SUPREME COURT OF QUEENSLAND

CITATION:	*Resolute Mining Ltd v Commissioner of State Revenue (No 2)* [2020] QSC 302
PARTIES:	**RESOLUTE MINING LIMITED** ACN 097 088 689 (appellant) **v** **COMMISSIONER OF STATE REVENUE** (respondent)
FILE NO/S:	BS No 8195 of 2019
DIVISION:	Trial Division
PROCEEDING:	Appeal
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	1 October 2020
DELIVERED AT:	Brisbane
HEARING DATE:	On the papers
JUDGE:	Bradley J
ORDER:	**The Order of the Court is that the respondent pay the appellant's costs of the proceeding:** **(a) to and including 15 June 2020 to be assessed on the standard basis; and** **(b) from and including 16 June 2020 to be assessed on the indemnity basis.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – OFFERS OF COMPROMISE, PAYMENTS INTO COURT AND SETTLEMENTS – INFORMAL OFFERS AND CALDERBANK LETTERS – UNREASONABLE REFUSAL OF OFFER – where the appellant succeeded completely in its appeal – where the respondent failed to accept two *Calderbank* offers made by the appellant, acceptance of which would have saved him from paying interest and costs – where the first offer was made at an early stage but, by the time the second offer was made, the appellant's case was clear and the respondent must have known he did not have reasonable prospects of challenging it – where there was no important legal issue raised by the case – whether each offer proposed a genuine compromise – whether it was

unreasonable for the respondent not to accept each offer

Uniform Civil Procedure Rules 1999 (Qld), r 785

Baygol Pty Ltd v Foamex Polystyrene Pty Ltd [2005] FCA 1089, cited
Computer Machinery Co Ltd v Drescher [1983] 1 WLR 1379, cited
Evans Shire Council v Richardson (No 2) [2006] NSWCA 61, cited
Federal Commissioner of Taxation v Clark (No 2) (2011) 197 FCR 251, cited
Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2) (2005) 13 VR 435, applied
Latoudis v Casey (1990) 170 CLR 534, cited
Leichhardt Municipal Council v Green [2004] NSWCA 341, cited
Rider v Pix [2019] QCA 257, considered
Tector v FAI General Insurance Co Ltd [2001] 2 Qd R 463, cited

COUNSEL: H Lakis for the appellant
D Marks QC, with P J Coore, for the respondent

SOLICITORS: McCullough Robertson Lawyers for the appellant
Crown Law for the respondent

[1] On 14 September 2020, the appellant succeeded completely in its appeal against the decision of the respondent (the **commissioner**) to disallow an objection to the commissioner's assessment and reassessment (the **assessments**) of the transfer duty payable on an agreement to transfer land found in a written instrument (the **Funding Agreement**). Orders were made to give effect to the court's decision. These required the commissioner to repay to the appellant the difference between the $511,744.50 paid pursuant to the reassessment and the appellant's true liability for transfer duty, being an amount of $21,600 and also to pay the appellant interest on the overpaid amount.[1]

[2] When those orders were pronounced, the parties were invited to make submissions on costs, as had been their request at the hearing. Mr Lakis of Counsel, who appeared for the appellant, was given leave to read and file a solicitor's affidavit exhibiting correspondence about two offers to settle the appeal. The commissioner's solicitor informed the court that she was not in a position to make any submissions on costs.

[3] Both parties sought directions permitting them to file written submissions and authorising the court to make orders about costs on the papers. The written submissions were received on 21 September 2020. These are the reasons for the court's decision on the costs of the appeal.

Overview

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1 See *Resolute Mining Ltd v Commissioner of State Revenue* [2020] QSC 281.

[4] The court has a wide discretion in awarding costs.[2] It must exercise the discretion judicially and by reference to relevant considerations.[3]

[5] In the present case, it is common ground that costs should follow the event so that the commissioner should be ordered to pay the appellant's costs of the appeal. The only matter of controversy is whether those costs should be assessed on the standard basis or on the indemnity basis and, if the latter, from which date.

