Acer Forester Pty Ltd v Complete Crane Hire (NT) Pty Ltd & Ors [2013] NTSC 62

PARTIES:	Acer Forester Pty Ltd (ACN 081 108 868) v Complete Crane Hire (NT) Pty Ltd (ACN 086 562 674) and SUTHERLAND, Bart Kenneth and A & K (NT) Pty Ltd (ACN 109 540 150)
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	119 of 2011 (21132442)
DELIVERED:	4 OCTOBER 2013
HEARING DATES:	13 AUGUST 2013
JUDGMENT OF:	KELLY J

REPRESENTATION:

Counsel:

Plaintiff:	L McCrimmon
Defendants:	A Young

Solicitors:

Plaintiff:	David Francis & Associates
Defendants:	Minter Ellison

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

Acer Forester Pty Ltd v Complete Crane Hire (NT) Pty Ltd & Ors [2013] NTSC 62
No. 119 of 2011 (21132442)

BETWEEN:

ACER FORESTER PTY LTD (ACN 081 108 868)
Plaintiff

AND:

COMPLETE CRANE HIRE (NT) PTY LTD (ACN 086 562 674)
Third Defendant

AND:

BART KENNETH SUTHERLAND
Fourth Defendant

AND:

A & K (NT) PTY LTD (ACN 109 540 150)
Fifth Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 4 October 2013)

The proceeding

[1] In this proceeding, the plaintiff claimed damages in negligence against the third, fourth and fifth defendants ("the defendants") for financial loss said

to have been caused by disruption to the plaintiff's business as a result of a crane collapsing onto the roof of the plaintiff's business premises.

[2] The plaintiff claimed that its business was disrupted by repairs to the roof, that that disruption caused a delay of 3½ months to a major project (the DHA project) which resulted in delays in receipt of payment for that project, and the loss of opportunities to earn income from other work during the period of the delay. The plaintiff also claimed re-imbursement of the cost of providing psychological counselling to staff members following the accident and of a payment made to a consultant on account of time lost during repairs. Those were minor matters and were admitted by the defendants. The major claim was the claim for loss of opportunity to earn income from other work as a result of the alleged delays to the DHA project.

[3] The defendants admitted liability shortly before trial and the matter proceeded as an assessment of damages.

[4] On 30 July 2013, I gave judgment for the plaintiff on the claim for:

(a) re-imbursement of an amount spent by the plaintiff in providing psychological counselling to staff members following the accident;

(b) re-imbursement of the payment made to a consultant on account of time lost during repairs;

(c) damages for a delay of eight days in receiving payment for the DHA project; and

(d) interest at a commercial rate on the above amounts.

[5] In doing so I made a finding that except for a period of eight days, the plaintiff had not satisfied the onus of proving that the delay to the DHA project was caused by disruption to the business as a result of the crane collapsing on the roof.

Orders sought

[6] The plaintiff has now applied for an order for indemnity costs on the issue of liability, based on the defendants' late admission of liability.

[7] The defendants resist that application and have applied for the following orders:

(a) that the defendants pay the plaintiff's costs on a standard basis until 21 December 2011, but not including any disbursement in respect of the report of Vernon Sawyers (the expert engaged by the plaintiff to provide a report on quantum) dated 30 July 2012; and

(b) that the plaintiff pay the defendants' costs of and incidental to the proceeding on an indemnity basis from 21 December 2011.

History of offers to compromise

[8] The defendants' application for indemnity costs from 21 December 2011 is based on the rejection by the plaintiff of a *Calderbank* offer.

[9] On 30 November 2011 the defendants' solicitors wrote a *Calderbank* letter to the plaintiff's solicitors offering $15,047.29[1] plus $5,000.00 for costs. The letter stated that the offer was made to avoid the cost of attending the settlement conference and so was expressed to be open for acceptance until 6 December 2011. The letter pointed out that Peddle Thorp Architects (who had engaged the plaintiff on the DHA project) had expressed concern that the plaintiff had the capacity to complete the project on time which suggested the possibility that there were other reasons (than the crane collapse) that the plaintiff was unable to meet the project timelines. It went on to put the plaintiff's solicitors on notice that the defendants disputed the sum of $243,810.00, the amount then claimed for lost income, "as there is no documentation evidencing that this was caused by the crane collapse". That was (essentially) the reason why this part of the plaintiff's claim was largely unsuccessful at trial.

[10] That offer was not accepted. On 16 December 2011, the defendants' solicitors made an oral offer to pay $60,000.00 plus $5,000.00 for costs.

