SUPREME COURT OF QUEENSLAND

CITATION:	*Trouton v Trouton & Anor (No 3)* [2024] QSC 54
PARTIES:	**PATRICIA ANN TROUTON** (applicant) **v** **NEIL SIMON TROUTON** (first defendant) **LEANNE TROUTON** (second defendant)
FILE NO/S:	BS No 6965 of 2017
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	11 April 2024
DELIVERED AT:	Brisbane
HEARING DATE:	7 December 2023
JUDGE:	Williams J
ORDER:	**1. The third party, Christine Trouton, pay the defendants' costs calculated on the indemnity basis in respect of the plaintiff's claim, including reserved costs.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – PARTIES AND NON-PARTIES – NON-PARTIES GENERALLY – application for costs order against third party – where orders were made in respect of costs as between the plaintiff and the defendants – where the respondent sought an order that a third party pay the defendants' costs of the proceeding in respect of the plaintiff's claim on an indemnity basis – where the defendants submit the third party was the person who caused the action – where the Court has a discretionary power to award costs against a non-party – whether the discretion be exercised in the current circumstances to make a costs order against the third party – whether evidence and findings at trial can be used in respect of the current application – whether the interests of justice favour a non-party costs order being made against the third party– whether the third party should be ordered to pay the defendants' costs in respect of the plaintiff's claim on a standard or indemnity basis

Civil Proceedings Act 2011 (Qld), s 15
Land Title Act 1994 (Qld), s 127

Beach Retreat Pty Ltd v Mooloolaba Marina Ltd [2009] 2 Qd R 356
Burns v State of Queensland and Croton [2007] QCA 240
Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 10) [2009] FCA 498
Dwyer v Nel [2021] QCA 165
FPM Constructions v Council of the City of Blue Mountains [2005] NSWCA 340
Grocon Constructors (Qld) Pty Ltd v Juniper Developer No 2 Pty Ltd [2015] QSC 102
Ipex ITG Pty Ltd (in liquidation) v Victoria [2014] VSCA 315
Kebaro Pty Ltd v Saunders [2003] FCAFC 5
KMB v Legal Practitioners Admissions Board (No 2) [2018] 1 Qd R 500
Knight v FP Special Assets Ltd (1992) 174 CLR 178; (1992) 107 ALR 585; [1992] HCA 28
MG Corrosion Consultants Pty Ltd v Vinciguerra (No 2) [2011] FCAFC 48; 276 ALR 319
Symphony Group Plc v Hodgson [1994] QB 179
Trouton v Trouton & Another (No 2) [2023] QSC 29
Trouton v Trouton [2022] QSC 210
Yu v Cao [2015] NSWCA 276; (2016) 19 NSWLR 190

COUNSEL: G R Allan for the applicant
G W Dietz for the respondent

SOLICITORS: Walt Allan for the applicant
Rose Litigation for the respondent

[1] On 30 September 2022, I published reasons in respect of the claim and counterclaim (**Trial Reasons**).[1]

[2] On 4 November 2022, judgment was pronounced as follows:[2]

> "THE JUDGMENT OF THE COURT IS THAT:
>
> 1. The plaintiff's claim is dismissed.
>
> 2. Pursuant to s 127 of the *Land Title Act 1992* (Qld) the following caveats over Lot 7 on Survey Plan 128612, Title Reference 50306461, located at 1 Harbut Street, Holland Park West be removed:

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1 *Trouton v Trouton* [2022] QSC 210 (**Trial Reasons**).
2 *Trouton v Trouton & Another (No 2)* [2023] QSC 29 (**Costs Reasons**) at [3].

(a) caveat number 717953437; and

(b) caveat number 718136397.

3. The defendants' counterclaim be otherwise dismissed."

[3] On 24 February 2023, orders were made in respect of costs as between the plaintiff and the defendants as follows:

> "1. The plaintiff pay the defendants' costs calculated on the indemnity basis in respect of the plaintiff's claim, including reserved costs.
>
> 2. Each party bear their own costs in respect of the counterclaim."

[4] Separate reasons were published in respect of costs as between the plaintiff and the defendants (**Costs Reasons**).

[5] By an application filed 31 October 2022, the defendants also sought an order that Ms Christine Trouton, a third party (**Third Party**), pay the defendants' costs of the proceeding in respect of the plaintiff's claim on an indemnity basis (**Third Party Application**).

[6] The Third Party Application was adjourned on a number of occasions as a result of the Third Party's health issues. Ultimately, the Third Party Application was heard on 7 December 2023.

[7] These reasons deal with the Third Party Application and use the defined terms set out in the Trial Reasons and Costs Reasons, unless indicated otherwise.

[8] The issues that arise for consideration are as follows:

(a) Can the evidence and findings at trial be used in respect of the Third Party Application?

(b) Does the Court have power to order the Third Party to pay costs?

(c) Should the Court order that the Third Party pay the defendants' costs in respect of the plaintiff's claim?

(d) If so, should the Third Party be ordered to pay the defendants' costs in respect of the plaintiff's claim on an indemnity basis?

Factual background

[9] The Third Party is:

(a) the daughter of the plaintiff;

(b) the sister of the first defendant; and

(c) the sister-in-law of the second defendant.

[10] The facts in relation to the claim and counterclaim are set out in the Trial Reasons and, to a lesser extent, the Costs Reasons, and are not repeated here except to the extent necessary.

[11] Relevant to the issue of costs, the judgment can be characterised as reflecting that:

(a) The plaintiff was totally unsuccessful on the claim.

(b) The defendants had a mixed result on the counterclaim: partly successful, partly unsuccessful.

[12] The characterisation of the result in respect of the plaintiff's claim is relevant to the Third Party Application.

Can the evidence and findings at trial be used in respect of the Third Party Application?

[13] The defendants rely on the findings in the Trial Reasons and the Costs Reasons, as well as relevant evidence from the trial. The defendants have filed, and rely on, a two-volume "Book of Evidence",[3] which includes a copy of the Trial Reasons, exhibits, and extracts of the transcript relied upon for the Third Party Application.[4]

[14] In particular, the defendants identify the following specific findings as relevant to the Third Party Application:

(a) Trial Reasons findings in respect of witnesses:

(i) [127(c)] – "The plaintiff's evidence was not credible or reliable."

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3 Court Doc Nos 101 and 102. Marked Exhibits 1 and 2 at the hearing of the Third Party Application on 7 December 2023.

4 Exhibit 1 is the hearing book (**HB**), which is not replicated in the "Book of Evidence" but is incorporated in it.

(ii) [127(d)] – "Overall, I do not accept the evidence of the plaintiff except where it is consistent with the evidence of the first and second defendants, or it is consistent with contemporaneous documents."

(iii) [133] – "I accept the evidence of the first and second defendants as credible and reliable. I also accept the evidence of Dr Deanne Hummelstad."

(iv) [134] – "In respect of the evidence of Christine Trouton, I find that her evidence was not reliable or credible in respect of the key areas relevant to the issues in dispute. In particular, I find that her account of how she first realised that the Harbut Street Property had been transferred to the defendants is implausible. I do not accept the evidence of Christine Trouton."

(v) [433] – "For the reasons articulated previously in these reasons, I accept the evidence of the first and second defendants in respect of the issues at trial."

(b) Trial Reasons factual findings [390] to [403], [404] to [410], and [435] to [443].[5] For convenience, these are extracted at Annexure A to these reasons.

[15] The defendants contend there is no injustice in relying on these findings and refer to several authorities in support of this proposition.

[16] The Third Party accepts the principle observed by Balcombe LJ in *Symphony Group Plc v Hodgson*[6] and followed in *Kebaro Pty Ltd v Saunders.*[7]

[17] In *Symphony Group Plc v Hodgson,* Balcombe LJ stated at 193:

> "(6) The procedure for the determination of costs is a summary procedure, not necessarily subject to all the rules that would apply in an action. Thus, subject to any relevant statutory exceptions, judicial findings are inadmissible as evidence of the facts upon which they were based in proceedings between one of the parties to the original proceedings and a stranger… Yet in the summary procedure for the determination of the liability of a solicitor to pay the costs of an action to which he was not a party, the judge's findings of fact may be

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5 The defendants identify [389], but that does not contain any factual findings as it identifies the "key issues". However, it assists in understanding the context of the factual findings that follow.

6 [1994] QB 179 at 193.

7 [2003] FCAFC 5 at [142].

> admissible…This departure from basic principles can only be justified **if the connection of the non-party with the original proceedings was so close that he will not suffer any injustice by allowing this exception to the general rule**." (emphasis added)

[18] In *Kebaro Pty Ltd v Saunders,* the Full Court of the Federal Court[8] was unpersuaded of any unfairness in relying on findings from the trial in circumstances where:

(a) Most of the main findings were based on documentary evidence;

(b) The non-party decided to call no evidence; and

(c) There was a closeness of connection and regard was had to the "dynamics of [the] relationship".[9]

[19] However, the Third Party submits that the findings must be used in the context in which they were made in the Trial Reasons. For example, it is submitted that the findings in respect of the Third Party's evidence at [134] of the Trial Reasons should be considered subject to more specific findings on key material facts, such as the finding that the plaintiff was not full and frank with the Third Party at [199] to [201] of the Trial Reasons.

[20] In respect of the evidence from the trial, the Third Party agrees with the defendants' submission that the evidence from the trial may be relied upon to the extent that such evidence is relevant and admissible; but also has bearing on the exercise of the discretion to order costs.

[21] Both the findings in the Trial Reasons and the Costs Reasons, and the evidence from the trial can be used for the Third Party Application, subject to relevance, context and any limitations apparent from the nature and content of the findings or evidence.

Does the Court have power to order the Third Party to pay costs?

[22] Section 15 of the *Civil Proceedings Act* 2011 (Qld) states:

> "A court may award costs in all proceedings unless otherwise provided."

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8 Constituted by Beaumont, Sundberg and Hely JJ.

9 [2003] FCAFC 5 at [142]; Consistent with the comment in *Symphony Group Plc v Hodgson* [1994] QB 179 at 193.

[23] Sofronoff P (with whom Gotterson JA and Douglas J agreed) considered this provision in *KMB v Legal Practitioners Admissions Board (No 2)*[10] and concluded at [54]:

> "Under s 15 *Civil Proceedings Act* 2011, the Court may award costs in all proceedings unless otherwise provided. The decision of the High Court in *Knight v FP Special Assets Ltd* (*Knight's case*)[11] is authority for the proposition that s 58 of the *Supreme Court Act* 1867, the predecessor of s 15 *Civil Proceedings Act* 2011, was expressed in terms that were wide enough to permit an order for costs to be made against a non-party."

[24] The relevant principles to be applied in respect of the exercise of the discretion to award costs against a non-party were considered by the Court of Appeal in *Dwyer v Nel*.[12] Holmes CJ and Bond J agreed with my reasons.

[25] It is appropriate to repeat some of the reasoning here:

(a) The High Court authority of *Knight v FP Special Assets Ltd*[13] contains the frequently cited statement by Mason CJ and Deane J:[14]

> "… the prima facie general principle is that an order for costs is only made against a party to the litigation. As our discussion of the earlier authorities indicates, there are, however, a variety of circumstances in which considerations of justice may, in accordance with general principles relating to awards of costs, support an order for costs against a non-party. Thus, for example, there are several long-established categories of case in which equity recognised that it may be appropriate for such an order to be made.
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> For our part, we consider it appropriate to recognise a general category of case in which an order for costs should be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. That category of case consists of circumstances where the party to the litigation is an insolvent person or man of straw, where the non-party has played an active part in the conduct of the litigation and where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, has an interest in the subject of the litigation. Where the circumstances of a case fall within that category, an order for costs should be made against the non-party if the interests of justice require that it be made."

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10 [2018] 1 Qd R 500.
11 (1992) 174 CLR 178.
12 [2021] QCA 165.
13 (1992) 174 CLR 178; (1992) 107 ALR 585; [1992] HCA 28.
14 (1992) 174 CLR 178 at 192-3; (1992) 107 ALR 585 at 595.

(b) The circumstances identified in *Knight v FP Special Assets Ltd* are not preconditions to the exercise of the Court's discretion to award costs against a non-party: they are a guide to the exercise of the discretion.[15]

(c) The categories of case which may enliven the exercise of the discretion are not closed.[16]

(d) The New South Wales Court of Appeal in *FPM Constructions v Council of the City of Blue Mountains*[17] observed at [210]:

> "It is also true that the principle established in *Knight v FP Special Assets* cannot be limited to the specific circumstances of the case, the joint judgment having expressed a conclusion in more general terms … It is clear that the categories of case which may attract the exercise of the power are by no means closed, nor should they be. Nevertheless, the requirements of justice should not be allowed to expand an exception to the general rule, so as to undermine the rule itself. What is significant from a survey of the cases in which orders have been made against non-parties is that they tend to satisfy at least some, if not a majority, of the following criteria:
>
> (a) the unsuccessful party to the proceedings was the moving party and not the defendant;
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> (b) the source of the funds for the litigation was the non-party or its principal;
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> (c) the conduct of the litigation was unreasonable or improper;
>
> (d) the non-party, or its principal, had an interest (not necessarily financial) which was equal to or greater than that of the party or, if financial, was a substantial interest, and
>
> (e) the unsuccessful party was insolvent or could otherwise be described as a person of straw."

