SUPREME COURT OF QUEENSLAND

CITATION: *Goomboorian Transport Pty Ltd & Ors v Hanson & Ors* [2018] QSC 182

PARTIES: **GOOMBOORIAN TRANSPORT PTY LTD ACN 011 054 658**
(first plaintiff)

AND

J & M LOGHANDLING PTY LTD ACN 011 054 667
(second plaintiff)

AND

BELLING INVESTMENTS PTY LTD ACN 123 710 734
(third plaintiff)

AND

GOOMBOORIAN LOGGING PTY LTD ACN 076 970 995
(fourth plaintiff)

AND

LITTLE YABBA DROUGHTMASTER STUD PTY LTD ACN 086 875 845
(fifth plaintiff)

AND

EMMERDALE FARMING PTY LTD ACN 151 515 909
(sixth plaintiff)

AND

JILRAY PTY LTD ACN 058 181 463
(seventh plaintiff)

AND

J & M FARMING PTY LTD ACN 086 991 291
(eighth plaintiff)

AND

J & M FARMING PTY LTD and LITTLE YABBA DROUGHTMASTER STUD PTY LTD ABN 89 152 178 639
(ninth plaintiff)

AND

JOHN GERHARD BELLING
(tenth plaintiff)

AND

MARLENE ANNE BELLING

(eleventh plaintiff)

v

ESTATE OF NORMA RENEE HANSON, DECEASED
(first defendant)

AND

DOROTHY MAUREEN HANSON
(second defendant)

AND

NORMAN RICHARD HANSON
(third defendant)

FILE NO/S: SC No 4392 of 2015

DIVISION: Trial Division

PROCEEDING: Trial – Further Orders

DELIVERED ON: 14 August 2018

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGE: Bond J

ORDER: **The orders of the Court are:**

1. **Christa Marie Moxey in her capacity as executor of the estate of Norma Renee Hanson, deceased, be substituted as the first defendant in this proceeding.**
2. **There be judgment against Christa Marie Moxey in her capacity as executor of the estate of Norma Renee Hanson, in favour of the following parties in the amounts identified:**
   a. **first plaintiff: $815,966.10**
   b. **second plaintiff $1,403,008.47**
   c. **third plaintiff: $8,735.50**
   d. **fourth plaintiff: $69,673.85**
   e. **fifth plaintiff: $86,937.36**
   f. **sixth plaintiff: $76,125.98**
   g. **seventh plaintiff: $10,018.11**
   h. **tenth plaintiff: $37,092.54**
3. **Further to the previous order, Christa Marie Moxey in her capacity as executor of the estate of Norma Renee Hanson must pay the plaintiffs' costs of the proceeding to date.**
4. **The parties are directed to bring in minutes of an order to be made consistent with these reasons for**

judgment in respect of the interest calculation which should be added to the amounts identified in order 2, within 14 days of the date of this judgment.

5. It is declared that so much of the second and third defendants' interest in the home located at 22 Parkland Drive, Chatsworth as represents the ratio between –

a. the amount of the $51,833.61; and

b. the value of that home at 26 February 2015,

is held on trust by the second and third defendants for the third and sixth plaintiffs.

6. It is declared that the Mercedes Benz A-Class motor vehicle (VIN WDD1 173432N154473) purchased by the second and third defendants on 3 March 2015 is held on trust by the second and third defendants for the third and sixth plaintiffs.

7. It is declared that:

a. as at and from the date of the deposit on 2 April 2015 of $180,000 into First Colonial superannuation account number 5129899 in the name of Norman Hanson, the third defendant held his chose in action in relation to that account on trust for the third and sixth plaintiffs;

b. as at and from the date of the deposit on 2 April 2015 of $540,000 into First Colonial superannuation account number 5129925 in the name of Dorothy Hanson, the second defendant held his chose in action in relation to that account on trust for the third and sixth plaintiffs;

c. as at the date of the deposit on 28 March 2015 of $80,000 into term deposit account number 154404313 in the name of Norman Hanson, the third defendant held his chose in action in relation to that account on trust for the third and sixth plaintiffs;

d. as at the date of the deposits referred to below, the second and third defendants held their choses in action in relation to the deposits on trust for the third and sixth plaintiffs:

i. the deposit on 4 May 2015 of $20,000 into the trust account of the solicitors for the second and third defendants; and

ii. the deposit on 6 May 2015 of $100,000

into the trust account of the solicitors for the second and third defendants.

