SUPREME COURT OF QUEENSLAND

CITATION:	*Australia Yinmore Holding Pty Ltd & Ors v Liu (No 2)* [2018] QSC 136
PARTIES:	**AUSTRALIA YINMORE HOLDING PTY LTD ACN 137 721 870** (first applicant) **YUNNAN YINMORE GROUP CO LTD** (second applicant) **JINQUAN LI** (third applicant) **v** **CHUNQING LIU** (respondent)
FILE NOS:	BS6500 of 2016
DIVISION:	Trial Division
PROCEEDING:	Costs
DELIVERED ON:	12 June 2018
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions
JUDGE:	Mullins J
ORDER:	**The respondent must pay the applicants' costs of the proceeding (including the counterclaim) 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 – OFFER OF COMPROMISE OR OFFER TO SETTLE OR CONSENT TO JUDGMENT PURSUANT TO RULES – GENERALLY – where the applicants were successful at trial – where the applicants had made a formal offer to settle 18 days before the commencement of the trial – where offer not accepted by the respondent and the trial proceeded – where the orders made after trial were no less favourable than the offer made by the applicants before the trial commenced – whether costs should be ordered against the respondent on an indemnity basis *Uniform Civil Procedure Rules* 1999 (Qld), r 354, r 360 *Australia Yinmore Holding Pty Ltd & Ors v Liu* [2018] QSC 76, related *Brown v Owners Corporation SP021532U* [2013] VSC 127,

considered
Fail v Hutton [2003] QSC 291, considered
Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2) (2005) 13 VR 435; [2005] VSCA 298, cited
Mules v Ferguson [2015] QCA 233, considered
Pensini v Tablelands Regional [2012] QCA 137, cited
Wynne v Davey (No 2) [2015] QSC 227, cited

SOLICITORS: HopgoodGanim Lawyers for the applicants
Creagh Weightman for the respondent

[1] The applicants succeeded before me on the trial of this proceeding. I published my reasons on 20 April 2018: *Australia Yinmore Holding Pty Ltd & Ors v Liu* [2018] QSC 76 (the reasons). When I invited oral submissions on costs, it became apparent that on 28 September 2017 (before the trial commenced) the applicants had made an offer to settle the proceeding (including the counterclaim), in accordance with chapter 9 part 5 of the *Uniform Civil Procedure Rules* 1999 (Qld). The offer was open for 14 days expiring on 12 October 2017. The offer was not accepted by the respondent and the trial proceeded between 16 and 20 October 2017. The orders made after trial were no less favourable to the applicants than the offer. In fact, the offer was on terms in relation to the first and second applicants' claims that were reflected in the orders made after trial in favour of the first and second applicants. The offer made in respect of the third applicant's claim was more favourable to the respondent than the order made after trial. The costs order provided in the offer was that each party was to bear its or his own costs of and incidental to the proceeding.

The applicants' submissions

[2] The applicants rely on r 360(1) of the *UCPR* to seek an order for costs in their favour on the indemnity basis:

> "(1) If—
>
> (a) the plaintiff makes an offer that is not accepted by the defendant and the plaintiff obtains an order no less favourable than the offer; 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."

[3] The applicants submit that, as they were at all material times willing to carry out the terms of the offer, they are *prima facie* entitled to their costs on the indemnity basis, unless the respondent discharges the onus he bears to show another order is appropriate.

[4] The applicants note that the offer was made after pleadings had closed on 29 March 2017, disclosure had been performed, and the affidavits of both parties for the purpose

of the trial had been filed and served, and there were still 18 days prior to the commencement of the trial.

[5] Although there was one area of the evidence-in-chief of Mr Li and Mr Liu that by direction of the court was reserved for oral evidence (namely the issues of contention), the balance of the evidence-in-chief of the witnesses was by affidavit, enabling the respondent to assess the merits of the applicants' claims and his counterclaim against them and to make an informed decision about whether to accept the offer or not. The significant issue of contention was what was said at the "two couple meeting" at the home of Mr and Mrs Li in September/October 2008. The evidence of Mrs Li and Mrs Liu on this meeting was in their affidavits and set out respectively at [22] and [30] of the reasons. Despite the direction that allowed for the evidence of this meeting to be given orally by both Mr Li and Mr Liu, Mr Liu also dealt with the conversation in his first affidavit which was set out at [25] of the reasons.

