Federal Court of Australia

Tregidga v Pasma Holdings Pty Limited (No 2) [2021] FCA 1439

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| File number: |  |
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| Judgment of: | **REEVES J** |
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| Date of judgment: | 18 November 2021 |
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| Catchwords: | **COSTS** – application by respondent for costs on an indemnity basis – where the applicants refused a *Calderbank* offer – application granted, indemnity costs ordered  |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth)  |
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| Cases cited: | *ALDI Foods Pty Ltd v Transport Workers’ Union of Australia* (2020) 282 FCR 174; [2020] FCAFC 231*Anchorage Capital Partners Pty Limited v ACPA Pty Ltd (No 2)* [2018] FCAFC 112*Associated Steamships Pty Ltd v Seafarers Safety, Rehabilitation and Compensation Authority (No 2)* [2020] FCA 853*Barnes v Forty Two International Pty Limited (No 2)* [2015] FCAFC 19*Bowen Investments Pty Ltd v Tabcorp Holdings Ltd (No 2)* [2008] FCAFC 107*Calderbank v Calderbank* [1975] 3 All ER 333*GEC Marconi Systems Pty Ltd (t/as Easams Australia) v BHP Information Technology Pty Ltd* (2003) 201 ALR 55; [2003] FCA 688*Hazeldene’s Chicken Farm Pty Ltd v Victorian Workcover Authority (No. 2)* (2005) 13 VR 435; [2005] VSCA 298*M.T. Associates Pty Ltd v Aqua-Max Pty Ltd & Anor (No. 3)* [2000] VSC 163*Management 3 Group Pty Ltd (ACN 100 863 036) (in liq) v Lenny’s Commercial Kitchens Pty Ltd (ACN 009 044 295) (No 3)* (2011) 278 ALR 754; [2011] FCA 725*Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd* (2011) 16 ANZ Insurance Cases 61-885; [2011] FCAFC 53*Stewart v Atco Controls Pty Ltd (in liquidation) (No 2)* (2014) 252 CLR 331; [2014] HCA 31*Tregidga v Pasma Holdings Pty Limited* [2021] FCA 721*Trustee for The MTGI Trust v Johnston (No 2)* [2016] FCAFC 190*University of Western Australia v Gray (No 21)* (2008) 249 ALR 360; [2008] FCA 1056*Verrocchi v Direct Chemist Outlet Pty Ltd (No 2)* [2016] FCAFC 162*WSA Online Limited v Arms (No 2)* [2006] FCAFC 108 |
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| Division: | General Division |
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| Registry: | Queensland |
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| National Practice Area: |  |
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| Number of paragraphs: | 21 |
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| Date of last submissions: | 12 July 2021 |
|  |  |
| Date of hearing: | Determined on the papers  |
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| Counsel for the Applicants: | NJ Derrington |
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| Solicitor for the Applicants: | Hall & Wilcox |
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| Counsel for the Respondent: | DA Savage QC |
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| Solicitor for the Respondent: | TurksLegal |

ORDERS

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|  | NSD 1803 of 2017 |
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| BETWEEN: | ROSS GILL TREGIDGAFirst ApplicantCATHERINE MARY JENKINSSecond Applicant |
| AND: | PASMA HOLDINGS PTY LIMITED ACN 093 774 559 TRADING AS PASMA ELECTRICALRespondent |

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| order made by: | REEVES J |
| DATE OF ORDER: | 18 NOVEMBER 2021 |

THE COURT ORDERS THAT:

1. The applicants pay the respondent’s costs on a party/party basis up to and including 5 April 2020.
2. The applicants pay the respondent’s costs on an indemnity basis from and including 6 April 2020.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

REEVES J:

1. On 28 June 2021, I delivered my reasons for judgment in this matter: *Tregidga v Pasma Holdings Pty Limited* [2021] FCA 721 (the primary judgment). In that judgment, I dismissed the applicants’ (Mr Tregidga’s and Ms Jenkins’) claims and ordered them to pay the respondent’s (Pasma’s) costs of the proceeding to be taxed failing agreement. Additionally, however, my orders allowed any party to seek a different order as to costs by preparing and submitting a set of submissions and supporting affidavit material directed to that question. These reasons arise out of an application by Pasma pursuant to those orders. Specifically, it applied for an order that Mr Tregidga and Ms Jenkins pay its costs on an indemnity basis from 6 April 2020, being the date on which it made a *Calderbank* offer.