8. There be no order as to the costs of the plaintiffs' application to re-open.

9. The second and third defendants must pay 95% of the plaintiffs' costs of the proceeding to date.

10. The questions whether the plaintiffs are entitled to–

a. any orders for accounts and inquiries; or

b. any further relief to give effect to the plaintiffs' rights,

having regard to the extent to which the plaintiffs' rights have been settled by the declarations made on 12 June 2018 and by the orders above, are adjourned to a date to be fixed, for directions.

CATCHWORDS: PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – GENERALLY – FORM OF JUDGMENT OR ORDER – where judgment had been delivered – where parties were invited to deliver further submissions on specific questions, including the form of order, particular claims to relief, and costs – where the plaintiffs delivered submissions on matters additional to the specified questions – where the plaintiffs' submissions went further than the arguments advanced at trial – where the plaintiffs' proposed orders went further than the issues litigated at trial – whether the additional orders and declarations sought by the plaintiffs should be made

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – CORRECTION UNDER SLIP RULE – OTHER PARTICULAR CASES – where judgment had been delivered – where judgment amount was based on a pleaded schedule – where amendments were made to the pleaded schedules at trial – where the amendments were not correctly reflected in submissions – where the judgment amount reflected the erroneous figures – whether the error can be corrected by application of the slip rule

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – OTHER PARTICULAR CASES AND MATTERS – where the plaintiffs filed an application to re-open its case after the close of the trial – where the additional evidence sought to be adduced by the plaintiffs were documents disclosed by defendants after the close of the trial – where the defendants were plainly at fault for not disclosing the documents – where the plaintiffs' application to re-open was refused because the material which should have been disclosed was no longer relevant due

to a narrowing of issues at the trial – where the defendants sought a costs order in their favour on the basis that costs follow the event – whether it is appropriate in the exercise of discretion to make different costs order

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – OFFERS OF COMPROMISE, PAYMENTS INTO COURT AND SETTLEMENTS – INFORMAL OFFERS AND CALDERBANK LETTERS – GENERALLY – where the plaintiffs made two *Calderbank* offers to settle – where the plaintiffs submit the result they achieved after trial should be regarded as having bettered both offers – whether the defendants' refusal to accept the first *Calderbank* offer should be regarded as an imprudent offer to settle – whether the plaintiffs should be awarded costs on the indemnity basis from the date after the first offer was made

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – PARTIAL SUCCESS – where the defendants accept a costs order should be made against them – where the defendants submit that the costs order should be limited to particular paragraphs in the statement of claim and reduced by 30% to reflect the failure by the plaintiffs on particular claims – where the defendants submit the plaintiffs carried out unnecessary analysis to identity and quantify the amounts claimed – where the second and third defendants' conduct of their defence had been characterized as an exercise of putting the plaintiffs to the proof of their allegation – whether the costs order in favour of the plaintiffs should be limited to particular paragraphs in the statement of claim – whether the costs order in favour of the plaintiffs should be reduced by 30% to reflect the extent of failure by the plaintiffs

Aklia Holdings Pty Ltd v The Carter Group Pty Ltd (In Liq) & Ors (No 2) [2017] QSC 266, cited

Goomboorian Transport Pty Ltd & Ors v Hanson & Ors [2018] QSC 135, related

Hadgelias Holdings and Waight v Seirlis [2014] QCA 325, cited

Smith v Wessling-Smith [2017] QSC 189, cited

COUNSEL: C Heyworth-Smith QC, with N H Ferrett, for the plaintiffs
G J Handran, with K W Wylie, for the second and third defendants

SOLICITORS: Griffith Hack for the plaintiffs
Mullins Lawyers for the first defendant
Baldwins Lawyers for the second and third defendants

Introduction

[1] On 12 June 2018, I published my reasons for judgment after the trial of this proceeding, including by dealing with an application to re-open which I had heard and refused: see *Goomboorian Transport Pty Ltd v Hanson* [2018] QSC 135. All parties were represented on that occasion, including the first defendant.

[2] For reasons which I explained in those reasons, the orders which I made were:

(a) I will hear the plaintiffs further on the form of order which should be made in relation to the first defendant.

(b) It is declared that the proceeds of the Asteron term life policy 81318923 were received by the second and third defendants as trustees for the third and sixth plaintiffs.

(c) I will hear the parties further on the plaintiffs' claims to the relief identified at paragraphs B, C and D of the claims to relief made in the plaintiffs' amended statement of claim.

(d) The plaintiffs' claim for declaratory relief in respect of the BT death benefit amount is refused.

