SUPREME COURT OF QUEENSLAND

CITATION:	*Brava Trading Pte Ltd v Leybourne Nominees Pty Ltd & Anor* [2013] QSC 23
PARTIES:	**BRAVA TRADING PTE LTD** (plaintiff) **v** **LEYBOURNE NOMINEES PTY LTD** **ACN 064 102 503** (first defendant) **and** **BRAVA MARINE PTY LTD (IN LIQ)** **ACN 112 606 649** (second defendant)
FILE NO/S:	SC No 10798 of 2010
DIVISION:	Trial
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court of Queensland
DELIVERED ON:	20 February 2013
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Philippides J
ORDER:	**The first defendant pay the plaintiff's costs of the proceedings on the standard basis**
CATCHWORDS:	PRACTICE – costs – offer to settle – whether effective for purpose of r 360 UCPR – whether an indemnity costs order should be made – whether Calderbank offer – whether other order appropriate
COUNSEL:	IA Erskine for the plaintiff A Greinke for the first defendant
SOLICITORS:	Irish Bentley Lawyers for the plaintiff Hardings Gulhane Solicitors for the first defendant

Background

[1] The plaintiff, Brava Trading Pte Ltd, brought proceedings seeking a declaration as to its security interest in moneys held in the trust account of Hardings Gulhane, the solicitors for the first defendant, Leybourne Nominees Pty Ltd, its claim being based on a registered mortgage debenture provided by the second defendant, Brava Marine Pty Ltd, which was subsequently placed into liquidation.

[2] Judgment was given in favour of the plaintiff and it was declared that the amount of $67,321.53, together with accretions and interest held in the trust account of Hardings Gulhane Solicitors were held subject to the registered charge provided in favour of, and on trust for, the plaintiff. An order was made accordingly.

Contentions as to costs

[3] The parties provided written submissions as to costs.

[4] The plaintiff sought an order against the first defendant for costs of the proceedings on an indemnity basis. It argued that such an order was warranted:

(a) by reason that judgment was given in favour of the plaintiff for an amount greater than an amount contained in a formal offer to settle under Part 5, Ch 9 of the *UCPR*;
(b) by reason of the first defendant's conduct generally;
(c) by reason that the first defendant failed to accept a *Calderbank* offer and obtained a judgment less favourable than that offer.

[5] No order for costs was sought against the second defendant liquidator given the formal and passive role played by that party in the proceedings.

[6] The first defendant contended that the proper order for costs was an order that it pay the plaintiff's costs of the proceeding on the standard basis as if the proceeding had started in the District Court. In support of its contention, the first defendant relied on the following arguments:

(a) the offer to settle was not a valid offer for the purposes of Part 5 of Ch 9 of the *UCPR*;
(b) the claim fell within the jurisdictional limit of the District Court when the proceeding commenced and ought to have been brought in that court;
(c) the plaintiff delayed in prosecuting its claim resulting in additional costs incurred by caseflow reviews;
(d) an order for indemnity costs would be disproportionate to the sum involved in the proceeding.

[7] Having regard to the first defendant's submissions, the plaintiff sought, in the alternative, costs on an indemnity basis on the District Court scale or alternatively costs on the standard basis.

The first defendant's conduct

[8] In submitting that the first defendant's conduct of the litigation was such as to warrant the exercise of the court's discretion in favour of an order for indemnity costs, the plaintiff pointed, *inter alia*, to the late filing of the Further Amended Defence and the inclusion of a counterclaim of which no mention was previously made during the caseflow process or to the plaintiff. The plaintiff also argued that the first defendant made extensive but late admissions to all material allegations in the proceedings (in its Further Amended Defence filed 21 June 2012), retreating from the position held to that point. The plaintiff contended that, had the admissions been made earlier, it would have had an opportunity to take steps to end the proceedings at an earlier date and that it incurred unnecessary costs relating to the denials and non-admissions. Additionally, the plaintiff submitted that the first defendant unreasonably refused an invitation to deposit the moneys in question into an interest-bearing term deposit, leaving the plaintiff not only deprived of these

moneys for the period of litigation but denied the interest that would otherwise have accrued.

[9] For its part, the first defendant denied that it engaged in any conduct that warranted an indemnity costs order. The late filing of the Further Amended Defence did not justify such an order, especially given the plaintiff's own delay in prosecuting the proceeding, which led to the caseflow intervention by the court. Further, the late admission largely concerned matters not within the knowledge of the first defendant and were properly admitted after documents were disclosed by the plaintiff and a document stamped "in house". The first defendant argued that the non-admission of those allegations was reasonable given that the plaintiff's case had changed significantly after an earlier District Court proceeding was discontinued (BD737/10). As to the deposit of the trust moneys into an interest-bearing account, that was not a matter for the first defendant but for Hardings Gulhane solicitors as trustee acting in accordance with the order of the District Court. The plaintiff made no application in respect of this, and the matter was irrelevant as to costs between the plaintiff and the first defendant.

[10] While the submission pressed in respect of the trust moneys is not attractive, I do not consider that the first defendant's behaviour as outlined by the plaintiff in its submissions involved such an element of misconduct as to warrant an order for indemnity costs.

