Squires v Power and Water Authority [1999] NTSC 5

PARTIES:	KIM ELLEN SQUIRES v POWER AND WATER AUTHORITY
TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	606 of 1986 (8618362)
DELIVERED:	3 February 1999
HEARING DATES:	3 December 1998
JUDGMENT OF:	BAILEY J

REPRESENTATION:

Counsel:

Plaintiff:	P. Barr
Defendant:	J. Neill

Solicitors:

Plaintiff:	James Noonan
Defendant:	Ward Keller

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

Squires v Power and Water Authority [1999] NTSC 5
No. 606 of 1986 (8618362)

BETWEEN:
KIM ELLEN SQUIRES
Plaintiff

AND:

POWER AND WATER AUTHORITY
Defendant

CORAM: BAILEY J

REASONS FOR ORDER FOR COSTS

(Delivered 3 February 1999)

[1] The trial of this action commenced on 20 October 1998, and was adjourned on the eleventh day of the trial (2 November 1998). The adjournment was made upon the plaintiff's application after I granted the defendant leave to file and serve an amended defence within seven days and, further, granted leave for the defendant to rely on nineteen categories of medical and other experts' reports which had not been served upon the plaintiff within the time required by the *Supreme Court Rules.*

[2] In granting the plaintiff's application for adjournment, I ordered the defendant pay the costs occasioned by the adjournment arising from the defendant's application to amend its defence (including the plaintiff's costs in obtaining further medical and other experts' reports; the costs thrown

away as a result of the loss of four hearing days; the costs of three days spent in legal argument occasioned by the defendant, and the costs of the duplication in preparation for trial as a result of the trial being adjourned). I further ordered that such costs be payable forthwith by the defendant.

[3] On the day of the trial's adjournment the plaintiff served notice of an offer, pursuant to Order 26 of the *Supreme Court Rules,* to settle the matter upon payment of $515,000. The offer was expressed to be open for acceptance at any time within 14 days after service upon the defendant. The offer of compromise was accepted by the defendant on the fourteenth day after service: 16 November 1998.

[4] By summons of 30 November 1998, the plaintiff sought an order that the defendant pay the plaintiff's costs up to and including the date of acceptance by the defendant of the plaintiff's offer of compromise.

[5] The law applicable to the plaintiff's application is not a matter of dispute between the parties.

[6] Order 26.03(7) of the *Supreme Court Rules* provides:

> "(7) On the acceptance of an offer of compromise in accordance with subrule (4), unless the Court otherwise orders, the defendant shall pay the costs of the plaintiff in respect of the claim up to and including the day the offer was served."

[7] In the light of that subrule, the defendant accepts that it is liable to pay the plaintiff's costs up to and including 2 November 1998, (in addition to any sums arising from the specific orders for costs that I made on that date).

[8] Both Mr Neill for the defendant and Mr Barr for the plaintiff also accept that Order 26.03(7) makes no provision for costs after service of an offer of compromise. Both Mr Neill and Mr Barr accept that the issue of costs after service of an offer of compromise is left to the ordinary discretion of the court as to costs. In *Bray v Deutscher Klub (Darwin) Incorporated*, unreported judgment of the Supreme Court, 31 August 1993, Angel J agreed with the following remarks of McGarvie J in *Malliaros v Moralis* [1991] 2 VR 501 at 505-506:

> "It is difficult to see what considerations of justice tell in favour of leaving the defendants free of liability for the costs of the period being considered. The defendants in such a situation are ordinarily liable for costs up to the day of service of the offer: r.26.03(7). According to normal practice they would also ordinarily be liable for costs incurred after acceptance of the offer such as costs incurred in arguing questions of the costs of the trial. There is no apparent reason why the time between those periods should be dealt with in a different way. The absence of apparent reason for differentiating on costs between these three periods would be the same even if a defendant could show a good justification for taking all the time it had taken in deciding to accept the offer.
>
> It would operate against the policy of the rules, and make plaintiffs reluctant to make an offer of compromise during a trial, if, in the usual case, they faced the prospect of incurring trial costs for up to 14 days before acceptance of the offer, and having ultimately to bear all those costs themselves."