(e) It is declared that the second and third defendants hold their interest in the home located at 22 Parkland Drive, Chatsworth, subject to an equitable lien in favour of the plaintiffs in the amount of $12,622.22.

(f) The plaintiffs' claim for declaratory relief in respect of the chattels listed at paragraph [110](e) of the Court's reasons for judgment is refused.

(g) The plaintiffs' application to re-open the case is dismissed.

(h) I will hear the parties as to the costs of the application to re-open and as to the costs of the proceeding.

[3] After publishing my reasons for judgment, I set a timetable for the receipt of further submissions on the matters in respect of which my orders indicated that I would hear the parties further. Having now received submissions from those parties who sought to make them, I now turn to address the requisite issues. These reasons should be read with the reasons published on 12 June 2018.

[4] As is plain from the form of the orders which I made on 12 June 2018, I invited further submissions from the parties only on the matters identified in [2](a), [2](c) and [2](h) above. I did not invite submissions from the parties on any other matter. In particular I did not invite submissions from the parties on whether I should grant any relief not actually the subject of evidence and submissions at the trial. Yet the plaintiffs have seen fit to make submissions on such matters.

[5] I will deal first with the three matters on which I have invited submissions. I will then respond to the plaintiffs' attempt to address other considerations.

The form of order which should be made in relation to the first defendant

[6] By claim for relief H made in the plaintiffs' amended statement of claim, the plaintiffs sought–

(a) a declaration that the first defendant is indebted to the plaintiffs in the amount set out in Part 11 of Schedule A to the amended statement of claim;

(b) judgment against the first defendant in those amounts in favour of those parties.

[7] By claim for relief K, the plaintiffs sought "interest pursuant to statute on any amounts awarded".

[8] I sought submissions on the form of order which should be made in relation to the first defendant because the first defendant was not named as a juridical person, but was only described as "The estate of [Ms Hanson], deceased".

[9] I had on the first day of the trial received evidence that, although probate had not been obtained, Ms Hanson had left a will which, after some of the persons named in the will as executors had renounced that role, operated to name as executor of the will Ms Hanson's sister, Christa Moxey. As was recited in my reasons for judgment at [5], Ms Moxey had appeared at the commencement of the trial, by her counsel, and had obtained an order that the first defendant be excused from further attendance during the trial.

[10] The plaintiffs have now proposed that the appropriate orders would be to require the substitution of Ms Moxey in her capacity as executor of the estate of the late Norma Renee Hanson as the first defendant, and then for money orders to be made against Ms Moxey in that capacity.

[11] Ms Moxey, her solicitors having been notified of the proposed orders, was only in the position of making limited submissions, in light of the limited resources of the estate. Her solicitors advanced the following submissions on her behalf:

(a) First, in light of the quantum for which judgments would issue, Ms Moxey would have no alternative but to apply for a bankruptcy trustee to be appointed for the estate.

(b) Second, once such a trustee was appointed, the trustee would take over administration of the estate and all dealings with the creditors of the estate.

(c) Finally:

> However, we submit that, in the circumstances of a bankruptcy trustee proposed to being appointed for the estate in the near future, an order substituting our client in her capacity as personal representative for the estate may be inappropriate and that, whilst not ideal in most circumstances, in these circumstances the First Defendant should remain as "Estate of the late Norma Renee Hanson" until such time that a bankruptcy trustee is appointed, at which time the Plaintiffs can pursue the bankruptcy trustee in respect of the judgment debt against the estate.
>
> Whilst we are of the view that it is inappropriate to substitute our client (in her capacity as personal representative) as the First Defendant, we appreciate that His Honour may require someone to be substituted as First Defendant, in which case the logical option appears to be our client.

[12] As things currently stand, in my view it is appropriate that a juridical person be made the subject of the judgments. Of course the judgments must be met out of estate assets (if any), not by Ms Moxey out of her personal resources. I would expect that once judgments are made, if the estate cannot meet them, the course foreshadowed by the first two submissions advanced by Ms Moxey's solicitors would then occur.

[13] Thus far, that would suggest that the substitution should be made and there should be judgment against Ms Moxey in her capacity as executor of the estate of the late Norma Renee Hanson in favour of the plaintiffs identified in Part 11 of Schedule A in amounts totalling the amount stolen by Ms Hanson, namely $2,524,073.60.

[14] However the plaintiffs now point out that –

(a) some minor amendments were made at the trial to reduce the amounts claimed as identified in the pleaded schedules;

(b) they erroneously did not reflect the reduced amounts in their submissions before me; and

(c) my judgment reflected their erroneous submissions, not the pleaded amounts.