(e) These comments assist in the consideration of the cases where the discretion has been identified, but they are not in themselves criteria or prerequisites that must be met before the discretion can be exercised. In that case, consideration was given to the particular factual circumstances against the three criteria in the joint judgment of *Knight v FP Special Assets Ltd*.[18]

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15 Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 10) [2009] FCA 498 at [25] per Collier J; Yates v Boland [2000] FCA 1895 (Full Court); Gore v Justice Corporation Pty Ltd (2002) 119 FCR 429 at 437, 447-8.

16 *Kebaro Pty Ltd v Saunders* [2003] FCAFC 5 at [103] per Beaumont, Sundberg and Hely JJ.

17 [2005] NSWCA 340 per Basten JA (Beazley and Giles JJA agreeing).

18 Ibid, [211] and following.

[26] The Court has a discretionary power to award costs against a non-party. The question then arises, should the discretion be exercised in the current circumstances to make a costs order against the Third Party?

Should the Court order that the Third Party pay the defendants' costs in respect of the plaintiff's claim?

[27] As identified above, the categories of case where a costs order may be made are not closed and the circumstances identified in *Knight v FP Special Assets Ltd* are only a guide to the exercise of the discretion.

[28] It is necessary to consider the particular circumstances of the case, as each case ultimately turns on its own facts.[19]

[29] Martin J (as the SJA then was) described the fundamental principles in respect of the exercise of the discretion in *Beach Retreat Pty Ltd v Mooloolaba Marina Ltd*[20] as follows:

> "(a) A non-party costs order will ordinarily be made "when, in the circumstances of the particular case, it is just and equitable that a non-party pay the costs of a party to the litigation".[21] Put another way, **a court will ordinarily not make a non-party costs order unless the interests of justice justify a departure from the general rule that only parties to proceedings are subject to costs orders**.[22]
>
> (b) As there is no doubt as to the jurisdiction to make such an order, the circumstances in which an order of this nature will be made are those which are confined by questions of discretion. Many different ways of expressing the degree of caution necessary have been set out in the authorities. They include that any such application should be treated "with considerable caution".[23] Such orders should be granted only when "exceptional circumstances make such an order reasonable and just".[24] Such orders should be granted only "sparingly".[25]
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> (c) As with any discretion, it must be "exercised judicially and in accordance with general legal principles pertaining to the law of

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19 Bakers Investment Group (Australia) Pty Ltd v Caason Investments Pty Ltd [2015] VSC 644 at [16].
20 [2009] 2 Qd R 356 at 368.
21 *Vestris v Cashman* (1998) 72 SASR 449 at 468.
22 Naomi Marble & Granite Pty Ltd v FAI General Insurance Company Ltd (No 2) [1999] 1 Qd R 518 at 544.
23 Symphony Group Plc v Hodgson [1994] QB 179 at 193.
24 Murphy v Young & Co's Brewery Plc [1997] 1 All ER 518 at 531 and Knight v FP Special Assets Ltd (1992) 174 CLR 178 at 208.
25 Arundel Chiropractic Centre Pty Ltd v Deputy Commissioner of Taxation (2001) 179 ALR 406 at 413 [34].

> costs".[26] The exercise of the discretion is accurately described by the author of "*Law of Costs*": "**It inevitably comes down to a fact-specific inquiry informed by various relevant considerations**."[27]" (bold emphasis added)

[30] The defendants raise in their submissions the specific class of case where costs have been awarded against a non-party who was "the person who has caused the action". The Court of Appeal *in Symphony Group Pty Ltd v Hodgson*[28] identified this as one of the six classes,[29] namely:

(a) Where a person has some management of the action (for example, a director of an insolvent company who causes the company improperly to prosecute or defend proceedings).

(b) Where a person has maintained or financed the action.

(c) Where the non-party is a solicitor whose conduct has led to the incurring of costs in a way which brings it within the statutory criteria for a cost orders against a solicitor or the solicitor's conduct would justify the order in the exercise of the Court's inherent jurisdiction in relation to the conduct of solicitors.

(d) Where the person's wrongful conduct has caused the action (or sometimes described as the person who caused the action).

(e) Where the person is a party to a closely related action which has been heard at the same time but not consolidated.

(f) Group litigation where one or two actions are selected as test actions.

[31] It is submitted that these six classes have been approved in numerous cases including:

(a) In Queensland: *Burns v State of Queensland and Croton,*[30] *Grocon Constructors (Qld) Pty Ltd v Juniper Developer No 2 Pty Ltd*[31] and *Beach Retreat Pty Ltd v Mooloolaba Marina Ltd*.[32]

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26 Knight v FP Special Assets Ltd at 192.
27 *Law of Costs*, (2nd ed LexisNexis, Butterworths, Australia 2009), at [22.16].
28 [1994] QB 174 at 191-192.
29 Some of the criteria reflect the minor modifications in *Grocon Constructors (Qld) Pty Ltd v Juniper Developer No 2 Pty Ltd* [2015] QSC 33.
30 [2007] QCA 240 at [17] per Jerrard JA with whom Cullinane and Jones JJ agreed.
31 [2015] QSC 102, Peter Lyons J at [22]-[33].
32 [2009] 2 Qd R 356, Martin J.

(b) Other jurisdictions: *Kebaro Pty v Saunders*,[33] *MG Corrosion Consultants Pty Ltd v Vinciguerra (No 2)*[34] and *Yu v Cao*.[35]

[32] In light of these authorities, the defendants submit that there is a recognised class of case, being "the person who has caused the action", which is a separate and distinct category of case from the general category recognised in *Knight v FP Special Assets*.

[33] What is required is consideration of all of the circumstances to see whether it is just and equitable that a non-party pay the costs of a party to the litigation. The cases identified are examples where it was found to be just and equitable. The factors, criteria and the "classes" identified are not to be applied inflexibly. They are guides to circumstances which may meet the threshold for the exercise of the discretion.

[34] However, it is helpful to start with a consideration of the three criteria identified by the High Court in *Knight v FP Special Assets Ltd* including the degree of involvement of the Third Party, and then to consider the "interests of justice"[36] and other factual matters relevant to the exercise of the discretion.

- *Is the party insolvent or a person of straw?*

[35] In respect of this factor, the defendants rely on evidence from the trial and findings in the Trial Reasons in respect of the plaintiff's historical asset and liability position.[37] It is submitted that the plaintiff has been on the aged pension since September 2007 and has no assets of any value.

[36] The Third Party accepts, for the sole purpose of the Application, that the plaintiff "has little or no resources to meet the order for costs made against her".[38]

[37] There is a sufficient basis to be satisfied that the plaintiff would be unable to pay the indemnity costs order against her without recourse to funds from another source and can be characterised as "a person of straw".

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33 [2003] FCAFC 5 at [73].
34 [2011] FCAFC 48; 276 ALR 319 at [19]-[20].
35 [2015] NSWCA 276; (2016) 19 NSWLR 190 at [141]-[142].
36 Described in *Kebaro Pty Ltd v Saunders* [2003] FCAFC 5 at [87] as "the fourth Knight factor".
37 Trial Reasons at [254]-[260]. Evidence of the plaintiff T1-24, L40-44; T1-75 L44-46; T1-76 L1-3; T3-22 L1-15.
38 At [23] of the Third Party's amended written submissions dated 30 November 2023.

- *Did the non-party play an active part in the litigation?*

[38] The defendants submit it is not necessary that the Third Party had "exclusive" control of the conduct of the proceeding, but rather that she was a central figure in "important and critical respects".[39]

[39] The Victorian Court of Appeal in *Ipex ITG Pty Ltd (in liquidation) v Victoria*[40] helpfully considered the phrase "played an active part in the conduct of the litigation" and commented at [42] as follows:

> "….his Honour also seems to have regarded it as necessary to show that the non-party must be "the real party" to the litigation. In our view, his Honour took too restrictive a view in deciding whether Mr Schwalb took an active part in the litigation. In *Kebaro* the Full Court of the Federal Court observed that:
>
> "Although the phrase 'played an active part in the conduct of the litigation' was used in *Knight*, … the phrase is not a term of art and thus can have no technical meaning. … Further, as in the case of 'the', contrasted with 'a', real party issue, **it is not, in our view, necessary to demonstrate that the non-party *exclusively* controlled the conduct of the proceedings. It is enough to point to its role as one of the actors in the scene in important and critical respects**.
>
> … the issue **here is whether the conduct of the non-party is sufficiently closely connected with the prosecution of the litigation, so that the non-party may fairly be described as 'a real party' in 'critical' and 'important' respects**."[41] (bold emphasis added)

[40] In relation to whether the Third Party instructed the plaintiff's lawyers, the defendants point to:

(a) The Third Party admitted she sought legal advice.[42]

(b) The Third Party was "very evasive" when cross-examined on her giving instructions to lawyers.[43]

(c) The Third Party admitted that she instructed Charles Lethbridge at Attwood Marshall Lawyers to send a letter of demand to the defendants.[44]

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39 *Kebaro Pty Ltd v Saunders* [2003] FCAFC 5 at [113]-[114].
40 [2014] VSCA 315 per Neave JA, Santamaria JA and Kyrou JA.
41 [2003] FCAFC 5 at [113]-[114] (emphasis in original).
42 T5-31 L21-22; T5-103 L44-46; T5-104 L12-13; T5-105 L5; T5-105 L18-20.
43 T6-4 L18 to T6-5 L9.
44 T6-4 L29-36; T6-4 L46-47.

(d) The Third Party referred to the plaintiff's solicitors as "my lawyer" in a discussion about instructions given to the plaintiff's solicitors.[45]

(e) The Third Party admitted she provided instructions to Chris Hansen of Creagh Weightman Lawyers to commence the proceeding[46] but then said she was "not sure" if she gave instructions on behalf of the plaintiff,[47] but "cannot exclude" that she gave the instructions to commence the proceeding.[48]

[41] Further, the defendants contend that the Third Party was a central figure in "important and critical respects" in that she:

(a) Allegedly "discovered" the "error" in the Form 1 Transfer.

(b) Did the CITEC searches.

(c) Ordered a copy of the Colin Trouton Enduring Power of Attorney.

(d) Commissioned and paid for valuations of the Dagmar Street Property and the Harbut Street Property.

(e) Embarked on the communications with the Titles Office.

(f) Lodged or arranged caveats over the Harbut Street Property.

(g) Contributed to part of the legal and expert costs.

[42] The defendants submit that the timeline of events supports the conclusion that:

(a) The Third Party's involvement really commenced with the text message to the first defendant on 24 June 2016; and

(b) after the Third Party moved in to live with the plaintiff in January 2017,[49] the Third Party "drove" the litigation.

[43] The Third Party:

(a) Admitted she had a role in instigating the proceeding.[50]

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45 T6-20 L9-44.
46 T6-19 L46 to T6-20 L2; T6-4 L46-47.
47 T6-22 L26-36.
48 T6-23 L17 and following.
49 T4-103 L9-17
50 T6-19 L37-44.

(b) Said that "We all played a role", in contrast to the express evidence of Dr Deanne Hummelstad that she played no role "in any decision to commence these proceedings after 11 May 2017".[51]

[44] Other evidence is also relied upon by the defendants in support of the proposition that the Third Party "owned" and had a vested interest in the institution and prosecution of the proceeding, namely:

(a) In the Third Party's oral testimony, she used "we" rather than "Patricia" or "mum",[52] and "my lawyers" rather than "Patricia's lawyers or "mum's lawyers".[53]

(b) The Third Party had a history of being litigious[54] and had commenced a law degree in 2016 and passed 4 law subjects before stopping in 2018.[55]

(c) The Third Party in about June 2021 threatened to sue her sister, Dr Deanne Hummelstad, claiming $225,000.[56]

[45] In respect of the matters identified at [41] above, the defendants identify further relevant evidence in respect of those matters.

[46] In relation to the CITEC searches:

(a) On 21 March 2017, the Third Party undertook a CITEC search on the Harbut Street Property, being the Form 1 Transfer.[57]

(b) The Third Party knew that the first defendant was building a "granny flat" at the Harbut Street Property.[58]

(c) On 28 March 2017, the Third Party ordered a copy of the Colin Trouton Power of Attorney.[59]

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51 T7-84 L29-35. Given the findings in relation to the witnesses, the evidence of Dr Hummelstad would be accepted on this point.
52 T5-105 L17 and following; T6-31 L1 and following.
53 T6-20 L9-44.
54 Exhibit 32. T6-48 L9-12.
55 T5-55 L24-47, T5-56 and T5-57 L1-8.
56 Exhibit 36.
57 T5-24 L32-35 and Exhibit 19.
58 T5-78 L7-15.
59 T5-96 L37-40 and Exhibit 20, Courtbook (**CB**) at 1031-1048.

(d) The Third Party was evasive in her answers as to what prompted her to undertake the CITEC searches in March 2017. The Third Party's explanation was she had seen some of the plaintiff's emails with reference to a "granny flat" and that had been a trigger for further enquiries.

