SUPREME COURT OF QUEENSLAND

CITATION:	*Cape York Airlines Pty Ltd v QBE Insurance (Australia) Ltd (No 2)* [2010] QSC 365
PARTIES:	**CAPE YORK AIRLINES PTY LTD** **ACN 000 627 010** (plaintiff) **v** **QBE INSURANCE (AUSTRALIA) LIMITED** **ACN 003 191 035** (defendant)
FILE NO/S:	BS 1762 of 2005
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	24 September 2010
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions as to costs
JUDGE:	Daubney J
ORDER:	**There will be an order pursuant to *UCPR* r 360(1) that the defendant pay the plaintiff's costs of and incidental to this proceeding (including any reserved costs) calculated on the indemnity basis.**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON THE INDEMNITY BASIS – where judgment has been for the plaintiff – where the plaintiff made a formal offer to settle – where the plaintiff seeks its costs of the proceeding on the indemnity basis pursuant to UCPR r 360 – whether the offer to settle was an offer of a genuine compromise – whether the defendant should be ordered to pay the plaintiff's costs on the indemnity basis *Uniform Civil Procedure Rules* 1999 (Qld), r 360 *Arian v Nguyen* (2001) 33 MVR 37, cited *Cape York Airlines Pty Ltd v QBE Insurance (Australia) Ltd* [2010] QSC 313, cited *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225, cited *Hobartville Stud Pty Ltd v Union Insurance Co Ltd* (1991) 25 NSWLR 358, cited

Jones v Millward [2005] 1 Qd R 498, distinguished
Maitland Hospital v Fisher (No 2) (1992) 27 NSWLR 721, cited
Tickell v Trifleska Pty Ltd (1990) 25 NSWLR 353, cited

COUNSEL: DR Cooper SC, with C Francis for the plaintiff
SSW Couper QC for the defendant

SOLICITORS: Kilmurray Solicitors for the plaintiff
Cooper Grace Ward for the defendant

[1] On 27 August 2010, I gave judgment[1] for the plaintiff in the sum of $1,942,367.88 plus interest to the date of judgment of $1,229,519, being a total judgment of $3,171,886.88 and invited submissions as to costs. Those written submissions have now been received.

[2] On 10 May 2007, the plaintiff made a formal offer to settle the proceeding pursuant to Chapter 9 Part 5 of the *Uniform Civil Procedure Rules* 1999 Qld ("*UCPR*"). The offer to settle was, relevantly, in the following terms:

> "1. The defendant pay to the plaintiff, within 28 days of acceptance of this offer, the amount of $1,757,367.88 in full and final satisfaction of the plaintiff's claim for damages.
> 2. The defendant pay to the plaintiff, within 28 days of acceptance of this offer, interest on the amount of $1,757,367.88, calculated at the rate of 10 per cent per annum, commencing from 26 February 2004; and up to the day upon which payment is made."

[3] That offer was delivered under cover of a letter from the plaintiff's solicitors to the defendant's solicitors, which was expressed to be "Without prejudice, save as to costs", and which relevantly stated:

> "You will see that the primary claim for damages as pleaded has been discounted by $50,000.00. The claim for recovery and emergency expenses has been factored, whilst the claims for loss of use and exemplary damages have not."

[4] The letter also indicated that the nominated date for calculation of interest (i.e. 26 February 2004) was chosen as that on which the defendant informed the plaintiff of the defendant's position with respect to the claim.

[5] The plaintiff now seeks its costs of the proceeding on the indemnity basis, invoking r 360 UCPR, which relevantly provides:

> "(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."

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1 [2010] QSC 313.

[6] The defendant submits that an order ought not to be made under r 360 because it can demonstrate that another order for costs is appropriate in the circumstances. It pointed to four reasons:

(a) the claim for $135,000.00 for loss of use, which was awarded in the judgment, was not part of the plaintiff's claim at the time the offer was made in May 2007;

(b) the difference between the amount which the plaintiff offered to accept and the amount to which it would have been entitled in consequence of my judgment is so slight that the offer cannot be regarded as offering a genuine compromise;

(c) the conduct of the plaintiff in advancing the damages claim was such as to lead the court at least to deprive the plaintiff of its costs and award the defendant its costs of that part of the claim; and

(d) the expert evidence and the evidence of Mr Stowers were called in pursuit of misconceived claims by the plaintiff and were unnecessarily incurred.

[7] As to the first of these points, it is correct that a claim for the payment of the $135,000.00 as a contractual entitlement under the policy was not part of the plaintiff's claim at the time of the offer. But the plaintiff's claim at that time did expressly seek, amongst other things, damages for loss of income (claimed as $250,000.00 per annum). It is quite clear on the face of the offer (and as confirmed by the terms of the covering letter) that the plaintiff was offering to forgo its claim for loss of income. The fact that the plaintiff subsequently amplified its claim for loss of income to include a claim for recovery on an alternative basis does not derogate from the fact that it was, at the time of the offer, prepared to give up such claim as it had for lost income.

