JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA IN CHAMBERS
CITATION	**:**	TONKIN -v- HEILONGJIANG FENG AO AGRICULTURAL & ANIMAL HUSBANDRY GROUP CO PTY LTD [2015] WASC 378 (S)
CORAM	**:**	MASTER SANDERSON
HEARD	**:**	ON THE PAPERS
DELIVERED	**:**	2 SEPTEMBER 2016
FILE NO/S	**:**	CIV 2352 of 2013
BETWEEN	**:**	IAN JAMES TONKIN CAROLYN ANNE TONKIN Plaintiffs AND HEILONGJIANG FENG AO AGRICULTURAL & ANIMAL HUSBANDRY GROUP CO PTY LTD Defendant

Catchwords:

Costs - Plaintiffs seeking special costs order - Defendant seeking costs after rejection of ***Calderbank*** offer - Turns on own facts

Legislation:

Legal Profession Act 2008 (WA)
Rules of the Supreme Court 1971 (WA)
Supreme Court Act 1935 (WA)

Result:

Costs order made

Category: B

Representation:

Counsel:

Plaintiffs	:	No appearance
Defendant	:	No appearance

Solicitors:

Plaintiffs	:	Pragma Legal
Defendant	:	Allion Legal

Case(s) referred to in judgment(s):

Calderbank v Calderbank [1975] 3 All ER 333
Doric Products Pty Ltd v Lockwood Security Products Pty Ltd [2002] FCA 282
Electricity Generation and Retail Corporation trading as Synergy v Woodside Energy Ltd [2014] WASC 469 (S)
Fagan v Morien [2008] WASC 54 (S)
Ford Motor Company of Australia Ltd v Lo Presti [2009] WASCA 115
Heartlink Ltd v Jones As Liquidator of HL Diagnostics Pty Ltd (in liq) [2007] WASC 254 (S)
McKay v Commissioner of Main Roads [No 7] [2011] WASC 223 (S)
Miwa Pty Ltd v Siantan Properties Pte Ltd [No 2] [2011] NSWCA 334
Naidoo v Williamson (2008) 37 WAR 516
Nikolaou v Papasavas, Phillips & Co (No 2) (1989) 166 CLR 394
Oshlack v Richmond River Council (1998) 193 CLR 72
Red Hill Iron Ltd v API Management Pty Ltd [2012] WASC 323 (S)
The Hancock Family Memorial Foundation Ltd v Fieldhouse [No 5] [2013] WASC 121 (S)

1 **MASTER SANDERSON**: These reasons deal with the question of costs following a trial of the action between the plaintiffs and the defendant. The plaintiffs are seeking a special costs order under s 280(2) of the *Legal Profession Act 2008* (WA). The defendants are seeking an indemnity costs order based on the plaintiff's failure to accept a ***Calderbank*** offer made well before trial. The plaintiffs' application was made by chamber summons dated 5 February 2016. The defendant's application was made by chamber summons dated 9 December 2015. It is convenient to deal first with the plaintiffs' application.

2 The plaintiffs seek a special costs order on an apportioned basis for the following reasons. First, they say two out of the plaintiffs' three claims were successful at trial - that being the specific performance claim and the interest claim. They acknowledge they failed on the damages claim and accordingly propose an apportionment of 65% of the costs to take this into account.

3 Second, they say the limits to items 6(b), 7(b), 10(a), 17, 20(a) and 20(c) the *Legal Practitioners (Supreme Court) (Contentious Business) Reports and Determination 2012* and 2014 respectively are inadequate. Finally, they say that the action was of importance to the plaintiffs and was made difficult by reason of the defendant persisting with two defences in relation to the claims for specific performance and interest which in the reasons I described as 'without merit'.

4 In written submissions counsel for the plaintiffs analyses in some detail the legal principles in relation to costs generally and special costs orders in particular. I propose to summarise these principles which counsel set out with admirable clarity. It is pursuant to these principles that I have determined this application.

5 The court has the power to award costs by reason of s 37 of the *Supreme Court Act 1935* (WA) and O 66 r 1(1) of the *Rules of the Supreme Court 1971* (WA). Taken together these provisions confer on the court a discretion in relation to costs of and incidental to all proceedings. Order 66 r 1(1) embodies the general rule that costs will follow the event. The discretion conferred by the combination of the Act and the Rules is very wide but it must be 'exercised judicially': see ***Naidoo v Williamson*** (2008) 37 WAR 516 [38] - [42].