(e) The finding at [134] of the Trial Reasons that the Third Party's "account of how she first realised that the Harbut Street Property had been transferred to the defendants is implausible".

(f) The plaintiff's evidence was also "particularly evasive" in respect of the discovery of the error with the Form 1 Transfer.[60]

(g) The Third Party took immediate action regarding the CITEC searches but was not prompted to do so at the plaintiff's direction.[61]

[47] In relation to commissioning the valuations:

(a) On 29 March 2017, being one day after ordering the Colin Trouton Power of Attorney, the Third Party commissioned valuations of the Dagmar Street Property and the Harbut Street Property from a registered valuer.[62]

(b) This was the first of four valuations[63] of the Harbut Street Property commissioned by the Third Party between 29 March 2017 and 26 August 2021.[64]

(c) The Third Party gave oral instructions for these valuations to be prepared.[65]

[48] In relation to causing the caveats to be lodged over the Harbut Street Property:

(a) The Third Party gave evidence that on 10 April 2017 the Plaintiff's Caveat was lodged by "her former lawyers".[66]

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60 T3-58 L8-31.
61 T3-53 L31-32; T3-54 L20-25; T3-56 L38-41.
62 T5-106 L26-28.
63 T6-44 L40-45.
64 T6-46 L11-20; T6-43 L28-34; T6-45 L1 and following; Exhibits 11, 12, 13, 24, 25, 27 and 31.
65 T6-46 L11-20.
66 T5-31 L13-19.

(b) On 27 June 2017, the Third Party was aware the Plaintiff's Caveat was going to lapse, so she wrote a letter to the Titles Office requesting the Registrar lodge a caveat.[67] The Registrar's Caveat was lodged on 6 July 2017.

[49] In relation to the Third Party attending the Titles Office:

(a) The Third Party had a role in sending a letter of demand to the defendants' lawyers, which was rejected by the defendants.

(b) Two days later, on 28 April 2017, the Third Party attended the Titles Office with the plaintiff.[68]

(c) On 1 May 2017, the Third Party sent an email to the plaintiff and her sisters, Mrs Margo Powell and Dr Hummelstad, outlining "options" allegedly given by the Titles Office to fix the "error" in the Form 1 Transfer.[69]

(d) The Third Party also visited the Titles Office with her sister, Anna Hughes, prior to 5 May 2017.[70]

[50] In relation to payments for legal costs and expert fees for the proceeding, the Third Party paid for:

(a) An expert medical report in respect of Colin Trouton's mental capacity.[71]

(b) The Court bundle for the trial prepared by Law In Order.[72]

(c) Valuations for the Harbut Street Property and the Dagmar Street Property.

[51] The Third Party submits that she did not play an active part in the conduct of the proceeding and points to the following in support of that position:

(a) The Third Party did not instruct the plaintiff's lawyers.

(i) The Third Party relies on an affidavit of Mr Chris Hansen filed 20 December 2022,[73] the solicitor on the record for the plaintiff. Mr Hansen's affidavit includes evidence as follow:

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67 T5-32 L25-47.
68 T6-5 L17-20; T5-104 L15-20.
69 T5-30 L5-29; Exhibit 21.
70 T5-32 L1-4.
71 T6-23 L24-45.
72 T6-24 L10-27.
73 Court Doc No 95.

(A) The plaintiff was the only client of the firm, Creagh Weightman Lawyers.[74]

(B) The plaintiff was the only person liable to pay the firm's fees.[75]

(C) He only ever sought and obtained instructions exclusively from the plaintiff.[76]

(D) He was conscious when he attended on the plaintiff in the presence of one of her children[77] that the plaintiff's instructions were her own and independent of any other person.[78] Further, "[t]here was no occasion where [he] had cause to be concerned that [the plaintiff's] will had been overborn, or that she was not acting in accordance with her own desires and of her own free will".

(E) The Third Party did not attend, nor give any instructions in relation to the mediation.[79]

(F) The Third Party only attended the trial to give evidence, on the days she gave evidence.[80]

(ii) The Third Party's evidence at trial that she had not met with Mr Hansen until the Monday of the week before she gave evidence.[81]

(iii) The Third Party accepts she was present when the plaintiff gave instructions to the plaintiff's lawyers over the telephone.[82]

(iv) The plaintiff asked the Third Party to prepare emails for the plaintiff to send to the plaintiff's lawyers.[83]

(b) The Third Party was not the plaintiff's source of funds for the proceeding. The Third Party gave evidence at trial that:

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74 At [6].
75 Ibid.
76 At [8] and [10]-[12].
77 Deanne, Margo, Christine and Anna-Maree.
78 At [15].
79 At [19].
80 At [23].
81 T6-21 L1-3.
82 Third Party's written submissions at [26(b)].
83 T6-20 L37-47.

(i) She paid approx. $7,000 for a psychiatric report in relation to her father, at the request of the plaintiff;[84]

(ii) She paid Law In Order for the trial bundle;[85] and

(iii) She did not have money to fund the proceeding and the plaintiff obtained funds for the proceeding from other relatives.[86]

(c) The Third Party accepts that she had a role in the institution of the proceedings.[87] However, all instructions were given by the plaintiff to the plaintiff's lawyers.[88]

(d) The Third Party accepts that she assisted the plaintiff before the institution of the proceeding on 7 July 2017 by:

(i) The Third Party commissioned and paid for valuations of real property:

(A) on or about 29 March 2017 - $550;

(B) 25 May 2018 - $385; and

(C) 24 October 2019 - $330.[89]

(ii) Ordered CITEC searches on 21 March 2017 and 28 March 2017;

(iii) Visited the Titles Office with the plaintiff and her sister, Anna Hughes.

[52] In respect of the contention that the Third Party "manipulated" the plaintiff, the Third Party submits:

(a) There is no evidence that the Third Party manipulated the plaintiff into instituting the proceeding.[90]

(b) Whatever her past conduct, she was "in a very different state" in January 2017.[91]

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84 T6-23 L24-27, L41-47.
85 T6-24 L10-13.
86 T6-24 L20-21.
87 T6-19 L40-44.
88 T6-20 L9-38.
89 Exhibits 12, 13 and 27.
90 This submission was revised at the conclusion of the hearing.
91 T8-5 L34 to T8-9 L5.

(c) Past conduct over 10 years earlier than the commencement of the proceeding is not relevant.

[53] The Third Party filed and relied upon an affidavit of Margo Powell affirmed on 13 November 2023. Mrs Powell is a sister of the first defendant and the Third Party, and a daughter of the plaintiff. Mrs Powell also gave evidence at trial on behalf of the plaintiff.

[54] Mrs Powell in her affidavit deposes to a number of matters and exhibits some screenshots of texts with the first defendant. The obvious purpose behind this evidence is to assist the Third Party in establishing the contention that she was not involved in giving instructions, settlement discussions or in the commencement of the proceedings.

[55] At [35] of the affidavit, Mrs Powell states:

> "To my knowledge, [the Third Party] did not attend any meetings to try and resolve these proceedings in early 2019. I am not aware of her providing any assistance to our mother to try and resolve these proceedings in early 2019. Put simply, I am not aware of any involvement of [the Third Party] at all in relation to attempts to resolve these proceedings in early 2019."

[56] The defendants cross-examined Mrs Powell on her affidavit at the hearing of the application. In particular, the defendants' Counsel cross-examined Mrs Powell about events leading up to the institution of the proceedings and four telephone conversations she had with the first defendant on 6 February 2019, 27 February 2019, 1 March 2019 and 5 April 2019. These telephone conversations were recorded at the time and excerpts were played to Mrs Powell. While she could not recall the conversations, she accepted that it was her voice, the first defendant's voice, and that she said the words put to her based on the recording.

[57] These statements are prior inconsistent statements to the evidence given by Mrs Powell in her affidavit and in oral evidence when questioned.

[58] The evidence of Mrs Powell under cross-examination was troubling in a number of respects. She repeatedly refused to concede points, even when evidence to the contrary was put to her, including her own prior inconsistent statements. Implausible

explanations were provided in an apparent attempt to explain away her prior inconsistent statements, many of which were unambiguous.

- *Events leading up to the commencement of proceedings*

[59] Mrs Powell was cross-examined in relation to events in 2017 leading up to the commencement of the proceedings.

[60] Exhibit 21 is an email from the Third Party to Mrs Powell and copied to her sister, Dr Hummelstad, and the plaintiff dated 1 May 2017. The email states in capital letters:

> "THIS IS NOT TO BE SENT IN A LETTER OR WRITTEN – VERBAL ONLY"

[61] The email sets out instructions from the Third Party to Mrs Powell as to a telephone call that Mrs Powell was going to have with the first defendant. Mrs Powell had a telephone call with the first defendant on 2 May 2017 and she agreed she said words to the effect of the following but "probably not delivered as blatantly and as bluntly ... because [she] was very concerned for [her] brother at the time"[92]:

> "We've been contacted by the Titles Office to make the transfer of 1 Harbut Street legal. You have to sign a form 1 and a form 24 and get back to the QSR and Titles Office by next Friday otherwise the Titles Office will take the matter further with the DPP. If the Titles Office had their way, they would contact the DPP and pursue you for fraud but have agreed to rectify the error. The property will be transferred back to mum and if she wishes, she can work out something with you. A declaration that you have made an honest error and there was nothing untoward to be co-signed and returned to the OSR."[93]

[62] Mrs Powell had proceeded to make the call to the first defendant in light of what she had been told by the Third Party. This included the Third Party finding out about the title transfer "inadvertently" in an email.[94] Further, Mrs Powell rejected the Court's finding that the Third Party's explanation was "implausible".[95]

[63] When questioned about the 1 May 2017 email, Mrs Powell accepted that she in effect was the "voice piece or conduit" for the Third Party, but she did present it in her own words.[96] A few questions later, Mrs Powell changed her position and stated she was

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92 T1-23 L44-45 (7 December 2023).
93 T1-23 L34-41; This statement generally accords with the contents of the email dated 1 May 2017.
94 T1-24 L7-8.
95 T1-25 L15.
96 T1-54 L21-23.

"a spokesperson, the voice for [the plaintiff]. Not [the Third Party]."[97] Again, a few questions later, Mrs Powell accepted that she obeyed the Third Party by acting on the 1 May 2017 email.[98]

[64] On 5 May 2017, Mrs Powell had left a voicemail message for the first defendant concerning a Form 1 Transfer for him to sign "so that the transfer could be reversed back" into the plaintiff's name.[99] This was agreed with her sisters to support the plaintiff.[100]

[65] On 10 May 2017, there was a without prejudice meeting between the first defendant, Dr Hummelstad and her husband, John Hummelstad, and Mrs Powell.[101] At the meeting, the first defendant outlined the facts why the defendants owned the Harbut Street Property (contrary to what the Third Party had said).[102]

[66] The first defendant had a spreadsheet showing all of the amounts owed by the plaintiff in respect of the RAMS Facilities, including the amounts paid by the defendants on behalf of the plaintiff.[103] Mrs Powell accepted that the payments were made on behalf of the plaintiff.[104]

[67] Mrs Powell appeared to accept that at the end of the meeting it was agreed that any action by the Titles Office against the defendants be stopped.[105]

[68] Whilst maintaining that "it was all of us and [the plaintiff] supporting our mother at the time", Mrs Powell reluctantly agreed that the Third Party had set out the options in the 1 May 2017 email.[106]

[69] The 10 May 2017 meeting was the last contact Mrs Powell had with the first defendant until October 2018 when there was a meeting at the Gardens Point Café.[107]

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97 T1-54 L37-38.
98 T1-54 L40-42.
99 T1-25 L25.
100 T1-25 L40-43.
101 T1-26 L16-19.
102 T1-26 L21-25.
103 T1-26 L27-47.
104 T1-27 L1-4.
105 T1-27 L23-25.
106 T1-27 L27-46.
107 T1-28 L1-8.

[70] The witness was also taken to an email dated 11 May 2017 sent from the plaintiff to Mrs Powell, Dr Hummelstad, Ms Hughes and the Third Party.[108] The email stated:

> "The situation will now be between [the first defendant] & I …. We will sort it out.
>
> …
>
> I have Emailed [the first defendant], taken it out of your hands & we will deal with it so please, don't worry about having your conference call tonight."

[71] The proceeding was commenced on 7 July 2017. Mrs Powell recalled that Dr Hummelstad was on an overseas holiday prior to 7 July 2017.[109] Dr Hummelstad returned on 5 July 2017.[110]

[72] Dr Hummelstad gave evidence at the trial denying that she was involved in the decision to institute proceedings on 7 July 2017.[111] Mrs Powell maintained that they were all part of the decision to support the plaintiff in commencing the proceeding.[112] Mrs Powell explained that she accepts that is what Dr Hummelstad said but that "she said the wrong thing".[113]

[73] Mrs Powell maintained that "it was a joint decision from all of us to support … our mother."[114]

[74] Further, Mrs Powell's evidence was that the Third Party was not a "driving force" behind the decision to institute proceedings but acknowledged that she had no knowledge of what was said by the Third Party to the plaintiff about instituting proceedings.[115]

- *Communications in February - April 2019*

[75] At pages 4-5 of the exhibit to Mrs Powell's affidavit, there are screenshots of text messages between the first defendant and Mrs Powell from 4 February 2019. The text messages include:

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108 Exhibit 1, CB at 3486.
109 T1-29 L40-44.
110 T1-31 L4.
111 T1-3- L33-35.
112 T1-30 L36-39.
113 T1-30 L44-46. Compare, the Trial Reasons at [133] where the evidence of Dr Hummelstad is accepted.
114 T1-31 L13-16.
115 T1-31 L24-32.

