HIGH COURT OF AUSTRALIA

GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ

Matter No S43/2008

PAUL ANTHONY IMBREE — APPELLANT

AND

JESSIE McNEILLY & ANOR — RESPONDENTS

Matter No S392/2007

JESSIE McNEILLY & ANOR — APPLICANTS

AND

PAUL ANTHONY IMBREE — RESPONDENT

Imbree v McNeilly [No 2]
McNeilly v Imbree [No 2]
[2008] HCA 47
26 September 2008
S43/2008 & S392/2007

ORDER

Matter No S43/2008

1. *In place of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 2 July 2007 and 23 July 2007 order:*

   (a) appeal dismissed and cross-appeal allowed;

   (b) set aside the judgment entered on 22 August 2006 and in its place order that:

      (i) the plaintiff's damages, before reduction for contributory negligence, be assessed at $11,323,622.46;

(ii) the plaintiff's damages be reduced by 30 per cent on account of his contributory negligence;

(iii) the plaintiff have judgment for $7,926,535.72 with costs of the proceedings at first instance on the ordinary basis up to and including 22 March 2006, and thereafter on an indemnity basis;

(iv) the defendants pay to the plaintiff interest on the judgment calculated up to 12 September 2008 in the sum of $875,000 and thereafter until payment at the rate of $1,100 per day;

(v) the defendants have credit in the sum of $3,744,060.84;

(c) the appellants and cross-respondents (Jessie McNeilly and Qantas Airways Ltd) pay the costs of the respondent and cross-appellant (Paul Anthony Imbree) of the appeal and the cross-appeal to the Court of Appeal on an indemnity basis.

2. Further order that the costs of the appeal to this Court are to be assessed on an indemnity basis.

On appeal from the Supreme Court of New South Wales

Representation

A S Morrison SC with M R Hall and A J Stone for the appellant in S43/2008 and the respondent in S392/2007 (instructed by Turner Whelan)

K P Rewell SC with M A Cleary for the respondents in S43/2008 and the applicants in S392/2007 (instructed by TL Lawyers)

CATCHWORDS

Imbree v McNeilly [No 2]
McNeilly v Imbree [No 2]

Procedure – Costs – Offers of compromise – *Calderbank* offer – Effect.

1 GUMMOW, KIRBY, HAYNE, HEYDON, CRENNAN AND KIEFEL JJ. On 28 August 2008, the Court published reasons for decision in these matters[1]. The Court made orders allowing the appeal in Matter No S43 of 2008, with costs, and refusing the related application for special leave to appeal (Matter No S392 of 2007), again with costs. In the appeal this Court set aside the orders of the Court of Appeal of the Supreme Court of New South Wales made on 2 July 2007 and 23 July 2007, but the making of further consequential orders was deferred to permit the parties to attempt to agree upon their form, or to identify the points of difference between them.

2 The parties have agreed upon the amount for which Mr Imbree should have judgment, the amount of interest on judgment that should be allowed, and the amount for which the respondents, Mr NcNeilly and Qantas Airways Ltd, should have credit against the judgment and interest. The parties also agree that Mr Imbree should have his costs of the proceedings at first instance in the Supreme Court of New South Wales on the ordinary basis up to and including 22 March 2006 and thereafter on an indemnity basis. The respondents accept that Mr Imbree should also have his costs of the proceedings in the Court of Appeal and in this Court. Contrary to submissions made on Mr Imbree's behalf, however, the respondents say that the costs of the proceedings in the Court of Appeal and in this Court should be on an ordinary basis not an indemnity basis.

3 The competing positions of the parties depend upon what effect is to be given to three offers Mr Imbree made to compromise his claim.

The first offer

4 On 21 March 2006, Mr Imbree made an offer of compromise pursuant to r 20.26 of the Uniform Civil Procedure Rules 2005 (NSW). That offer, open for acceptance until 4.00 pm on 22 March 2006, was to consent to judgment in his favour "in the sum of $4.5 million clear of payments to date plus costs as agreed or assessed". At that time payments already made by the respondents are said to have "totalled a little over $2.6 million so the gross offer was effectively a little over $7.1 million plus costs". The offer was not accepted.

---

1 *Imbree v McNeilly; McNeilly v Imbree* [2008] HCA 40.

5 The trial judge gave judgment on 22 August 2006. The present respondents filed a notice of appeal to the Court of Appeal on 12 September 2006. The appellant subsequently cross-appealed.