6 The discretion must not be exercised 'arbitrarily, capriciously or so as to frustrate the legislative intent': see ***Oshlack v Richmond River Council*** (1998) 193 CLR 72 [22]. As McHugh J said in ***Oshlack*** at [66]:

> … the most important factor which courts have viewed as guiding the exercise of the costs discretion is the result of the litigation.

7 A successful party may be ordered to pay costs of an issue or issues introduced by the successful party upon which the successful party fails: see O 66 r 1(3). This should not be done as a matter of course. Fairness and policy dictates a departure from the general rule should be limited. It is incumbent upon the unsuccessful party to satisfy the court that there are good reasons why it should not pay the other party's costs: see ***Nikolaou v Papasavas, Phillips & Co (No 2)*** (1989) 166 CLR 394, 407. Parties should not be dissuaded by the risks of costs from canvassing all issues which might be material to the matters before the court: see ***Doric Products Pty Ltd v Lockwood Security Products Pty Ltd*** [2002] FCA 282 [10].

8 Special costs orders are provided for in s 280(2) of the *Legal Profession Act*. That section is in the following terms:

> (2) Despite subsection (1), if a court or judicial officer is of the opinion that the amount of costs allowable in respect of a matter under a costs determination is inadequate because of the unusual difficulty, complexity or importance of the matter, the court or officer may do all or any of the following -
>
> (a) order the payment of costs above those fixed by the determination;
>
> (b) fix higher limits of costs than those fixed in the determination;
>
> (c) remove limits on costs fixed in the determination;
>
> (d) make any order or give any direction for the purposes of enabling costs above those in the determination to be ordered or assessed.

9 An application pursuant to s 280(2) of the Act is to be determined by applying a two limb test that was enunciated in ***Heartlink Ltd v Jones As Liquidator of HL Diagnostics Pty Ltd (in liq)*** [2007] WASC 254 (S). The first limb of the test requires that there be a fairly arguable case to put before the taxing officer to the effect that the bill of costs should tax out as more than the limit which would be imposed by the relevant costs

determination. The second limb of the test requires that the matter be of 'unusual difficulty' 'complexity' or 'importance'.

10 There must be a causal connection between the unusual difficulty, complexity or importance of the issue, dispute or controversy before the court and the inadequacy of the costs allowable under the relevant determination: see ***Electricity Generation and Retail Corporation trading as Synergy v Woodside Energy Ltd*** [2014] WASC 469 (S). The construction and application of s 280(2) of the Act is to be made 'as a matter of impression rather than as a matter of detailed evaluation' and 'taking into account the greater expertise of taxing officers in fixing the amount of costs properly and reasonably allowed'. These two statements of principle are found respectively in the ***Heartlink*** and the ***Woodside*** decisions.

11 In relation to the second limb it is only necessary to satisfy one of the factors. That is the action has to be either unusually difficult, complex or important. It does not have to be all three. The word 'unusual' only qualifies the word 'difficulty'. A matter may be unusually difficult if it is 'much more difficult than would ordinarily be expected in an application of '[its] kind': see ***Fagan v Morien*** [2008] WASC 54 (S) [19].

12 The word 'importance' connotes whether the work done was appropriate to the significance of the issues that arose in the litigation, including the significance of the issues to the parties. The test on whether a matter is important is a subjective test. Martin CJ in ***Heartlink*** put the position as follows at [18]:

> … if it had been the intention of the legislature to require the court to give consideration to an issue of community or public importance then I think it would have been reasonable to expect the legislature to use the words that would connote that meaning such as the well-known phrase 'public importance' which is found in a number of other legislative provisions.

13 The factors of unusual difficulty, complexity or importance qualify the issue, dispute or controversy before the court rather than the work done or services provided in respect of each applicable item of the costs determination. The question which must be addressed is whether the costs allowable in respect of the work done are inadequate because of the particular characteristic or characteristics of the 'matter' which has or have enlivened the jurisdiction of the court, that is to say unusual difficulty, complexity or importance. In relation to rates the complexity or importance of a matter may make it reasonable and proper to engage

solicitors and counsel at rates above those allowed in the scale: see ***Red Hill Iron Ltd v API Management Pty Ltd*** [2012] WASC 323 (S) [31].

14 Nothing that a court does in determining an application for a special costs order can in any way bind or impinge upon the decisions made by the taxing officer as to whether or not the work was appropriately and reasonably done or as to the proper amount to be allowed in respect of that work. The only effect of the order will be to free the taxing officer of the constraints which would otherwise be imposed by the scale. The function of the court is limited to setting the parameters within which the taxing officer will tax the relevant bill providing any specific directions which will assist the taxing officer to assess the quantum of costs to be allowed on taxation. These principles emerge from the ***Heartlink*** and ***Woodside*** decisions.

