

SUPREME COURT OF QUEENSLAND

CITATION: *Fudo Ninjas Pty Ltd v HSW Nominees Pty Ltd* [2021] QSC 353

PARTIES: **FUDO NINJAS PTY LTD**
ACN 620 750 245
(plaintiff/respondent)
v
HSW NOMINEES PTY LTD
ACN 166 209 874
(defendant/applicant)

FILE NO/S: BS No4808 of 2021

DIVISION: Trial Division

PROCEEDING: Application

DELIVERED ON: 17 December 2021

DELIVERED AT: Brisbane

HEARING DATE: Application on the papers

JUDGE: Williams J

ORDER: **The plaintiff pay:**

- 1. the defendant's costs of the proceeding up until 9 August 2021 on the standard basis; and**
- 2. the defendant's costs of the proceeding from 10 August 2021, including the application filed 30 September 2021, on the indemnity basis.**

COUNSEL: J P Morris for the plaintiff/respondent
M S Henry SC, and N J Derrington, for the applicant/defendant

SOLICITORS: JHK Legal for the plaintiff/respondent
Arnold Bloch Leibler for the applicant/defendant

[1] The defendant brought an application for an order permanently staying the proceeding or alternatively, for security for costs. On 2 December 2021, I ordered that the proceedings be permanently stayed pursuant to r 16(g) of the *Uniform Civil Procedure Rules 1999 (Qld)* (UCPR). The parties were directed to provide written submissions in respect of costs. Further, the parties agreed that the issue in respect of costs of the application be dealt with on the papers, without the need for a further hearing.

Applicant/defendant’s position on costs

- [2] The applicant submits that as the plaintiff was wholly unsuccessful, r 361 of the UCPR does not apply in the current circumstances and the issue of costs is a matter in the discretion of the Court.
- [3] Reference is made to the “usual considerations” that inform the exercise of the costs discretion as set out in the decision of *Hazeldene’s Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)*.¹ These “usual considerations” include:
- (a) the stage of the proceeding at which the offer was received;
 - (b) the time allowed to the offeree to consider the offer;
 - (c) the extent of the compromise offered;
 - (d) the offeree’s prospects of success, assessed as at the date of the offer;
 - (e) the clarity with which the terms of the offer were expressed; and
 - (f) whether the offer foreshadowed an application for an indemnity costs order in the event of the offeree rejecting it.
- [4] It is also submitted that the Court’s exercise is not fettered by these identified considerations. Further, not every factor must point positively in favour of an order for indemnity costs.
- [5] A further affidavit of Mr Jonathan Milner sworn 7 December 2021 was filed in respect of the application for costs. Exhibited to this affidavit at tab 2 page 39 is a copy of a letter from Arnold Bloch Leibler to JHK Legal dated 26 July 2021 containing an offer to settle (the Offer). The applicant relies on the Offer, namely that the defendant pay the plaintiff the sum of \$100,000 in full and final settlement of all claims between the parties, with each party bearing its own costs.
- [6] The offer was expressly stated to be made pursuant to both Part 5 of Chapter 9 of the UCPR and the principles in *Calderbank v Calderbank*.²
- [7] As a consequence of the Offer, the applicant seeks a costs order as follows:
- (a) the plaintiff pay the defendant’s costs in the proceeding up until 9 August 2021³ on the standard basis; and
 - (b) the plaintiff pay the defendant’s costs of the proceeding from 10 August 2021,⁴ including the application filed 30 September 2021, on the indemnity basis.
- [8] Addressing the “usual considerations” the applicant submits:
- (a) The offer was made following the close of pleadings with the claim and statement of claim filed on 29 April 2021, an amended defence filed on 3 June 2021 and the reply filed on 2 July 2021. Accordingly, the pleadings

¹ (2005) 13 VR 435 at 442 [25].

² [1975] 3 All ER 333.

³ Being the date of expiry of the Offer.

⁴ Being the day after the expiry of the Offer.

define the matters in issue and the facts relied upon as the basis of the argument of an abuse of process were clearly identified in the pleadings.⁵ Further, it is submitted that both parties were represented by Senior Counsel and the defendant expressly put in issue that the proceedings had been compromised and the plaintiff was estopped from advancing the claim. It is in these circumstances that the applicant submits that the offer was made at a time where the plaintiff was, or at least should have been, sufficiently aware that its proceedings were an abuse of process.

- (b) The offer was open for 14 days, which is the standard period.
 - (c) The applicant acknowledges that the compromise contained in the offer involved a substantial compromise on the part of the plaintiff. However, the applicant contends that any claim for loss of a commercial opportunity would need to be evaluated in the circumstances of the COVID-19 pandemic. Further, it is contended that it was clear that the settlement of the claim in the Magistrates Court was based upon the same breach of contract and there was a litigation risk that the proceeding would either be barred by that settlement or amount to an estoppel or an abuse of process. It is in these circumstances that the applicant contends that at the time of the offer, the prospects of success of the plaintiff were not strong. In addition, from the defendant's perspective, the offer to pay \$100,000 to avoid the time and cost of defending the claim was also a significant compromise.
 - (d) The offer was clearly expressed and capable of acceptance.
 - (e) The offer foreshadowed an application for indemnity costs should the UCPR offer rules not apply and the defendant obtained an outcome that was better than what was offered.
 - (f) The findings made to establish an abuse of process as the basis of the permanent stay are also relevant.
- [9] Overall, the applicant contends that the continuation of the proceeding by the plaintiff in the face of the offer to settle was unreasonable. In these circumstances, it is submitted that it is a proper exercise of the Court's discretion for the plaintiff to pay the defendant's costs of the proceeding, assessed on the standard basis until 9 August 2021 and on the indemnity basis thereafter.

