

SUPREME COURT OF QUEENSLAND

CITATION: *Artesian Hospitality Pty Ltd v Tsuen Fung Holdings Pty Ltd (No 2)* [2021] QSC 311

PARTIES: **ARTESIAN HOSPITALITY PTY LTD**
ACN 623 276 184
(applicant)
v
TSUEN FUNG HOLDINGS PTY LTD
ACN 106 616 031
(respondent)

FILE NO: BS 10306 of 2021

DIVISION: Trial

PROCEEDING: Costs

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 26 November 2021

DELIVERED AT: Brisbane

HEARING DATE: On the papers

JUDGE: Flanagan J

ORDER: **1. The interlocutory injunction order made in paragraph 2 of the order of Kelly J on 8 September 2021 is discharged.**

2. The applicant pay the respondent's costs of the amended originating application, including the costs reserved by Kelly J on 8 September 2021.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – OFFERS OF COMPROMISE – CALDERBANK LETTERS – UNREASONABLE REFUSAL OF OFFER – where an originating application was brought on for early trial – where the respondent sent a *Calderbank* letter to the applicant prior to the exchange of trial submissions – where the *Calderbank* letter offered for the originating application to be dismissed and that each party bear its own costs – where the applicant refused the offer and proceeded to trial on the basis that it had a real prospect of success – where the applicant was unsuccessful at trial and the originating application was dismissed – whether it was unreasonable to refuse the *Calderbank* offer – whether indemnity costs should be awarded

Auspile Pty Ltd v Bothar Boring and Tunnelling (Australia)

Pty Ltd [2021] QSC 122, distinguished
Barboza v Blundy [2021] QSC 82, distinguished
Thomopoulos v Faulks (No 2) [2006] VSC 286, cited

COUNSEL: R R Ivessa for the applicant
 R J Douglas QC, with J K Meredith, for the respondent

SOLICITORS: McCullough Robertson Lawyers for the applicant
 Ellem Warren Lawyers for the respondent

- [1] On 17 November 2021, the Court dismissed the amended originating application and ordered that it would hear the parties as to costs.¹ The parties subsequently filed costs submissions. The respondent, relying on a *Calderbank* offer dated 30 September 2021, seeks its costs on the standard basis up to and including 1 October 2021, and on the indemnity basis thereafter. The applicant submits that the general costs rule should apply and that the applicant should pay the respondent's costs on the standard basis.
- [2] The proceeding was commenced by originating application filed 6 September 2021. On 8 September 2021, Kelly J granted an interlocutory injunction restraining the respondent from taking any steps to lease the Premises until further order of the Court. His Honour made directions for an early trial, including the exchange of submissions by 30 September 2021. The applicant filed its submissions on 1 October 2021 and the respondent filed its submissions on 5 October 2021. The applicant filed reply submissions on 7 October 2021, with further reply submissions from the respondent being filed on the date of hearing, 8 October 2021. There were no pleadings. As outlined in paragraphs [55] to [57] of the trial judgment, the issues were identified from the parties' written submissions. The applicant identified three issues, whereas the respondent identified eight issues, three of which generally aligned with those of the applicant.
- [3] The respondent's solicitors emailed the *Calderbank* offer to the applicant's solicitors at 6.56 pm on 30 September 2021 and it should be deemed to have been made at the commencement of the following day, 1 October 2021.² The offer was open for acceptance for six days, which is less than the 14-day period required for offers made pursuant to the *Uniform Civil Procedure Rules 1999* (Qld). The applicant accepts, however, that nothing turns on this.³ The applicant also accepts that the offer was clearly expressed and the fact that it did not foreshadow an application for indemnity costs is only a minor factor weighing against the respondent.⁴ The applicant's primary submission is that indemnity costs should not be awarded because the extent of the compromise offered in the *Calderbank* offer "was minimal at best, nothing at worst".⁵

¹ *Artesian Hospitality Pty Ltd v Tsuen Fung Holdings Pty Ltd* [2021] QSC 288 (**Trial Judgment**).

² Respondent's Costs Submissions, paragraph 4.

³ Applicant's Costs Submissions, paragraph 8.

⁴ Applicant's Costs Submissions, paragraphs 10 and 11.