# THE OFFER OF COMPROMISE

1. Pasma’s rationale for seeking the order mentioned above was explained in a supporting affidavit of Ms Dana Shadbolt of TurksLegal, Pasma’s lawyers. In it, she deposed that, on 6 April 2020, she had sent a letter to Mr Tregidga’s and Ms Jenkins’ lawyers offering, on a without prejudice basis, to settle their claim by paying them “the all-inclusive sum of $450,000.00” (the offer). As explained in Ms Shadbolt’s letter, the offer was made to avoid the costs of defending the litigation despite the fact that Pasma considered Mr Tregidga’s and Ms Jenkins’ claims to be “unsustainable”. It is convenient to summarise those claims at this juncture.
2. On 11 October 2017, Mr Tregidga and Ms Jenkins filed an originating application accompanied by a statement of claim. In that statement of claim, as amended, they alleged that they were the owners of a vessel, the *Miss Angel*, that had been extensively damaged in a fire that occurred at the BSE Shipyards in Cairns, North Queensland on 8 June 2016. They alleged that Pasma, an electrical contractor that was performing work on the *Miss Angel* at the time, had caused the fire. They claimed damages against Pasma on the separate bases of breach of contract, breach of statutory guarantee and negligence.
3. On 14 June 2019, the issues of liability in the proceeding were ordered to be determined as separate questions before any issues of quantum. Those separate questions were set down for trial to commence on 30 March 2020. That trial was vacated in mid-March 2020 because of the onset of the Corona Virus Disease 2019 (COVID-19) pandemic. It eventually commenced in late July 2020 and was then adjourned to, and completed in, mid-November 2020.
4. As already noted, the offer was made on 6 April 2020. It was stated to be “open for acceptance by [Mr Tregidga and Ms Jenkins] for a period of 14 days” and was expressed in the following terms:

While we consider the applicant’s [sic] claim is unsustainable our client will incur substantial further cost in defending the claim. The Respondent therefore makes an offer to settle the matter on a commercial basis to avoid the further accrual of legal costs and interest.

The Respondent offers to settle the claim in the Federal Court of Australia in the Brisbane Registry NSD1803/2017 (the **Proceedings**) on the following terms:

1. The Respondent pays to the Applicant [sic] the sum of FOUR HUNDRED AND FIFTY THOUSAND DOLLARS ($450,000.00) (the **Settlement Sum**), as full and final settlement of the Proceedings, including interest and costs;

2. The Parties execute and exchange a Deed of Release on usual terms to be prepared by the Respondent which shall include a release and indemnity from all future claims by the applicant [sic] and any third party in relation to the claims forming the Proceedings;;

3. Payment of the Settlement Sum be made within fourteen (14) days of exchange of thy [sic] executed Deed of Release;

4. Within 7 days of receipt of the Settlement Sum by the Applicants the parties execute consent orders dismissing the Proceedings with no order as to costs.

The Offer is a genuine compromise made on a without prejudice basis, save as to costs, and made pursuant to the principles of *Calderbank v Calderbank* [1975] 3 All ER 333.

If your client fails to accept the offer, our client reserves the right to rely on this letter in support of an Application for payment of our client’s costs on an indemnity basis from the date of this correspondence.

Should you believe that there is any aspect of this letter which is unclear or ambiguous, please contact our office at your earliest convenience to seek clarification.

