

SUPREME COURT OF QUEENSLAND

CITATION: *Body Corporate for Ocean Pacifique CTS 8379 v Body Corporate for Orchid 17 CTS 11906 (No 2)* [2026] QSC 120

PARTIES: **BODY CORPORATE FOR OCEAN PACIFIQUE CTS 8379**
(applicant)

v

BODY CORPORATE FOR ORCHID 17 CTS 11906
(respondent)

FILE NO/S: BS 5963/22

DIVISION: Trial division

PROCEEDING: Claim

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 11 June 2026

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGE: Cooper J

ORDER: **The applicant is to pay the respondent's costs of and incidental to the proceeding, including reserved costs, to be assessed:**

(a) on the standard basis up to and including 29 May 2024;

(b) on the indemnity basis from 30 May 2024.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – GENERAL PRINCIPLES AND EXERCISE OF DISCRETION – where the applicant's claims in nuisance and negligence against the respondent were dismissed – where the applicant submits that there should be no order as to costs up to 21 May 2025 or, alternatively, up to 1 November 2024 and thereafter that the respondent have its costs awarded on the standard basis – where the respondent seeks an order that the applicant pay its costs of and incidental to the proceeding, including all reserved costs, to be assessed on the indemnity basis – whether there should be an order that costs follow the event pursuant to r 681 of the *Uniform Civil Procedure Rules* 1999 (Qld) up to 21 May 2025, or alternatively, up to 1 November 2024

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – PARTICULAR CASES – HOPELESS CASES – where the respondent submits an order for costs on the indemnity basis is appropriate because inter alia the applicant’s case was untenable at every stage of the proceeding – whether the circumstances of the case warrant the exercise of the court’s discretion to order indemnity costs against the applicant

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – OFFERS OF COMPROMISE, PAYMENTS INTO COURT AND SETTLEMENTS – INFORMAL OFFERS AND CALDERBANK LETTERS – UNREASONABLE REFUSAL OF OFFER – where the respondent also submits that an order for costs on the indemnity basis is appropriate because the respondent made a *Calderbank* offer on 22 May 2024 which, acting prudently, the applicant ought to have accepted – whether the rejection of the offer was unreasonable in the circumstances of the case – whether the circumstances of the case warrant the exercise of the court’s discretion to order indemnity costs against the applicant

Uniform Civil Procedure Rules 1999 (Qld), r 681

Body Corporate for Ocean Pacifique CTS 8379 v Body Corporate for Orchid 17 CTS 11906 [2025] QSC 260, cited *Body Corporate for Ocean Pacifique CTS 8379 v Body Corporate for Orchid 17 CTS 11906* [2026] QSC 84, cited *Di Carlo v Dubois* [2002] QCA 225, applied *J & D Rigging Pty Ltd v Agripower Australia Ltd* [2014] QCA 23, applied *Hazeldene’s Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* [2005] 513 VR 435, applied *Oshlack v Richmond River Council* (1998) 193 CLR 72; [1998] HCA 11, applied

COUNSEL: G Radcliff for the applicant
A Crowe KC with M Bland for the respondent

SOLICITORS: MBA Lawyers for the applicant
QBM Lawyers for the respondent

[1] On 28 April 2026, I gave judgment dismissing the applicant’s claims in nuisance and negligence.¹ The claims arose from allegations that water and contaminated material

¹ *Body Corporate for Ocean Pacifique CTS 8379 v Body Corporate for Orchid 17 CTS 11906* [2026] QSC 84 (**Liability Judgment**).

had leaked from the respondent's neighbouring property into the basement of the applicant's building at 19 Orchid Ave, Surfers Paradise.

[2] In summary, the applicant's claims were dismissed because:

