

# SUPREME COURT OF QUEENSLAND

CITATION: *Calmmoth Pty Ltd v AVJennings Properties Limited (No 2)*  
[2021] QSC 23

PARTIES: **CALMMONTH PTY LTD IN ITS CAPACITY AS  
TRUSTEE OF THE CALMMONTH TRUST**  
ACN 134 449 988  
(plaintiff)  
v  
**AVJENNINGS PROPERTIES LIMITED**  
ACN 004 601 503  
(defendant)

FILE NO: BS 11433 of 2017

DIVISION: Trial Division

PROCEEDING: Trial

ORIGINATING COURT: Supreme Court of Queensland at Brisbane

DELIVERED ON: 18 February 2021

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: Applegarth J

ORDERS:

- 1. The defendant pay the plaintiff's costs of and incidental to the defendant's application for a special costs order, including the costs of the plaintiff's written submissions dated 10 February 2021.**
- 2. Otherwise, the plaintiff pay the defendant's costs of and incidental to the proceeding, including reserved costs, to be assessed if not agreed.**

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 defendant made a *Calderbank* offer – where the plaintiff did not accept the offer – whether the plaintiff acted unreasonably in not accepting the offer

*Calmmoth Pty Ltd v AVJennings Properties Ltd* [2021] QSC 3, cited

*J & D Rigging Pty Ltd v Agripower Australia Limited & Ors* [2014] QCA 23, cited

*LPD Holdings (Aust) Pty Ltd & Anor v Phillips, Hickey and Toigo & Ors* [2013] QCA 305, cited  
*S.H.A. Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd (No 2)* [2020] QSC 323, cited

*Uniform Civil Procedure Rules* 1999

COUNSEL: D J Butler for the plaintiff  
 C A Johnstone, with M Eade, for the defendant

SOLICITORS: Bartley Cohen for the plaintiff  
 McCullough Robertson for the defendant

- [1] The proceeding was successfully defended.<sup>1</sup> The plaintiff accepts that it should be ordered to pay the defendant's costs of and incidental to the proceeding, including reserved costs, to be assessed if not agreed. This was the order proposed by me.
- [2] The defendant opposes this order and contends that the plaintiff should be ordered to pay its costs of the proceeding on the standard basis up to, and including, 17 April 2019 and on the indemnity basis thereafter. The sole basis for seeking an order for indemnity costs is that the plaintiff rejected a *Calderbank* offer dated 17 April 2019. The defendant submits that the plaintiff acted unreasonably in rejecting this offer.
- [3] On 17 April 2019, the defendant offered to settle proceedings on the terms that:
- (a) it would pay the plaintiff the sum of \$51,800.19 plus GST in full and final satisfaction of the plaintiff's claim;
  - (b) it would discontinue its counterclaim; and
  - (c) each party would bear their own costs.
- [4] The parties accept that the offer does not trigger the cost consequences of an offer to settle made under the rules. This is because the offer to settle provisions of the *Uniform Civil Procedure Rules* 1999 (Qld) do not expressly cater for a wholly successful defendant who has earlier made an offer to settle.

### **Relevant principles**

- [5] The usual order is that the unsuccessful party pays costs on the standard basis.<sup>2</sup> Some unusual feature is required to warrant a departure from that usual rule. Sometimes it has been said that some blameworthy conduct is required on the part of the unsuccessful party.<sup>3</sup>
- [6] The making and rejection of a *Calderbank* offer, without more, does not justify an order for indemnity costs.<sup>4</sup> The issue is whether the rejection was unreasonable or imprudent.<sup>5</sup>

<sup>1</sup> *Calmmouth Pty Ltd v AVJennings Properties Ltd* [2021] QSC 3.

<sup>2</sup> *S.H.A. Premier Constructions Pty Ltd v Niclin Constructions Pty Ltd (No 2)* [2020] QSC 323 at [10].

<sup>3</sup> *LPD Holdings (Aust) Pty Ltd & Anor v Phillips, Hickey and Toigo & Ors* [2013] QCA 305 at [22].

<sup>4</sup> *J & D Rigging Pty Ltd v Agripower Australia Limited & Ors* [2014] QCA 23 at [5].

- [7] The following matters have been said to be relevant to that assessment<sup>6</sup>:
- (a) the stage of the proceeding at the time of the offer;
  - (b) the time allowed to consider the offer;
  - (c) the extent of the compromise offered;
  - (d) the offeree's prospects of success (at the date of the offer);
  - (e) the clarity of the terms of the offer; and
  - (f) whether the offer foreshadowed an application for indemnity costs in the event of its rejection.

**Was the rejection of the offer unreasonable or imprudent?**

- [8] The proceeding was at an advanced stage when the offer was made. The plaintiff was seeking payment of \$1,622,877.44. As its submissions point out, the offer to pay \$51,800.19 was for an amount just over three per cent of the sum claimed by it.
- [9] The offer was for a sum which the defendant acknowledged was due and owing to it. In other words, it was premised on the complete success of the defence that there was no implied term and that the consultancy agreement was amended.
- [10] The extent of the compromise offered was limited. It required the plaintiff to, in effect, concede the entirety of its case. The plaintiff would receive an amount which the defendant acknowledged it was required to pay in the event of complete success on the defence. It did provide the benefit of not exposing the plaintiff to an order for costs.
- [11] The counterclaim was of no practical consequence and did not need to be pursued if the defendant succeeded upon its defence. Therefore, the offer to discontinue the counterclaim adds little to the compromised calculation. Overall, the extent of the compromise offered was small.
- [12] I accept the plaintiff's submissions that its prospects of success, at the date of the offer, were not so poor as to make it reasonable or prudent to effectively concede the entirety of its case. Expressed differently, it was not unreasonable or imprudent for the plaintiff to reject the offer. It was not the kind of blameworthy or unreasonable conduct which should trigger an award of costs on the indemnity basis.
- [13] In my view, the defendant has failed to show some special or unusual feature in the circumstances to warrant departure from the usual rule that costs are on the standard basis. I decline to exercise my discretion to order costs on the basis sought by the defendant.

---

<sup>5</sup> Ibid at [5] – [6].

<sup>6</sup> Ibid.

- [14] Subject to an order in relation to the costs of and incidental to this contested costs application, the order for costs of the proceedings will be the one proposed by me and accepted by the plaintiff.
- [15] It is appropriate that the costs of the application for a special order as to costs should follow the event of that application. The application by the defendant for costs to be ordered on the indemnity basis after 17 April 2019 was successfully resisted. The defendant should be ordered to pay the plaintiff's costs of and incidental to the defendant's application for a special costs order, including the costs of the plaintiff's written submissions dated 10 February 2021.
- [16] I would be prepared to fix those costs if they cannot be agreed, based upon a short affidavit as to what a reasonable amount to fix is and submissions not exceeding one page. My intent is to avoid the costs associated with an assessment of those costs and to fix costs in a similar way to what is done on occasions in the Applications List when it is possible to fairly fix costs. If the parties cannot agree those costs in seven days, then a request to fix them may be made. Failing that, they will have to be assessed.

### **Conclusion**

- [17] The orders for costs will be:
1. The defendant pay the plaintiff's costs of and incidental to the defendant's application for a special costs order, including the costs of the plaintiff's written submissions dated 10 February 2021.
  2. Otherwise, the plaintiff pay the defendant's costs of and incidental to the proceeding, including reserved costs, to be assessed if not agreed.