The second offer

6 On 15 September 2006, after the present respondents had instituted their appeal to the Court of Appeal, Mr Imbree made a fresh offer of compromise pursuant to r 20.26. This offer was to consent to judgment in his favour "in the sum of $7.55 million inclusive of payments to date plus costs as agreed or assessed". The offer was open for acceptance for 28 days from the date of receipt. It was not accepted.

7 The Court of Appeal gave its judgment in July 2007.

The third offer

8 On 16 April 2008, after he had obtained special leave to appeal to this Court, Mr Imbree made a *Calderbank* offer[2]. He offered to compromise his claim on terms that he have judgment for what was then the agreed quantum of damages ($11,115,290) reduced by 35 per cent for contributory negligence, together with interest and costs of the trial and the proceedings in the High Court, but with each party bearing its own costs of the proceedings in the Court of Appeal. The offer was not accepted.

On what basis should costs be assessed?

9 The effect of the consequential orders upon which the parties are now agreed is that Mr Imbree will have judgment for a principal sum of $7,926,535.72.

10 Mr Imbree made separate offers to compromise his claim at each stage of the proceedings: trial, appeal to the Court of Appeal and the appeal to this Court. The questions that might otherwise arise about the effect to be given to an offer

---

2 *Calderbank v Calderbank* [1976] Fam 93.

made at or before trial, when deciding what order should be made for costs of an appeal[3], do not arise and need not be considered.

11 The amount of the judgment that now is to be entered is larger than the amount for which the litigation would have been compromised if any of Mr Imbree's three offers was accepted. (The first offer was to settle for about $7.1 million; the second was to settle for $7.55 million; the third was to settle for a little less than $7.225 million.) In these circumstances, he should have his costs of his appeal to this Court, and his costs in the Court of Appeal, and at trial after 22 March 2006, on an indemnity basis. The costs of the application for special leave should be determined on the ordinary basis. It is therefore not necessary now to make any further order in that application.

12 There should, however, now be further orders made in Matter No S43 of 2008, in addition to those that were pronounced on 28 August 2008. The further orders proposed are founded upon the parties' agreement that judgment should be entered for $7,926,535.72. In order to comply with s 11 of the *Law Reform (Miscellaneous Provisions) Act* 1965 (NSW) it is necessary to record in the orders "the total damages that would have been recoverable had there been no contributory negligence". Consistent with the parties' agreement, the total damages should be fixed at $11,323,622.46.

13 Further, although the orders entered in the Court of Appeal did not deal expressly with the cross-appeal to that Court, the orders now to be made should do so. That is best done by ordering that the appeal to that Court by the parties who are respondents in this Court is dismissed and ordering that Mr Imbree's cross-appeal to the Court of Appeal is allowed.

14 Further to the orders made on 28 August 2008, there should now be orders as follows:

1. In place of the orders of the Court of Appeal of the Supreme Court of New South Wales made on 2 July 2007 and 23 July 2007, there should be orders:

---

3 See, for example, *Ettingshausen v Australian Consolidated Press Ltd* (1995) 38 NSWLR 404; *Brymount Pty Ltd v Cummins (No 2)* [2005] NSWCA 69; *Baresic v Slingshot Holdings Pty Ltd (No 2)* [2005] NSWCA 160.

(a) appeal dismissed and cross-appeal allowed;

(b) set aside the judgment entered on 22 August 2006 and in its place order that:

(i) the plaintiff's damages, before reduction for contributory negligence, be assessed at $11,323,622.46;

(ii) the plaintiff's damages be reduced by 30 per cent on account of his contributory negligence;

(iii) the plaintiff have judgment for $7,926,535.72 with costs of the proceedings at first instance on the ordinary basis up to and including 22 March 2006, and thereafter on an indemnity basis;

(iv) the defendants pay to the plaintiff interest on the judgment calculated up to 12 September 2008 in the sum of $875,000 and thereafter until payment at the rate of $1,100 per day;

(v) the defendants have credit in the sum of $3,744,060.84;

(c) the appellants and cross-respondents (Jessie McNeilly and Qantas Airways Ltd) pay the costs of the respondent and cross-appellant (Paul Anthony Imbree) of the appeal and the cross-appeal to the Court of Appeal on an indemnity basis.

2. Further order that the costs of the appeal to this Court are to be assessed on an indemnity basis.