Cook v Modern Mustering Pty Ltd & Ors and Savage & Ors v Modern Mustering Pty Ltd & Ors [2016] NTSC 17

PARTIES:	COOK, Robert Thomas
	v
	MODERN MUSTERING PTY LTD (ACN 112 371 543)
	and
	HAYES HOLDINGS (NT) PTY LTD (ACN 105 519 695) in its capacity as the Trustee of the Seven H Trust and in its own capacity
	and
	LESLIE, Zebb Raymond
AND BETWEEN:	ROBERT JOHN SAVAGE, LILLIAN ROSE SAVAGE, WILLIAM JOHN COOK, AND LETITIA VALERIE COOK TRADING AS SUPLEJACK PASTORAL (NT) (A FIRM)
	v
	MODERN MUSTERING PTY LTD (ACN 112 371 543)
	and
	HAYES HOLDINGS (NT) PTY LTD (ACN 105 519 695) in its capacity as trustee of the Seven H Trust in its own capacity
	and
	LESLIE, Zebb Raymond

TITLE OF COURT:	SUPREME COURT OF THE NORTHERN TERRITORY
JURISDICTION:	SUPREME COURT OF THE NORTHERN TERRITORY EXERCISING TERRITORY JURISDICTION
FILE NO:	12 of 2011 (21132488) and 119 of 2011 (21132442)
DELIVERED:	1 April 2016
JUDGMENT OF:	KELLY J

REPRESENTATION:

Counsel:

Plaintiff:	M Livesey QC with S Brownhill SC
First & Second Defendants:	R Newlinds SC with M Crawley
Third Defendant:	A Wyvill QC with T Brown

Solicitors:

Plaintiff:	Hunt & Hunt as town agents for Curwoods Lawyers
First & Second Defendants:	Paul Maher agent for Norton White
Third Defendant:	Ward Keller

Judgment category classification:	B
Judgment ID Number:	KEL16005
Number of pages:	6

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

Cook v Modern Mustering Pty Ltd & Ors and Savage & Ors v Modern Mustering Pty Ltd & Ors [2016] NTSC 17
No. 12 of 2011 (21132488) and 119 of 2011 (21132442)

BETWEEN:

ROBERT THOMAS COOK
Plaintiff

AND:

MODERN MUSTERING PTY LTD (ACN 112 371 543)
First Defendant

AND:

HAYES HOLDINGS (NT) PTY LTD (ACN 105 519 695) in its capacity as the Trustee of the Seven H Trust and in its own capacity
Second Defendant

AND:

ZEBB RAYMOND LESLIE
Third Defendant

AND BETWEEN:

ROBERT JOHN SAVAGE, LILLIAN ROSE SAVAGE, WILLIAM JOHN COOK, AND LETITIA VALERIE COOK TRADING AS SUPLEJACK PASTORAL (NT) (A FIRM)
Plaintiff

AND:

MODERN MUSTERING PTY LTD (ACN 112 371 543)
First Defendant

AND:

HAYES HOLDINGS (NT) PTY LTD (ACN 105 519 695) in its capacity as trustee of the Seven H Trust in its own capacity
Second Defendant

AND:

ZEBB RAYMOND LESLIE
Third Defendant

CORAM: KELLY J

REASONS FOR JUDGMENT

(Delivered 1 April 2016)

Proceedings

[1] Robert Thomas Cook suffered catastrophic injuries in a helicopter accident while conducting helicopter mustering operations on Suplejack Station. He commenced proceedings against his employer, Suplejack Pastoral (NT) ("Suplejack") seeking statutory benefits pursuant to the *Workers Rehabilitation and Compensation Act* (NT) ("the Work Health proceeding"). He later commenced a common law action[1] against the owner of the helicopter, Hayes Holdings (NT) Pty Ltd ("Hayes"), the company under whose Air Operator's Certificate (AOC) the helicopter was operating,

[1] No 12 of 2011

Modern Mustering Pty Ltd ("Modern Mustering") and the pilot Zebb Raymond Leslie ("the common law proceeding").