The plaintiff's offer to settle

[11] By separate letters dated 14 March 2012 addressed to the solicitors of the first defendant and to the liquidators of the second defendant, the plaintiff "offered to the defendants to settle this matter" on the following terms:

> "1. The parties to the District Court Proceedings authorise and direct Hardings Gullhane to pay $65,000.00 from the amount held in its trust account pursuant to the Order dated 24 July 2009 of Judge McGill SC DCJ (including all interest earned on that amount) to the plaintiff;
>
> 2. The payment referred to in paragraph 1 above will be in full and final satisfaction of the plaintiff's claim including costs and interest;
>
> 3. The balance of the amount held in Hardings Gullhane's trust account to be dealt with as the defendants see fit;
>
> 4. The amount referred to in paragraph 1 above must be received within 7 days after any acceptance of this offer;
>
> 6. The parties must take all necessary steps to carry out the terms of this offer, if accepted;
>
> 7. This offer must be accepted by both defendants for any acceptance to be effective.
>
> This offer is open for acceptance for 15 days after the day of service of this offer.
>
> This offer is made in accordance with Part 5 of Chapter 9 of the UCPR."

Neither defendant responded to the offer.

Part 5 of Ch 9 of the *UCPR* offer

[12] The plaintiff argued that the above offer was an "all up" offer inclusive of interest and costs, which was and ought to have been an attractive offer that ought to have been accepted. It was not only for an amount less than the total amount of the moneys held on deposit in the Hardings Gulhane trust account, but it carried with it a significant discount in terms of costs.

[13] The plaintiff submitted that, given the terms of the judgment and order made on 24 October 2012, the plaintiff obtained a judgment no less favourable than its offer to settle. Accordingly, it was argued that by operation of the mandatory terms of r 360(1) *UCPR*, the court must order the first defendant to pay the plaintiff's costs on an indemnity basis, unless the first defendant showed that some other order was appropriate.

[14] Rule 360 *UCPR* 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.
>
> (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."

[15] In disputing that the offer to settle was made in accordance with Part 5 of Ch 9 of the *UCPR*, the first defendant argued that, by paragraph 1 of the offer, it was directed to "the parties to the District Court proceedings". Those parties were the first and second defendants and therefore required both defendants to accept (contrary to r 353 *UCPR* requiring service "on another party"). Further, the first defendant "was incapable of accepting the purported offer without the second defendant also accepting the offer". And although the offer was served on the liquidators for the second defendant, they did not respond. In those circumstances, the first defendant argued that even if it "had attempted to accept the purported offer that acceptance would have been futile as the liquidators did not respond at all". An additional defect rendering the offer invalid was that when the offer was made the plaintiff had not obtained leave to proceed against the second defendant pursuant to s 471B of the *Corporations Act 2001* (Cth). No leave having been obtained, the plaintiff was not entitled to serve an offer to settle. The first defendant thus argued that r 360 *UCPR* had no application. Nor with its defects could the purported offer be relied upon under the *Calderbank* principle as a matter of general discretion. The first defendant submitted that the proper order for costs was that they be assessed on the standard basis: see r 702 *UCPR*, *Colgate-Palmolive Company v Cussons P/L* (1993) 46 FCR 225.

[16] No prescribed form is specified for an offer made under Part 5 of Ch 9. Rule 353(3) of the *UCPR* requires only that the offer be in writing and contain a statement that it is made under Part 5 of Ch 9 (as the offer in question did). However, the offer must be one to settle everything in the document constituting the claim and not simply an offer to settle a particular course of action, nor one of several claims for relief: *Charter Pacific Corporation Ltd v Belrida Enterprises Pty Ltd* [2002] QSC 319 at [15].

[17] Although the offer referred to the "parties to the District Court proceedings", the plaintiff argued the word "District" was clearly a typographical error, as was apparent from the fact that the offer made clear reference in the heading which correctly identified the Supreme Court proceeding as follows: "BRAVA TRADING PTE LTD v LEYBOURNE NOMINEES & BRAVA MARINE PTY LTD (in liquidation): SUPREME COURT OF QUEENSLAND BS 10798/10." Moreover, it argued that given that the District Court proceeding had been discontinued some two years earlier, there could be no real basis for contending that there was any doubt as to the proceeding to which the offer related. Furthermore, the offer specified that it was directed to "the defendants to settle this matter".

[18] The plaintiff also contended that there was no substance to the argument that because the offer was directed to "the defendants" and required acceptance by both defendants it could not be said to have been served "on another party". The plaintiff referred to r 363 *UCPR* which it was said rendered it permissible for a plaintiff to make an offer to settle with any defendant – where there are two or more defendants – "any" defendant can mean "all" defendants. Reliance was placed on the following dicta in *Charter Pacific Corporation Ltd v Belrida Enterprises Pty Ltd & Ors* [2002] QSC 319 at [21]:

> "It is worth noting that the rule [363] does not impose a limitation on r 353. An offer which complies with the latter does not have to satisfy the former. In other words, an offer by a sole plaintiff to all defendants does not have to comply with r 363(2) …"

[19] Nor was the plaintiff unable to carry out what was proposed in the offer because it was conditioned on acceptance by both defendants: *Dale v Nichols Constructions P/L* [2004] QDC 026 at [6]-[7].