- (a) I accepted expert evidence that the basement retaining wall in 19 Orchid Ave was designed and constructed as a "wet wall" which was not intended to be waterproof;²
- (b) I accepted expert evidence that water entered the basement of 19 Orchid Ave, but only during major rainfall periods;³
- (c) based on the analysis of water collected from the basement of 19 Orchid Ave, I was not satisfied that contaminants emanating from the respondent's property had entered, or were continuing to enter, that basement through the retaining wall;⁴
- (d) I accepted evidence that washdown effluent from a restaurant at the respondent's property had been discharged to the respondent's stormwater drainage system, but was not satisfied this contributed to the leaking of water into the basement of 19 Orchid Ave;⁵
- (e) as to the causes of the water entering the basement of 19 Orchid Ave, I found that during periods of high rainfall the limited capacity of the stormwater drainage system on the respondent's property, combined with the additional run-off from the southern wall of the building on 19 Orchid Ave, results in water pooling in the rear paved area of the respondent's property which then seeps through cracks in the concrete slab into the ground below, adjacent to the basement retaining wall on 19 Orchid Ave and, from there, along with groundwater from other adjacent properties, enters the basement of 19 Orchid Ave because the retaining wall was not intended to be waterproof;⁶
- (f) I was not satisfied on the evidence that this pooling of water would have been avoided if washdown effluent from the restaurant on the ground floor of the respondent's property had not been discharged to the stormwater drainage system or that the discharge of washdown effluent to the stormwater drainage system had increased the frequency or extent of this pooling of water;⁷
- (g) the claim in nuisance failed because, in circumstances where the real cause of the entry of water into the basement was the applicant's failure to waterproof the basement retaining wall, I was not satisfied that the respondent had caused an unreasonable interference with the land at 19 Orchid Ave;⁸

² Liability Judgment, [10]-[15].

³ Liability Judgment, [16]-[21].

⁴ Liability Judgment, [29]-[32].

⁵ Liability Judgment, [45] and [47]-[50].

⁶ Liability Judgment, [40]-[44], [46] and [51].

⁷ Liability Judgment, [52].

⁸ Liability Judgment, [60].

- (h) the claim in negligence failed because the applicant failed to establish that the respondent had breached any duty it owed to the applicant or that any breach caused the harm alleged by the applicant.
- [3] The parties have now filed submissions on costs.
- [4] The respondent seeks an order that the applicant pay its costs of and incidental to the proceeding, including all reserved costs, to be assessed on the indemnity basis.
- [5] The applicant submits that:
 - (a) there should be no order as to costs up to 21 May 2025 or, alternatively, up to 1 November 2024;
 - (b) thereafter, the respondent should have its costs on the standard basis.

Should there be an order for costs before 21 May 2025 or 1 November 2024?

- [6] Rule 681 of the *Uniform Civil Procedure Rules* 1999 (Qld) provides that costs are in the discretion of the court, but follow the event, unless the court orders otherwise.
- [7] The general rule that costs follow the event embodies the principle that a successful party is ordinarily entitled to an award of its costs in its favour. This is not done to punish the unsuccessful party but to indemnify the successful party.⁹
- [8] The applicant must show there is some good reason to depart from that general rule and deprive the respondent of the benefit of an order for costs it incurred before either 21 May 2025 or 1 November 2024, in a proceeding in which it was wholly successful.
- [9] The applicant submits that there should be no order as to costs up to 21 May 2025, because that is the date when the respondent advised the applicant that it had undertaken rectification works on the grease trap and stormwater drainage system on the respondent's property. The report of Mr Maxwell of OSKA dated 13 May 2025 stated that the stormwater system of the respondent's property had been repaired to the point that it had "no further leaks". The applicant submits that the respondent's decision to carry out those repairs means it ought not have the benefit of an order for costs incurred before the repairs were undertaken.
- [10] I do not accept that submission. The repairs were referred to in other expert reports I considered in dismissing the applicant's claims.¹⁰ However, this was not a case where the repairs removed what I would otherwise have found to be an unreasonable interference with the land at 19 Orchid Ave. Those repairs were not the reason the applicant's claims failed. The fact that the respondent decided to undertake those repairs provides no basis for an order that would deprive the respondent of the benefit of an order in respect of costs incurred before the repairs were undertaken.
- [11] The applicant submits that there should be no order as to costs up to 1 November 2024, when Justice Kelly adjourned an earlier trial listing because of defects in a report provided by Mr Maxwell of OSKA as joint expert. It submits that it was only

⁹ *Oshlack v Richmond River Council* (1998) 193 CLR 72, 97 [67].

¹⁰ Liability Judgment, [47].

after the adjournment of the earlier trial listing, aided by Justice Kelly's supervision, that the parties came to crystalise the issues for trial.

- [12] I can see no reason why either the adjournment of the trial listing because of issues with the joint expert report, or the subsequent refinement of the issues in dispute with the benefit of Justice Kelly's supervision of the matter, support an order that would deprive the respondent of the benefit of an order for costs incurred before the adjournment.
- [13] There is no reason why costs from the commencement of the proceeding ought not follow the event.