> "Hi Neil. Mum's not having success getting all together for a meeting hence delay in getting back to you. I'm sorry. Deanne won't commit without a mediator and **Anna and Chrissy want original demand** despite my and Deanne's efforts to negotiate otherwise. Mum would be happy to meet you on her own this week if you are prepared to discharge the mortgage and give her a reasonable payout that provides her with somewhere to live. This would be the only reasonable option as I can see to avoid trial and the house being sold from you". (emphasis added)

[76] Mrs Powell was questioned about the phrase "original demand" and what it meant. Mrs Powell could not recall but ultimately accepted it could be a reference to the letter from Attwood Marshall[116] dated 12 April 2017 demanding payment of $1.75 million by the defendants to the plaintiff.[117]

[77] Counsel for the defendants questioned Mrs Powell about a telephone conversation with the first defendant on the evening of 6 February 2019. The recording of the conversation was played and while Mrs Powell could not recall the conversation, she accepted that the following was said:[118]

> First Defendant: "Not very much notice, but at the same point is I'm not going to waste any time sitting down meetings and whatever have you. It's just going to be a total farce because based on what [the Third Party] is sending through and the games that she is playing and, you know, "Oh, sold", and whatever you have. Good luck to her. You know, obviously – and if [the plaintiff's] all part of that and if she knows – and she knows exactly what happened and if she's prepared to allow them to happen, well so be it."
>
> Mrs Powell: "Well, I had a word to [the Third Party] for sending that stuff through. I said, "you know, your motivation – **I don't know what your motivation was but it doesn't help anything, Chris**."
>
> First Defendant: "No. Well, you've made it very clear in the text to say, well, [the Third Party] and Anna, they want everything."
>
> …
>
> First Defendant: "So I'm happy to meet, but I certainly will not meet if it it's just going to be, "Here's the ultimatum. If you don't do XYZ, you're going to lose your house", and I assume that's what it is."

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116 The Third Party's evidence was that she arranged for the letter of demand to be sent. See [40] above.
117 T1-31 L12-13.
118 T1-32 L1 to T-34 L31.

Mrs Powell: "No, it's not. This is – this is between you and [the plaintiff]. [The Third Party] – Chrissy and everybody else is out of it for that reason because they're not".

First Defendant: "Margo, I'm sorry to say, but obviously from that point of view, I don't – I don't agree with you in that one because [the Third Party] will never be out of the equation. In the mediation, [the Third Party] was very much part of the – obviously, the process and – and in anything that [the plaintiff] does. [The Third Party] is driving it, right? So please don't insult my intelligence by telling me that [the Third Party] is out of the equation because she is not because even if we have a discussion at some point in time, I'm sure nothing will get resolved because [the plaintiff] will have to go back and talk to [the Third Party]: the same person who's done everything from the start and caused all the grief and the person who's controlling this. So"

Mrs Powell: "I – **I agree that none of this would have happened if it wasn't for [the Third Party]** and her [indistinct] but **I specifically spoke to [the plaintiff] on her own without anybody else and then [the plaintiff] made the decision that she wanted everybody involved and that's why I came back and I told you the truth that this is what [the Third Party] wants. That Chrissy wants.** That's what Anna wants. You've spoken with Deanne. Deanne wants the mediator there. That's why I suggest that you and [the plaintiff] and me – so she just phoned me before." (emphasis added)

[78] In respect of this telephone conversation:

(a) Mrs Powell could not explain the reference to "Oh, sold". Ultimately Mrs Powell accepted in the context it was a reference to the Harbut Street Property.[119]

(b) Mrs Powell accepted that the first defendant's reference to "they want everything" was a reference to her statement in the earlier text message about the "original demand".[120]

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119 See email in Exhibit 1, CB at 3486.

120 T1-33 L22.

(c) Further, Mrs Powell accepted that the reference to "what Chrissy wants… What Anna wants" is a reference to the "original demand".[121]

[79] The recorded telephone conversation on 6 February 2019 also addressed the plaintiff's conduct at the mediation held on 30 October 2018.[122] In cross-examination, Mrs Powell was taken to exchanges including the following:

> First Defendant: "They create stories, Margo. Just like at the mediation. Deanne – [the plaintiff] told Deanne, "[The first defendant] didn't even acknowledge me. [The first defendant] didn't even ask how I was" Know what she did? She kept her head down all the time. She did not even look up once. Right?"
>
> Mrs Powell: Well – well, you could've gone up to her and said hello."
>
> First Defendant: "What? So she's there, she did not want even – to even acknowledge me when I walked in the room. They were in the room beforehand. We requested that we actually sit down with the mediator and myself and Uncle Rob in a room; we could go through and sort this out. Boom. Flatly denied. Didn't want to do it."
>
> Mrs Powell: "Well, **I think that was probably [the Third Party] giving her advice**, or her lawyers giving her advice there. I don't think that would've been [the plaintiff]. She's not like that." (emphasis added)

[80] In respect of the Third Party giving advice to the plaintiff as to how to conduct herself at the mediation, Mrs Powell attempted to explain this by saying the Third Party was "allowed to give advice, like [she was] allowed to give [the plaintiff] advice."[123]

[81] Counsel for the defendants questioned Mrs Powell about a telephone conversation with the first defendant on 1 March 2019. The recording of the conversation was played and while Mrs Powell could not recall the conversation, she accepted that the following was said:

> Mrs Powell: "That's right, and I told this – [the plaintiff] this, and I said, you know Deanne or I have to be there to – exactly that – broker it, or to help mediate it."

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121 T1-34 L35-40.
122 Counsel said 2019 but the mediation was held on 30 October 2018: [85(c)] Costs Reasons.
123 T1-36 L11-15.

…

First Defendant: "She's just creating stuff".

Mrs Powell: "Well, yeah. Well, and I think you know that night that, you know, when we spent that night with you, and I talked to mum the next day, and I said, "Look. There's a lot of – you might want to think about the inconsistencies and what you remember. What you presented; **what [the Third Party's] presented on behalf of the lawyers**; what we've all presented based on assumption, and have been made – that have been made, I should say, and what [the first defendant's] come back with." And I think she genuinely understood where you're coming from a bit. And then I said to you, "You know a couple of things that you and I discussed, she can't remember doing", and I said, 'Well – well, there you go, mum". But I don't know – I don't know the facts." (emphasis added)

[82] In respect of this telephone conversation:

(a) Mrs Powell was referring to the dispute between the first defendant and the plaintiff.[124]

(b) Mrs Powell cannot recall what was meant by the Third Party "presented on behalf of the lawyers".[125] She maintained that the Third Party was not communicating with the lawyers, but the plaintiff was.[126] Further, Mrs Powell considered it could not be inferred from her statement that the Third Party was presenting information that had been communicated to her by the plaintiff's lawyers.[127]

[83] Counsel for the defendants questioned Mrs Powell about a telephone conversation with the first defendant on 5 April 2019. The recording of the conversation was played and while Mrs Powell could not recall the conversation, she accepted that the following was said:

First Defendant: "Yeah. That – that we had, and we tried to organise meetings. We tried to do this. Leanne basically almost wiped her hands of it so she said I can't believe this. Her words were, "I can't believe this

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124 T1-36 L32-33.
125 T1-38 L12-13.
126 T1-38 L31-33.
127 T1-39 L1-4.

effing family, right." That was one of her comments because she goes away and comes back thinking, oh, we're moving forward; we're going to try and resolve it, and oh, okay, the granny flat and there'd be some funds and other bits and pieces like that because she told me what mum wants. She really wants access to the granny flat; I said, okay, that's not a problem; we can sort something like that out because it's built anyway, other than the finishes. We did not turn this to go pear-shaped, Margo. That was Christine and mum, in conjunction with probably Anna, Richard, whoever else the eff was involved because it was – it was leading down a path, that we were supposedly going to sign a document and she was going to work something out with us. No. What was happening, we were going to get set up and we were going to get screwed over, so whatever she's told you is an absolute fabrication as per usual.

Mrs Powell: "Well, you know, I think – **I think with [the plaintiff] is that she's influenced a lot by [the Third Party]** and by the lawyers."

First Defendant: "There weren't lawyers involved back then, Margo. There weren't any lawyers involved".

Mrs Powell: "**Yeah, But I – yeah, good point, in respect of there being no lawyers involved at that time**."

…

First Defendant: "If you – if you can't understand what manipulation and what lies [the plaintiff] has told, we're wasting our time even talking."

Mrs Powell: "All I can say is I – I – **I give [the plaintiff] the benefit of the doubt. I think the manipulation and the lies you 're talking about might be coming from another factor. An external source or an external factor and it doesn't matter because that person represents [the plaintiff] so all I can say is I don't think there's anything deliberate from [the plaintiff]. She's being influenced**."

First Defendant: "I'm sorry Margo. It does matter. The fact is if you can condone the fact that she is able to be manipulated to a point where she's happy to – to not tell the truth – you know, I don't know how she's going to go at trial, Margo, I really don't."

Mrs Powell: "Well – well, that's what worries me, Neil, but **the thing is I think she's had so much manipulation**".

First Defendant: "All I have is just people accusing us of disgusting things and nobody wants to listen. Nobody wants to accept the fact that, well, [the plaintiff] may be lying. [the plaintiff] may not be telling the truth. What – what is [the defendants'] position."

Mrs Powell: Well, I mean, Neil – Neil, this is where I'm coming from. Deanne and I, we appreciate what you're saying. I've tried to relay that to mum; you have spoken to her. We've done all of our best. I mean, I said to mum, "Neil's got a lot you need to think about." I said, "I think we've made a lot of assumption." **I think Chrissy has been very persuasive and engaging the lawyers**. Has been very persuasive. There are a lot of assumptions that have been made, unfortunately, this is what happens. It comes to this, and I thought that, you know, that chat that you and mum and I had that night might have swayed her, but then she gets back, and I asked – I said to her, "Please don't involve Chrissy", and, of course, she does. **So I think of – a lot of it is being dictated by Chrissy and mum is vulnerable; she's influenced**. She feels like that she has the right to the property. She feels like she's being hard done by. I mean, yes, I agree with her. You should have addressed this ten years – this is – this is what happens.

First Defendant: Because, Margo, it wasn't an issue 10 years ago, and this – and this story to say, oh, we only found out last year – that's – and that's a load of crap. And as I said to the car – that there's even other evidence that we have which – which just, again, totally denies these accusations, "I didn't even know", right? And this is what's so frustrating, Margo. We know the story. Deanne knows a fair bit of the story, but, still, everyone's happy to try and do whatever they can to extort money from us and take something from us, of which – you know, we've already – we've made – we tried to resolve this, paying out the frigging RAMS loans, which were never ours. We've already forked out all this money for RAMS, plus – hang on a minute – oh, we will – I want my own house. No, the granny flat's here. That was per the agreement. That only happened – the house sat here for 10 years, Margo. We couldn't do anything with it. It was a shell, not due – not due to our doings. If she told us and

explained everything that was going on – but no, she decided to not tell us about the mortgages, not to tell us about the default, not tell us about anything, which puts us in a –

Mrs Powell: "**What about – yeah, I get that**."

…

First Defendant: "That's right because if they tell the solicitor the truth – the truth does not suit their case, Margo. That's the whole problem".

Mrs Powell: "**Yeah. Yeah – well, exactly**."

First Defendant: "If they told the truth, we wouldn't be having this – and then there would be everyone – there'd be – or everyone be saying – like"

Mrs Powell: But see, Mum's – **[the plaintiff's] focus – [the plaintiff's] focus on the truth. It sounds like it's been completely obscured by the conversations and the assumptions that have been made. So her – her understanding of the truth is probably a complete different scenario to what it was – you know, 10 years ago because its's been obscured**."

First Defendant: "The worst part about it, Margo, is Christine was heavily involved in all this stuff leading up to it And – Chrissy owes me money and this and whatev – whatever have you. And the worst part about it is the person who's created this – all of this – who's embezzled all the money from Mum and Dad –

Mrs Powell: "**Yes, I know**".

First Defendant: "That put [the plaintiff] in this position in the first place".

Mrs Powell: Exactly, Neil. I couldn't agree with you more. And I said this to Mum. I said "**Mum, we would never be in this situation if it wasn't for Chrissy**". And I said "**You know what, you were just as responsible because you aligned yourself with Chrissy**. Everybody told you not to. **You're at fault just as much Chrissy is**". And she goes "Yes, I know that". So she admits that. I mean, people blame Chrissy all the time but it was Mum's decision at the end of the day.

