemnity basis and otherwise on the standard basis; and
 - (ii) its costs of and incidental to the counterclaim on the indemnity basis.
- [4] Counsel for Turrisi Properties Pty Ltd submitted that there should be the usual order for costs to be assessed on the standard basis.
- [5] The first offer was made by a *Calderbank*⁴ letter – that is, it was made "without prejudice" save as to costs, and Turrisi Properties Pty Ltd was put on notice that if LJ & BJ Investments Pty Ltd achieved a result in court equal to or more favourable than the offer, it would produce the letter to the court on the question of costs and apply for costs on the indemnity basis from the date of the letter. It was in these terms –

"Our client instructs us that if your client agrees to return our clients Bank Guarantee to our office within seven (7) days of the date of this letter, LJ and BJ Investments as Trustee offers your client \$40,000.00 in full and final settlement of all claims between your client and our clients (including William Clarkson).

Our client instructs us that it will forward a cheque in the amount of \$40,000.00 payable to Turrisi Properties Pty Ltd within seven days of:

1. receipt of the Bank Guarantee; and
2. written acknowledgment from Turrisi Properties Pty Ltd that payment of \$50,000.00 [sic] is considered a legally binding settlement between Turrisi Properties Pty Ltd and LJ and BJ Investments as Trustee and William Clarkson in relation to the Contract dated 18 January 2008 and full and final settlement of all claims by Turrisi Properties Pty Ltd against LJ and BJ Investments as Trustee and William Clarkson."

- [6] There are several reasons why I consider that the plaintiff's non-acceptance of that offer should not result in an award of indemnity costs against it. First, the offer was internally inconsistent in that it involved payment of \$40,000, but an acknowledgement of payment of \$50,000 as a legally binding settlement. Secondly,

³ [2010 QSC 325 [157], [147], [45].

⁴ See *Calderbank v Calderbank* [1976] Fam 93.

it was made pre-litigation, and thirdly, it was made in circumstances where the plaintiff had an arguable case.

- [7] The second offer was made by letter from LJ & BJ Investments Pty Ltd's solicitors to Turrisi Properties Pty Ltd's solicitors, expressed as a *Calderbank* offer and as being made pursuant to r 353 of the *Uniform Civil Procedure Rules 1999* (Qld) ("*UCPR*"). It was in these terms –

"With a view to minimising the costs incurred by all parties we are instructed to make your client the following offer:

1. Your client:
 - 1.1. confirms the rescission of the contract;
 - 1.2. returns the original Bank Guarantee; and
 - 1.3. pays all legal fees or costs payable to Holding Redlich; and
 - 1.4. pays its own legal costs and fees to date;
 - 1.5. discontinue its claim against our client; and
 - 1.6. executes and files a Notice of Discontinuance; and
2. Our client:
 - 2.1. receives the original Bank Guarantee from Holding Redlich; and
 - 2.2. pays its own legal costs and fees to date; and
 - 2.3. discontinues its claim against your client."

- [8] This clearly involved compromise. By that stage, discontinuance of the claim required the leave of the court or the consent of LJ & BJ Investments Pty Ltd, and similarly, discontinuance of the counterclaim required the leave of the court or the consent of Turrisi Properties Pty Ltd. In either case, the discontinuing party could expect to have to pay the other party's costs.⁵ The parties' costs of and incidental to the claim could reasonably have been expected to be considerably more than their costs of and incidental to the counterclaim. I accept that the defendant was willing and able to perform its part of the proposed compromise.

- [9] Rules 360 and 361 of the *UCPR* provide –

"360 Costs if offer to settle by plaintiff

(1) 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; and
 - (b) the court is satisfied that the plaintiff was at all material times willing and able to carry out what was proposed in the offer; 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.
- (2) If the plaintiff makes more than 1 offer satisfying subrule (1), the first of those offers is taken to be the only offer for this rule.

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

⁵ *UCPR* rr 304, 307.

- (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."

Rule 361 does not provide a warrant for awarding indemnity costs on the claim in the circumstances of this case. This is because the plaintiff has failed on the claim: it has not obtained any judgment.⁶ On the other hand, LJ & BJ Investments Pty Ltd has obtained a judgment on the counterclaim more favourable than its offer of compromise, and pursuant to r 360 it should have its costs of the counterclaim on the indemnity basis.

[10] Rule 681 applies to the costs of the claim. It provides –

"681 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 orders otherwise.
- (2) Subrule (1) applies unless these rules provide otherwise."