[6] In anticipation of an argument that the effect of r 360(1) would be a generous result to the applicants, having regard to the lateness of the offer, the applicants rely on the fact that r 354(1)(b) of the *UCPR* expressly contemplates that an offer may be served at any time before final relief is granted. Reliance is placed on the observation of the members of the Court of Appeal made by reference to r 354 in *Mules v Ferguson* [2015] QCA 233 at [4] that:

> "Whilst that offer to settle was made during the course of the trial, and towards the conclusion of the trial, that fact does not prevent the offer from being an offer which invokes the provisions of rule 360 of the UCPR."

[7] Moynihan SJA in *Fail v Hutton* [2003] QSC 291 at [12] acknowledged that the prospect of the order for indemnity costs when an offer to settle is not accepted is a matter that must be taken into account by the party to whom the offer is directed:

> "One of the considerations the recipients of an offer has to take into account in determining whether or not to accept it is that if the other obtains a judgment no less favourable an indemnity costs order might be made. In other words it is part of the scheme of the rules to exert pressure on a party to consider an offer made in accordance with the rules. See *Connolly v Skrapulj* (McDonald J) Supreme Court of Victoria 434 of 1990 judgment delivered 2 March 1993, p9(a)."

[8] The timing of the applicants' offer is not a sufficient reason not to give effect to the outcome that r 360 contemplates in the "ordinary case": *Wynne v Davey (No 2)* [2015] QSC 227 at [15].

[9] That the offer to settle proposed the third applicant release all claims to the Camry vehicle was a genuine compromise by the third applicant. In any case, the offer by the applicants to settle on the basis that each party pay his or its own costs involved sufficient compromise to characterise the offer to settle as involving a true element of compromise, particularly having regard to the "all or nothing" claims of the applicants: cf *Pensini v Tablelands Regional* [2012] QCA 137 at [67].

[10] The respondent's reliance on the fact it was the second applicant which procured him to register the Mizzen Place property in his name, as the first applicant was prohibited from purchasing the property in its name without prior FIRB approval, as conduct that now justifies an order for costs other than indemnity costs, is not relevant to the respondent's failure to accept the offer to settle at the time it was made. It also overlooks the case advanced by the respondent at trial that treated the property, shares and Camry vehicle as all the subject of the promises or representations made to him by Mr Li.

The respondent's submissions

[11] The respondent relies on a consideration of the factors relevant to the exercise of the discretion not to order indemnity costs identified by Dixon J in *Brown v Owners Corporation SP021532U* [2013] VSC 127 to submit that indemnity costs are not appropriate in this matter and the appropriate order for costs is that the respondent should pay the applicants' costs assessed on the standard basis. These factors were those that may be considered by a court in dealing with a submission that the rejection of a *Calderbank* offer was unreasonable and were taken from *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* (2005) 13 VR 435 at [25]:

> "(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;
> (f) whether the offer foreshadowed an application for an indemnity costs in the event of the offeree's rejecting it."

[12] The respondent's written submissions suggest the offer to settle was on the basis the respondent capitulated to all the relief claimed in the proceeding by the applicants with the only concession being with respect to costs. That submission is not correct, as the offer did amount to a compromise of the third applicant's claim to the ownership of the Camry vehicle by the third applicant offering to give up all claims to the vehicle.

[13] As the central element of evidence in contention of the conversation held between Mr and Mrs Li and Mr and Mrs Liu in 2008 before the decision was made for Mr Liu to travel to Australia was the subject of the oral evidence of both Mr Li and Mr Liu, the respondent was not in the position to make a true assessment of the likely outcome of the proceeding until this evidence unfolded. This was even more so, when there was no contemporaneous written record presented by either party about this conversation at the trial and the respective versions could be tested only by oral evidence at the trial. In addition, a significant part of Mr Li's cross-examination concerned his involvement in the transactions that resulted in the Cayman Islands case (referred to at [75] of the reasons) that went to Mr Li's conduct and credit, but depended upon his cross-examination at the trial.

[14] The offer to settle was made very late in the litigation when all costs of filing the affidavits, preparing the trial bundle and briefing counsel for trial had been incurred. Such a late offer leads to the applicants' obtaining a disproportionate advantage in the

outcome on costs. A late offer does not facilitate the purpose of the offer to settle regime which is to encourage the parties to compromise and therefore limit litigation.