[15] The error should be corrected by application of the slip rule to reduce the amount found. No submission to the contrary was made. My reasoning as to the appropriate way in which that should be done is as follows.

[16] The amounts transferred from each of the plaintiffs, based on the amended Part 11 of Schedule A, but taking into account the reductions identified in my reasons for judgment at [23], were as follows:

(a) first plaintiff: $967,216.68

(b) second plaintiff $1,530,221.97

(c) third plaintiff: $8,735.50

(d) fourth plaintiff: $69,673.85

(e) fifth plaintiff: $86,937.36

(f) sixth plaintiff: $76,125.98

(g) seventh plaintiff: $10,018.11

(h) tenth plaintiff: $37,092.54

(i) total: **$2,786,021.99**

[17] My previous reasons for judgment identified that I calculated Ms Hanson's total lawful entitlement to be $278,464.08. The difference between her lawful entitlement and the total figure referred to in the previous paragraph is $2,507,557.91. The judgments made in favour of the plaintiffs should total to that figure.

[18] The total lawful entitlement of Ms Hanson should be deducted from the amounts of the judgments in favour of the first plaintiff and the second plaintiff, because Ms Hanson was formally the employee of the first plaintiff until 20 June 2011, when she became the employee of the second plaintiff. The plaintiffs contend that the total lawful entitlement should be split between the first plaintiff and the second plaintiff by allocating $151,250.58 to the first plaintiff and $127,213.50 to the second plaintiff. No party opposes that course. Accordingly, that is what I will do.

[19] Thus far, and for the reasons I have identified, the result is that the orders I would make on this topic are as follows:

(a) Christa Marie Moxey in her capacity as executor of the estate of Norma Renee Hanson, deceased, be substituted as the first defendant in this proceeding.

(b) There be judgment against Christa Marie Moxey in her capacity as executor of the estate of Norma Renee Hanson, in favour of the following parties in the amounts identified:

(i) first plaintiff: $815,966.10

(ii) second plaintiff $1,403,008.47

(iii) third plaintiff: $8,735.50

(iv) fourth plaintiff: $69,673.85

(v) fifth plaintiff: $86,937.36

(vi) sixth plaintiff: $76,125.98

(vii) seventh plaintiff: $10,018.11

(viii) tenth plaintiff: $37,092.54

[20] Of course that does not take account of the plaintiffs' claim for relief for "interest pursuant to statute". As to this:

(a) The plaintiffs belatedly sought to justify an unpleaded claim for compound interest on the hypothesis that it was covered by claim for relief J, namely "such further or other relief as the Court deems necessary or just to give effect to the plaintiffs' rights". I reject that contention. Interest was the subject of a specific claim for relief. If compound interest was to have been sought, it should have been specifically claimed.

(b) The plaintiffs should have interest on the amounts transferred from each of the plaintiffs (after having due regard for the legitimate amounts to which Ms Hanson was entitled from the first and second plaintiffs) only on the basis of simple interest at the rates applied from time to time by the Court pursuant to applicable practice directions: see http://www.courts.qld.gov.au/courts-calculator/interest-rates. (The plaintiffs submitted I should adopt a fixed rate of 7% over the whole period, but I think that the fluctuating rate is more just.)

(c) I direct the parties to bring in minutes of an order to be made consistent with these reasons for judgment in respect of the interest calculation which should be added to each of the amounts identified in the previous paragraph, within 14 days of the date of this judgment.

The orders which should be made in respect of the plaintiffs' claims to the relief identified at paragraphs B, C and D of the claims to relief made in the plaintiffs' amended statement of claim

[21] My reasons for judgment stated:

> [86] The plaintiffs are entitled to the declaration they seek, namely that the proceeds of the Asteron term life policy 81318923 were received by Ms Hanson's parents as trustees for the third and sixth plaintiffs.
>
> [87] It was common ground that Ms Hanson's parents had conducted the following transactions with funds which they had obtained from receipt of the insurance proceeds:
>
> (a) on 12 February 2015, payment of Ms Hanson's funeral expenses in the amount of $13,843.50;
>
> (b) on 26 February 2015, a gift to Glen Hanson in the amount of $148,300;
>
> (c) on 26 February 2015, repayment of their home loan in respect of the family home in the amount of $51,833.61;
>
> (d) on 3 March 2015, purchase of a motor vehicle in the amount of $61,495;
>
> (e) on 28 March 2015, deposit into a term deposit at Bendigo Bank in the name of Mr Hanson, in the amount of $80,000;
>
> (f) on 2 April 2015, deposit into Mrs Hanson's First Colonial superannuation account in the amount of $540,000;
>
> (g) on 2 April 2015, deposit into Mr Hanson's First Colonial superannuation account in the amount of $180,000;
>
> (h) on 13 April 2015, a loan to John Hanson repayable by July 2015 in the amount of $200,000;
>
> (i) on 4 May 2015, a deposit to their solicitors' trust account in the amount of $20,000; and
>
> (j) on 6 May 2015, a deposit to their solicitors' trust account in the amount of $100,000.

