Blackbear (NT) Pty Ltd v Want & Anor [2013] NTSC 63

PARTIES:	Blackbear (NT) Pty Ltd ACN 116 222 005 v WANT, Gary John and WANT, Geraldine Elizabeth
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	18 of 2012 (21207410)
DELIVERED:	4 OCTOBER 2013
HEARING DATES:	26 SEPTEMBER 2013
JUDGMENT OF:	KELLY J

REPRESENTATION:

Counsel:

Plaintiff:	P Maher
First & Second Defendants:	K Sibley

Solicitors:

Plaintiff:	Paul Maher
First & Second Defendants:	De Silva Hebron

Judgment category classification:	C
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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Blackbear (NT) Pty Ltd v Want & Anor [2013] NTSC 63
No. 18 of 2012 (21207410)

BETWEEN:

BLACKBEAR (NT) PTY LTD
CAN 116 222 005
Plaintiff

AND:

GARY JOHN WANT
First Defendant

AND:

GERALDINE ELIZABETH WANT
Second Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 4 October 2013)

[1] This case concerned a dispute between the plaintiff, a building contractor, and the defendants for whom the plaintiff had contracted to build a house. There were substantial delays in the progress of the work and, on 8 July 2010, the defendants purported to terminate the contract. At the date of the purported termination, the work was almost complete and the plaintiff rendered a final series of invoices for a total of $81,245.55 being the balance of the contract price plus a claim for additional works less an

allowance for some work not completed/materials not installed. The defendants refused to pay and eventually the plaintiff instituted these proceedings.

[2] In the proceedings, the plaintiff disputed the validity of the termination and claimed the amount owing under the contract in accordance with the invoices plus interest at 20% per annum, the rate specified in the contract. With some minor exceptions, the defendants did not dispute the calculation of the contract price, but defended the plaintiff's claim on the basis that they had offsetting claims against the plaintiff for unfinished and defective work, for breach of contract on account of the plaintiff's delay in completing the work, and for building the house in the wrong position on the block. The defendants did not quantify these claims either before the proceedings were commenced or after and offered no evidence in support of their alleged claims at trial.

[3] Before the matter came on for trial, the defendants proposed that the parties jointly engage an expert to determine the extent of the unfinished work, identify any defects in the work, and give evidence of what it would cost to finish the work and remedy any identified defects. The plaintiff agreed to this highly sensible proposal and the parties engaged Mr John Brears to produce a report working initially from a list supplied by the defendants of aspects of the work they claimed to be either unfinished or defective. On 11 November 2012, Mr Brears produced a draft report which, with some minor amendments, became a final report a short time later. By agreement, that

report was tendered at the trial as the sole evidence in relation to the extent and cost of the unfinished and defective work. The report identified unfinished and defective work to a value of $8,165.00.

[4] Following the trial I found that the defendants had not validly terminated the contract as they had purported to do on 8 July 2010 and gave judgment for the plaintiff for the amount of $81,245.55 owing under the contract plus interest at 20% per annum. No deduction was made for the identified unfinished and defective work as the uncontradicted evidence of the principal of the plaintiff was that the unfinished work (which was of a minor nature) would have been attended to by him in the last week of the contract and any defects in work performed by sub-contractors (which again were of a minor nature) would have been attended to by the sub-contractors at no cost to the plaintiff.

[5] The plaintiff now claims that it should be entitled to indemnity costs for the whole of the proceeding, or alternatively from the date of receipt of the jointly commissioned report by John Brears (11 November 2012) or alternatively, from the date of a *Calderbank* offer served on the defendants by the plaintiff on 11 December 2012. The defendants resist such an order and contend that costs should be awarded on the standard basis.

[6] The Court's discretion to award costs has been described as "absolute and unfettered"; nevertheless, it must be exercised judicially.[1] Ordinarily costs follow the event and are awarded on the standard basis. The circumstances of the case must be such as to warrant the court departing from the usual course.[2]

[7] It may be appropriate to award indemnity costs where it appears that an action had been commenced, continued or defended for some ulterior motive or in wilful disregard of the known facts or clearly established law or in circumstances where the litigant, if properly advised, should have known that he or she had no chance of success.[3] It is not a necessary pre-condition of the discretion to award indemnity costs that it be shown that the party against whom such an order is sought had an ulterior motive or was guilty of some species of fraud; it is sufficient that the party persisted in what, on a proper consideration, is seen to be a hopeless case.[4]

[8] Indemnity costs may also be awarded where there has been an imprudent refusal of an offer to compromise.[5] The categories of cases in which indemnity costs may be ordered is not closed. The question is whether the

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1 *Fountain Select Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 per Woodward J at p 400

2 *Colgate Palmolive v Cussons* (1993) 46 FCR 225 per Sheppard J at p 233

3 *Fountain Select Meats* at p 401

4 *J-Corp Pty Ltd v Australian Builders Labourers Federation (No 2)* (1946) IR 301 per French J at p 303

5 *Colgate Palmolive* at p 233

facts and circumstances of the case warrant the making of an order for payment of costs other than on a party and party basis.