…

Mrs Powell: Oh, Neil, we want to listen. Deanne and I want to listen. That's why I'm talking to you on the phone. I get that, and I have. I have. We've had

teleconferences offline. Deanne and **I have advocated for you and Leanne big time** and I think you know, once, you know **– we're getting, you know, 10 steps forward, and then we always go five steps forward, and then we go 10 steps back**. And it's very frustrating for us, and that's why Deanne throws her hands up and goes – and she goes "I can't do this anymore. What's the point?" Not having any influence. Yeah.

First Defendant: She told me what I should be doing, and you know I'm not going to repeat it now, but it's a shame that even my own sister has lost confidence in my mother and my other sister to a point where she's telling us and recommending stuff to us which goes against – I'm just, you know, that – and that's a reflection. I think it ties into a few things that happened with Mum and Deanne, and what was happening with Chrissy, and it is so disappointing that, you know, one person – as in Christine – can have such a negative influence to a point it doesn't affect – only affect us. It affects everybody else, Margo. It affects the whole family.

Mrs Powell: "Yeah, yeah, she does. I mean, Chrissy is, and she's got this – you know what she's like. **She's got this incredible manipulative influence that doesn't**' – you know, Deanne, it just goes straight over our head, **but with mum and Anna, to a certain extent, she's very convincing, but she's been like that for most of her** life. As you know, and I know. So this is – this is what I'm saying: it's not – it's not mum, **it's other external factors that are influencing and manipulating her and the lawyers**. None of us have been privy to the lawyers, where I've actually met with their lawyer once, **but Chrissy has been the main point of 5 contact with that. So everything – the lawyers here – is from Chrissy and Chrissy and mum. But mum, because she's so naïve with all this stuff, she relies on Chrissy, and she leans on Chrissy.** So you know, when I hear stuff, I don't know half of what's going on. Deanne doesn't because we haven't been privy to those conversations. I've – I've been hearing more from you than I 10 have from mum about what's going on because sometimes, she doesn't understand that – it either.

First Defendant: "No. That's right. Well, that going to be great in court, isn't it so".

Mrs Powell:	"And that's what I am worried about. **I said to mum you've got to be very careful if this goes to trial, and I said this in front of [the Third Party]**. If you can't remember what happened, the judge is going to say, well, what are we here for?"
First Defendant:	"That's right. So what's she going to do? So I need a recess so I can consult with my daughter so she can tell me what I should be saying?"
Mrs Powell:	"**But what I should be saying – exactly**. But I said, mum, when you're on that podium, they're going to look at you on the stand. If you can't verify accurately what's going on, then, I'm sorry, you've lost your case. That's what really worries me." (emphasis added)

[84] In respect of this telephone conversation:

(a) Mrs Powell did not accept that the Third Party influenced the plaintiff to commence the proceedings on 7 July 2017.[128] She maintained it was a "joint decision" that they were all supporting their mother.[129]

(b) Mrs Powell did not recall whether the reference to "external or another factor" was a reference to the Third Party.[130]

(c) Mrs Powell did not accept that the reference was to the Third Party manipulating the plaintiff, as she could not recall the conversation.[131]

(d) Mrs Powell agreed that the plaintiff was vulnerable and that the Third Party was "persuasive" in her demeanour, but she would not describe the Third Party as manipulative.[132]

(e) Mrs Powell accepted that the Third Party had influence over the plaintiff and that the Third Party "influenced and persuaded" the plaintiff in relation to the filing.[133] However, Mrs Powell then stated again in response to the next question that the decision to commence the proceedings was "made by all of us".[134]

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128 T1-41 L11-14.
129 T1-41 L18-19.
130 T1-42 L14-24.
131 T1-43 L35-38. See also T1-44 L1-29.
132 T1-45 L36-44.
133 T1-46 L5-7.
134 T1-46 L19-10.

(f) Mrs Powell seemed to accept that the Third Party had been "persuasive" and "engaging the lawyers", being the plaintiff's lawyers.[135]

(g) Mrs Powell accepted that the reference to only finding out "last year" is a reference to the transfer of the Harbut Street Property[136] and it was a reference to what she had been told by the plaintiff and the Third Party.[137]

(h) Mrs Powell did not accept that by saying "Yeah, I get that" that she was agreeing with the first defendant. Rather, she "gets what he is saying".[138]

(i) Mrs Powell disagrees with the findings in the Trial Reasons in relation to the Third Party, including that the Third Party's account of how she first realised the Harbut Street Property had been transferred is "implausible",[139] but she accepts it is the same evidence referred to by the first defendant.[140] In the next answer, she appears to accept the original proposition that she is agreeing with the first defendant.[141]

(j) In respect of the reference to "it's been obscured", Mrs Powell explained this on the basis that it was the information presented to the plaintiff "by all of the family that might have obscured her recollection of the events at that time".[142]

(k) In respect of the comment "we would never be in this situation if it wasn't for [the Third Party]", Mrs Powell could not remember what she meant.[143]

(l) In respect of the comment that the Third Party was the main point of contact, and that everything the lawyers hear is from the Third Party, Mrs Powell explained this as the Third Party "supporting" the plaintiff.[144] Further, Mrs Powell explained that the lawyers were "contacting [the plaintiff] and [the Third Party] was, obviously part of those conversations as well … but [the plaintiff] was the main point of contact .. with her lawyers, not [the Third Party]."[145]

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135 T1-46 L36-38.
136 T1-47 L34-35.
137 T1-47 L39-41.
138 T1-48 L5-7.
139 T1-48 L38.
140 T1-49 L14-18.
141 T1-49 L27.
142 T1-51 L2-3.
143 T1-51 L38-46.
144 T1-57 L9-10.
145 T1-57 L16-19.

(m) Mrs Powell agreed that this was another example of where the words she had spoken were not what she had meant.[146]

[85] In the course of her evidence, Mrs Powell again stated:

> "the decision that we all had to institute proceedings against [the defendants] was because we could not resolve – a – a mutual outcome for [the plaintiff], and we wanted justice for our mother. And that's when we supported [the plaintiff's] decision to – to file. To go to trial."[147]

[86] Counsel for the defendants questioned Mrs Powell about a telephone conversation with the first defendant on 27 February 2019. The recording of the conversation was played and while Mrs Powell could not recall the conversation, she accepted that the following was said:

> First Defendant: "I'm sorry to bother you. I was going to leave it until this afternoon, but Chrissy sent Leanne a text and she's rung her work saying that she's been leaving message which we've never received, and saying we need to contact her urgently.
>
> …
>
> You know, Leanne's not going to be talking to her directly, and I've already said that, you know. We won't be talking to her directly because it becomes a nonsensical discussion, so I – I thought I'd ask you to say – say is something else going on.
>
> Mrs Powell: No, Neil. I **don't know why she does this**, and I think all I can say is that it's **another agenda that Chrissy has**. And I don't know what that is, but I might actually ring Mum and ask – and can see if she can enlighten. **See, Chrissy does this. She goes off half-cocked and doesn't tell anybody what she's doing**. And then – and then, you know, when we're trying to have a good conversation with you, she comes in and violates it. It drives me nuts.
>
> …
>
> Mrs Powell: Yeah, I know. **I would say that she's got an agenda**, and I would completely ignore it, and it's unfair for her to say, "Please contact Chrissy urgently." I'm going to – I'm going to –
>
> First Defendant: She shouldn't be ringing work either.

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146 T1-57 L21-22.
147 T1-55 L16-19.

> Mrs Powell: No. Exactly. So she rang Leanne at work as well? Freaking hell. Okay. I might give Mum a call and ask if she knows what's going on. **I bet that Mum's got no idea**. But just – just tell her – just tell Leanne to – and, I mean, Leanne's not going to do anything, is she?"

[87] In respect of this telephone conversation:

(a) Mrs Powell's explanation of the Third Party's behaviour referred to was the Third Party "like all of us, trying to resolve it, the dispute".[148]

(b) In respect of the comment that the plaintiff had "no idea", Mrs Powell explained that the Third Party would "do things of her own choice" and she could not recall whether that was related to the dispute.[149] Further, whilst the Third Party may have been doing things "off her own back" in respect of the Supreme Court proceedings, the Third Party was "not driving the litigation".[150]

[88] Counsel for the defendants took Mrs Powell back to [35] of her affidavit and asked whether she adhered to that testimony, having heard the statements from the telephone recordings played to her. Mrs Powell responded:

> "I adhere to that testimony in paragraph 35 to the extent that that was the information that I had to hand. These new voice messages I can't recall, and I didn't actually include them in my affidavit because I didn't have a record of those. But at the same time, [the Third Party] was not driving this litigation for my mother. It was – it was all of us together supporting [the plaintiff]."[151]

[89] Mrs Powell was again asked whether she adhered to [35] of her affidavit in light of the recordings she was taken to and she responded:

> "Yes and no. I mean, the conversations that I was presented today were conversations between myself and [the first defendant] about what we discussed, not what I knew [the Third Party] was doing.
>
> …
>
> But I do accept that this evidence that – these voice recordings that I – I didn't recall – I can't remember those, are being presented so that does show to a certain extent that while I wasn't aware that there is

148 T1-59 L15.
149 T1-60 L10-11.
150 T1-60 L16-17.
151 T1-60 L43-47.

> new conversations that shows that [the Third Party] was involved but not to the extent what you're proposing. If I could – if I could say that."[152]

[90] A third time, Mrs Powell was asked whether she adhered to [35] in her affidavit as true and correct, she responded "not to that extent"[153] but then indicated she did not know how to answer the question.[154]

[91] Ultimately, Mrs Powell responded:

> "As I swore on that affidavit, that was what I – that was what were the facts and I knew at the time. Having presented these new voice messages, I – I've got so much going on in my mind I can't even think about what was presented to me right now. So I do stand by what I said but there is new evidence that would suggest that [the Third Party] was involved in some of those – with [the plaintiff's] litigation early 2019 that I wasn't aware of at the time of my affidavit. So I – I can't give you a yes or a no answer."[155]

[92] Mrs Powell presents as a witness who is prepared to be an advocate for a party. While the plaintiff is her mother, this does not justify her evidence. I generally do not accept the evidence of Mrs Powell set out in her affidavit, particularly in relation to the Third Party's involvement. The evidence in the affidavit is selective and unreliable, particularly in light of the prior inconsistent statements she was taken to in cross-examination. Further, Mrs Powell's oral evidence is largely unreliable and not credible. In the circumstances, I generally do not accept Mrs Powell's oral evidence.

[93] However, I do accept the evidence of Mrs Powell to the extent:

(a) it is consistent with the statements made by her in 2019;

(b) it is consistent with contemporaneous documents (for example, text messages) and contemporaneous evidence (for example, voicemail messages relied upon by the defendants); or

(c) is contrary to the plaintiff's and Third Party's interests.

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152 T1-61 L17-26.
153 T1-61 L38.
154 T1-61 L42.
155 T1-62 L2-8.

- *Does the non-party have an interest in the subject of the litigation?*

[94] The defendants contend that the Third Party had an interest in the litigation in the sense that, given her history of "manipulating" the plaintiff for money, she would have access to more funds if the plaintiff successfully obtained possession of the Harbut Street Property.

[95] In support of this contention, the defendants rely on:

(a) The Third Party commissioning and paying for valuations of the Dagmar Street Property and the Harbut Street Property[156] and not being able to provide a reason why she did so.[157]

(b) It can be inferred that the Third Party wanted to know the increase in value of these two properties: described as "the pot of gold".[158]

(c) The evidence as to the Third Party's "long history of manipulating" the plaintiff to give her access to funds.[159]

(d) The Third Party was appointed an attorney with her two sisters for the plaintiff under an Enduring Power of Attorney on 25 February 2020.[160]

[96] The defendants contend that the Third Party had a "plan" against the first defendant from 24 June 2016 when she texted the first defendant that she had had enough of the "lies and coverups" and she would "have to take appropriate steps to ensure the financial future for [her] mother".[161]

[97] The Third Party was asked about this statement in cross-examination and was unable to explain what she meant.[162] From this, the defendants are seeking to infer that there is no other plausible explanation for the statement other than the Third Party having the so-called "plan".

[98] It is submitted that an inference is available, based on the Third Party's past conduct, that the Third Party would have taken steps to sell the Harbut Street Property and to

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156 Exhibits 24, 25, 27, 31, 11, 12, 13.
157 T5-106 L26 and following; T5-108 L5 and following; T6-4 L7 and following.
158 [9] Defendants' written submissions.
159 T3-67 L1-20; Exhibit 10.
160 Exhibit 26; T6-21 L11-30.
161 T6-8 L22-31.
162 T6-8 L33 to T6-9 L7.

use the surplus funds for her own purposes.[163] That is, if the Harbut Street Property had been ordered to be transferred back to the plaintiff, there was nothing to prevent the plaintiff selling the property and providing funds to the Third Party.