[20] The plaintiff accepted that leave to proceed was required pursuant to s 471B of the *Corporations Act*, but pointed out it was able to be obtained *nunc pro tunc*. In any event, as was stated in *Mitchell v Pacific Dawn Pty Ltd* [2003] QSC 179 at [16], an overly technical approach in analysing the outcome of the proceeding for the purposes of determining costs ought to be avoided. The real issue in the proceeding concerned which of the plaintiff and first defendant was entitled to the funds paid into the trust account of the first defendant's solicitors. On that matter, the plaintiff was successful.

[21] I consider that the submissions advanced by the plaintiff adequately address the argument that the offer was not effective for the purpose of r 360. The fact that the offer was addressed to both defendants did not preclude the first defendant from being able to indicate its acceptance. Had it done so, the cost consequences of the second defendant unreasonably refusing the offer would have impacted only on the second defendant.

[22] However, even accepting that the offer fell within r 360 *UCPR* and also that it qualified as a *Calderbank* offer being a sufficiently advantageous one, I do not consider that an indemnity costs order should be made in the circumstances of this case. I am persuaded that another costs order is appropriate. In coming to that conclusion, I take into account arguments made by the first defendant as follows.

[23] The first defendant contended that the relief sought by the plaintiff could have been obtained in the District Court, both by reason of the monetary amount and the orders sought which concerned moneys held pursuant to an order of the District Court. Additionally, the first defendant relied on r 697(3) and 697(4) *UCPR*, which provides that if the only relief obtained by a plaintiff in a proceeding in the Supreme Court is relief that, when the proceeding began, could have been given by the District Court, the costs the plaintiff may recover must be assessed as if the proceeding had been started in the District Court unless the court orders otherwise. It argued that rule applied directly or by analogy.

[24] The first defendant argued that the proper course was for the plaintiff to have made an application to the District Court to be joined as a party to the existing District Court proceeding, and press its relief in that proceeding. It could also have filed a claim in the District Court, as it did in respect of its abandoned proceedings regarding the Deed of Agreement. Granted that under s 471B the plaintiff required leave of this Court to proceed against the second defendant, such leave would ordinarily be sought before the commencement of proceedings by summary application. That course had been adopted by the first defendant when it obtained leave to proceed against the second defendant in the District Court.

[25] Further, the first defendant referred to r 5 *UCPR* which requires the parties to facilitate the just and expeditious resolution of the real issues "at a minimum of expense". It submitted that the costs incurred by parties to litigation should be proportional, and that the court is permitted in its discretion to limit costs to be recovered by parties having regard to the totality of the sum recovered: *Lownds v Home Office* [2002] 4 All ER 775; *Nudd v Mannix* [2009] NSWCA 327 and *Delta Electricity v Blue Mountains Conservation Society Inc* [2010] NSWCA 263, applying s 60 *Civil Procedure Act 2005* (NSW). An order for indemnity costs would be disproportionate to the modest sum of money in dispute, and would also deprive a costs assessor of the ability to take into account the relief sought.

[26] The plaintiff submitted it was not an unusual course to retroactively seek leave to proceed or continue a proceeding against a company in liquidation: *Bell Group Ltd v Westpac Banking Corp* (2000) 104 FCR 305; [2000] FCA 439; *Moore v Scolaro's Concrete Constructions Pty Ltd (in Liq)* [2004] VSCA 152. It was readily able to be inferred that the proceedings were commenced, and continued, in this jurisdiction, and the application for leave left until commencement of the trial, in an endeavour to save the costs of having to go forward in separate jurisdictions. There was no evidence of the first defendant having raised the issue of the plaintiff having commenced in an inappropriate jurisdiction or having invited the plaintiff to have the proceeding transferred to the District Court.

[27] Because the plaintiff, when the proceeding began, obtained relief sought in the claim that was not available in the District Court (namely leave to proceed against a company in liquidation), it may be accepted that r 697(3) and r 697(4) *UCPR* do not apply directly. However, while the course adopted by the plaintiff in so bringing

the proceedings in this Court and retroactively seeking leave was not an unusual one, it was one which added to the costs of the proceeding compared with the alternative available of simply bringing an application for leave (which may well have been unopposed). That cost differential was more significant given the relatively modest quantum of the claim. The first defendant's arguments as to the instigation and continuation of proceedings in this Court and as to the proportionality of costs are not nullified by its failure to raise the issue of jurisdiction earlier, or by its conduct concerning investment of the funds. This is particularly so where the drawn out nature of the proceedings, which cannot be entirely sheeted home to the first defendant, required the additional costs of caseflow management. There was a considerable period of time during which the plaintiff did not progress the proceedings and which, as stated, required a caseflow intervention. There was no explanation for that inaction. In these circumstances, I do not consider that indemnity costs are appropriate, even on a District Court scale.

[28] I consider that the appropriate costs order is that the first defendant pay the plaintiff's costs on the standard basis. I so order.