15 Finally there is the question of reserved costs. In ***The Hancock Family Memorial Foundation Ltd v Fieldhouse [No 5]*** [2013] WASC 121 (S) Le Miere J said at [9]:

> When costs are reserved it is necessarily implied that there is reserved the question of the incident of those costs, quite apart from any question whether they are to be paid by the party who is ultimately successful in the litigation. Where the reserved costs have not been identified, the court is unable to determine whether the costs should be borne by the plaintiff, the second defendants or neither.

16 Against those legal principles the plaintiffs make the following submissions. They point out they were successful in two of the three claims at trial. In an affidavit of Tina McAulay sworn 5 February 2015 Ms McAulay estimates that approximately 35% of the time spent in preparing for trial and at trial related to the damages claim on which the plaintiff was unsuccessful. On that basis the plaintiffs say they should be entitled to 65% of their costs of the action.

17 In relation to the special costs order the plaintiffs say in relation to the first limb of the test the plaintiffs rely on [12], [13] and [15] of Ms McAulay's affidavit. In [13] reference is made to a draft bill of costs which is annexed to the affidavit. It shows costs on a party and party basis of $352,126.80. Ms McAulay says that six items in the scale are inadequate. These are the provision of further and better particulars of the statement of claim, discovery, the plaintiffs' application for discovery of specific documents, the plaintiffs' application for inspection and discovery, getting up and counsel fee on brief. The largest of these items

is getting up. The scale maximum is $56,760 and the amount claimed in the bill is $138,355.80.

18 In relation to the second limb, it was submitted that this case satisfied all three requirements - that is it was unusually difficult, it was complex and that it was important. In my view the case was not one of unusual difficulty and nor was it particularly complex. The claim for specific performance was relatively straightforward and based upon the available documents. The interest claimed was made pursuant to the contract. It too was relatively straightforward. The real question is whether or not the plaintiffs satisfy the importance test.

19 This is addressed by the first plaintiff in an affidavit sworn 3 February 2016 and filed in support of the application. The litigation concerned the plaintiffs' farm from which they derived their livelihood and which was their home. The first plaintiff says, and I accept, that he subjectively believed the trial was of 'great importance'.

20 The plaintiffs also sought costs reserved at a directions hearing on 30 June 2014 and a further directions hearing on 5 May 2015. The plaintiffs say the order made at the directions hearing on 30 June 2014 related to the plaintiffs' discovery application. Ultimately the defendant gave further discovery and accordingly costs ought follow the event. As to the directions hearing on 5 May 2015 the plaintiffs say that hearing concerned programming the action towards trial and as the plaintiffs were ultimately successful costs should follow the event.

21 The defendant's answer to the plaintiffs' claim is in large measure bound up with their submissions in relation to the ***Calderbank*** offer. The defendant begins by contrasting the result at trial with what was actually sought by the plaintiffs. They point out, correctly in my view, that the plaintiffs sought three things. First, settlement on the contract, second, interest pursuant to the contract on account of an alleged delay by the defendant in proceeding to settlement and thirdly, damages for the 2012, 2013 and 2015 farming years as compensation for the losses allegedly sustained in their farming business in those years as a result of the delay in settlement.

22 The defendant says the plaintiffs fell short of their claim. They did obtain an order for specific performance of a contract. They were awarded interest pursuant to the contract for the period limited from 18 January 2012 until 2 September 2013 - an amount the defendant refers to as 'contractual interest'. They were permitted to remain on the property

after settlement until 1 March 2016 and were required to pay rent to the defendant for the possession period at the rate of $520 per day. Their damages claim for 2012 and 2013 was dismissed. They were required to make an application for assessment of their damages claim for the 2015 farming year by 31 March 2016 in the event they wished to pursue any claim. Due to the timing of the harvest no evidence was led at trial as to the alleged losses for that year.

23 The amount awarded to the plaintiffs by way of contractual interest was calculated to be $1,173,698.63. That sum was credited to the value of $660,000 in favour of the defendant on the basis the plaintiffs had received the sum to that value in or around November 2012. That was to reimburse the costs they had incurred in the 2012 cropping season and hence their loss had been mitigated to that extent. The plaintiffs were required to pay the defendant by way of rent for the post-settlement period an amount of $53,040.