The claim for indemnity costs for the whole proceeding

[9] Counsel for the plaintiff pointed to the fact that at no stage did the defendants ever attempt to quantify their alleged loss. He contended that this deliberate failure to quantify their claim should be treated the same way as wilfully disregarding known facts. He submitted that it should be inferred from this, and the fact that they failed to respond in a reasonable fashion to the plaintiff's offers to compromise the proceedings, that the defendants must have had an ulterior motive from the outset in refusing to pay, causing the plaintiff to have to commence proceedings and proceed to trial and that, therefore, the defendants should pay the plaintiff's costs on an indemnity basis for the whole proceeding. Although it must be said that there appears to have been an element of refusal to face facts on the part of the defendants throughout, I am not prepared to draw the inference sought by the plaintiff, or to award indemnity costs for the whole of the proceeding.

The claim for indemnity costs based on rejection of the *Calderbank* offer

[10] On 11 December 2012 the plaintiff made a *Calderbank* offer to settle the matter for $126,573.50 or $106,573 plus costs. This was calculated on the basis of a claim of $72,355.55 plus interest at 20% as provided for by the contract. In the alternative to its claim for indemnity costs for the whole

proceeding, the plaintiff claims indemnity costs from the making of that offer on the basis that, in light of the Brears Report, it was unreasonable of the defendants not to accept the offer at that point.

[11] In contrast to the situation where there has been an offer of compromise under Rule 26, there is no presumption that a party who rejects a *Calderbank* offer should pay the offeror's costs on an indemnity basis if the offeree receives a less favourable result. However, the rejection of a *Calderbank* offer is a relevant consideration when considering whether or not to award indemnity costs.[6] The question to be asked is whether the rejection of the offer was unreasonable in the circumstances: it is not necessary that it be "manifestly" or "plainly" unreasonable.[7]

[12] Counsel for the defendants submitted that it was not unreasonable to reject that offer in the circumstances as they existed at the time, essentially because the offer simply took the plaintiff's case, deducted the amounts set out in the draft Brears Report[8] and added interest and costs. It did not offer any genuine compromise of the plaintiff's claim and did not make any compromise to allow for the breach of contract by the plaintiff and the delay in completion of the works. The simple answer to that is that there was no reason why the plaintiff should make any such allowance as the defendants had never given any quantification of their supposed claims. If the

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6 *Hazeldene's Chicken Farm v VWA (No 2)* (2005) 13 VR 435 at p 440 at [19]

7 Ibid p 441 at [23]; *Edgar v Public Trustee for the Northern Territory & Anor* [2011] NTSC 21 at [17]

8 In fact the figure offered was slightly less than a simple deduction of the amount in the Brears Report.

defendants had wanted the plaintiff to take into account a counter claim for damages for those matters, they were obliged to provide figures and some evidentiary basis for the figures. In the absence of such quantification and evidence the plaintiff could (and did) safely leave those claims out of account. That they were right to do so is confirmed by the fact that the defendants did not pursue those claims at trial.

[13] Nevertheless, I do not think it was unreasonable for the defendants to reject that offer at the time, notwithstanding that the defendants achieved a less favourable result at the trial. The question of whether the defendants had lawfully terminated the contract was a live one and it was not unreasonable to want to take that question to trial.

The claim for indemnity costs from the date of the Brears Report

[14] What was unreasonable, it seems to me, was what the defendants did (and did not do) once they came into possession of the information in the Brears Report which I emphasise was a joint report obtained on the suggestion of the defendants. Thereafter, it seems to me the defendants' conducted the proceedings in wilful disregard of known facts.

[15] This is not a case such as a personal injuries claim where it may be difficult to quantify an award of general damages and reasonable minds may well differ in their assessment of the likely outcome. From the time of the Brears Report, the defendants knew with certainty that the minimum amount they owed the plaintiff for work done under the contract was $73,080.00 (ie the

amount calculated in accordance with the contract less the total value of the defects and unfinished work identified in the Brears report). Since about 2 ½ years had elapsed since they purported to terminate the contract, they must also have known (or clearly ought to have known) that they had no evidence to support any of their claims to damages for delay or the alleged wrongful positioning of the house on the block.