Should the respondent's costs be assessed on the indemnity basis?

- [14] The respondent submits an order for costs on the indemnity basis is appropriate because:
- (a) the applicant's case was untenable at every stage;
 - (b) on 22 May 2024, the respondent made a *Calderbank* offer which, acting prudently, the applicant ought to have accepted.

Untenable case

- [15] The respondent cites the statement in *Di Carlo v Dubois*,¹¹ that circumstances which may justify an order for indemnity costs include "the fact that the proceedings were commenced ... or continued ... in wilful disregard of known facts; or clearly established law; the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions."
- [16] In that regard, the respondent submits that the applicant's case at every stage was groundless and doomed to fail having regard to the following matters:
- (a) When the initial statement of claim was filed on 13 December 2022, seeking damages of \$625,466 including \$575,575 for the cost of waterproofing the basement wall or a mandatory injunction compelling the respondent to carry out such works as were necessary to prevent the ingress of water into the basement, the applicant had already received an expert report in June 2019 which stated that the bored piers used to construct the basement wall were not designed to be watertight. The same conclusion was repeated in further expert reports the applicant received in November 2023, April 2024 and January 2025. Despite having this expert evidence, the applicant persisted until October 2025 with its case that the respondent was obliged to pay to waterproof a basement that was designed and built to admit water.
 - (b) The applicant persisted with allegations that water leaking into the basement had caused physical damage to its property after it had received a report from a joint expert in November 2023, and a report of its own expert in January 2025, which made it clear that this was not the case.

¹¹ [2002] QCA 225, [37], citing *Colgate-Palmolive Company v Cussons Pty Ltd* (1993) 46 FCR 225.

- (c) The applicant persisted with allegations that the respondent was responsible for the water leaking into the basement after it had received a report from a joint expert in October 2024, and a report from its own expert in January 2025, which made it clear that runoff from the southern wall of the building on 19 Orchid Ave contributed to water pooling in the rear paved area of the respondent's property.
 - (d) The applicant amended its case to plead an allegation that contaminated material was leaking into the basement after it had received a report from its own expert in April 2025 which stated that laboratory tests of water collected from the bottom of the basement wall had no detectable oil and grease and attributes indicative of freshwater.
 - (e) Amendments which the applicant made shortly before the trial commenced, to plead the kitchen waste allegations, failed to have regard to evidence that the respondent's stormwater drainage system had been repaired, with the result that any kitchen waste deposited into the system would not affect the applicant's property. Those amendments also ignored the report from the applicant's expert in April 2025 which stated that laboratory tests of water collected from the bottom of the basement wall had no detectable oil and grease and attributes indicative of freshwater.
- [17] As to the conduct referred to in [16](a), I made an order regarding the costs thrown away by the abandonment of the waterproofing case in an earlier judgment.¹² In circumstances where the costs wasted in responding to that case have been dealt with by that earlier order, it would not be appropriate for that conduct to be used to support an order that costs unrelated to the waterproofing case should be assessed on the indemnity basis.
- [18] As to the conduct referred to in [16](b), as I noted in the Liability Judgment,¹³ the applicant was not required to prove that water that had leaked into the basement caused physical damage as an element of the cause of action in nuisance. The applicant's failure to prove physical damage was not the reason the claim in nuisance was dismissed.
- [19] As to the conduct referred to in [16](c), the evidence that runoff from the southern wall of the building on 19 Orchid Ave contributed to water pooling in the rear paved area of the respondent's property made the applicant's claims more difficult but did not necessarily preclude success on those claims.
- [20] The same can be said of the conduct referred to in [16](d). For the applicant to succeed on its claims, it was not necessary that it prove that the water leaking into the basement of 19 Orchid Ave contained contaminants.
- [21] As to the conduct referred to in [16](e), I addressed the prospects of success of the kitchen waste allegations in my judgment granting leave to amend.¹⁴ For the reasons

¹² *Body Corporate for Ocean Pacifique CTS 8379 v Body Corporate for Orchid 17 CTS 11906* [2025] QSC 260, [57]-[66].

¹³ Liability Judgment, [61]-[65].

¹⁴ *Body Corporate for Ocean Pacifique CTS 8379 v Body Corporate for Orchid 17 CTS 11906* [2025] QSC 260, [29]-[36].