(Errors in original)

1. In her affidavit, Ms Shadbolt deposed that the offer was rejected. In its submissions, Pasma stated that a counter-offer was made, on 22 April 2020.

# THE CONTENTIONS

1. Pasma contended that the offer was made “well before the costly preparation of the lengthy trial”, at a point where Mr Tregidga and Ms Jenkins were aware of the relevant issues in preparing their case and were able to assess its prospects of success. It also contended that the offer was substantial when viewed against those prospects. In that light, it contended that Mr Tregidga’s and Ms Jenkins’ rejection of the offer had been unreasonable and that represented a “strong factor” weighing in favour of an award of indemnity costs. On that footing, it contended that the offer was unreasonably refused, based on the factors enumerated in *Hazeldene’s Chicken Farm Pty Ltd v Victorian Workcover Authority (No. 2)* (2005) 13 VR 435; [2005] VSCA 298 at [25] per Warren CJ, Maxwell P and Harper AJA (*Hazeldene’s*). It also relied on the observations of Gillard J in *M.T. Associates Pty Ltd v Aqua-Max Pty Ltd & Anor (No. 3)* [2000] VSC 163 at [74]-[76], that “litigants and their lawyers must consider all offers of settlement, bona fide and reasonably”.
2. While Mr Tregidga and Ms Jenkins accepted that the principles set out in *Hazeldene’s* were apposite, they contended that an order for indemnity costs was not a “normal consequence” of rejection or non-acceptance of a *Calderbank* offer. Further, they claimed that, “in all the circumstances”, their rejection of the offer was not unreasonable, citing *WSA Online Limited v Arms (No 2)* [2006] FCAFC 108 at [16] per Nicholson, Mansfield and Bennett JJ. As well, they contended that there was a number of factors which weighed against exercising the discretion to award indemnity costs.
3. With respect to the former, they contended that the offer was made after the first listing for trial in the proceeding was vacated, by which time significant costs had already been incurred in preparation for that trial. They also claimed that the offer required them to indemnify Pasma in respect of future claims by third parties, an outcome which would have placed Pasma in a more advantageous position than if it had successfully defended their claim. Further, they claimed that the offer consisted of a “rolled-up” sum that was inclusive of costs and liability, which made an accurate assessment of the risks associated with rejecting or accepting it difficult. As well, they claimed that their case was not hopeless and that they had only failed because they had not proved the steps that ought to have been taken to prevent the fire on the *Miss Angel*. Finally, they claimed that they had made a counter-offer in which they provided significant reasons as to why a departure from the usual costs orders was not justified.
4. With respect to the latter, they contended that Pasma had prolonged the trial by failing to confine it to the real issues in dispute. That was so, so they claimed, because Pasma had raised issues regarding the transfer of ownership of the vessel on the first day of the trial necessitating lengthy cross-examination, the adducing of further evidence and the expansion of their closing submissions. Further, they claimed that Pasma had pleaded a proportionate liability defence, the consideration of which extended the trial. As well, they claimed that Pasma had initially denied that it was vicariously liable, a plea which it ultimately abandoned. Finally, they claimed that Pasma had raised additional minor allegations on the first day of the trial which were ultimately not vigorously pursued.

# THE PRINCIPLES

1. Three basic principles relating to an award of costs, whilst trite, are worth stating at the outset. First, this Court has a broad discretion under s 43 of the *Federal Court of Australia Act 1976* (Cth) to award costs; secondly, costs usually follow the event; and thirdly, while the discretion to award costs is unconfined, it must be exercised judicially and there are well-established principles guiding its exercise (see *ALDI Foods Pty Ltd v Transport Workers’ Union of Australia* (2020) 282 FCR 174; [2020] FCAFC 231 at [86]-[88]). One of those guiding principles is that, where a successful party has prolonged the litigation by pressing issues on which it is ultimately unsuccessful, that conduct is ordinarily taken into account in determining costs (see *Bowen Investments Pty Ltd v Tabcorp Holdings Ltd (No 2)* [2008] FCAFC 107 at [3]-[5] per Finkelstein and Gordon JJ).
2. Furthermore, a party seeking an order for indemnity costs must identify a “special or unusual feature in the case” to justify such an order (see *Associated Steamships Pty Ltd v Seafarers Safety, Rehabilitation and Compensation Authority (No 2)* [2020] FCA 853 at [20] and the cases there cited). However, as the Full Court explained in *Trustee for The MTGI Trust v Johnston (No 2)* [2016] FCAFC 190 (*The MTGI Trust*) (at [21]-[22]), the rejection of a *Calderbank* offer may constitute such a “special or unusual feature”:

21 It is well-established that a failure to accept a *Calderbank* offer may justify the exercise of the Court’s discretion to award costs on an indemnity basis. Principles referable to *Calderbank* offers are well-known. As the Full Court explained in *Kooee Communications Pty Ltd v Primus Telecommunications Pty Ltd (No 2)* [2011] FCAFC 141:

19. … The purpose of the principles governing *Calderbank* offers and offers of compromise in accordance with court rules is to ensure that, when one party makes another an offer that contains a genuine element of compromise, the recipient of the offer is compelled to give real consideration to the costs and benefits of prosecuting its claim by reason of the prospect of suffering an indemnity costs order should its failure to accept the offer prove unreasonable.

22 In determining whether the Court should exercise its discretion and order indemnity costs in light of a rejection by the unsuccessful party of a Calderbank offer, a key question for consideration by the Court is whether the Calderbank offer was reasonable and proposed a genuine compromise of a case brought without a realistic prospect of success: *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd* [2011] FCAFC 53 at [125].

See also *Stewart v Atco Controls Pty Ltd (in liquidation) (No 2)* (2014) 252 CLR 331; [2014] HCA 31 at [4] per Crennan, Kiefel, Bell, Gageler and Keane JJ.

1. Where a *Calderbank* offer proffers a “rolled up” sum inclusive of costs, that may constitute a factor weighing against a finding of unreasonableness in respect of its refusal. In *GEC Marconi Systems Pty Ltd (t/as Easams Australia) v BHP Information Technology Pty Ltd* (2003) 201 ALR 55; [2003] FCA 688 at [37], Finn J observed of a *Calderbank* offer that “[t]he fact that the [*Calderbank*] offer gave no indication at all of the breakdown … between the claim, interest and costs blunts significantly the weight to be given to the offer” (see also *University of Western Australia v Gray (No 21)* (2008) 249 ALR 360; [2008] FCA 1056 at [34] and [41] per French J and *Management 3 Group Pty Ltd (ACN 100 863 036) (in liq) v Lenny’s Commercial Kitchens Pty Ltd (ACN 009 044 295) (No 3)* (2011) 278 ALR 754; [2011] FCA 725 at [39] per Dodds-Streeton J).
2. As to the factors that may be taken into account in determining whether the non-acceptance of an offer was unreasonable, in *Anchorage Capital Partners Pty Limited v ACPA Pty Ltd (No 2)* [2018] FCAFC 112, the Full Court provided the following non-exhaustive list (at [7]):

(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 in the event of the offeree rejecting it

Observations relating to these factors were also made in *Sagacious Legal Pty Ltd v Wesfarmers General Insurance Ltd* (2011) 16 ANZ Insurance Cases 61-885; [2011] FCAFC 53 at [145]; *Barnes v Forty Two International Pty Limited (No 2)* [2015] FCAFC 19 at [19]-[20]; *The MTGI Trust* at [23]; and *Verrocchi v Direct Chemist Outlet Pty Ltd (No 2)* [2016] FCAFC 162 at [8].