[6] The primary purpose of any costs order is to protect a successful party from the undue depletion of its resources from the pursuit of its lawful rights or the defence of its lawful conduct. It is not to punish an unsuccessful (or insufficiently successful) party.[4] An indemnity costs order, therefore, is typically deployed where a party has behaved unreasonably so as to increase the costs the other party has incurred. In such cases, other things being equal, the court may conclude an award of costs on the standard basis would be insufficient to protect the successful party. The relevance of this consideration is not diminished where one of the parties is a public officer or institution.[5]

[7] The rules about offers to settle proceedings in the trial division, in chapter 9 part 5 of the UCPR, require the court to order a defendant to pay a plaintiff's costs to be assessed on the indemnity basis if the plaintiff made a compliant offer, which was not accepted by the defendant, and obtains an order no less favourable than the offer – unless the defendant shows a different costs order is appropriate in the circumstances.[6]

[8] The policy basis for indemnity costs being the default position in those circumstances is well-understood. While each of the parties to litigation should have an interest in resolving it at a minimum cost, there is also a public interest in parties acting reasonably and not making unreasonable use of the courts, to the detriment of other litigants and the community generally. The public substantially meet the cost of the litigation process. The possibility of costs being assessed on the indemnity basis provides an appropriate incentive for both the plaintiff and the defendant to consider a compromise – particularly where the parties might assess the plaintiff's prospects of success as good.

[9] Encouraging comprise and shortening of litigation is a relevant consideration even where the default position created by those rules does not apply.[7] This is such a proceeding, as it was commenced by a notice of appeal and not by a claim or an originating application.[8] Without the mechanism of the rules, the appellant, as the party making an offer, bears the onus of satisfying the court the discretion should be exercised in its favour to order an assessment on the indemnity basis.[9] I note that in the

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2 *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**) rr 681(1), 766(1)(d), 785(1).

3 *Latoudis v Casey* (1990) 170 CLR 534.

4 (1990) 170 CLR 534 at 543 (Mason CJ), 562-563 (Toohey J), 567 (McHugh J).

5 *Federal Commissioner of Taxation v Clark (No 2)* (2011) 197 FCR 251 at 257-259 [20]-[30] (Dowsett, Edmonds and Gordon JJ).

6 The court must also be satisfied the plaintiff was willing and able to carry out what was proposed in the offer at the material times: r 360(1)(b).

7 *Computer Machinery Co Ltd v Drescher* [1983] 1 WLR 1379 at 1383 (Megarry VC).

8 See r 352 for the definition of "proceeding" in chapter 9 part 5.

9 *Evans Shire Council v Richardson (No 2)* [2006] NSWCA 61 at [26] (Giles, Ipp and Tobias JJA).

Court of Appeal, special or unusual features have been said to warrant a departure from the usual order that appeal costs are assessed on the standard basis.[10]

[10] The unreasonable or imprudent rejection of an offer of compromise may justify an order that the rejecting party pay the offering party's costs to be assessed on the indemnity basis. That is the basis upon which the appellant seeks such an order in this proceeding.

The offers

[11] The appellant made two offers of settlement. Each was expressed to be made "in accordance with the principles set out in *Calderbank v Calderbank* [1975] 3 All ER 333". Courts have accepted and encouraged the practice of sending so-called *Calderbank* letters because, like offers under the rules, they:

> "facilitate the public policy objective of providing an incentive for the disputants to end their litigation as soon as possible. Furthermore, however, it can be seen as also influenced by the related public policy of discouraging wasteful and unreasonable behaviour by litigants."[11]

[12] A *Calderbank* offer was appropriate in this proceeding, as no offer "under the rules" could be made.

[13] The appellant made the first offer of settlement on 15 November 2019, about three and a half months after it commenced the proceeding.[12]

[14] Acceptance of the first offer would have required the commissioner to issue a notice of reassessment reducing the transfer duty payable to $21,600, within seven days of accepting the offer. The commissioner would have had to repay the difference between that amount and the sum paid by the appellant pursuant to the challenged reassessment within seven days of the new reassessment. The commissioner would not have been required to pay any interest on the refunded amount; the proceedings would have been discontinued; and each party would have borne its own costs.

[15] The first offer was clear. The commissioner had 14 days to consider whether or not to accept it, which was a reasonable time. In the offer, the appellant foreshadowed an application for indemnity costs from the date of the offer, if the offer was rejected and the outcome of the proceeding was a judgment less favourable for the commissioner than the terms of the offer.