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[1] This was expressed to be subject to satisfactory evidence that the counselling fees claimed related to the collapse of the crane. Such evidence was evidently subsequently provided as this part of the claim was ultimately not disputed.

That offer was confirmed in writing by an email from the defendants' solicitors dated 21 December 2011 in the following terms:

> "I would be grateful if you could confirm in writing whether my client's offer of $60,000 plus $5,000 for costs is rejected."

[11] There followed another email from the defendants' solicitors to the plaintiff's solicitors on 15 February 2012 in the following terms:

> "This email is without prejudice save as to costs.
>
> In our telephone conversation on 7 February, prior to the directions hearing, we discussed the possibility of enlivening settlement discussions.
>
> I just wanted to make sure that you were aware of our client's offer to settle your client's claim for $60,000 plus $5,000 as a contribution to costs. I have a note that Alex made that offer to you by telephone on 16 December 2011 but you didn't seem to recall it when we spoke.
>
> Anyway, please let me have a response to that offer. If we're around the mark but costs is an issue, please come back to me and I'll prevail on my client to try to squeeze a little bit more.
>
> This offer is made in accordance with the principles in *Calderbank v Calderbank*.
>
> I look forward to hearing from you."

[12] Other offers and counter offers followed. On 9 August 2012, the plaintiff offered to settle for $377,500.00 inclusive of costs. The letter from the plaintiff's solicitors making this offer set out and relied on the figures in the Sawers Report.

[13] On 10 May 2013 the defendants' solicitors made another offer, this time in an amount of $200,000.00 inclusive of interest and costs. The offer was expressed to be made in accordance with the principles applied in *Calderbank v Calderbank* and foreshadowed an application that the plaintiff pay the defendants' costs "on a solicitor and own client basis (or in the alternative in a party and party basis) from the day following the expiry of this offer". In that letter the defendants' solicitors said:

> "The difficulties we have with Mr Sawers' approach are clearly set out in the Holmes' report.
>
> As you know, Mr Holmes considers that Mr Sawers has overstated the alleged loss simply by commencing calculations of the loss from 1 July 2006 rather than 17 July 2006. ...
>
> Over and above this is the fact that Mr Holmes does not agree that your client has proved anything other than a delay in receipt of income."

Again, this reflects the reasons why the plaintiff was largely unsuccessful in its claim for lost income.

[14] On 14 May 2013, the defendants' solicitors filed and served an offer to compromise under Order 26 of the *Supreme Court Rules* offering $60,000.00 inclusive of interest, plus costs to be agreed or taxed.

[15] The plaintiff's solicitors responded on 22 May 2013 with an offer to accept "$498,000.00 inclusive of interest", again expressing confidence in the conclusions in the Sawers Report.

[16] Finally, by letter dated 30 May 2013, the defendants' solicitors made another offer, again said to be made in accordance with the principles in *Calderbank v Calderbank* and again foreshadowing an application for solicitor and own client costs, offering $275,000.00 inclusive of interest and costs. This offer was expressed to be open for acceptance within 7 days. On the same date they sent an alternative *Calderbank* offer and an offer of compromise purportedly pursuant to Order 26 of the *Supreme Court Rules* both offering $135,000.00 inclusive of interest plus costs, and both said to be open for acceptance within 7 days. (Rule 26.02(3) provides that an offer of compromise under the Rules may not be expressed to be open for acceptance for a period of less than 14 days.)

Defendants' application for indemnity costs

[17] The plaintiff accepts that the costs consequences stipulated in the Rules should apply to its failure to accept the offer to compromise served on 14 May 2013. Those consequences, set out in Rule 26.08(3), are that (unless the Court orders otherwise) the plaintiff is entitled to an order for costs against the defendants taxed on a standard basis up to 14 May 2013, and the defendants are entitled to an order against the plaintiff for the defendants' costs after 14 May 2013, taxed on a standard basis. The question is whether a different order should be made: in particular, whether the plaintiff should pay the defendants' costs from an earlier date and/or on an indemnity basis as a consequence of the plaintiff's failure to accept any of the earlier *Calderbank* offers.

