

SUPREME COURT OF QUEENSLAND

CITATION: *Armstrong v Mitchell-Smith and Allianz Australia Insurance Limited (No 2)* [2012] QSC 370

PARTIES: **CORY JAMES ARMSTRONG**

Plaintiff

v

JASON DAVID MITCHELL-SMITH

First Defendant

And

ALLIANZ AUSTRALIA INSURANCE LIMITED

Second Defendant

FILE NO/S: S14/12

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court Mackay

DELIVERED ON: 23 November 2012

DELIVERED AT: Supreme Court Rockhampton

HEARING DATE: On the Papers

JUDGE: McMeekin J

ORDER:

1. The judgment given on 7 November 2012 is vacated.
2. Judgment is given for the plaintiff in the sum of \$492,277.25.
3. The second defendant is ordered to pay the plaintiff's costs of the proceedings on the standard basis

CATCHWORDS: PROCEDURE – COSTS – GENERAL PRINCIPLES – where basis on which costs should be awarded in issue

Uniform Civil Procedure Rules 1999 rr 122, 361, 681

Deeson Heavy Haulage Pty Ltd v Cox & Ors (No 2) [2009] QSC 348

Taske v Occupational & Medical Innovations Ltd [2007] QSC 147

COUNSEL: P Cullinane for the plaintiff
 GF Crow SC for the second defendant

SOLICITORS: Macrossan & Amiet Solicitors for the plaintiff
 Sciacca's Lawyers for the second defendant

- [1] **McMeekinJ:** On 7 November 2012 I delivered judgment in this matter.¹ Only the assessment of damages was in issue. The plaintiff was awarded damages in the sum of \$491,917.25. I gave leave to the parties to make submissions on costs. They have now done so.
- [2] The plaintiff has taken the opportunity to point out an apparent arithmetical error in the calculation of past loss of superannuation. The amount awarded did involve such an error. The parties are agreed that in those circumstances the judgment should be amended accordingly pursuant to the slip rule. I vacate the earlier judgment and now give judgment for the plaintiff in the sum of \$492,277.25.
- [3] The parties disagree on the appropriate order as to costs. The plaintiff seeks that the second defendant pay his costs. The second defendant seeks that the orders be:
- (a) That the second defendant pay the plaintiff's costs calculated on the standard basis up to and including 8 October 2012;
 - (b) That the plaintiff pay the second defendant's costs calculated on the standard basis from 9 October 2012.
- [4] Rule 681(1) *Uniform Civil Procedure Rules* 1999 (UCPR) provides that costs are at the discretion of the court but follow the event unless the court considers another order to be more appropriate. Plainly the plaintiff succeeded in the event. The defendant contends that another order is more appropriate.
- [5] The point in issue concerns the efficacy of an offer made by the second defendant and sent by facsimile to the plaintiff's solicitors on 8 October 2012 in the sum of \$500,000 plus standard costs and outlays "up to the date of this offer". It can be seen that the offer exceeded the judgment sum by \$7,722.75. The offer was subject to the plaintiff signing a "suitably worded discharge to the satisfaction of the defendants" and included a condition in these terms: "Acceptance of this offer is in full and final satisfaction of all the claims and rights which the plaintiff has against the first or second defendant in connection with the damage which the plaintiff alleges or could have alleged in this action" ("the condition").
- [6] Rule 361 UCPR is relevant. It provides so far as is relevant:
- 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
 - (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.

¹ [2012] QSC 334

(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.

[7] The second defendant’s submission reflects the application of r 361(2) and assumes that its offer was made on 8 October and that its offer meets the necessary pre-condition, namely that the plaintiff has obtained a judgment that is not more favourable to the plaintiff than the offer to settle.

[8] The plaintiff contests those assumptions. There are essentially three arguments:

(a) As the offer was subject to the plaintiff signing a “suitably worded discharge to the satisfaction of the defendants” and the terms of such a discharge were not disclosed the defendant cannot demonstrate the offer meets the pre-conditions of the rule;

(b) The provision for costs made in the offer was more restrictive of the plaintiff’s rights than the rule envisages; and

(c) The offer was served originally by facsimile but the relevant rule relating to such service (r122 UCPR) was not complied with. Effective service only occurred when the offer was received by the plaintiff’s solicitors by post on 10 October 2012. That has the effect that the 14 day period provided for in the offer for its acceptance expired on the second day of the trial, rather than the day before the trial. The plaintiff argues that should affect the costs orders made.