[16] Moreover, on any view of the matter, the plaintiff would have been entitled to interest on the amount outstanding from the time when it ought to have been paid. That would have been a reasonable time from the date of termination, sufficient to allow the defendants to engage another contractor to perform the unfinished work and remedy the defects – a matter of weeks, given that there were only a few matters (those listed in the Brears Report) to attend to. The only uncertainty was the applicable rate of interest. If the rate under the contract applied, it would be 20%. On the other hand, if the defendants were right in their assertion that they had validly terminated the contract, the rate would be a commercial rate.

[17] The plaintiff made no claim for interest by way of damages (as in *Hungerfords v Walker*).[9] As *Hungerfords* interest is a head of damage, it must be specifically pleaded and evidence adduced as to the damage actually suffered by the plaintiff, whether by way of increased interest payments on the plaintiff's overdraft, lost opportunity to invest, or otherwise. In the

[9] (1989) 171 CLR 125

absence of any such pleading and evidence it has become the practice to apply payable on judgments, which is in the range of 10% (ie about half that under the contract) or around $7,300.00 per annum.[10]

[18] Therefore, on receipt of the Brears Report, the defendants and the plaintiff both knew that at that date the minimum amount payable by the defendants to the plaintiff (in round figures) was about $90,000.00 ($73,080 plus 2 ¼ years interest at 10%). Since no protective offer had been made at that stage, the defendants would also have been liable to pay the plaintiff ‘s costs. Moreover, interest was continuing to accrue and costs were continuing to be incurred.

[19] In other words, once the Brears Report had been received (which by agreement was to be the only evidence on the subject) the parties knew to the dollar the minimum amount that the plaintiff would be entitled to and could calculate with precision the amount of interest that would be payable on that sum under the contract (at 20% per annum) or at the rate prescribed for judgment interest. (This has varied from time to time but is in the region of 10%.)

[20] Had the defendants performed that calculation and made an offer of compromise based on the assumption that they had lawfully terminated the agreement, then it is likely that the matter would have settled. At the very

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10 *Sherwin v Commens* [2008] NTSC 45 at [67]-[68]; *Helvixa Pty Ltd & Ors v Lederer & Ors* [2007] NSWSC 49 at [16]

least there would have been a basis for a negotiated settlement.[11] However, the defendants did no such thing. Instead, on 18 February 2013, the defendants made an offer to settle the matter for $90,000 inclusive of interest and costs, and on conditions of payment by instalments.

[21] This it seems to me was plainly unreasonable. At the time this offer was made, both parties knew with certainty that the offer was worse than the plaintiff's worst possible result should the matter proceed to trial. (As set out in paragraph 18 above, the plaintiff's worst case in November 2012 was around $90,000 plus costs; by February 2013, it would have been around $92,000 plus costs.) There was therefore no incentive for the plaintiff to accept the offer, or even to make a counter offer since it was assured of doing better at trial and getting an order for the payment of its costs of the proceeding on at least a standard basis and possibly an indemnity basis.

[22] There were subsequent offers from both parties but the offers by the defendants all suffered from the same wilful blindness to the facts. At a settlement conference (date unknown) the plaintiff offered to accept $115,000 inclusive of interest and costs, at which time their estimate of costs was $20,000. Later, on 4 March 2013, the plaintiff offered to accept $125,000 inclusive of interest and costs, their estimate of costs by that time having risen to $30,000. On 24 April 2013, the defendants made an offer to settle for $105,000 inclusive of interest and costs. By this date the

[11] Had they made a payment on account they could have stopped interest accruing.

plaintiff's worst case at trial would have been (in round figures) $100,000 plus costs. In the letter in which the offer was made, the defendants' solicitors acknowledged that the plaintiff's costs at that stage were in the vicinity of $30,000.

[23] In short, the defendants wilfully ignored the known facts about the quantum of the plaintiff's claim, and their failure to make an offer of settlement (or make a payment to the plaintiff) which took account of these known facts once they were in receipt of the Brears Report was the primary cause of the matter proceeding to trial, and the costs incurred in doing so.

[24] Bearing in mind that the plaintiff took about a month to formulate an offer of settlement following receipt of the draft Brears Report, I think it would have been reasonable for the defendants to have utilised the information available to make an offer (or a payment) within the same time frame. I therefore order that the defendants pay the plaintiff's costs of and incidental to the proceeding on a standard basis to 11 December 2012 and thereafter on an indemnity basis.