[88] The statement of claim also sought declarations which might be thought to be ancillary to the primary declaration as to the proceeds of the policy, and consequent upon the agreed facts concerning the disposition of the proceeds, as follows:

(a) a declaration that so much of Ms Hanson's parents' interest in the family home as represents the ratio between –

(i) the amount of the $51,833.61 payment referred to at [87](c); and

(ii) the value of the family home at the time of the payment,

is held on trust by Ms Hanson's parents for the third and sixth plaintiffs;

(b) a declaration that the motor car referred to at [87](d) is held on trust by Ms Hanson's parents for the third and sixth plaintiffs;

(c) a declaration that the amounts identified at [87](e), [87](f), [87](g), [87](i) and [87](j) are held on trust by Ms Hanson's parents for the third and sixth plaintiffs.

[89] I did not receive any substantive written or oral submissions from either side addressing the plaintiffs' claim to those declarations. Now that they have the benefit of my reasoning and conclusions as to the principal claim in relation to the proceeds, I will hear the parties on those questions.

[22] The claims referred to at [88](a), (b) and (c) of my previous reasons for judgment reflected claims for relief B, C and D sought in the plaintiffs' amended statement of claim.

[23] As to claim for relief B:

(a) The second and third defendants accept that based on my judgment the third and sixth plaintiffs are entitled to a proportionate interest in the family home based on the proportion which the abovementioned payment represented as against the value of the family home when that payment was made. It appears to be common ground that the family home is correctly described as the home located at 22 Parkland Drive, Chatsworth.

(b) Accordingly, it should be declared that so much of the second and third defendants' interest in the home located at 22 Parkland Drive, Chatsworth as represents the ratio between –

(i) the amount of the $51,833.61; and

(ii) the value of that home at 26 February 2015,

is held on trust by the second and third defendants for the third and sixth plaintiffs.

(c) In their further written submissions after my reasons for judgment, the plaintiffs sought to introduce evidence as to the value of the home as at 26 February 2015 to persuade me to fix the proportion in percentage terms at 11.27% (on the basis that the home was valued $460,000 and $51,833.61 is 11.27% of $460,000). But that was not the declaration which they sought at trial. More importantly, no attempt was made during the trial to prove what was the value of the home as at 26 February 2015. That factual issue was not litigated before me. To litigate it would require some form of further process than the trial which has already occurred.

(d) If the parties cannot reach agreement on the pecuniary consequences of the declaration, the plaintiffs will have to take other steps to enforce their rights as against the second and third defendants, having regard to the extent that those rights have now been settled by the fact of the declaration. The second and third defendants accept that such directions could be made. If the plaintiffs seek to have me do that, then the proper course is to take separate steps to achieve that outcome, not to seek to introduce it as part of the submissions which I have invited in order to resolve finally the orders which should be made consequent upon the trial.

[24] As to claim for relief C:

(a) By this claim, the plaintiffs sought a declaration that a particular motor car was held on trust for the third and sixth plaintiffs by the second and third defendants because it had been purchased by them out of the proceeds of the Asteron life policy. It appears to be common ground that the car is accurately described as a Mercedes Benz A-Class motor car (VIN WDD1 173432N154473).

(b) There is no reason not to make the declaration sought by the plaintiffs.

(c) In their further written submissions after my reasons for judgment, the plaintiffs raised the spectre of sheeting home to the second and third defendants responsibility for any diminution in value of the motor car since its purchase. They contended that any disposition of the proceeds of the Asteron life policy constituted a breach of trust by the second and third defendants for which they might be liable to compensate the plaintiffs.