[99] In relation to the Third Party's history of manipulation, the defendants rely on the following:

(a) Dr Deanne Hummelstad's evidence as to:

(i) the Third Party's manipulation;[164]

(ii) her misgivings about the impact on her mother, the plaintiff, living with the Third Party from early 2017;[165]

(iii) the Third Party's history of "taking advantage" of the plaintiff;[166]

(iv) the Third Party's history of "bullying" the plaintiff;[167]

(v) the Third Party previously encouraging the plaintiff to take out mortgages on her property to pay for the Third Party's debts;[168] and

(vi) the Third Party previously encouraging the plaintiff and Colin Trouton to provide the initial funding for Scaasi.[169]

(b) the Third Party's evidence as to:

(i) Admitting that she had been "manipulative in cases, in relationships and with [her] mother";[170]

(ii) Admitting she "may have been" manipulative of the plaintiff since November 1997,[171] but later denying this.[172]

(c) The plaintiff's evidence as to:

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163 At [23] Defendants' written submissions.
164 T8-5 L1-27; T8-5 L47 to T8-6 L5; T8-16 L4-11.
165 T7-92 L15-17.
166 T8-10 L25-46.
167 T8-15 L44-46; T7-104 L7 to T7-105 L24.
168 T8-10 L28-34; T3-68 L5-12; T5-5 L5-35.
169 T4-96 L1-10.
170 T6-9 L34-35.
171 T6-10 L17-28.
172 T6-75 L39-41.

(i) On 30 January 2006, the plaintiff told a doctor that she was being manipulated by the Third Party.[173]

(ii) Admitting that she was not subject to the Third Party's control and manipulation when she was living away from her.[174] Relevantly, the plaintiff lived with the Third Party from January 2017.

[100] The defendants also point to the emails and text messages sent by the Third Party to the defendants as evidence of her attempts to manipulate the defendants by intimidating them to settle the proceeding.

[101] The Third Party submits that she does not have any interest in the subject of the litigation "equal to or greater than that of the [plaintiff]".[175] The plaintiff claimed orders cancelling the transfer and for recovery of possession of the Harbut Street Property. There is no basis that the Third Party could have acquired any interest in the Harbut Street Property.

[102] In response, the Third Party says that under the terms of the Power of Attorney, all three attorneys must make any decisions jointly, and consequently, the Third Party could not have sole control or access to the plaintiff's funds.

[103] It is submitted that at the highest, the Third Party took steps to assist the plaintiff "to ensure the financial future for" the plaintiff, as her mother.[176]

[104] In these circumstances, the Third Party contends that the Third Party had no substantial financial interest in the litigation.

Additional criteria

[105] While not prerequisites, it is of some assistance to consider the additional factors identified in *FPM Constructions v Council of the City of Blue Mountains*.

[106] The plaintiff was the unsuccessful party to the proceeding and was the moving party, not the defendant.[177]

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173 T3-67 L1-20; Exhibit 10.
174 T3-76 L10-13; T3-67 L1-20.
175 At [54(b)] Third Party's written submissions.
176 T6-8 L22-31.
177 The defendants are seeking the costs in respect of the plaintiff's claim, so consideration of the counterclaim is not necessary.

[107] Other than the identified expenses, the source of the funds for the litigation was not the Third Party.

[108] Given the findings in the Trial Reasons and the Costs Reasons,[178] the Third Party accepts that in the circumstances the plaintiff's conduct of the litigation should be regarded as "unreasonable or improper".

[109] In respect of the finding at [84(b)] of the Costs Reasons that the plaintiff commenced and continued the proceeding, making allegations of fraud, knowing them to be false and in wilful disregard of known facts, the Third Party says:

(a) There is no evidence that the Third Party knew the matters found by the Court at [84(a)] of the Costs Reasons, namely:

"(a) At all material times, the plaintiff:

(i) Knew and understood the legal effect of the Form 1 Transfer.

(ii) Knew that she had knowingly and voluntarily signed the Form 1 Transfer in both her personal capacity and purportedly as an attorney on behalf of Colin Trouton.

(iii) Knew that she had intended to transfer the Harbut Street property to the defendants."

(b) The Court found to the contrary at [201] of the Trial Reasons,[179] namely:

> "It can be inferred from this evidence that the plaintiff was not full and frank with her daughter Christine Trouton, as the plaintiff did not say truthfully where she had been and what she had done. Not only had the plaintiff been to Garden City to sign the Form 1 Transfer, she had seen the defendants and their children, and bought a new television.[180] This position is consistent with the evidence of Dr Hummelstad that the Harbut Street Agreement (and logically the transfer of the property) was to be kept "quiet".

(c) Further, the Third Party contends that while the Court has found that the Third Party's evidence:

(i) "was not reliable or credible in respect of key areas relevant to the issues in dispute" and

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178 Namely, that the plaintiff commenced and continued the proceeding making allegations of fraud knowing them to be false and in wilful disregard of known facts: Costs Reasons [84(b)].

179 In relation to 19 June 2007.

180 See evidence discussed below (at [202]-[204] Trial Reasons).

(ii) as to "how she realised that the Harbut Street property had been transferred to the defendants is implausible",

the Court has not found, and there is no evidence to find, that the Third Party knew that the proceeding had been commenced, and was being continued, on the basis of allegations made by the plaintiff that were false or in wilful disregard of known facts.

[110] Given the findings by the Court, the Third Party invites the Court to draw an inference that the plaintiff was not truthful or honest with the Third Party about her knowledge of the matters stated in [84(a)] of the Costs Reasons.

[111] In respect of the UCPR Offer[181] considered in the Costs Reasons, the Third Party submits that:

(a) There is no evidence that the Third Party had any involvement in not accepting the UCPR Offer; and

(b) There is no evidence that she even knew of the making of the UCPR Offer.

[112] The Third Party also relies on the evidence in the affidavit of Mr Hansen that she did not give instructions on the pleadings and had no involvement in the mediation.

Matters relevant to the interests of justice

[113] In respect of the "fourth factor", the defendants contend that the interests of justice warrant the making of a costs order against the Third Party as:

(a) The defendants have incurred substantial legal costs since the commencement of the proceeding on 7 July 2017. The costs are estimated at "approaching half a million dollars", including the costs of the proceedings relating to the RAMS Facilities.[182]

(b) But for the central role of the Third Party in instituting and continuing the prosecution of the proceeding, the case would not have been litigated.

(c) The evidence establishes the Third Party had a "real and direct and … material connection with the principal litigation".

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181 See [44] Costs Reasons.

182 T11-9 L9-20; Exhibits 58, 69 and the finding at Trial Reasons [474].

(d) The plaintiff is a "woman of straw" and will be unable to satisfy the costs ordered against her as the plaintiff.

(e) The Third Party is not a "woman of straw", being the registered owner of a property at Carindale purchased with funds in part from the settlement of a dispute with Suncorp and Super Ltd.[183] The Third Party also has an interest in a medical and cosmetic clinic business.[184]

[114] The defendants submit that in these circumstances, it is in the interests of justice that there is some prospect of recovering at least in part the significant legal expenses incurred in defending the proceeding commenced as a result of the "central role" of the Third Party.

[115] In the context of considerations of the interests of justice, it is common ground that the Third Party was not warned by the defendants that an application for non-party costs would be made against her if the plaintiff's claim failed.

[116] The defendants contend that there is "no absolute rule" that a failure to warn is a disqualifying factor. However, the defendants acknowledge that, consistent with the authorities, it may be a material consideration in the exercise of the Court's discretion whether, or not, an order should be made.[185]

[117] The defendants submit the Court should not speculate what would have happened if the warning had been given but rather look at what did happen. The defendants point to the following in this regard:

(a) The Third Party's long-standing animosity towards the defendants.[186]

(b) The Third Party was not deterred by the plaintiff's instructions on 11 May 2017 that the plaintiff would "sort it out" and the issue was "taken out of [the Third Party's] hands".[187]

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183 The property was purchased for $989,000 on 16 April 2020 and the Third Party is the sole registered owner. T5-52 L21-22; T5-52 L44-46; T5-53; T5-54 L1-10; Exhibit 23.

184 T5-54 L15-47; T5-55 L1-22.

185 Yates v Boland [2002] FCA 1895; Gore (t/as Clayton Utz) v Justice Corporation [2002] FCA 354; Kebaro Pty Ltd v Saunders [2003] FCAFC 5.

186 T5-6 L29-45; T5-35 L41-45.

187 Exhibit 16; T6-19 L10-19; T6-75 L7-21.

(c) The Third Party had a history of being "extremely litigious".[188]

(d) The Third Party stood to gain from the proceedings if they were successful.[189]

[118] The Third Party also addresses this and wider issues going to the interest of justice.

[119] The Third Party submits:

(a) Her role was not a central role.

(b) The evidence points to a "daughter endeavouring to support her mother to ensure her mother's financial future".[190]

(c) The support that was given was limited, indirect and was in the nature of support "justified by family ties" as described by Collier J in *Citrus Queensland Pty Ltd v Sunstate Orchards Pty Ltd (No 10)*.[191]

(d) The Third Party was not warned that she might be the subject of an application for costs against her if the plaintiff was unsuccessful. As a consequence, the Third Party was deprived of any opportunity to "check" her involvement in the dispute the subject of the proceeding or behave differently.

[120] In response to the defendants' contention that the Third Party "had a history of being extremely litigious",[192] the Third Party analyses the litigation referred to in Exhibit 32. Only six of the 23 matters identified were commenced by the Third Party. Two concerned a property dispute with an ex de facto, one concerned a claim against an insurer and three were against former solicitors for the Third Party (two who had previously sued the Third Party).

[121] Further, it is submitted that the manner of the cross-examination of the Third Party at trial is consistent with the defendants at that time suspecting[193] that the Third Party had a substantial role in the proceeding. Despite this, no prior notice was given to the Third Party.

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188 [7(c)] of the Defendants' written submissions. See Exhibit 32; T6-47 to T6-52 and T7-93 L18-21 (threat of litigation).

189 See discussion at [94]-[98] above.

190 At [43] Third Party's written submissions.

191 [2009] FCA 498. See also Payne JA in KSMC Holdings Pty Ltd t/as Hubba Bubba Childcare on Haig v Bowden (No 3) [2020] NSWCA 158 and Burley J in Skelin v Self Care Corporation Pty Ltd (No 2) [2022] FCA 50.

192 See [7(c)] Defendants' written submissions.

193 At least strongly suspected or were of the understanding. See [47] Third Party's written submissions.

Further affidavit evidence

[122] For the purpose of the Third Party Application, the defendants rely on an affidavit of the second defendant sworn 11 October 2023.[194] The affidavit exhibits:

(a) A USB drive containing copies of voicemail messages from the Third Party variously to the first defendant or the second defendant on various dates between 11 and 15 November 2019.

(b) Copies of text messages from the Third Party variously to the first defendant or the second defendant on various dates between 29 October 2019 and 26 November 2019.

[123] In respect of this affidavit evidence the defendants submit that it is further compelling evidence of the central role the Third Party played in the institution and continuing of the litigation and that the Third Party had a real and direct connection with the litigation.

[124] The defendants rely on parts of the text messages including:

(a) The use by the Third Party of "we" and "I" at various times when referring to the litigation and consequences.

(b) A statement by the Third Party that "Mum has nothing to lose!!!".

(c) A statement by the Third Party that refers to "what we've found" and "I'd hate to see this battled out in court as a fraud case & your beautiful children lose their parents in the jail system" followed by a date by which it is to be settled.

(d) A statement by the Third Party that "I'm not sitting here waiting until Christmas again and then we need to just set down a trial date then and I need to get it in before Christmas …".

[125] The defendants contend that inferences can be drawn from the evidence that as at October and November 2019:[195]

(a) The Third Party was the "principal protagonist in trying to force [the defendants] into a settlement of the proceedings acceptable to her."

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194 Filed 12 October 2012. Court Doc No 120.

195 More than two years after the commencement of the litigation.

(b) The repeated demands of the Third Party, including threats to the defendants that it was "imperative for them to settle" the proceeding:

(i) "were not in fact because she was interested in obtaining a settlement for the benefit of her aging mother but rather to benefit herself, namely to obtain "the pot of gold" without the risks of her wrongful conduct being exposed at a trial and the associated delays which would result from the case going to trial";[196] and

(ii) "confirmed that, contrary to her contentions otherwise, [the Third Party] had a central role in providing the instructions to [the plaintiff's] lawyers either directly or alternatively indirectly".[197]

(c) As revealed by the words "[the plaintiff] has nothing to lose", from "the [Third Party's] perspective, based on her experience in other litigation and putting to one side the cost of her mother's lawyers, there was no real risk of her mother going to trial if a settlement was not forthcoming. That was because if her mother lost the case and was ordered to pay costs, [the Third Party] knew it was highly improbable that any adverse costs order would be able to be enforced against/satisfied by [the plaintiff] as her mother had no assets."[198]

[126] In respect of the affidavit evidence, the Third Party's submissions in response include:

(a) The evidence needs to be considered in context.

(b) There is a danger in considering extracts as it does not take into account the whole message or the chronological sequence.

(c) The messages are from a period over two years after the proceedings were commenced.

[127] Particularly, the Third Party contends that the inferences at [4(a)] to [4(c)] do not arise from the statements relied upon by the defendants.

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196 [4(b)(i)] Defendants' Supplementary Submissions dated 23 November 2023.
197 Ibid, [4(b)(ii)].
198 Ibid, [4(c)].