Respondent/plaintiff's position on costs

- [10] The respondent agrees with the relevant legal principles identified by the applicant. However, the respondent contends that in considering whether the Court ought to exercise its discretion, the circumstances of this case result in the conclusion that the appropriate order is for costs on a standard basis.
- [11] In respect of the "usual considerations" the respondent also addresses these in turn:
- (a) The respondent ultimately contends that it was "plainly unreasonable" that the plaintiff would resolve a claim seeking not less than \$12 million for \$100,000. Further, the respondent points to the pleaded case as being whether there was a binding compromise, and whether there was an estoppel

⁵ See for example the defence at [43] and reply at [16].

rather than an allegation of abuse of process. It is submitted that the allegation of an abuse of process was not raised until 30 September 2021, after the expiry of the offer.

Further, the submission is made that despite the decision granting the permanent stay on the basis of an abuse of process, it was not “patently unreasonable for the plaintiff to proceed on the basis that its case was distinguishable from *Tyne*”.

- (b) No issue was taken in respect of the time allowed to consider the offer.
- (c) In respect of the extent of the compromise offered and the prospects of success, it is submitted that the offer of \$100,000 was entirely unreasonable and it was proper for the plaintiff to reject it. Further, it is submitted that it cannot be said that the plaintiff’s prospects were poor or so poor that it was unreasonable not to accept an offer of compromise of \$100,000.
- (d) The respondent takes no issue in respect of the clarity of the offer or the notice of application.
- (e) In respect of other considerations, the respondent repeats its primary submission that was made at the hearing of the substantive application that the plaintiff’s claim was filed in the context of having brought a third party proceeding in the Magistrates Court seeking an indemnity for damages being sought by a contractor and it was the third party proceeding which was discontinued after a compromise was reached.

[12] It is further contended that:

“It is not the case that the facts of this matter are so patently analogous to those of *Tyne* that the plaintiff ought to have foreshadowed, at the time of rejecting the defendant’s offer, that an application seeking a stay based upon an abuse was forthcoming or likely to succeed, such that a refusal of the offer was imprudent [or] unreasonable”.

[13] It is in these circumstances that the respondent ultimately submits that this is not a case that warrants the exercise of the Court’s discretion to award indemnity costs.

Consideration

[14] The letter dated 26 July 2021 containing the offer is headed “[w]ithout Prejudice save as to Costs”.

[15] The letter includes the following:

“While HSW considers your client has poor prospects of success in the Proceedings, to avoid the expense and inconvenience of this litigation it is prepared to resolve the Proceedings on the following terms:

1. HSW will pay your client the sum of \$100,000 in full and final settlement of all issues in dispute between our respective clients, including the claims the subject of the Proceedings.

2. The parties to the Proceedings release each other in respect of all claims the subject of the Proceedings and any claims arising out of or in any way connected with the subject matter of the Proceedings, being claims currently existing or arising later which the parties have or might have had but for acceptance of this offer of settlement.
3. Both parties will bear their own costs of the Proceedings.
4. Your client will file a UCPR Form 38 – Notice of Acceptance of Offer in accordance with rule 358 of the UCPR.
5. Your client will discontinue the Proceedings against HSW, with no order as to costs.

The Offer is a real compromise. In our view, it is generous given the practical and legal difficulties in your client’s claim, not least of which is the issue concerning the prior Magistrates Court proceedings and the circumstances in which those proceedings were settled.”

- [16] Whilst the letter does not directly refer to seeking a permanent stay on the basis of an abuse of process, it does directly point to the issue arising out of the prior Magistrates Court proceedings and the settlement. Further, the amended defence and the reply clearly crystallise the underlying facts which give rise to the circumstances which were considered at the application seeking the permanent stay.
- [17] Whether the applicant sought relief by way of an application for a permanent stay for an abuse of process or another basis for the relief, the same factual basis and the legal risks faced by the plaintiff remained substantially the same.
- [18] Further, whilst it is accepted that there is a significant delta between the amount claimed in the Supreme Court proceedings by the plaintiff of not less than \$12 million and the \$100,000 offer, this in itself is not a basis for the conclusion that the rejection of the offer was not unreasonable.
- [19] The compromise reflected in the Offer identifies the factual basis relevant to the analysis of the prospects of success and the litigation risk which the defendant clearly articulated in its amended defence and those factors are factored into the Offer.
- [20] At that point in time, the plaintiff was fully aware of the risk that it would be unable to continue with its Supreme Court claim for damages given that the Magistrates Court proceedings which arose out of the same alleged breach of contract had been compromised. This required an evaluation of the prospects of success in light of the matters pleaded.
- [21] By way of the order that the proceedings be permanently stayed pursuant to r 16(g) of the UCPR, the applicant has achieved an outcome in the proceeding that is no less favourable than the terms of the Offer. The respondent was clearly on notice that the applicant would seek indemnity costs from the date of the Offer in the event that it was not accepted and the applicant achieved that outcome.

- [22] In the circumstances, and taking into account the relevant factors, I consider that it is appropriate to order that the plaintiff pay:
- (a) the defendant's costs of the proceeding up until 9 August 2021 on the standard basis; and
 - (b) the defendant's costs of the proceeding from 10 August 2021, including the application filed 30 September 2021, on the indemnity basis.