(d) But, again, no claim was advanced at the trial before me for any relief in respect of the motor car other than that I declare that it was held on trust. Whether it was a compensable breach of trust to spend the proceeds of the Asteron life policy on the car, whether there had been any diminution in value of the car, and whether the plaintiffs should have some form of personal remedy against the second and third defendants in relation thereto were questions not litigated before me at the trial. To litigate such issues would require some form of further process than the trial which has occurred. If the plaintiffs seek to have me do that then the proper course is to take separate steps to achieve that outcome, not to seek to introduce those questions as part of the submissions which I have invited in order to resolve finally the orders which should be made consequent upon the trial. In such a process, it might well be necessary to consider the question whether the plaintiffs should now be regarded as bound by some form of election, as the second and third defendants have now submitted to me.

(e) The relief which I give the plaintiffs consequent upon the trial should be limited to that sought by them at the trial. The defendants do not oppose an order that they deliver the car up to the third and sixth defendants, but as no such order was sought in the plaintiffs' claim, and as there appears to be no need that it be made (because the second and third defendants have made clear that they are happy to give the car to the plaintiffs), I do not propose to make that order. If the defendants do not do that which they have said they will do, then that may be addressed at some later stage.

[25] As to claim for relief D:

(a) The effect of claim for relief D when read with paragraphs 33(e), (f), (g), (i) and (j) of the amended statement of claim (which allegations had been admitted) was that the plaintiffs sought a declaration that particular "amounts", namely –

(i) $80,000 paid into a term deposit at Bendigo Bank in the name of Mr Hanson on 28 March 2015;

(ii) $540,000 deposited into Mrs Hanson's First Colonial superannuation account on 2 April 2015;

(iii) $180,000 deposited into Mr Hanson's First Colonial superannuation account on 2 April 2015;

(iv) $20,000 deposited into their solicitors' trust account on 4 May 2015; and

(v) $100,000 deposited into to their solicitors' trust account on 6 May 2015,

"are" held on trust by the second and third defendants for the third and sixth plaintiffs because the payments were made by them out of the proceeds of the Asteron life policy.

(b) The only issue on which I invited further submissions was the plaintiffs' claim to such declarations.

(c) The plaintiffs submitted I should make a declaration in these terms:

> As at and from the date of each transaction identified herein:
>
> (a) the third defendant held the following funds on trust for the third and sixth plaintiffs:
>
> (i) the deposit on 28 March 2015 of $80,000 into term deposit account number 154404313 in the name of Norman Hanson;
>
> (ii) the deposit on 2 April 2015 of $180,000 into First Colonial superannuation account number 5129899 in the name of Norman Hanson;
>
> (b) the second defendant held the deposit on 2 April 2015 of $540,000 into First Colonial superannuation account number 5129925 in the name of Dorothy Hanson on trust for the third and sixth plaintiffs;
>
> (c) the second and third defendants held the following amounts on trust for the third and sixth plaintiffs:
>
> (i) the deposit on 4 May 2015 of $20,000 into the trust account of Baldwins Lawyers; and
>
> (ii) the deposit on 6 May 2015 of $100,000 into the trust account of Baldwins Lawyers.

(d) The second and third defendants did not address whether I should make such a declaration. Rather they advanced submissions the effect of which seemed to be that they acknowledged:

(i) the monies in the two superannuation accounts had been preserved and could be transferred to the third and sixth plaintiffs;

(ii) monies in the term deposit account had not been preserved in that account, but had been transferred into a solicitors' trust account (although the trust account was that of a different firm, not Baldwins Lawyers who are the solicitors on the record); and

(iii) the amount remaining in the trust account was $165,055.78, which was a figure which was less than the sum of $80,000, $20,000 and $100,000, but the second and third defendants were willing to transfer $150,000 to the third and sixth defendants.

(e) I observe that it is not presently clear to me whether the monies in the solicitors' trust account might not at least partially reflect also some part of the loan which had been made and repaid out of the Asteron life proceeds (as to which see [55] and [56] below). Nor is it clear to me what dispositions have been made out of the monies and whether there is any legitimate justification for them.

(f) Given the uncertainty, the appropriate course is to resolve only the dispute which was taken to trial by the plaintiffs, namely whether there should be a declaration as to rights in respect of particular property. What, if any, other orders should follow consequent upon that having been resolved, are questions for another day.

(g) It would be wrong to declare that "amounts" were held on trust. The second and third defendants do not hold "amounts" when they deposit monies with third parties. Rather they hold rights against those third parties in the form of choses in action against those third parties. It follows that any declaration that property is held on trust, consequent upon the transactions concerned, could only be a declaration that the choses in action against the third parties were held on trust. The declarations

must reflect that legal reality. Subject to that modification, the plaintiffs should have the declarations they seek in relation to the two superannuation accounts. The declaration in relation to the term deposit and the deposits to the solicitors' trust account should be limited to a declaration of rights which existed as at date of the transaction. I am not persuaded that the declaration should extend to "from" the date of the transaction, given the possibility that changes may have been made such that amounts are no longer held in the same amount or in the same form as they were as at the time the deposits were first made.