The Requirement to Execute a Discharge

[9] The second defendant argues that the point made is “disingenuous” as the solicitors acting for the plaintiff had had long experience, over some ten years, with the form of discharge usually tendered by the second defendant’s solicitors.

[10] That submission misses the point in my view. It would have more force if the offer had been made subject to the plaintiff executing the second defendant’s “usual discharge” or some similar term. While there would still be scope for debate it might be at least arguable that the plaintiff’s solicitor knew precisely what was being discussed. There would remain the issue of whether his or her knowledge would be imputed to the plaintiff. It is unnecessary to consider that question. The second defendant by the terms of its offer preserved to itself the right to tender any discharge that it saw fit. What “suitably worded” might mean is at least contentious. Suitable to whom would be the relevant question. The following words “to the satisfaction of the defendants” might suggest the answer. That there was the potential for the plaintiff’s rights to be affected by the discharge cannot be doubted.

[11] But there is a further point. It would not be unreasonable for the plaintiff to suppose that the proposed discharge must go further than the condition included in the offer, otherwise why insist on it? I perceive that any judgment of the court would have the effect of going no further in restricting the plaintiff’s rights than the condition set out in the terms of the offer itself and which I have quoted. That condition was not apparently sufficient to satisfy the defendant.

- [12] In these circumstances and where the terms of the proposed discharge are not defined I cannot see why a plaintiff is not entitled to see the terms of the discharge before committing himself to accepting the offer. Otherwise he may be committing himself to the giving up of rights that he would not otherwise have done.
- [13] The onus it seems to me is plainly on the defendant to show that the offer made met the pre-conditions set down in the rule if the defendant is to take advantage of the rule. Here there was a further condition imposed which had the potential to require the plaintiff to give up rights that went beyond the effect of any judgment in the proceedings. Hence I am not satisfied that the offer did in fact meet the pre-conditions of r 361.
- [14] I point out that I have reached the same conclusion in another matter where a term to the like effect was included in an offer: *Deeson Heavy Haulage Pty Ltd v Cox & Ors (No 2)* [2009] QSC 348 [32]-[49]. Moynihan SJA reached the same conclusion in *Taske v Occupational & Medical Innovations Ltd* [2007] QSC 147 where the offer made was subject to the terms of a deed being agreed, he there pointing out that “the parties may not have agreed the terms of the deed and there was no agreed mechanism to settle them.”² Both of those cases were, in a sense, clearer in that, as Moynihan SJA said in *Taske*, terms had been proposed which “were not terms which would be part of any judgment in the action”.³ But the point remains valid irrespective of that. His Honour concluded in *Taske* that in the circumstances pertaining there was “no basis for departure from the usual rule that costs follow the event: cf *Rickard Constructions Pty Ltd v Rickard Hails Moretti Pty Ltd* [2005] NSWSC 481,11-14; *Hazeldene’s Chester Jackson Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 513 VR 435.”⁴
- [15] In the circumstances the defendant has not made an offer that met the requirements of r 361.
- [16] It is not necessary to deal with the remaining issues that the plaintiff has raised however I observe that in my view the purported service by facsimile was not effective. I note that the rule provides that “A document served by fax **must** include a cover page stating...” and seven matters are required to be set out. The requirement is mandatory. There was no cover page. The information required to be set out was not clearly identified as I think the rule requires. And crucially the requirement in paragraph (g) of r122 that the cover page state that “the transmission is for service under a stated rule” was not met. The importance of alerting the other party to the significance of the transmission by compliance with paragraph (g) is plain.
- [17] I have been provided with all of the offers made in the course of the proceedings. None satisfy the pre-conditions of the rules that suggest another order would be more appropriate than the default position provided for in r 681(1) - the costs should follow the event.
- [18] I order that the second defendant pay the plaintiff’s costs of the proceedings on the standard basis.

² At [16]

³ At [16]

⁴ At [18]