[9] Neither Mr Neill nor Mr Barr take issue with those remarks. I respectfully agree that those remarks are an appropriate starting point to consider exercise of the court's discretion in ordering the defendant to pay costs after service of an offer of compromise.

[10] For the defendant, Mr Neill submitted that, in the present case, the court's discretion to award costs should not be exercised in the plaintiff's favour. He emphasised that, in contrast to the cases of *Bray* and *Malliaros*, the present trial had been adjourned at the time the offer was served by the plaintiff. Accordingly, it was not a situation where the plaintiff was, in practical terms, forced to continue with the trial until the defendant accepted her offer of compromise. In Mr Neill's submission, it was not imperative or even appropriate for the plaintiff to carry out significant work in preparation for the resumption of the trial (for which no date had been fixed). In the defendant's submission, the plaintiff should have postponed undertaking any further preparation until the expiry of the 14 day period during which the offer was open to be accepted.

[11] For the plaintiff, Mr Barr submitted that it was essential that the plaintiff's solicitors prepare for a resumption of the trial. A directions hearing had been fixed for 2 December 1998, and there had been discussion (through my Associate) about the possibility of the trial resuming in January 1999. In the plaintiff's submission, having regard to the reasons for the adjournment of the trial, it was necessary that the plaintiff's solicitors proceed expeditiously with a good deal of work to meet the defendant's amended defence. Mr Barr also emphasised that the plaintiff had received no advice from the defendant that the plaintiff's offer would, or even might, be accepted. Accordingly, in Mr Barr's submission, the plaintiff should not be

made to suffer financially in proceeding upon the basis that it was necessary to continue detailed preparations for the resumption of the trial.

[12] The essential issue in the present application is whether it was reasonable for the plaintiff to continue its preparations for the resumption of the trial after making an offer of compromise. I accept that in the present case that it is an important distinction from the situation in *Bray* and *Malliaros* in that the trial here had been adjourned. It may well be that, in the usual course of events, it would be appropriate in such circumstances for a party who has made an offer of compromise to cease further preparations, pending the outcome of the offer. However, each case must be considered in the light of its particular circumstances.

[13] I have referred above to the orders for costs which I made against the defendant in granting the plaintiff's application to adjourn the trial. In my reasons for making such orders (and for granting leave to file an amended defence and rely on late served medical and experts' reports), I criticised the adequacy of the preparation of the defence case. I also emphasised that the plaintiff had come to court in relation to events, dating back more than 14 years, expecting to meet a case of strict proof of its own claim, and to provide a defence to a claim of contributory negligence based on work-related matters. The defence, which the defendant sought to pursue by amendment, maintained the requirement for strict proof, but added a positive case that the plaintiff's injuries (and consequent loss and damage), arose from a personality disorder. The claim of contributory negligence was

broadened to encompass not just work-related matters, but also ingestion of alcohol and marihuana. The effect of the defendant's very late change in direction was to increase very substantially what would be required of the plaintiff's solicitors. Having regard to the scheduled directions hearing of 2 December 1998, and the possibility of the trial resuming in January 1999, I consider that it would be unrealistic to have expected the plaintiff's solicitors to cease preparations and simply await the outcome of the offer of compromise. During the eleven days of the trial, the defendant had given no indication that it was open to settlement; I also accept that it gave no such indication during the 14 days between the service of the offer and its acceptance.

[14] In all the circumstances, I consider that it was reasonable for the plaintiff to proceed expeditiously with preparations for resumption of the trial. I do not consider that there is anything in the circumstances sufficient to disentitle the successful plaintiff from obtaining costs. Accordingly, I order that the defendant pay the plaintiff's costs up to and including the date of acceptance by the defendant of the plaintiff's offer of compromise. I further order that the defendant pay the plaintiff's costs of this application.

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