(h) I will make declarations in these terms:

> It is declared that:
>
> (a) as at and from the date of the deposit on 2 April 2015 of $180,000 into First Colonial superannuation account number 5129899 in the name of Norman Hanson, the third defendant held his chose in action in relation to that account on trust for the third and sixth plaintiffs;
>
> (b) as at and from the date of the deposit on 2 April 2015 of $540,000 into First Colonial superannuation account number 5129925 in the name of Dorothy Hanson, the second defendant held her chose in action in relation to that account on trust for the third and sixth plaintiffs;
>
> (c) as at the date of the deposit on 28 March 2015 of $80,000 into term deposit account number 154404313 in the name of Norman Hanson, the third defendant held his chose in action in relation to that account on trust for the third and sixth plaintiffs;
>
> (d) as at the date of the deposits referred to below, the second and third defendants held their choses in action in relation to the deposits on trust for the third and sixth plaintiffs:
>
> (i) the deposit on 4 May 2015 of $20,000 into the trust account of the solicitors for the second and third defendants; and
>
> (ii) the deposit on 6 May 2015 of $100,000 into the trust account of the solicitors for the second and third defendants.

The costs of the application to re-open and the costs of the proceeding.

The application to re-open

[26] This part of these reasons should be read with my previous reasons for judgment at [120] to [128].

[27] In those paragraphs I explained:

(a) The plaintiffs had demonstrated that the second and third defendants were plainly at fault for not disclosing documents which were relevant to the plaintiffs' pleaded case against them.

(b) The documents which ought to have been disclosed might well have influenced decisions made at or prior to the trial in relation to how the plaintiffs framed their claims for relief.

(c) But I refused the application to re-open because, by the time it was made the issues had narrowed at the trial such that the material which should have been disclosed was no longer relevant, and the plaintiffs did not advance the application on the basis that they would seek to reinstitute any of the claims they had abandoned during the trial which was conducted on the basis of disclosure now proved to have been flawed.

[28] The second and third defendants seek a costs order in their favour, on the basis that costs should follow the event.

[29] The plaintiffs contend, correctly, that although the ordinary rule is that costs should follow the event, I have a discretion to make another order if that is appropriate. They contend

that because the second and third defendants' breach of their disclosure obligation provoked the application, the more just outcome would be to make no order as to the costs of the application to re-open.

[30] I agree with the plaintiffs.

The costs of the proceeding

As against the first defendant

[31] The plaintiffs have succeeded to recover money judgments against the first defendant. Prima facie, costs should follow the event.

[32] The plaintiffs sought an order that I specify that reserved costs be included in the costs order in their favour. No submission was made which attempted to identify for me what reserved costs orders had been made, or that there were particular considerations which required a particular order dealing with them. In those circumstances, it is appropriate not to deal specifically with reserved costs but merely to leave them to be dealt with by operation of *Uniform Civil Procedure Rules* 1999 (Qld) r 698.

[33] However the plaintiffs submit that the costs should be awarded on the indemnity basis because the first defendant put in issue the question of whether the theft had occurred as alleged. However, as is acknowledged by the plaintiffs, in the events which happened in this litigation, Ms Hanson was deceased by the time the proceeding started and the estate had insufficient resources to incur the expense to give responsible and informed consideration to whether to make the admissions sought by the plaintiffs. As the plaintiffs recognized, Ms Moxey as executor could hardly be criticised for the way in which she conducted the litigation.

[34] There does not in those circumstances seem to me to be any basis on which an indemnity costs order can be justified. The plaintiffs suggested that if Ms Hanson had lived and had defended an action by putting the plaintiffs to the proof, an indemnity costs order would be warranted in those circumstances. I do not accept the analogy is apposite. Ms Hanson did not live. I must assess these questions against the events which did happen.

[35] In addition to being the subject of money judgments requiring payment of particular amounts to the respective plaintiffs, the first defendant must pay the plaintiffs' costs of the proceeding.

As against the second and third defendants

[36] The plaintiffs have succeeded in obtaining declaratory relief against the second and third defendants, as follows:

(a) The declaration that the proceeds of the Asteron term life policy 81318923 were received by the second and third defendants as trustees for the third and sixth plaintiffs.