⁵ Applicant's Costs Submissions, paragraph 12.

- [4] The *Calderbank* offer was in the following terms:
- “1. The Applicant withdraws the Originating Application filed 6 September 2021;
 2. The parties consent to an order that:
 - a. The Originating Application filed 6 September 2021 is dismissed;
 - b. The injunction ordered on 8 September 2021 is dismissed;
 - c. No order as to costs.”⁶
- [5] The offer was open for acceptance until 4.00 pm on Wednesday, 6 October 2021 and was stated to be made pursuant to the principles of *Calderbank v Calderbank*.⁷
- [6] At the time the *Calderbank* offer was made, the parties had not exchanged submissions and, in the absence of pleadings, the issues to be determined at trial had not been specifically identified.
- [7] The applicant submits that there is some level of disagreement in the authorities as to whether an offer by a defendant to have the plaintiff’s action dismissed with no order as to costs is a genuine offer to compromise at all.⁸ This was recognised by Cavanough J in *Thomopoulos v Faulks (No 2)* as follows:
- “The offer was that there be orders by consent that the proceeding be dismissed and that each party bear their own costs of the proceeding. This was either no compromise or only a limited compromise, depending upon whether one should treat an offer to bear one’s own costs as containing a compromise for present purposes. There are authorities which suggest that such a proposal should not be regarded as any kind of compromise at all, and other authorities which do recognise an offer to bear one’s own costs as a kind of compromise, albeit not necessarily a large compromise. Certain observations in *Berrigan Shire Council v Ballerini* tend to suggest that such a proposal should be regarded ‘not so much as an offer of compromise as a demand to capitulate’.”⁹
- [8] The respondent submits, however, that the form of the present *Calderbank* offer was similar in terms to those considered by Bond J (as his Honour then was) in *Barboza v Blundy*¹⁰ and by Wilson J in *Ausipile Pty Ltd v Bothar Boring and Tunnelling (Australia) Pty Ltd*.¹¹ The exercise of the discretion to award indemnity costs was, however, informed by the particular circumstances of those cases.

⁶ Exhibit 3.

⁷ [1976] Fam 93.

⁸ Applicant’s Costs Submissions, paragraph 14.

⁹ *Thomopoulos v Faulks (No 2)* [2006] VSC 286, [16], quoting *Berrigan Shire Council v Ballerini (No 2)* [2006] VSCA 65, [17] (Callaway JA).

¹⁰ [2021] QSC 82, [13], [18].

¹¹ [2021] QSC 122, [10].

- [9] In the present case, the respondent submits that the applicant chose to “roll the dice” in circumstances where it was appraised of the issues and prospects, in particular, those pertaining to the second issue concerning whether the terms of the lease were agreed in a teleconference on 19 August 2021. As I have already observed, the precise issues in the proceedings were not identified until the parties had filed and delivered their submissions. The respondent’s submissions were not filed until 5 October 2021, which was only three days before the trial. As is evident from the trial judgment, the first issue required the Court to construe the Agreement and, in particular, cl 27. As to whether the parties agreed the terms of the lease in the teleconference on 19 August 2021, this required a consideration of both the cross-examination of Mr McAndrew and Jac Moc and the affidavit evidence.¹² The third issue raised for consideration whether the respondent had breached its obligation to use reasonable endeavours to proceed to execute a lease. The resolution of this issue required a consideration of the affidavit evidence and the oral evidence of Jac Moc, James Moc and Mr Keegan.¹³
- [10] I accept the applicant’s submission that its case was genuinely brought with a real prospect of it succeeding.¹⁴ In those circumstances, it was not, in my view, unreasonable for the applicant to refuse the respondent’s *Calderbank* offer. This is not an appropriate case for the Court to exercise its discretion to depart from the usual rule as to costs.

Disposition

- [11] The Court makes the following orders:
1. The interlocutory injunction order made in paragraph 2 of the order of Kelly J on 8 September 2021 is discharged.
 2. The applicant pay the respondent’s costs of the amended originating application, including the costs reserved by Kelly J on 8 September 2021.

¹² Trial Judgment (n 1) [87]-[88].

¹³ Trial Judgment (n 1) [95]-[100].

¹⁴ Applicant’s Costs Submissions, paragraph 16.