[11] 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.⁷ Although that special feature is often some delinquency on the part of the party being ordered to pay costs, it is not necessarily so. It is anomalous that a defendant who has offered to compromise a plaintiff's claim which ultimately it defeats completely should not be able to recover indemnity costs pursuant to r 361, while a defendant who has offered to compromise a claim and against whom some judgment (albeit no more than that offered) is entered may do so. That an offer took the form of a *Calderbank* offer is another relevant factor in the exercise of the discretion to depart from the usual order as to costs.

[12] In all the circumstances, I have determined that Turrisi Properties Pty Ltd should pay –

⁶ *Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd* [2003] QSC 299 at [36] (Chesterman J); *Anderson v AON Risk Services Australia Ltd* [2004] QSC 180 at [10] (PD McMurdo J); *Rathie v ING Life Ltd* [2004] QSC 146 at [46] – [57]; *Astway Pty Ltd v Council of the City of the Gold Coast* [2007] QSC 224 at [15] – [16]; *Campbell v Turner & Ors* [2007] QSC 362 at [18]; *Sultana Investments Pty Ltd v Cellcom (No. 2)* [2008] QCA 398 at [15] – [19].

⁷ *Di Carlo v Dubois* [2002] QCA 225 at [37]; *Colgate Palmolive Co Pty Ltd v Cussons Pty Ltd* (1993) 46 FCR 225 at 233.

- (i) LJ & BJ Investments Pty Ltd's costs of and incidental to the claim, including reserved costs if any, on the indemnity basis from and including 21 January 2010 and otherwise on the standard basis; and
- (ii) LJ & BJ Investments Pty Ltd's costs of and incidental to the counterclaim, including reserved costs if any, but exclusive of the costs of and incidental to the return of the bank guarantee referred to in paragraph 157 of the reasons for judgment on the substantive issues, on the indemnity basis.

McVicar

[13] Turrisi Properties Pty Ltd's claim against McVicar failed. There was no counterclaim.

[14] In the ordinary course, there should be an order for costs in favour of McVicar, to be assessed on the standard basis.

[15] McVicar has asked for indemnity costs. In support of that application, his counsel has noted that prior to the community titles scheme being established and some eight weeks before the revised settlement date, his client started making a number of open offers of settlement, none of which the plaintiff accepted. The only one of these submitted to be relevant to the discretion to award indemnity costs was made in a letter from McVicar's solicitor of 2 July 2009. The letter was in these terms –

"My client has now instructed me to advise your client that as a result of his deteriorating health and Turrisi's decision to proceed with the contract my client:

1. Will complete the purchase of the Contract for the contract price of \$2,045,000.00; &
2. He is listing the property immediately for Sale at a price of less than \$2,000,000.00.

Previously your client (through its agent) asked my client not to list the property for an amount less than the stated price of the remaining unsold units, so that future sales were not adversely affected. However, my client now has no option but to do this.

However my client makes a final offer to resolve this matter on the basis that he will forego the current cash deposit of \$50,000 if released from the contract."

[16] The offer to forgo the deposit of \$50,000 if released from the contract was not a *Calderbank* offer. However, it was an open offer, and so there was always the likelihood that it would come before the court on costs. On the other hand, it was made pre-litigation, in the context of McVicar's solicitor saying his client had decided to complete the contract and list the property for sale. Further, it was in a matter where the plaintiff had an arguable case. In my view, Turrisi Properties Pty Ltd's non-acceptance of this offer does not afford sufficient reason to depart from usual order as to costs.

[17] There should be an order that Turrisi Properties Pty Ltd pay McVicar's costs of and incidental to the proceeding, including reserved costs if any, to be assessed on the standard basis.

Mulcahy

- [18] Turrisi Properties Pty Ltd's claim against Mulcahy failed. There was no counterclaim.
- [19] He, too, has sought indemnity costs. He relies on an open offer made on 17 December 2008 (two days before he exercised the call option). It was in these terms–
- "We note that your Clients have rejected our Clients' proposal that they purchase the Contract back from him.
- Our Clients make a further offer to terminate the Contract on the basis that each Party walk away with your Client to waive any claim over the Deposit Bond and to rescind the Contract.
- Could you please advise your Client's instructions as a matter of urgency."
- [20] In my view, Turrisi Properties Pty Ltd's non-acceptance of this offer does not warrant departure from the usual order as to costs.
- [21] There should be an order that Turrisi Properties Pty Ltd pay Mulcahy's costs of and incidental to the proceeding, including reserved costs if any, to be assessed on the standard basis.