[16] The commissioner instructed his solicitor to reject the first offer. The solicitor did so in writing on 29 November 2019.

[17] The second offer was made on 1 June 2020, about six months after the first offer was rejected. It was materially in the same terms as the first offer.

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10 *Amadio Pty Ltd v Henderson* (Federal Court of Australia – Full Court, Northrop, Ryan and Merkel JJ, 28 August 1998), cited with apparent approval in *Tector v FAI General Insurance Co Ltd* [2001] 2 Qd R 463 at 464 [5] (McMurdo P, Pincus JA and White J). This appeal is not in that division of the court.

11 *Leichhardt Municipal Council v Green* [2004] NSWCA 341 at [14] (Santow JA).

12 The notice of appeal was filed on 2 August 2019.

[18] The second offer was made after the parties had filed their respective statements of facts and contentions, the indices of relevant documents and the agreed statement of facts, and after the appellant had filed its written submissions for hearing of the appeal. The proceeding had not then been listed for hearing.

[19] Like the first offer, the second offer was clear. It allowed the commissioner 14 days to consider whether or not to accept the offer, which was a reasonable time. It foreshadowed an application by the appellant for indemnity costs from the date of the offer, if the outcome of the proceeding was a judgment less favourable for the commissioner than the terms of the offer.

[20] The commissioner did not respond to the second offer. It lapsed, in accordance with its terms, on 15 June 2020.

[21] It is common ground that the judgment obtained by the appellant was more favourable to the appellant and less favourable to the commissioner than each of the offers. The appellant submits the commissioner's rejection of the first offer was unreasonable and his failure to accept the second offer was also unreasonable.

[22] The commissioner joins issue with the appellant, contending it was not unreasonable or imprudent for him to refuse each offer. The commissioner also contends that neither offer proposed a genuine compromise. The dispute is confined to those two points.

Did the commissioner act unreasonably?

[23] The commissioner submits it was not unreasonable to reject the first offer because it was made prior to the exchange of statements of facts and contentions and at a time when the commissioner was still clarifying the appellant's case. According to the written submissions on costs, the commissioner's solicitor's letter of 29 November 2019 shows he "was clarifying the Appellant's case in November 2019".

[24] The letter of 29 November 2019 detailed the commissioner's objections to certain paragraphs of the appellant's notice of appeal, alleging that they departed from grounds in the earlier (pre-proceeding) objection or added new grounds. By the letter, the commissioner's solicitor called upon the appellant to withdraw those paragraphs of the notice of appeal. It is quite inaccurate to describe the letter as seeking clarification of the appellant's case. It is apparent from the text of the letter that the commissioner, or those advising him, had considered the appellant's case in great detail and purported to understand it.

[25] The commissioner's complaints about departures and new grounds were unfounded. The appellant did not accede to them.

[26] The matters in dispute in the appeal had been the subject of the objection process before the appellant commenced the present proceeding. At the latest, the real matters in issue were clear from the commencement of the appeal proceeding. The first offer was made at an appropriate time in the proceeding.

[27] The second offer was made after the appellant had filed its outline of submissions for the hearing of the appeal. The commissioner submits the outline "led to further uncertainty as to the Appellant's case". I reject that submission. The appellant's case

in the outline of submissions was sufficiently clear for the commissioner to form a view about its prospects.[13]

[28] Next, the commissioner submits:

> "This case raised important legal issues. At the hearing, his Honour acknowledged as much in saying on 21 August that the decision would be reserved. At the time both offers were made, there was no clear, judicial authority in Queensland which had resolved these issues. Therefore, in the circumstances, it was reasonable for the Commissioner to defend the claim."

[29] The central issues – identification of the consideration for the transfer and whether the consideration could be ascertained on the date the agreement was executed – turned on the proper construction of the particular written agreement. That is a matter governed by clear and well-established legal principles. The commissioner's written outline and the oral submissions put on his behalf did not identify or indicate that the case raised any important legal issue. The commissioner did not submit that the case could have any broader effect or implication for the work of assessing duty payable under the *Duties Act* 2001 (Qld) (the **Act**) or for the revenue to be collected.

[30] The remaining issue concerned the effect of s 502 of the Act. No ambiguity was identified in that provision.