[18] Indemnity costs may be awarded where there has been an imprudent refusal of an offer to compromise.[2] In contrast to the situation where there has been an offer of compromise under Order 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, or whether or not to depart from the usual order as to costs.[3] 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.[4]

[19] The following matters have been found to be relevant to a consideration of whether the rejection of a *Calderbank* offer was unreasonable (they are not exhaustive):

(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;

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

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

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

(f) whether the offer foreshadowed an application for an indemnity costs in the event of the offeree's rejecting it.[5]

[20] The defendants have not relied on the *Calderbank* offer of 30 November 2011:[6] they seek costs against the plaintiff on an indemnity basis from 21 December 2011, the date on which they first confirmed in writing their offer of $60,000.00 plus $5,000.00 costs.

[21] In relation to the offer of $60,000.00 plus $5,000.00 costs in December 2011 (confirmed on 15 February 2012), the plaintiff contends that it was not unreasonable for the plaintiff to reject that offer. Referring to the criteria set out in *Hazeldene's Chicken Farm*, counsel for the plaintiff submitted that:

(a) the proceedings were still at an early stage and it was not possible to assess properly the plaintiff's prospects of success;

(b) the terms of the offer were unclear;

(c) the extent of the compromise was small; and

(d) the offer did not foreshadow an application for security costs if the offer were to be rejected.

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5 *Hazeldene's Chicken Farm* at p 444 para [25]

6 For this reason it is not necessary for me to address the plaintiff's contentions in relation to this offer made in the plaintiff's written outline of submissions.

[22] I do not agree with these contentions. Whether the failure to accept an offer was unreasonable must be assessed at the time the offer was made, and not with the benefit of hindsight. In this case, contrary to the contention of the plaintiff, the plaintiff ought to have been able to assess its chances of success at the stage the proceeding had reached at the time of the offer. This is not a case which depended on disputed versions of facts between the plaintiff and the defendant or depended upon documents obtained in discovery. The plaintiff was making a claim for damages for business interruption in which it claimed a very specific sum for lost income. All the information was in the possession of the plaintiff. The plaintiff must have known (or ought to have known) whether it had the evidence to establish this claim. Moreover, the defendants' solicitors had put the plaintiff on notice in their letter of 30 November 2011 that the defendants did not accept the loss of profits claim because of the lack of documentary evidence that the crane collapse was the cause of delays in the DHA project.

[23] Counsel for the plaintiff contended that the terms of the offer were unclear, particularly in relation to the time for which the offer was open for acceptance and on behalf of which defendant or defendants it was made. I do not agree.

(a) If no time for acceptance of an offer is stipulated, the law is clear: the offer is open for acceptance until it is withdrawn or rejected either expressly or by the making of a counter-offer.

(b) The terms of the offer are abundantly clear: the plaintiff was to receive $65,000.00, $60,000.00 of which was attributed to the plaintiff's claim and $5,000.00 to costs.

(c) I do not accept that the fact that the letter referred to "our client", instead of "our clients" made the offer unclear or confusing. To the plaintiff's knowledge the solicitors making the offer were acting for all three active defendants remaining in the proceeding (the third, fourth and fifth defendants). If there had been any real doubt in the plaintiff's mind about whether the offer was being made on behalf of all three, the plaintiff's solicitors would no doubt have sought clarification. It appears to have been assumed in all of the offers and counter-offers that the defendants' solicitors were communicating on behalf of all extant defendants.[7]

[24] Nor do I agree with the contention that the extent of the compromise was small. In their letter of 30 November 2011, the solicitors for the defendants pointed out that the plaintiff's total substantiated claim was $5,480.00 (ie the amount claimed for re-imbursement of an amount spent by the plaintiff in providing psychological counselling to staff members following the accident; and re-imbursement of the payment made to a consultant on account of time lost during repairs plus interest to the date of the offer) and that the defendants disputed the claim for lost income for the

[7] I do not know, but assume that this was because they were being instructed by an insurer, the "client" in question. The first and second defendants who were not proceeded against were insurers.

reasons already explained. The offer of $60,000.00 plus $5,000.00 costs was a significant compromise. Moreover, the assessment made by the defendants' solicitors in that letter came close to the result at trial.

[25] Further, in my view, the fact that the offer did not specifically foreshadow an application for indemnity costs if the offer was rejected, does not affect (or does not affect greatly) the reasonableness or otherwise of the plaintiff's decision to reject the offer, which should largely be judged by its adequacy in light of the plaintiff's prospects of success judged on the information available to the plaintiff at the time.

[26] In my opinion it was unreasonable for the plaintiff to reject the offer of $60,000.00 plus $5,000.00 costs and the consequence should be a costs order in favour of the defendants. Two questions remain: the date from which the plaintiff should pay the defendants' costs and whether they should be paid on the standard basis or on an indemnity basis.