[8] The defendant contends, however, that the $135,000.00 should be ignored when comparing the terms of the offer with the outcome at trial. It was submitted that, as the 10 May 2007 offer was for $1,757,367.88 with interest at 10% from 26 February 2004, the total (including interest) payable under the offer as at 24 May 2007 (the final date for acceptance of the offer) was $2,150,666.81. The defendant then says that one should discount the $135,000.00 from the judgment amount awarded, which yields a sum of $1,807,367.88, with interest to run from 30 April 2004. That sum with interest calculated to 24 May 2007 gives a figure of $2,181,673.77. The difference between those two amounts is $31,066.96, which the defendant says is so inconsequential as to mean that the offer did not involve a genuine compromise.

[9] In fact, the judgment was comprised of three components:

(a)	agreed value of the aircraft	$1,800,000.00
(b)	recovery expenses	$7,367.88
(c)	loss of income (as per policy)	$135,000.00

[10] Clearly enough, the offer of $1,757,367.88 was calculated as the agreed value less $50,000 and plus the recovery expenses. The difference between the amount which the defendant calculates would have been payable if the offer had been accepted and the amount payable if the sum of $1,807,367.88 had been the base for the calculation has nothing to do with the fact that the plaintiff reduced its claim in respect of the agreed value of the aircraft by $50,000.00, but is a mathematical consequence of the fact that

under one calculation interest ran from 26 February 2004 while under the other it ran from 30 April 2004. The comparison suggested by the defendant is, in my view, quite inappropriate. Even disregarding the recovery expenses and the loss of income amount, the true amount of compromise offered by the plaintiff at the time was the $50,000.00 discount on the agreed value of the aircraft component.

[11] The next question, then, is whether the plaintiff's offer represented an offer of a genuine compromise. The defendant relied on *Jones v Millward*,[2] and the authorities cited therein, to contend that there was no element of compromise in the offer and that this disentitled the plaintiff to an award of indemnity costs. The case before the Court of Appeal in *Jones v Millward* was quite different to the present. In that case, a plaintiff had sought and obtained after trial an order for specific performance by the defendants of a contract for the sale of land. Prior to trial, the plaintiff had offered to settle on the basis that the defendants specifically perform the contract and pay the plaintiff's standard costs of the proceeding. In other words, the plaintiff's offer was for complete capitulation on the part of the defendant. The trial judge considered that r 360 did not apply when the offer was for the entirety of the relief, and in any event, that it was appropriate in the circumstances for a different order from one awarding indemnity costs to be made. On appeal, Holmes J (as she then was), with whom McMurdo P and Jerrard J agreed, examined cases decided under the cognate New South Wales rules of court, viz. *Tickell v Trifleska Pty Ltd*[3] and *Hobartville Stud Pty Ltd v Union Insurance Co Ltd*[4] in which the question of what is and what is not a compromise was considered. Holmes J concluded[5]:

> "It is not necessary to embark on considerations of what degree of compromise is required before an offer is properly described as an offer to settle. … A proposal which demands nothing less than all the relief sought in the claim plus costs is not in truth an offer to settle."

[12] It is therefore necessary to look at the substance of what is offered in the circumstances of the case to see whether the offer is, in truth, a compromise. For example, in *Hobartville Stud*, a plaintiff's offer to accept one dollar less than the full amount of the claim was not a compromise. The decision in this regard is one to be made by reference to all of the circumstances of the case, not by applying a fixed mathematical formula.[6]

[13] An offer to forego $50,000.00, even from a claim for $1,800,000.00, is not, in my view so trivial as to disqualify it from being a genuine offer of compromise. In addition, the plaintiff's offer in this case involved it forsaking its claim for lost income. I would, therefore, reject the defendant's contention that this offer ought not be regarded as a genuine offer of compromise.

[14] The defendant next submitted that, the plaintiff, by its conduct of the damages claim, had disentitled itself from an award for indemnity costs, and indeed that the defendant should have its costs of that part of the claim. The defendant invoked authority to the effect that if a party raises issues or makes allegations improperly or unreasonably, this may constitute misconduct such as to lead a court not only to deprive that party of its

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2 [2005] 1 QdR 498.
3 (1990) 25 NSWLR 353.
4 (1991) 25 NSWLR 358.
5 [2005] 1 QdR 498 at 500.
6 *Maitland Hospital v Fisher (No 2)* (1992) 27 NSWLR 721 at [13].

costs but to order it to pay the other party's costs.[7] The defendant submitted that in this case, the plaintiff "made demonstrably false claims for damages based upon intentionally false evidence", that it failed to make disclosure "which disproved the plaintiff's claims", and that significant time at trial was taken up on these issues including "significant time on the first day of the trial … taken up with argument about the plaintiff's failure to disclose relevant documents".