[128] The Third Party relies on the affidavit of Margo Powell[199] affirmed 13 November 2023.[200] Mrs Powell was cross-examined on these issues at the hearing and this is dealt with in detail previously in these reasons.

[129] The defendants are critical of the evidence of Mrs Powell and ultimately it was submitted no weight should be given to the affidavit evidence. These submissions need to be considered further in light of the cross-examination of Mrs Powell.

Consideration

[130] As reflected in the findings and reasoning in the Trial Reasons and the Costs Reasons, there was no basis for the plaintiff commencing the plaintiff's claim. The "case theory" contended for by the plaintiff and pleaded in the SOC was totally unsuccessful at trial.

[131] While the Third Party was not a party to the proceeding, there is evidence that she did play a substantial and influential role in the proceeding.

[132] I make the following findings based on the evidence and findings in the Trial Reasons and the Costs Reasons, together with the further evidence in respect of the Third Party Application:

(a) At the material times for the commencement of the proceeding and the continuation of the proceeding there was a close connection between the plaintiff and the Third Party.

(b) The "dynamics of the relationship" were such that the Third Party had substantial influence over and the ability to persuade the plaintiff.

(c) The plaintiff, to the Third Party's knowledge, had no assets to be able to meet any costs order if the plaintiff was unsuccessful in the proceeding.

(d) The Third Party did play an active part and was involved in the litigation in the sense of counselling and encouraging, and otherwise influencing, the plaintiff, in addition to the specific steps that she took in respect of the proceeding. Whilst she did not exclusively control the conduct of the proceeding, she was

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199 Mrs Powell is a daughter of the plaintiff and a sister of the first defendant and the Third Party, and the sister-in-law of the second defendant.

200 Filed 12 October 2023. Court Doc No 124.

central to the commencement and maintenance of the proceeding in "important and critical respects".

(e) The plaintiff was wholly unsuccessful and was the moving party. The conduct of the litigation by the plaintiff was "unreasonable and improper".

(f) The Third Party was a source of some funds in respect of the conduct of the proceeding, but was not the sole source of funds.

(g) The Third Party had no direct interest in the litigation. However, the Third Party's conduct in making the initial demand for a payment of $1.75 million, being involved in negotiations and maintaining that initial demand[201] tends to support a conclusion that she had as a minimum an "agenda" or "motive" in the litigation being pursued.

(h) The Third Party "caused" the action in the sense that it was her alleged discovery of something that led ultimately to the plaintiff commencing proceedings.[202]

(i) The Third Party's influence predated the involvement of lawyers.

(j) The Third Party took steps including seeking legal advice, gave at least to some extent instructions to the plaintiff's lawyers, undertook investigations including searches and obtaining valuations, communicated with the Titles Office and lodged or arranged caveats over the Harbut Street Property.

(k) The Third Party took action in undertaking these investigations but was not prompted or directed to do so by the plaintiff.

(l) The Third Party directed her sister, Mrs Powell, to present an "option" to the first defendant in May 2017 to effect a transfer of the Harbut Street Property back to the plaintiff.

(m) Despite the plaintiff expressly saying the dispute was between the plaintiff and the first defendant, the Third Party remained involved.

(n) The Third Party often used language consistent with her being akin to a party to the proceeding, rather than a non-party.

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201 Even when further "facts" had been presented.

202 The Third Party's explanation was found to be implausible at [134] of the Trial Reasons. The plaintiff's explanation of this discovery was also vague and evasive.

(o) There is some evidence to support an inference that the Third Party manipulated the plaintiff to commence and continue the proceeding.

(p) The defendants have incurred substantial legal costs in defending the plaintiff's claim.

(q) The Third Party does have some assets which may meet a costs order, should one be made.

(r) The involvement of the Third Party went beyond simple support of a family member. It was neither limited nor indirect: it was substantial and direct in many respects as shown in the evidence.

[133] While the defendants did not warn the Third Party that a costs order may be sought against her, that is only one factor to be weighed up in the exercise of the Court's discretion and the consideration of what is just and reasonable in all of the circumstances.

[134] The question then arises, should the discretion be exercised in the current circumstances to make a costs order against the Third Party? A Court will ordinarily not make a non-party costs order unless the interests of justice justify a departure from the general rule that only parties to proceedings are subject to costs orders.

[135] In all of the circumstances, taking into account the evidence at trial, the findings in the Trial Reasons and the Costs Reasons, and the further evidence and findings in respect of the Third Party Application, I am satisfied that:

(a) It is just and reasonable to depart from the general rule that only parties to proceedings are subject to costs orders.

(b) The interests of justice require that an order be made that the Third Party pay the defendants' costs of the plaintiff's claim.

[136] The question remains as to whether the Third Party should be ordered to pay the defendants' costs on a standard basis or an indemnity basis.

Should the Third Party be ordered to pay the defendants' costs in respect of the plaintiff's claim on an indemnity basis?

[137] The defendants rely on all of the matters relied upon to support a non-party costs order as also supporting costs on an indemnity basis. The defendants contend that the Third Party's conduct warrants the exercise of the Court's discretion to order the Third Party be liable for the defendants' costs in respect of the plaintiff's claim on an indemnity basis.

[138] The Third Party submits that if the Court is satisfied that the Third Party should pay costs, then it should be on the standard basis and not the indemnity basis.

[139] The Third Party contends that there is no evidence to support an indemnity costs order, particularly there is no evidence that:

(a) The Third Party engaged in any of the conduct described at [77] of the Costs Reasons, namely:

> "While the categories are not closed, the authorities do recognise some circumstances that warrant the exercise of the discretion. For example:
>
> (a) The making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud.
>
> (b) Evidence of particular misconduct that causes loss of time to the Court and to other parties.
>
> (c) The fact that the proceedings were commenced or continued for some ulterior motive.
>
> (d) The fact that the proceedings were commenced or continued in wilful disregard of known facts or clearly established law.
>
> (e) The making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions.
>
> (f) An imprudent refusal of an offer to compromise.[203]"

(a) The Third Party has engaged in, been knowingly concerned in or otherwise encouraged the plaintiff to do, any of the matters found by the Court at [91] of the Costs Reasons, namely:

> "The circumstances warranting a departure from the usual costs position in respect of the plaintiff's claim can be classified as at least falling in the categories of:

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203 *Colgate Palmolive Co v Cussons Pty Ltd* [1993] FCA 536; (1993) 46 FCR 225 per Sheppard J at 233 point 5.

(a) the making of allegations of fraud knowing them to be false;

(b) proceedings commenced or continued in wilful disregard of known facts; and

(c) an imprudent refusal of an offer to compromise."

Consideration

[140] The evidence relied upon by the defendants gives rise to consideration of a number of the "circumstances that warrant the exercise of the discretion" as identified in the authorities referred to in the Costs Reasons. These may be different from the circumstances considered in respect of the plaintiff.

[141] In respect of the Third Party, the circumstances that may warrant a departure from the usual position of costs on a standard basis can be classified as possibly falling in the categories of:

(a) the making of allegations of fraud knowing them to be false;

(b) proceedings commenced or continued in wilful disregard of known facts;

(c) an imprudent refusal of an offer to compromise; and

(d) the fact that the proceedings were commenced or continued for some ulterior motive.

[142] In respect of these, the following conclusions can be drawn from the evidence, and available inferences, and findings in the Trial Reasons, the Costs Reasons and these reasons:

(a) The Third Party was "pivotal" in the initial demand to the defendants, the development of the "case theory" and ultimately to the commencement of the proceeding.

(b) The Third Party at the initial stage and at various stages in the proceeding had considerable influence over the plaintiff.

(c) This influence by the Third Party extended to making and responding to settlement negotiations and whether, ultimately, to proceed to trial.

(d) The Third Party was part of discussions which included the first defendant outlining the facts relied upon by the defendants that the Harbut Street Property had been transferred intentionally by the plaintiff.

(e) Further, there were contemporaneous documents which were inconsistent with the "case theory."[204]

(f) The Third Party did not, or would not, objectively evaluate those facts contrary to the "case theory", on her own behalf and/or in support of the plaintiff.

(g) Very serious allegations of fraud were made against the defendants.

(i) As the plaintiff was the person with actual knowledge of some of the discussions and events which transpired between the plaintiff and the defendants, and the plaintiff had on at least one occasion not been full and frank with the Third Party, it is open to conclude that the Third Party may not actually have known the allegations of fraud were false.

(ii) However, it is open on the facts to conclude that the Third Party counselled and encouraged, and otherwise influenced, the plaintiff to at least continue the proceeding making the serious fraud allegations with at least reckless disregard by the Third Party to the known facts.[205]

(h) The Third Party at least counselled and encouraged, and otherwise influenced, the plaintiff to commence and/or continue the proceeding for the Third Party's improper motive in respect of the defendants, namely to get a negotiated settlement of a payment of $1.75 million from the defendants.[206]

[143] These matters in respect of the Third Party also need to be considered in the context that the plaintiff was totally unsuccessful at trial and the findings made in respect of the plaintiff, in particular at [82] to [84] of the Costs Reasons.

[144] The UCPR Offer was relevant to the consideration of an imprudent refusal of an offer to compromise in respect of the plaintiff. The Third Party submits that there is no evidence that the Third Party knew of the UCPR Offer. However, there is evidence

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204 As discussed in the Trial Reasons.

205 That is where the first defendant had outlined the defendants' position, including circumstances ultimately relied upon by the defendants at the trial.

206 Again in circumstances where the defendants' position, as ultimately found at trial, had been outlined to the plaintiff and the Third Party.

that the Third Party was involved in negotiations to try to settle the proceeding at various stages, including giving the defendants ultimatums to settle or they would, in effect, "face the consequences".

[145] Further, the UCPR Offer was made on 31 October 2018 immediately following the unsuccessful conclusion of the mediation. There is evidence that the Third Party had some involvement at the time of the mediation. In the circumstances, particularly given the close relationship between the plaintiff and the Third Party, it is more probable than not that the Third Party was aware of the UCPR Offer on or around 31 October 2018.

[146] The plaintiff's SOC at that time was in the same form as the trial was conducted on, which was totally unsuccessful. The continuance of the proceeding from that point has to be considered in light of the UCPR Offer and the weaknesses of the plaintiff's case. The Third Party's comment that the plaintiff had "nothing to lose" supports at least indifference to whether the claim was "unreasonable and improper".

[147] The text messages on various dates between 29 October 2019 and 26 November 2019 show that the Third Party was prepared to put considerable pressure on the defendants to settle, including deploying a threat of the risk of jail for fraud. These are civil proceedings and the threat of criminal sanction is not relevant or appropriate. A threat of that outcome could be characterised as a tactic to force a negotiated outcome consistent with the original demand by letter dated 12 April 2017[207] prior to the commencement of the proceeding.

[148] Further, the statements by Mrs Powell in the recorded conversations between Mrs Powell and the first defendant on 6 February 2019, 27 February 2019, 1 March 2019 and 5 April 2019 also evidence the willingness of the Third Party to put pressure on the defendants to settle on terms that were, in effect, acceptable to the Third Party, even if that result was not consistent with the "facts".

[149] Some of the evidence indicates a level of vitriol by the Third Party in communications with the defendants, particularly the first defendant. For example:

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207 Claiming $1.75 million from the defendants.

(a) The email attaching the "sold" gif and the following email attaching the "oops" gif sent by the Third Party to the defendants in February 2019.[208]

(b) The email sending comments from people about RAMS repossessing properties for non-payment of loans.[209]

[150] There is no logical explanation for these emails other than the Third Party goading the defendants in the course of these, and related, proceedings. Again, it can be inferred that the motive was to force a negotiated outcome.

[151] In all of the circumstances, in exercising the Court's discretion I am satisfied that it is appropriate to order that the Third Party pay the defendants' costs calculated on the indemnity basis in respect of the plaintiff's claim, including reserved costs.

Order

[152] Accordingly, the order is that the Third Party, Christine Trouton, pay the defendants' costs calculated on the indemnity basis in respect of the plaintiff's claim, including reserved costs.

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208 Exhibit 29.
209 Court Doc No 28.

ANNEXURE A – EXTRACT FROM TRIAL REASONS OF FACTUAL FINDINGS RELIED UPON BY THE DEFENDANTS

[396] Given the way that the plaintiff's fraud claim has been articulated, it is necessary to consider three issues:

(a) Question 1: Was the Form 1 Transfer signed without the plaintiff knowing or understanding the legal effect of the Form 1 Transfer and the plaintiff never intending to transfer the title of the Harbut Street property to the defendants by the execution of the Form 1 Transfer?

(b) Question 2: Did the defendants never have any intention of paying the purchase price of the Harbut Street property as pleaded at [17(a)], [17(b)] and [17(c)] of the SOC and/or by their conduct after the registration of the title as particularised in [2] of the Further and Better Particulars?