[27] The offer was first made orally on 16 December 2011 and first confirmed in writing on 21 December 2011. However, there seems to have been some confusion about the offer and it was not set out formally, with proper notice that it was made on the principles in *Calderbank v Calderbank*, until the email of 15 February 2012. Accordingly, I consider it would be just to order the plaintiff to pay the defendants' costs from that date.

[28] Next I must consider whether those costs should be paid on a standard or an indemnity basis. In my view, it should be on a standard basis. When

offers of compromise are made in accordance with the Rules, the usual costs consequence of a failure by a plaintiff to accept an offer is that, if the plaintiff does not achieve a better result at trial, the plaintiff will be obliged to pay the defendant's costs from the date of the offer. It is when there has been a failure by a defendant to accept an offer by a plaintiff that the consequence of rejecting the offer (and not doing better than the offer at trial) is an order that the defendant pay the plaintiff's costs on an indemnity basis. In my view, unless there are other factors which would lead to the imposition of indemnity costs, the same consequences should normally apply to an unreasonable failure by a plaintiff to accept a *Calderbank* offer by a defendant.

The plaintiff's application for indemnity costs on the question of liability

[29] The plaintiff seeks an order that the defendants pay the plaintiff's costs on an indemnity basis from 21 June 2011 (the date that the defendants disputed liability) to 10 April 2013(the date they admitted liability) on an indemnity basis. The submission is that the failure to admit liability until three days before the trial caused the plaintiff to incur unnecessary costs.

[30] The order sought by the plaintiff is too wide, given that I have already determined that the plaintiff should pay the defendants' costs from 15 February 2012 on account of its unreasonable rejection of the defendants' *Calderbank* offer. If the plaintiff had accepted that offer, no costs would

have been incurred on liability or quantum after that date. The question is whether the defendants should pay the plaintiff's costs from 21 June 2011 to 15 February 2012 (or part of those costs) on an indemnity basis.

[31] The Court's discretion to award costs has been described as "absolute and unfettered"; nevertheless, it must be exercised judicially.[8] 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.[9]

[32] 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.[10] 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.[11]

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

9 *Colgate Palmolive v Cussons* (1993) 46 FCR 225 per Sheppard J at p233

10 *Fountain Select Meats* at p 401

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

[33] Counsel for the plaintiff submitted that it ought to have been obvious to the defendants that they were liable for the damage to the roof (and hence the interruption to the plaintiff's business) from the NT WorkSafe Report which was included in the defendants' documents. The NT WorkSafe officer who investigated the accident concluded that "the cause of the accident can be attributed to a combination of operator error, failure to adhere to information provided by the Owner/Operator Manual and plant failure".

[34] Counsel for the defendants contended that there were difficulties with that report and that the defendants took the view that there was insufficient evidence to support the plaintiff's claim until the plaintiff filed and served an expert report. I do not propose enquiring into the sufficiency of the earlier report or holding a mini-trial to establish whether it was reasonable of the defendants to refuse to admit liability until they did. Rather, I will look solely at the defence and assess whether, on the face of that document, the defendants caused costs to be unnecessarily incurred by persisting in a plainly hopeless defence.

[35] In the defence of the defendants filed on 21 June 2011, the defendants contended:

(a) that the loss suffered by the plaintiff was too remote, or was not a foreseeable consequence of the crane collapse;[12]

(b) that the cause of the collapse of the crane was the communication of the incorrect weight of the load by the tiler;[13] and

(c) the crane collapsed because of the unforeseeable mechanical failure of the static moment limiting device on the crane.[14]

[36] Counsel for the plaintiff contended that each of the three bases upon which the defendants denied liability was groundless, persisted in by the defendants in wilful disregard of the known facts and clearly established law.

[37] It was contended by the plaintiff that the allegation that the loss was too remote or was not a foreseeable consequence of the crane collapse ignores the well-established High Court authority regarding remoteness and foreseeability in *Wyong Shire Council v Shirt*[15] and *Chapman v Hearse*.[16]

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12 Defence para [6]

13 Defence para [17.7]

14 Defence para [17.10]

15 (1979-1980) 146 CLR 40

16 (1961) 106 CLR 112 Counsel for the plaintiff pointed to two English authorities (*Liesbosch (Dredger) v The Edison*, [1933] AC 449 at 468 and *Lagden v O'Connor*, [2004] 1 AC 106) which held that consequential economic loss arising from physical damage to property includes compensation for disturbance and loss in carrying out a contract entered into by the plaintiff. He also relied on the New South Wales Supreme Court decision in *Waratah Smash Repairs Pty Ltd v Sonenco (No 92) Pty Ltd* [2005] NSWSC 1283 at [23] in which a crane collapsed onto an adjoining property and the plaintiff recovered damages for economic loss including past loss of profits, interest on past loss of profits, loss of goodwill and interest on loss of goodwill, although in that case the defendant admitted liability and only contested the quantum of damages.