# CONSIDERATION

1. With these principles in mind I turn to consider, first, whether Pasma’s offer was a genuine offer. The key question in that assessment is whether the offer “contained a genuine element of compromise”. Answering that question requires a slightly more detailed examination of the procedural history to the proceeding. As is noted above (at [3]), the originating application in this proceeding was filed on 11 October 2017. After some amendments to the pleadings and the parties had conducted an unsuccessful mediation, the proceeding was eventually set down for a four day trial commencing on 30 March 2020. On 17 March 2020, the parties were notified by my chambers that it was necessary to vacate that trial following the onset of the COVID-19 pandemic. New trial dates were fixed commencing on 27 July 2020, but COVID-related issues caused its adjournment after three days. The trial was ultimately completed on 13 November 2020 after a further four days of hearing.
2. By the date of the offer, it follows that: the proceeding had been on foot for approximately two years and four months; it had been set down for trial once and vacated; and, as at that date, new trial dates remained to be fixed. It follows further that, because the vacation of the original trial occurred shortly before it was due to commence in late March 2020, the parties were likely to have been well advanced in their preparations for that trial and to have incurred a significant amount of costs.
3. Mr Tregidga and Ms Jenkins have complained that the offer was made after those costs had already been incurred. While they have not adduced any evidence of the approximate quantum of those costs, I can infer that they must have been significant. On the other hand, Pasma’s offer of $450,000 was for a quite significant sum. It is likely to have at least equalled, if not exceeded, the trial preparation costs that Mr Tregidga and Ms Jenkins had incurred by that date. It is also important to note that the offer was put on the basis that Mr Tregidga and Ms Jenkins had no reasonable prospects of success in the proceeding. Having regard to all these factors, despite its timing, I consider the offer represented a genuine attempt at compromise of the proceeding.
4. The next question is whether Mr Tregidga and Ms Jenkins unreasonably failed to accept the offer. For the following reasons, I consider they did. First, and most importantly, by the time the offer was made, Mr Tregidga and Ms Jenkins would, as already observed, have been well advanced in their preparations for the original vacated trial. In those circumstances, the flaws in their case, which ultimately led to its complete failure, must have been readily apparent to them. That being so, if they had accepted the offer, they would have received $450,000 against the costs they had already incurred, and which, as it turned out, they would not have been able to recover. They would also have avoided the costs of a seven day trial. Conversely, they would have avoided inflicting the costs of that trial on Pasma. In those circumstances, it is not difficult to conclude that their rejection of the offer was unreasonable.
5. As to the other factors they have advanced, I do not consider the indemnity sought by Pasma placed it in a more advantageous position than that it ultimately achieved, namely the complete dismissal of the proceeding. Further, given that it was put on the basis that their claims were completely without merit and that was the ultimate outcome, I do not consider the so-called “rolled up” form of the offer is at all relevant. Finally, I also do not consider their counter-offer is relevant. Whatever its terms, I do not consider it could have affected the outcome described above. For these reasons, I have little hesitation in concluding that Mr Tregidga and Ms Jenkins unreasonably rejected Pasma’s offer.
6. Finally, I do not consider any of the discretionary matters advanced by Mr Tregidga and Ms Jenkins weigh against the exercise of the discretion to make an indemnity costs order. In brief, I am not satisfied that Pasma improperly prolonged the trial. In my view, both parties were at fault for not properly pleading the ownership issue. Further, since Pasma was ultimately successful on the primary liability issues, it was not necessary to determine the proportionate liability issue. Nonetheless, I do not consider it raised that issue improperly because, in the prevailing circumstances, there were several parties who may have reasonably been considered to be the cause of the fire. I also do not consider Pasma’s abandoned plea with respect to vicarious liability had any significant effect on the length of the trial. Finally, the contention that Pasma did not “vigorously pursue” certain matters at the trial is too vague and general to be of any moment.

# CONCLUSION

1. For these reasons, I consider that Pasma is entitled to an indemnity costs order against Mr Tregidga and Ms Jenkins, commencing from the day of the offer, namely 6 April 2020.

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| I certify that the preceding twenty-one (21) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Reeves. |

Associate:

Dated: 18 November 2021