[31] The only testing topic was the commissioner's attempt to avoid the operation of s 502 and to persuade the court to apply an adaptation of the common law position that had prevailed before s 502 was enacted. There was no clear judicial authority on the commissioner's case about s 502. There was no need for one. No basis for ignoring the operation of s 502 was articulated on the part of the commissioner. In the circumstances, no important legal issue was raised by the case.

[32] The case was a matter of some significance to the parties as it concerned the appellant's liability to pay $511,744.50 in transfer duty. The parties tendered more than 200 pages of documents. They also prepared a "working bundle of documents", a "bundle of legislation" and a "bundle of authorities" for the hearing. In addition to the Funding Agreement and another written agreement, the bundles included eight documents filed in the proceeding, 16 extracts of current and repealed legislative instruments, two explanatory notes and a second reading speech, as well as 21 reported decisions. Further decisions were cited in oral submissions. Counsel's oral submissions occupied the morning and continued after the lunch adjournment. It would not be usual for the court to give an *ex tempore* decision in these circumstances. However, the decision was not reserved because it raised important issues.

[33] The commissioner submits it was not unreasonable to reject the offers because the letters of offer did not summarise "in a pithy way why the successful party's case is said to be irresistible" or "attempt to make out asserted confidence in the Appellant's case nor asserted weakness in the Respondent's case".

[34] In each offer, the appellant referred to the confidence in its case by reference to the material it had filed in the proceeding to that date. That was appropriate in the

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[13] The progress of the appellant's case from the objection considered by the commissioner's delegate to the notice of appeal and to the outline involved a reduction in the number of matters in issue, as the appellant narrowed and focussed its case.

circumstances. There was no need for the appellant to descend to specificity.[14] The commissioner was able to make a decision on each offer by reference to the merits and prospects of the case as put in the filed material. Breast-beating by the appellant in a letter of offer could not have altered that position.

[35] The commissioner also submits "no genuine element of compromise was plain" in either offer.

[36] If the commissioner had accepted either offer, then the appellant would have foregone a claim to interest on the overpaid amount of $490,144.50 and would have lost its right to seek an order for the commissioner to pay its costs.

[37] The interest accrued from 14 January 2019, when the appellant paid the reassessment amount, until the date the overpaid amount was refunded. The figures for interest are approximately $6,849 at the time of the first offer and $10,992 at the time of the second. Considered in isolation, these are modest amounts.

[38] The commissioner submits the interest amounts were "small and would properly be regarded as minimal considerations". It is unclear whether this submission is a statement of the commissioner's view or speculation about the view the commissioner might have taken at the time. It might seem undesirable that a public officer should approach the matter on that basis, *viz* that, when challenged, he may retain about half a million dollars of a tax-payer's money and simply pay the "small" and "minimal" statutory interest when the tax-payer succeeds.

[39] The appellant says its costs were approximately $40,580 at the time of the first offer and $130,150 at the time of the second offer. These are significant amounts, particularly in the context of the sum in dispute. The second offer detailed these amounts, so that the commissioner could have been in no doubt about the effect of acceptance of that offer.

[40] The commissioner makes no submission about these costs, save to observe that the sums ordered as security for costs in the Court of Appeal in recent times have been less than these figures. This was not such an appeal. Here, the appellant could not seek security, as it was the moving party. In fixing such amounts for security, the courts have often adopted a broad-brush approach to anticipated costs, assuming the costs recoverable on the standard basis of assessment are likely to be between one half and two thirds of the party's actual costs. On this basis, the commissioner might have assumed acceptance of the second offer would eliminate his exposure to being ordered to pay between $65,000 and $87,000 to partially compensate the appellant for its costs to that date.

[41] An offer to forego slightly more than 10% of the sum in dispute has been described as a "marginal" concession where the offer also required payment of the whole of the claimant's costs, in a case where the appeal against the claimant's judgment had some merit.[15] The appellant's first offer represented a compromise well below 10%. By the

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14 *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435 at 442 [27] (Warren CJ, Maxwell P and Harper AJA), adopting *Aljade & MKIC v OCBC* [2004] VSC 351 at [95] (Redlich J).

15 *Rider v Pix* [2019] QCA 257 at [16] (Flanagan J, Sofronoff P and Morrison JA agreeing).

second offer, the appellant offered to forgo between 13% and 21% of its likely entitlement.[16] The merits of proceeding are considered below.