[38] I must say I find it difficult to see how it could rationally be asserted that if a crane fell on the roof of a commercial building there was not a real risk (in the sense of not being far fetched)[17] that the business of a company whose ceiling had thereby been caved in might suffer disruption.

[39] Counsel for the plaintiff contended that the allegation in the defence that the crane collapse could be attributed to the tiler giving the wrong weight of the load to the fourth defendant was also an argument doomed to fail in law.[18] He relied on *Florida Hotels Pty Ltd v Mayo*,[19] in which the High Court held that architects responsible for supervising construction work were bound to take reasonable steps to ensure that they inspected the work before concrete was poured and were not entitled to rely on a foreman whose work they were employed to supervise to notify them when that would occur. The tiler in question in this case was not a person who the fourth defendant was employed to supervise so *Florida Hotels* is not of direct relevance. Nevertheless, I find it hard to see how the fact (if it had been a fact) that a tiler (who was not a servant or agent of or otherwise connected with the plaintiff) had given the crane driver the wrong weight for the load would have been of much relevance to the question of whether the crane driver and/or crane owner were liable to the plaintiff as a result

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17 *Overseas Tankships (UK) Ltd v Miller Steamship (The Wagon Mound (No 2))* [1967] 1 AC 617; *Wyong Shire Council v Shirt* (supra) per Mason J at para [11]

18 He also asserted that it was wrong in fact, but I do not see that as relevant to the present argument. Moreover, it is hard to reconcile with the fact that the plaintiff made the very same allegations against the tiler in its amended statement of claim.

19 (1965) 113 CLR 588 at 593

of (for example) failing to operate the crane in accordance with the manufacturer's instructions, or operating the crane without any operational static moment limiting device in place, to name two of the allegations in the statement of claim. However, the tiler's role was treated as an issue in the proceeding by the plaintiff as well as the defendant, a major allegation being that the crane collapsed because it was overloaded and, conceivably, the allegations about the tiler in the defence may have been relevant to apportionment.

[40] As far as the third aspect of the defence is concerned, the plaintiff submitted that the allegation that the crane collapsed because of the unforeseeable mechanical failure of static moment limiting device was equally without merit. Counsel relied on the fact that the test to ensure that (inter alia) the static moment limiting device was required (by the operating manual and the relevant Australian Standard) to be carried out before the commencement of each work shift, and it was not carried out by the fourth defendant on the day of the crane collapse. This was set out in the accident report and admitted by the fourth defendant in an affidavit filed in the proceeding. Hence, the plaintiff submitted, the contention that the failure of the static moment limiting device was unforeseeable was groundless. That may well be so, but the conclusion depends upon evidence and I am not prepared to find that the initial decision to plead this defence should be considered as being in wilful disregard of the known facts and clearly established law.

[41] In summary, it seems to me that the defences relied upon by the defendants were most unlikely to succeed, which is why liability was ultimately admitted. However, I am not prepared to find that it must have been obvious to the defendants from the outset that they were manifestly hopeless, or that they were pleaded for an ulterior motive or in wilful disregard of the known facts and clearly established law.

[42] I therefore decline to make an order that the defendants pay the plaintiff's costs on an indemnity basis to 15 February 2012. I should add that, had I decided that the defendants should pay indemnity costs for this period, I would have limited the order to that part of the plaintiff's costs attributable to the question of liability. Given the limited period of time in question (21 June 2011 to 15 February 2012) and the fact that the expert report on liability was not obtained until well after that period, close to the trial date, it would appear that the difference between indemnity costs and costs on the standard basis on the issue of liability in that period would amount to very little (if anything).

[43] I have been asked to specifically order that the costs which the defendants pay to the plaintiff not include any disbursement in respect of the report of Vernon Sawyers dated 30 July 2012. Mr Sawers was the expert engaged by the plaintiff to provide a report on quantum and counsel for the defendants was highly critical of the utility of that report. The approach adopted by Mr Sawers to the assessment of damages was rejected at the trial and it is clear from the correspondence that that report was one of the primary causes of

the plaintiff adopting an inflated view of the value of its claim. Moreover, in the letter from the plaintiff's solicitors of 9 August 2012, they advised that the report had cost $63,772.37 (a curiously precise sum). Solicitors for the defendants responded by categorising the cost of the report as "astronomical", said that their expert, Mr Holmes, had reviewed the same documentation and produced a report for approximately $20,000.00, and put the plaintiff on notice that that they would require the plaintiff to tax its costs if an agreement could not be reached.