(c) Question 3: Did the second defendant when lodging the Form 1 Transfer on behalf of herself and the first defendant with the Registrar of Land Titles:

(i) know that the document was not properly executed and/or was a false document;

(ii) know that the Registrar of Land Titles would not have registered the Form 1 Transfer had they been informed of the death of Colin Trouton and absent the purported execution of the Form 1 Transfer by or on behalf of Colin Trouton; or

(iii) had the intention that the Registrar be induced by the misleading representation that Colin Trouton knew or approved of the registration of the Form 1 Transfer or that the power of attorney authorised the first defendant and plaintiff to execute the Form 1 Transfer on behalf of Colin Trouton, notwithstanding his death on 15 June 2007?

[397] I accept the evidence of the first and second defendants as to the circumstances of the execution of the Form 1 Transfer on 19 June 2007. In particular, I find that:

(a) The plaintiff knew and understood the legal effect of the Form 1 Transfer at the time it was executed.

(b) The plaintiff knowingly and voluntarily signed the Form 1 Transfer.

(c) The plaintiff, by executing the Form 1 Transfer in both her personal capacity and purportedly as an attorney on behalf of Colin Trouton, intended to transfer the Harbut Street Property to the defendants.

(d) The plaintiff, the first defendant and the second defendant honestly, but mistakenly, thought the Form 1 Transfer was properly executed on behalf of Colin Trouton.

(e) The first and second defendants were not dishonest in the preparation of and execution of the Form 1 Transfer.

[398] Further, in respect of the Form 1 Transfer, I find that:

(a) The execution of the Form 1 Transfer was defective to the extent that it purported to be executed by or on behalf of Colin Trouton under the Colin Trouton Power of Attorney.

(b) The Colin Trouton Power of Attorney was revoked on and from 15 June 2007 when Colin Trouton died.

(c) The correct procedure to effect a transfer of the Harbut Street Property where one of the registered joint tenants had died was as follows:

(i) A certified copy of the official certificate of death to be provided to Titles Queensland;

(ii) Completion of Form 4 – Request to record death to be completed and lodged with Titles Queensland;

(iii) The Harbut Street Property to be registered solely in the name of the surviving joint tenant, being the plaintiff; and

(iv) Completion and execution of a Form 1 Transfer from the plaintiff to the defendants.

(d) Had the Registrar of Titles known of the death of Colin Trouton, the Form 1 Transfer would have been requisitioned and the procedure at (c) would have been required to complete the transfer.

(e) The plaintiff, the first defendant and the second defendant did not know that the execution of the Form 1 Transfer by or on behalf of Colin Trouton was defective.

(f) The plaintiff, the first defendant and the second defendant did not know the correct procedure outlined at (c) above was required by Titles Queensland to effect the transfer of the Harbut Street Property from the plaintiff as the sole surviving joint tenant to the defendants.

[399] It is also necessary to make additional findings in respect of factual disputes arising both before and after the registration of the Form 1 Transfer.

[400] As to matters arising before 19 June 2007 concerning the plaintiff, I find that:

(a) The plaintiff had more than limited experience in business and commercial matters. Her relevant experience included being a director of a clothing business and also executing other Form 1 Transfers to complete transfers of real property.

(b) The plaintiff was not reliant on the first and second defendant in relation to the transfer of the Harbut Street Property as alleged in [1(g)] of the SOC.

(c) The plaintiff on the evidence was capable of, and did, make decisions in respect of commercial and legal matters without the input of the defendants. This included the increase of the drawdown amounts under the RAMS Facilities and liaising with RAMS in respect of the facilities.

(d) The plaintiff lodged the Colin Trouton Power of Attorney with Queensland Titles for registration.

[401] I make findings in respect of the Harbut Street Agreement separately below at [404]-[410].

[402] In light of these initial findings of fact, I make the following findings in respect of the key issues to be determined:

(a) Question 1: At the time the Form 1 Transfer was signed the plaintiff knew and understood the legal effect of the Form 1 Transfer and the plaintiff intended to transfer the title of the Harbut Street Property to the defendants by the execution of the Form 1 Transfer.

(b) Question 2:

(i) The defendants intended to pay the purchase price of the Harbut Street Property and subsequently did so by way of:

(A) payments made at the request of or at the direction of the plaintiff in the amount of $94,547.55 (Exhibit 67); and

(B) payment of the amounts owing under the RAMS Facilities in the amount of $531,726.18 as at 30 November 2021 (Exhibit 71).

(ii) The amount paid towards the purchase price is in excess of the purchase price of $500,000 as per the Harbut Street Agreement[210] (or alternatively $525,000 is stated on the Form 1 Transfer and the unadjusted purchase price of $550,000. Each of these amounts has been exceeded on what has been paid by the defendants).

(iii) Further, while the design has changed with the consent of the plaintiff,[211] a space that can be used as a 'granny flat' by the plaintiff remains as part of the design of the new dwelling built on the Harbut Street Property.

(c) Question 3: The second defendant when lodging the Form 1 Transfer on behalf of herself and the first defendant with the Registrar of Land Titles:

(i) Did not know that the document was not properly executed and/or was a false document.

(ii) Believed the document to be properly executed.

(iii) Did not know that the Registrar of Land Titles would not have registered the Form 1 Transfer had they been informed of the death of Colin Trouton.

(iv) Did not have the intention that the Registrar be induced by the misleading representation that Colin Trouton knew or approved of the registration of the Form 1 Transfer or that the power of attorney authorised the first defendant and plaintiff to execute the Form 1 Transfer on behalf of Colin Trouton, notwithstanding his death on 15 June 2007.

[403] Given these findings, the plaintiff has not established fraud for the purposes of s 184(3)(b) of the Land Title Act.

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210 See separate discussion below.

211 See email dated 14 December 2007 at 5:54pm.

[404] Both the plaintiff and the defendants intended the Form 1 Transfer to be effective in transferring the Harbut Street Property to the defendants. While the Form 1 Transfer had significant deficiencies, none of the parties were aware of the deficiencies and the parties believed it to be a genuine document to transfer the ownership of the Harbut Street Property to the defendants.

[405] As a consequence of these findings, the plaintiff's claim as pleaded in the SOC must fail.

[406] In the circumstances, the defendants obtained indefeasible title upon registration of the Form 1 Transfer.

[407] It is appropriate that orders be made that the caveats lodged by both the plaintiff and the Registrar of Titles be removed.

[408] To the extent that the plaintiff submits that any orders pursuant to s 127(1) of the Land Title Act for the removal of the caveats should be conditional on the plaintiff being discharged from the mortgage over the Harbut Street Property, I consider it is not appropriate to impose such a condition.

[409] The mortgagee (now RHG) has an interest under the mortgage and to alter that interest in the absence of the mortgagee is not appropriate. The plaintiff has a legal relationship with the mortgagee under the terms of the RAMS Facilities and the plaintiff remains responsible to RHG in respect of the amounts owing under the RAMS Facilities.

[410] It is not appropriate to vary the security by way of the mortgage over the Harbut Street Property in the way proposed by the plaintiff, at least without hearing from the mortgagee and there being a proper basis to do so.

[411] While there are arguments both ways, given the various significant difficulties that arise due to Colin Trouton's lack of mental capacity and the nature of the joint obligations of the plaintiff and Colin Trouton in the 9 March Written Agreement, the better view is that the 9 March Written Agreement does not give rise to legally enforceable obligations.

[412] However, I accept the evidence of the defendants as to the circumstances in which the plaintiff and Colin Trouton signed the 9 March Written Agreement. Accordingly, I do not accept the plaintiff's contentions in respect of the 9 March Written Agreement being an aspect of the plaintiff's fraud case.

[413] Whilst there are issues which result in the 9 March Written Agreement being unenforceable, I accept that there were discussions between the plaintiff and the first defendant as to the terms contained in the written agreement and that the plaintiff accepted those terms.

[414] In respect of the Harbut Street Agreement, I find that the agreement in or about February 2007 was an oral agreement reached between the first defendant (on his own behalf and on behalf of the second defendant) and the plaintiff (on her own behalf and on behalf of Colin Trouton) with the following terms:

(a) The first defendant agreed to purchase and the plaintiff agreed to sell the Harbut Street Property for a purchase price of $500,000.

(b) The defendants would demolish the existing house on the Harbut Street Property and build a new house to live in with their children, including a "granny flat" for the plaintiff and Colin Trouton to live in.

(c) The defendants agreed to assist in providing care to Colin Trouton and the plaintiff and Colin Trouton would have the benefit of living in the "granny flat" and the defendants being able to provide care.

(d) The defendants would be responsible for the design and construction of the new house.

(e) The plaintiff would be responsible for paying the RAMS Facilities secured by a mortgage over the Harbut Street Property.

(f) Once the construction of the new house was completed to the lock-up stage, the defendants would list the Dagmar Street Property for sale.

(g) The defendants would pay the purchase price for the Harbut Street Property to the plaintiff and Colin Trouton upon settlement of the sale of the Dagmar Street Property.

[415] The oral agreement was varied further by agreement between the first defendant and the plaintiff:

(a) In May 2007 for the Harbut Street Property to be transferred to the defendants prior to them incurring the costs of construction of the new house.

(b) On or about 5 June 2007 that payments made by the defendants to the plaintiff or at her direction (including payments made in respect of Scaasi debts or expenses) were part payments of the purchase price.

(c) On or about 15 September 2008 that the payment by the defendants of the RAMS Facilities arrears of $7,148 was a part payment of the purchase price.

(d) From on or about 30 September 2008 onwards that the ongoing payments by the defendants of the RAMS Facilities on behalf of the plaintiff were part payments of the purchase price.

[416] I also find that acts of part performance of the oral agreement were performed by the first and/or second defendants including:

(a) Taking possession of the Harbut Street Property and the existing house being demolished between 27 and 29 March 2007.

(b) Commencement of construction of the new dwelling in approximately September 2007.

(c) The defendants paying the rates, sewerage and water charges from 8 May 2007.

(d) The second defendant prepared a draft Form 1 Transfer to give effect to the agreement as varied.

(e) The first defendant and the plaintiff made an arrangement for the plaintiff and Colin Trouton to visit the defendants' home on 3 and 4 June to sign the Form 1 Transfer.

(f) The telephone conversation between the first defendant and the plaintiff on 18 June 2007 regarding arrangements for the Form 1 Transfer to be signed in front of a Justice of the Peace in Brisbane on 19 June 2007.

(g) A further telephone conversation between the first defendant and the plaintiff on 19 June 2007 agreeing to meet at Garden City shopping centre to meet with a Justice of the Peace.

(h) The execution of the Form 1 Transfer on 19 June 2007 before a Justice of the Peace.

(i) Payments made by the defendants to or at the request of the plaintiff, including expenses of Scaasi as per Schedule 2 as part payments of the purchase price. Exhibit 67 records total payments of $94,547.55.

(j) Payments made by the defendants on behalf of the plaintiff in respect of the RAMS facilities secured by a mortgage against the Harbut Street Property as per Schedule 3 as part payments of the purchase price. Exhibit 71 records payments as at 30 November 2021 of $531,726.18.

[417] The relevant context for the part performance is also demonstrated by the plaintiff registering the Colin Trouton Power of Attorney on or about 21 May 2007 at the Gold Coast to give effect to the Harbut Street Agreement and the transfer of the Harbut Street Property.

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[442] Further, page 3421C of the Court Book is a record of what was done in relation to the subdivision and organising the various plans and includes an approximation of the time spent on the relevant activities.

[443] These documents were provided with a letter to the plaintiff.

[444] The first defendant's evidence was that he had discussions with the plaintiff in relation to the Scaasi loan and the first defendant gave evidence that that was to be used as a payment towards the purchase of the Dagmar Street Property.[212] As a result of that discussion, he prepared the schedules in relation to how the costs were to be dealt with.[213]

[445] The first defendant gave evidence that he prepared a spreadsheet from primary documents including Mastercard statements, cheque butts, cheque statements and other primary documents and imported the dollar values into the spreadsheet maintained by him in respect of the payments which were being offset against the Dagmar Street Property purchase price.

[446] In respect of the payments that were made, the first defendant gave evidence that these were done following requests from his mother for the specific payment to be made on her behalf or on behalf of the company, Scaasi.

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212 T9-22 L30-34.
213 T9-22 L40.

[447] The first defendant also gave evidence that occasionally, the second defendant would be contacted by the plaintiff and ask for a specific payment to be made. Payments of this nature were factored into the spreadsheet.

[448] Exhibit 50 is the version of Schedule 1 which was addressed by the first defendant in giving evidence. This reflects the payments made at the direction of the plaintiff in relation to Dagmar Street.

[449] I accept the first defendant's evidence in respect of the agreement reached between the plaintiff and the defendants to set off amounts paid for and on behalf of the plaintiff including payments for and on behalf of Scaasi as offsetting against the Dagmar Street Property purchase price. In this respect, I find that the payments made by the defendants on account of the purchase price of the Dagmar Street Property are as set out in exhibit 50, totalling $147,451.14.

[450] I accept the evidence of the defendants in respect of the amounts that were paid by the plaintiff to, in effect, repay the claimed overpayment of $29,453.83.[214] Accordingly, on the evidence of the defendants, which I accept, the purchase price of $160,000, including the offset of the subdivision costs, has been paid and no balance remains outstanding.

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214 2ADCC [8].