[42] The commissioner says nothing about the other effects that would have flowed from acceptance of either offer. The commissioner would not have incurred his own additional costs of the proceeding, including a hearing and, as it has transpired, of a further process to determine the appropriate orders as to costs. The costs that would have been saved on the part of each of the parties, by acceptance of either offer, were not small or minimal, both objectively and in comparison to the principal sum in issue.

[43] The public resources dedicated to hearing and determining the appeal (and now the costs) could also have been applied for the benefit of other litigants.

[44] Broadly considered, neither of the appellant's offers acknowledged any substance in the commissioner's case. This squarely raises a question about whether either offer was genuine and offered a realistic compromise.[17]

[45] That question has a ready answer. The appellant's position was understandable. The commissioner was never able to demonstrate that there was any substance in his resistance to the appellant's case.

[46] In the 7 June 2019 decision on the appellant's objection, the commissioner's delegate had explained:

> "I have been informed by the Commissioner's [other] delegate [responsible for the assessments] that s.502 was not applied to the assessments. As that provision had no bearing on the making of the assessments, it is not necessary to address that aspect of your submissions".

[47] The delegate's refusal to consider this element of the objection had the consequence that the commissioner offered no explanation for his failure to apply s 502, prior to the appeal. The commissioner's outline of submissions for the appeal hearing did not explain his position with respect to s 502.

[48] At the hearing, after informing the court he would "deal head on with the relevance of section 502",[18] Mr Marks QC failed to do so. When pressed about the application of s 502, aside from conceding that s 502(1)(c) "does seem open", Mr Marks pulled up the drawbridge saying, "I can't take that any further in terms of, just looking at the agreement, as to why we say the funding amount is the consideration for the dutiable transaction."[19]

[49] The commissioner offered no explanation as to why s 502 ought not to apply, according to its clear terms, to what was unarguably a contingent amount payable by the appellant pursuant to the Funding Agreement.[20]

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16 This range is created by taking the costs figure as stated and reducing it by half as an approximation of costs assessed on the standard basis.

17 *Baygol Pty Ltd v Foamex Polystyrene Pty Ltd* [2005] FCA 1089 at [12] (Tamberlin J).

18 Transcript 1-47 ln 31.

19 Transcript 1-51 ln 29-31.

20 Paragraphs 13(e) and 46 to 48 of the commissioner's statement of facts and contentions contended three different things about s 502. The first was a "further or alternative" contention that the contingency that some amount greater than the stated figure for the Funding Amount might be payable "is disregarded in accordance with the general law 'contingency principle' or s.502" and that the commissioner "relies on the contingency principle, both in its general law form, and as given statutory backing by s.502". The

[50] Acting reasonably, at the time of each offer, the appellant would have assessed its prospects of success to be good and the commissioner's case to be weak. It is not clear that the commissioner had any different view or, if he did, how he came to that conclusion.

[51] Perhaps, at the time of the first offer, the commissioner anticipated some case might be developed that would have reasonable prospects of challenging the appellant's case. By the time of the second offer, the commissioner must have known that he had developed no such case.

[52] In the circumstances, the second offer was a genuine offer of a realistic compromise. The commissioner's failure to accept it was unreasonable and imprudent. An order that the commissioner pay the appellant's costs to be assessed on the indemnity basis from the date it failed to accept the second offer will serve the purpose of encouraging the compromise and shortening of litigation. There is no reason to conclude it would deter parties with genuine defences or with good prospects from resisting lesser claims.

Final disposition

[53] Orders should be made to the effect that the commissioner pay the appellant's costs of the proceeding:

(a) to and including 15 June 2020 to be assessed on the standard basis; and

(b) from and including 16 June 2020 to be assessed on the indemnity basis.

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second was that, "On one view of s.502(1), no paragraph readily applies, hence primary reliance on the general law rule of construction, above." The third was that s.502 is "to be read so as to take into account ascertainable, dollar figures" and that "s.502(1)(a) can be applied on the basis that s.502(2)(a) refers to the highest consideration payable 'under the instrument'". None of these propositions about s 502 was put or referred to at the hearing of the appeal. None has any discernible merit.