[15] There was no finding made in the principal judgment that the plaintiff had made "demonstrably false claims", and I am not prepared to make such a finding now. True it is that the plaintiff failed to come up to proof on its damages claim. It is also correct that I was, and remain, critical of the plaintiff for the fact that such disclosure as it did belatedly make during the trial cast serious doubts on the veracity of the evidence which had initially been given in support of those claims, and this reflected poorly on the credit of Mr Williams. But it should also be noted that the argument on the first day of the trial in fact concerned the defendant's application to adjourn the trial. Part of that argument concerned the non-disclosure by the plaintiff of CASA documents, but those were available in any event pursuant to subpoenas which had been issued.

[16] The plaintiff's conduct in respect of its claim for lost income was less than salutary, and I have commented on that in the principal judgment. But I am not persuaded that the plaintiff's conduct in that regard was so egregious as to disentitle it from the presumption which arises under r 360(1).

[17] The fourth point advanced by the defendant is that, as the case was decided, the evidence of Mr Stowers and the experts was irrelevant. It was said that the evidence was necessary only because the statement of claim raised "false issues" about whether the ASIC repair quote constituted an effective repair process. The defendant submitted that this is a relevant consideration because "the matter was decided on the question whether the defendant had made an election to repair the aircraft".

[18] The defendant's submissions on this point, however, do not take account of the actual circumstances in which this dispute arose, which are described at length in the principal judgment. It is correct that I was able to determine the matter on the election issue, noting, of course, that I found against the defendant's submission that it had exercised the option to repair. But this was not the only matter in issue between the parties. The adequacy of the ASIC repair estimate and the question whether repairs under that estimate would have returned the aircraft to its pre-accident state were patently live issues between the parties almost from the outset. As I observed in the principal judgment, the case advanced at trial on behalf of the defendant included the submission that once the defendant elected to repair, it was the defendant which was on risk and was obliged to undertake the repairs and the concession that if such repairs had been unsuccessful the plaintiff would have been entitled to damages for the failure of the defendant to return to it the aircraft in proper condition, which would be calculated by reference to the agreed sum under the insurance policy. At no time, however, did the defendant say to the plaintiff, in effect, that regardless of what the ASIC estimate did or did not encompass, it had made the election to repair and would honour that election regardless of the ultimate cost to it. Nor did it make clear to the plaintiff that if the ASIC repairs were not adequate then the defendant would pay the plaintiff the agreed sum under the policy. Rather, the defendant's consistent position

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7 *Arian v Nguyen* (2001) 33 MVR 37.

was to rely on the ASIC estimate in an attempt to fix the plaintiff with the quantum of ASIC's repair estimate for the purpose of negotiating a cash settlement.

[19] The defendant relied solely on the three letters referred to in the principal judgment as evidence of it having made the election to repair. If the matter had been as clear-cut as was presented quite properly in argument by senior counsel for the defendant, one would have expected the defendant to have been agitating for the matter to have been determined summarily or for this question to have been determined as a preliminary point. There was no such application by the defendant; indeed, the defendant positively sought to justify the proposition that repairs performed under the ASIC repair estimate would have yielded the certifications and approvals necessary to restore the aircraft to its pre-accident condition. An adjudication on those issues would have been necessary if I had not determined that an election to repair had not been made. If I had determined that an election to repair had been made, the next issue, even on the defendant's case, would have been whether the plaintiff had repudiated. The plaintiff, for its part, would have argued that its conduct was not repudiatory because the only repairs being offered were under the ASIC estimate. This issue would necessarily have involved an examination of the evidence of Mr Stowers and the expert witnesses called by the parties on issues of aircraft repair.

[20] Accordingly, I do not accept the defendant's submission that, on a proper view of the relevant issues in this case, the evidence of Mr Stowers and the experts was irrelevant. On the contrary, it would have been directly relevant if I had found for the defendant on the election issue.

[21] In those circumstances, I am not satisfied that the defendant has shown for the purposes of r 360(1) that another order for costs is appropriate in the circumstances.

[22] In light of my conclusions above, it is not necessary for me to canvass an alternative argument advanced by the plaintiff that I ought to exercise the discretion to award indemnity costs in line with the principles articulated in such authorities as *Colgate-Palmolive Company v Cussons Pty Ltd* [8] as a consequence of what the plaintiff alleged to be bad faith by the defendant in its dealings with the plaintiff and in the conduct of this litigation, and I expressly decline to do so.

Order

[23] There will be an order pursuant to *UCPR* r. 360(1) that the defendant pay the plaintiff's costs of and incidental to this proceeding (including any reserved costs) calculated on the indemnity basis.

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[8] (1993) 46 FCR 225.