[2] Suplejack settled the Work Health proceeding for a lump sum payment to Mr Cook of $10.5 million (inclusive of Suplejack's liability for future payments) and commenced proceedings[2] to recover the payments made under that settlement from Hayes, Modern Mustering and Mr Leslie ("the recovery proceeding").

[3] On 11 March 2015, the Court ordered that the common law proceeding and the recovery proceeding be heard together, that the evidence in each proceeding be evidence in the other, and that liability be determined before the quantum of Mr Cook's damages (if any). There were also claims for contribution but determination of those was postponed until after liability had been determined in the principal proceeding.

Issues

[4] The issues at the trial were whether Mr Leslie had breached the duty of care he owed to Mr Cook and, if so, whether that breach of duty caused the injuries to Mr Cook.

[5] On 10 December 2015 I gave judgment for the first, second and third defendants in both proceedings. The relevant findings were:

(1) The third defendant was engaged in aerial stock mustering operations at the time of the accident.

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[2] No 119 of 2011

(2) It was therefore not unlawful for the third defendant to be flying at less than 500 feet above ground level at the time the helicopter lost power.

(3) The plaintiffs had not proved on the balance of probabilities that the third defendant was in breach of his duty of care to the plaintiff.

(4) Even if the third defendant had been in breach of his duty of care in flying under 500 feet, the plaintiffs had not shown that his doing so was a cause of Mr Cook's injuries.

[6] The defendants now seek orders that the plaintiffs pay their costs of and incidental to the proceeding:

(a) on the standard basis to 30 June 2014; and

(b) thereafter on an indemnity basis.

[7] The defendants claim indemnity costs on two interconnected bases. They say that the plaintiff's failure to accept two *Calderbank* offers was unreasonable, and that the failure to accept those offers and to continue to press their claims was in wilful disregard of the facts when a properly advised litigant should have known they had no chance of success.

[8] An order for indemnity costs is appropriate when a plaintiff wilfully disregards known facts or clearly established law or persists in what should, on proper consideration be seen to be a hopeless case, makes allegations that ought never to have been made, or unduly prolongs the case by groundless

contentions.[3] In my view the plaintiffs' conduct of their case does not fall into this category.

[9] The allegation made by the defendants is that the plaintiffs "acted in wilful disregard of the facts" in continuing to press their claims. I do not think that can be said to be the case. Judgment was given for the defendants based to a large degree on the absence of evidence on matters on which the plaintiffs bore the onus – not on the basis of clearly established facts of which the plaintiffs should have been aware. (Issues of statutory interpretation also arose which could not be said to be plainly unarguable.)

[10] That disposes of the claim for indemnity costs by the third defendant, as the third defendant did not make any *Calderbank* offers.

[11] The first and second defendants made two *Calderbank* offers on 5 May 2014 and 17 June 2014. It is the second offer that is relied upon. That offer was open for acceptance until 30 June 2014. In it, the first and second defendants offered to pay the plaintiffs' insurer (QBE Insurance (Australia) Limited) $350,000.00. The offer was conditional upon the entry of judgment for the first and second defendants in both proceedings, there being no order as to costs, and existing costs orders in favour of either party being vacated.[4]

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[3] *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 at 401; *Colgate Palmolive v Cussons Pty Ltd* (1993) 46 FCR 225 at 233

[4] There was an existing costs order in favour of the plaintiffs as a result of a successful appeal against an order of the Master for discovery of documents by the plaintiffs.

[12] The question is whether the plaintiffs' failure to accept those offers at that stage was unreasonable. In my view it was not. The plaintiffs' claim was at least $10.5 million. At the time the offer was made, the plaintiffs did not have the expert report eventually relied upon by the defendants or the joint report of the two experts upon which some of the key conclusions in the judgment were based[5] and the offer was only open for acceptance for 13 days.

[13] There will be an order that the plaintiffs pay the defendants' costs of and incidental to the proceeding to be agreed or taxed on the standard basis.

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[5] An order for the preparation of a joint expert report was made on 22 September 2015. The joint report was filed on 8 October 2015.