I gave then, I do not accept the submission that those claims were groundless and doomed to fail.

- [22] The matters which the respondent has identified demonstrate that the applicant's claims should always have been assessed as relatively weak. Those weaknesses ultimately led to the claims being dismissed. I am not persuaded, however, that those matters warrant the exercise of the discretion on the basis that the applicant commenced or continued the proceedings in wilful disregard of known facts or clearly established law; or made allegations which ought never to have been made; or unduly prolonged the case by making groundless contentions.

The Calderbank offer

- [23] The offer made by the respondent on 22 May 2024 was:
- (a) the applicant discontinue its claim on the basis there would be no order as to costs;
 - (b) on the respondent's counterclaim, the applicant pay the sum of \$26,849.89, being \$17,831 payable under the Deed as well as \$4,464.24 in interest and \$4,554.65 in costs.
- [24] The offer was open for acceptance for seven days. It was marked "without prejudice save as to costs".
- [25] The applicant did not accept the offer.
- [26] The fact that a *Calderbank* offer was made but not accepted is a matter that the court should have regard to when considering whether to order indemnity costs. However, the refusal of such an offer is not, of itself, sufficient to warrant an order for indemnity costs. The critical question is whether the rejection of the offer was unreasonable in the circumstances. Matters which should generally be considered in considering that question include: the stage of the proceeding at which the offer was received; the time allowed to consider the offer; the extent of the compromise offered; the recipient's prospects of success, assessed at the date of the offer; the clarity with which the terms of the offer were expressed; and, whether the offer foreshadowed an application for indemnity costs if the recipient does not accept it.¹⁵
- [27] In the present case, the *Calderbank* offer was made well before the trial. The applicant was given a reasonable period to consider it. Its terms were clearly expressed. As the offer was expressed to be "without prejudice save as to costs", the applicant's legal representatives would have understood that indemnity costs would be sought if the applicant did not accept it.
- [28] I am satisfied that, given the weakness of the applicant's claims, the respondent's offer to forego its costs of defending those claims constituted a genuine attempt to compromise. Further, the result for the applicant if it had accepted the offer would have been more favourable than the dismissal of the claims at trial which has left it exposed to an order that it pay the respondent's costs of the proceeding.

¹⁵ *J & D Rigging Pty Ltd v Agripower Australia Ltd* [2014] QCA 23, [5]–[6]; *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* [2005] 513 VR 435, 442 [25].

- [29] As to prospects, the applicant submits that the offer could only be assessed by reference to the evidence available to it at the time the offer was made. That must be accepted. By that stage, the applicant had already received three expert reports showing that the basement wall was designed and constructed as a “wet wall” which was not intended to be waterproof. That should have alerted the applicant to the weakness of the claim for waterproofing the basement wall which it eventually abandoned. The remainder of the applicant’s claim for the cost of removing mould from the basement and disposing of water damaged items was also weakened by this evidence because mould and water damage are the natural consequences of a basement that is not intended to be waterproof. The applicant had also received a report from a joint expert showing that water leaking into the basement had not caused physical damage to the applicant’s property. That should have been a further indication of the weak prospects of the applicant’s claims.
- [30] As to the counterclaim, the applicant’s only defence was to set-off the damages it claimed in respect of water leaking into the basement against the respondent’s entitlement to payment under the deed.¹⁶ Accordingly, the defence to the counterclaim suffered the same weaknesses as the claims in nuisance and negligence.
- [31] The applicant’s submission that the offer was overtaken by subsequent events is not to the point. None of the later events identified by the applicant, including the adjournment of the earlier trial listing, the repair works undertaken on the stormwater drainage system or evidence the parties obtained after the offer was made, bear upon the assessment whether the rejection of the offer was unreasonable in the circumstances. None of the evidence obtained after the applicant rejected the offer addressed the weakness in the applicant’s case caused by the evidence that the basement was not designed to be waterproof.
- [32] In all the circumstances, I am satisfied that it was unreasonable for the applicant not to accept the offer. An order should be made for the respondent’s costs to be assessed on the indemnity basis from the time the offer was open for acceptance.

Conclusion

- [33] The order will be that the applicant is to pay the respondent’s costs of and incidental to the proceeding, including reserved costs, to be assessed:
- (a) on the standard basis up to and including 29 May 2024;
 - (b) on the indemnity basis from 30 May 2024.

¹⁶ Liability Judgment, [86]-[93].