24 On 21 February 2014 the defendant's solicitors sent an email to the plaintiffs' solicitors attaching a letter offering to compromise the action. The letter contained what all parties agree was a ***Calderbank*** offer: see ***Calderbank v Calderbank*** [1975] 3 All ER 333. The defendant summarised the substance of the ***Calderbank*** offer as follows:

(a) it was open for a period of seven days until 5.00 pm on 28 February 2014;

(b) settlement on the contract would proceed;

(c) at settlement the defendant would pay to the plaintiffs the sum of:

(i) $8,000,000 (being the purchase price of the property in accordance with a contract); plus

(ii) $500,000 (comprising contractual interest in the amount of $1,160,000 less the amount of $660,000 already paid to the plaintiffs);

(d) settlement would take place within five days of the acceptance of the offer (which would then have been in or around early March 2014);

(e) the plaintiffs would be entitled to a rent free post-settlement possession period of up to 30 days (allowing the handing over of possession to be delayed until early April 2014); and

(f) the parties would each bear their own costs of the action.

25 The court's approach to a ***Calderbank*** offer has been the subject of numerous decisions both in this State and throughout the Commonwealth. In ***Ford Motor Company of Australia Ltd v Lo Presti*** [2009] WASCA 115 the relevant principles were considered. The court there held the test which must be applied in determining whether to award indemnity costs against a party who rejected a ***Calderbank*** offer is whether the rejection was unreasonable in the circumstances. The onus is on the offeree to demonstrate unreasonableness. The relevance of a ***Calderbank*** offer has recently been the subject of consideration by the New South Wales Court of Appeal in ***Miwa Pty Ltd v Siantan Properties Pte Ltd [No 2]*** [2011] NSWCA 334. Basten JA (McColl and Campbell JJA agreeing) said any offer may be viewed on the one hand as a basis for the court declining to make an award of costs in favour of a party that rejected (or failed to accept) a reasonable offer when that party might otherwise have expected to receive an award. Alternatively, the offer may be viewed as having changed the proper characterisation of the event (being the outcome of trial) such as the party that fails to accept a reasonable offer and obtains no better result in the judgment is treated from the date of the offer as the unsuccessful party.

26 So the question here to be determined is whether or not the plaintiffs' rejection of the defendant's offer was unreasonable.

27 The defendant says in comparing outcomes - that is to say comparing the ***Calderbank*** offer with the outcome at trial - there were two differences. First, the relatively longer and rent free post-settlement possession period contemplated in the defendant's offer substantially outweighed the marginally greater net award of contractual interest achieved by the plaintiffs at trial when offset by the rent they were ordered to pay for the actual post-settlement possession period. Second, had the plaintiffs accepted the defendant's offer their claim for damages for the 2015 farming year would never have arisen. On that basis the defendant says the outcome at trial was no more favourable to the plaintiffs than the outcome proposed in the defendant's offer.

28 The defendant submits that from the time of the rejection of the defendant's offer the real cause and occasion of the litigation was the desire on the part of the plaintiffs to pursue their claims for contractual interest and farming damages in excess of the compensation explicitly contemplated by the contract as completely satisfying any claim in respect of the delay in settlement. In these circumstances the defendant says to

award the plaintiffs their costs of the action would be to ignore the significant body of authority that requires the court in such a case to have regard to the public and private costs of litigation and the proper incentive to encourage the early making of reasonable offers of compromise in an effort to minimise the burden on the courts, on private parties and on the public purse of unnecessary litigation.

29 In summary then the defendant makes three submissions. First, the defendant's offer was a reasonable one, made at an early stage of proceedings and which contemplated an outcome that would have in fact been more favourable to the plaintiffs than the outcome they achieved at trial. Second, that in view of the relative outcomes contemplated by the defendant's offer and as was achieved at trial the plaintiffs' failure to accept the defendant's offer unreasonably required the parties to proceed to a trial for a no more favourable outcome. Third, as a consequence, the plaintiffs' failure to accept the offer was an unreasonable one and ought disentitle the plaintiffs to an award of costs in their favour after the offer was made and entitling the defendant to an award of its costs from the date on which the offer was made.

30 Clearly the crucial question to be determined was whether or not the plaintiffs acted reasonably in rejecting the offer. In answering that question a range of factors need to be considered. Based on the Court of Appeal decision in ***Lo Presti*** and what was said by Beech J in ***McKay v Commissioner of Main Roads [No 7]*** [2011] WASC 223 (S) [120] the following factors are relevant:

(a) the stage of proceedings 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 made; and

(f) whether the offer foreshadowed an application for indemnity costs in the event of the offeree's rejection.

31 The question of reasonableness must be considered and determined objectively in the circumstances known to the parties at the time the relevant offer was made. Alternatively, those circumstances ought to

have been reasonably anticipated by the parties had they properly turned their minds to them.