[44] It appears from the letter of 9 August 2012 that the Sawers Report was served on 31 July 2012, so it may be that none of the costs of preparing that report were incurred before 15 February 2012. However, if some costs were incurred before that date in obtaining an expert report on quantum, I see no reason why those costs should not be paid by the defendants. Therefore, I decline to make the order sought. Of course, if costs are not agreed, it will be incumbent on the plaintiff to establish to the satisfaction of the taxing master the reasonableness of whatever costs were so incurred.

[45] I make the following orders as to costs:

(a) The defendants are to pay the plaintiff's costs of and incidental to the proceeding to 15 February 2012, such costs to be agreed or taxed on the standard basis.

(b) The plaintiff is to pay the defendants' costs of and incidental to the proceeding after 15 February 2012, such costs to be agreed or taxed on the standard basis.

Interest

[46] In giving judgment in this matter I ordered that interest be paid at a commercial rate on the amounts for which judgment was given. The parties have been unable to agree on the appropriate rate/s at which interest on the modest amounts for which judgment was given for the plaintiff should be calculated and I received written submissions from the parties.

[47] The defendants contend, without citing any authority or adducing any evidence (other than a printout of the actual rates), that the rate to be adopted should be the Reserve Bank cash rate from time to time.

[48] The plaintiff contends, likewise without citing any authority or adducing any evidence in support of the proposition, that an appropriate commercial rate would be the Reserve Bank cash rate plus 4%.

[49] The plaintiff submits that it is not desirable for the plaintiff to call evidence to calculate commercial interest and cites *Lawrence v Mathison*[20] in support. That case is not authority for any such general proposition. In *Lawrence v Mathison*, Muirhead J was simply making the point that plaintiffs (in that case in a claim under the *Motor Accidents (Compensation) Act*) should not be obliged to keep calling evidence in

[20] (1981) 11 NTR 1 at p 14

every case about what constitutes a commercial rate.[21] This is what he said:

> "I have considered the evidence of the witness Mr Bucker and the helpful and careful calculations he prepared to assist me in the exercise. I have decided, in the circumstances, that the interest , if it is to be assessed with a firm eye on the marketplace and commercial trends over that period should be 12 per cent. It is not desirable that plaintiffs should be continually expected to call evidence to calculate interest. I understand this may be the first determination of this court. Speaking for myself only and subject to higher authority, I will continue to apply interest at the rate of 12 per cent to judgments for damages where the causes of action have arisen since 1979. I will not expect further evidence to be called to justify such a rate. Of course if it is intended to argue that the rate is inadequate and that higher rates should be applied, that may well be a matter of further evidence."

[50] Thereafter, for some years, interest in such cases was routinely awarded at 12%, but 1981 was a considerable time ago, and interest rates have not remained static in the mean time.

[51] It is certainly open to the plaintiff to call evidence about interest rates,[22] but in more recent cases[23] it has been held that, in the absence of such

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[21] The same reasoning was applied in the other case cited by the plaintiff (*Serisher Investments Pty Ltd v English* [1989] 1 Qd R 678) to justify a standard rate of 14% on damages for negligence in 1989 in Queensland.

[22] *Territory Sheet Metal v ANZ* (2010) 26 NTR 1 at p 39 at [195]-198] In relation to the award of damages for the delay in receipt of the payments for the DHA project, one would certainly have expected evidence to have been called about, for example, the plaintiff's overdraft rate (assuming the plaintiff operated on an overdraft). In the absence of such evidence, the defendants, in their submissions, have calculated the amount of the judgment under that head by reference to the interest rate they say is applicable. I do not understand the plaintiff to be quibbling with that approach, merely the appropriate rate to be applied.

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

evidence it is appropriate to apply the rates from time to time applicable to post judgment interest.[24]

[52] Accordingly, in the absence of evidence, I adopt the usual practice and order that the rate at which interest is to be paid on the amounts awarded in the judgment be the rates applicable from time to time for post judgment interest under the Rules.

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[24] Under the *Supreme Court Rules* [Rule 59.02(3)] that rate is the rate of interest specified in the *Federal Court Rules*.