[15] It is relevant in considering the appropriate order for costs that the court takes into account that the litigation was the result of the second applicant procuring the respondent who was its employee to purchase the Mizzen Place property in his name, when the first applicant was prohibited from purchasing the property without prior FIRB approval (which was the advice of the solicitor engaged to act in the purchase of the property and referred to at [43] of the reasons).

What costs order should be made?

[16] As Dixon J recognised in *Brown* at [15], the list of factors found in *Hazeldene*, has to be considered in the context of the precise terms and structure of the offer to settle rule, which has distinguishing features from a confidential offer to settle or *Calderbank* offer. In particular, the matter of the stage of the proceeding at which the offer was received by the respondent is of less significance under r 360, when r 354(1)(b) of the *UCPR* contemplates that an offer may be served at any time before final relief is granted: *Mules* at [4].

[17] Of the list of factors referred to *Brown* at [15], those that have the most relevance in this matter are the extent of the compromise offered and the respondent's prospects of success, assessed as at the date of the offer. The claim by the third applicant which was forgone under the offer to settle was in respect of the Camry vehicle that had the least value of the assets claimed by the applicants. The extent of the compromise otherwise was still significant, because, as explained in *Fail* at [12], an offer for the parties to bear their own costs had be considered in the context that, by virtue of the making of the offer, the respondent was then exposed to an order for indemnity costs, if the applicants obtained relief that was no less favourable than the terms of the offer. The offer to settle proposed a sufficient compromise to preclude the characterisation that it was made only for setting up a claim for indemnity costs, rather than being a genuine offer to settle: *Brown* at [19].

[18] In assessing the terms of the offer, the outcome of the trial in respect of the parties' cases on the two couple meeting was critical. Although the respondent did not have Mr Li's affidavit evidence on the conversation at the two couple meeting when the offer to settle was received, the respondent was in a position to assess the affidavit evidence of Mrs Li and Mrs Liu on what happened at this meeting, in conjunction with the respondent's own recollection of what occurred and the applicant's pleaded case that Mr Li had not promised or represented to the respondent that he would provide him with a home or shares. The respondent's plan to test Mr Li's credit at trial, including arising from his dealings that were the subject of the Cayman Islands case, had to be taken into account by the respondent as part of the risk of the litigation when assessing the offer to settle. Even though the outcome of a collateral attack on the credit of Mr Li may not have been predictable at the time of the offer to settle, the respondent could assess the risk of relying on that attack in the context of all the other evidence then available to the respondent.

[19] The respondent was unsuccessful at trial (at [93] to [99] of the reasons) in relying on the purchase of the Mizzen Place property in the respondent's name as conduct by the first applicant to avoid an application for FIRB approval to purchase the property in its name that was therefore an impediment to the first applicant's obtaining equitable relief. The issue only arose after the respondent was unsuccessful in rebutting the presumption that he held the property on a resulting trust for the first applicant. Just as the first applicant's conduct did not preclude equitable relief in its favour at the trial, the same conduct should not now preclude the award of indemnity costs, when that is the ordinary case that follows from the offer to settle.

[20] Taking into account the timing of the offer, the state of the evidence and what was known by the respondent about his own case at the time the offer was received by the respondent, the genuine compromise contained in the offer, and the risks assumed by the respondent in not accepting the offer to settle, the respondent has not shown that an order other than the respondent pay the applicants' costs on the indemnity basis should be made.

[21] The parties did not expressly address the costs of the counterclaim in their written submissions. The offer to settle made by the applicants was treated by the parties as covering the whole proceeding. That was understandable as the relief sought by the respondent in the counterclaim was that he was the owner of the subject property, shares and Camry vehicle which was the opposite of the relief sought by the applicants in the proceeding. To the extent that it is arguable that the applicants were in the position of defendants in offering to settle the counterclaim when offering to settle the proceeding, there should not in the circumstances be a different order for any additional costs of the counterclaim. In effect, the applicants have shown that an order for indemnity costs is also the appropriate order on the counterclaim. The order therefore will be that the respondent must pay the applicants' costs of the proceeding (including the counterclaim) to be assessed on the indemnity basis.