32 Looking at the criteria mentioned above the defendant's offer was made within six months of the commencement of the proceedings. At that time the parties had only recently attended an initial strategic conference in the action. They had been to mediation and each had filed just one amended pleading. The parties were about to commence the process of inspecting relevant documents and had yet to come into the protracted discovery dispute. Neither had embarked upon the costly process of obtaining expert witnesses. It is the defendant's position their offer was made at an appropriate time and in circumstances where the plaintiffs had sufficient information to make a decision.

33 In their written submissions the plaintiffs do not maintain the timing of the offer was the reason it was not accepted. It can be said with reasonable certainty that when the offer was made the plaintiffs must have been aware they stood a good chance of obtaining an order for specific performance and a sum of money for contractual interest. The damages claim was more problematic. Without the benefit of expert evidence they could not have been sure what any damages claim might be. On the other hand they were actively farming the property that was sold and they were in the best place to understand the effect the delay in settlement had on their farming operations.

34 On balance I am satisfied the timing of the offer is marginally in the defendant's favour. It was certainly not too soon to allow the plaintiffs to carefully consider their position in the light of the respective pleaded cases. Nor was it so late in the day as to make acceptance pointless because of the already incurred costs. In a perfect world the offer might have been made later - that is to say after the pleadings had closed and perhaps after discovery. But nonetheless the timing of the offer is I think in the defendant's favour.

35 The offer remained open for seven days. In my view in a case such as this, that was probably too short a period. Perhaps 28 days would have been more appropriate. It would have given the plaintiffs time to consider in more detail the damages claim and perhaps to have obtained expert advice. The evidence filed on behalf of the plaintiffs does not develop this argument. But they do complain of the time given for consideration of the offer is too short and on balance I think that is correct. This consideration marginally favours the plaintiff.

36 As to the extent of the compromise offer offered the plaintiffs say the offer required them to hand over possession within 30 days of settlement. That they say was unreasonable because they operated a farm which included holding approximately 5,000 animals that were required to be moved or sold. They would also have had to arrange for the removal of the whole of the property on the farm - the contents of houses and sheds - and to wind up the farming business. Further, the plaintiffs would have needed to move from the district affecting their children's schooling.

37 In my view the time offered to vacate the property was very short and it is not difficult to understand the plaintiffs' reluctance to accept such an offer. The logistics of moving within the time proposed were clearly daunting. In my view this was a significant factor and provided grounds for rejecting the offer.

38 As at the date of the offer the plaintiffs' prospects of success were very good. Properly advised the defendant should have realised there was no hope of defending the claim for specific performance and no hope of avoiding the contractual damages. Really the issue between the parties came down to damages for breach of contract in relation to lost profits on the farming enterprise. The plaintiffs would have seen their case as rock solid. The strength of that position favoured rejection of the offer.

39 There can be no complaint about the clarity of the offer nor can there be any doubt that the defendant foreshadowed an application for indemnity costs if the offer was rejected.

40 It is a matter then of weighing all these factors in the balance. Having done so I am satisfied the plaintiffs were justified in rejecting the offer. The two decisive factors were the strength of the plaintiffs' case at the time the offer was made and the length of time provided by the offer for the plaintiffs to vacate the farm. These two factors with a little help from the short duration for which the offer was open weigh decisively in my view.

41 Accordingly, the failure to accept the offer does not remove the plaintiffs' right to costs.

42 Having reached that conclusion it seems to me that the costs claim by the plaintiffs is in all respects reasonable. The discount of 35% in relation to the damages question is about right. It could be slightly higher, it could be slightly lower; but in an imperfect world it is a reasonable approximation and it should be adopted.

43 There should also be a special costs order in the plaintiffs' favour. Both limbs of the test found in s 280(2) are satisfied. Of course in relation to the first limb, the taxing officer must be satisfied as to the amount claimed. But I think it is proper to give that jurisdiction to the taxing officer by removing the limits on the items referred to by the plaintiffs in their submissions. As to the second limb, I am satisfied as to the importance of this action. It was very important to the plaintiffs. I have already mentioned the plaintiffs' subjective views and they need not be repeated. It is also worthy of note this was a farm purchase by a foreign corporation who had paid a premium price for the property and who had failed to settle largely because they were unable to bring funds from overseas. This case was important in the sense of determining whether or not the contractual obligations would be enforced in those circumstances. Although the better view is that the word 'importance' does not denote 'public importance' the ramifications of the decision cannot be ignored.

44 In summary then I am satisfied the plaintiffs have made out their position in relation to costs. Subject to hearing further from the parties I would propose making orders in terms of the plaintiffs' chamber summons.