(b) The declarations that the second and third defendants hold property on trust for the third and sixth plaintiffs in various ways, which are derivative of the declaration concerning the insurance proceeds, namely:

(i) The declaration that the second and third defendants hold a proportionate interest in the family home on trust for the third and sixth plaintiffs.

(ii) The declaration that the motor car is held on trust by the second and third defendants for the third and sixth plaintiffs.

(iii) The declarations concerning the choses in action in relation to the various depositions referred to above.

(c) The declaration that the second and third defendants hold their interest in the home located at 22 Parkland Drive, Chatsworth, subject to an equitable lien in favour of the plaintiffs in the amount of $12,622.22, the entitlement to which was founded on the proposition that the plaintiffs could demonstrate that that amount of money had been spent on the house out of funds stolen from the plaintiffs.

[37] The plaintiffs either abandoned or failed to obtain the following relief:

(a) The claim for declaratory relief in respect of the BT death benefit amount.

(b) The claim for declaratory relief in respect of the amounts received by the second and third defendants which were identified by being struck through as recorded at paragraph [108](a) of my previous reasons for judgment.

(c) The claim for declaratory relief in respect of the chattels listed at paragraph [110](e) of my previous reasons for judgment.

[38] The plaintiffs submitted that –

(a) they made the following two written *Calderbank* offers to settle to the second and third defendants:

(i) offer to settle made on 29 March 2017 for a total of $1,470,000; and

(ii) offer to settle made on 31 March 2017 for a total of $1,225,000.

(b) the result they achieved after trial should be regarded as having bettered both offers; and

(c) they should have their costs as against the second and third defendants up to 29 March 2017 on the standard basis, and, after that, on the indemnity basis.

[39] The plaintiffs' case seems to be that the indemnity costs after 29 March 2017 should be founded on the proposition that refusal to accept the first offer should be regarded as an imprudent rejection of an offer to settle. The relevant principles by which that proposition might be assessed were discussed by me in *Smith v Wessling-Smith* [2017] QSC 189 in which I applied the decision of Holmes JA (as the Chief Justice then was) in *Hadgelias Holdings and Waight v Seirlis* [2014] QCA 325. For the following reasons I find unpersuasive the plaintiffs' argument that I should conclude that it was imprudent not to accept the offers according to their terms.

(a) First, the argument was not presented within the requisite legal framework because the plaintiffs did not present an analysis examining each of the considerations identified by Holmes JA. They did not even prove the terms of the written offers, leaving that to be done by the defendants.

(b) Second, they did not demonstrate how the declaratory relief which they had obtained could be evaluated as doing better than the offers. Rather they merely asserted that fact. It is not apparent to me that the fact of the declarations I have made will inevitably result in a personal right to recover from the second and third defendants in an amount in excess of the offers. The proposition that it will assumes matters which have not been litigated.

(c) Third, the first offer was made on Wednesday 29 March 2017, and required acceptance by 5:00pm on Friday 31 March 2017. The trial commenced on Monday 3 April 2017. I am not persuaded that sufficient time was permitted to allow the offer to be considered in the context of this particular trial. The second offer was made on Friday 31 March 2017 and required acceptance by 9:30am on Monday 3 April 2017.

(d) Fourth, as will be apparent from the nature of the discussion in my previous reasons for judgment, the prospects of success assessed from the point of view of the second and third defendants were not so poor as would assist the argument that it would have been imprudent not to accept the offer. Moreover, the offers did not contain any analysis which sought to demonstrate why that view should have been taken.

[40] For their part, whilst the second and third defendants accept that a costs order should be made against them, they submitted:

(a) the order should address only the costs of the third and sixth plaintiffs; and

(b) based on an evaluation of –

(i) the suggestion that it was not necessary as against them for the plaintiffs to carry out the detailed (and no doubt expensive) analysis which enabled the plaintiffs to identify and quantify the amounts which had been stolen and the source of the requisite funds;

(ii) the claims on which the plaintiffs had failed,

any costs order against them should be limited to costs occasioned in respect of paragraphs 21 to 33 of the further amended statement of claim, and should be reduced by 30%.

[41] In *Aklia Holdings Pty Ltd v The Carter Group Pty Ltd (In Liq) & Ors (No 2)* [2017] QSC 266, I set out a summary of the principles which are applicable to a consideration of a submission of this nature, in the following way:

> The following summary of general principle derives from *Thiess v TCN Channel 9 Pty Limited (No 5)* [1994] 1 Qd R 156 at 208–209, *Interchase Corporation Limited (in liq) v Grosvenor Hill (Queensland) Pty Ltd (No 3)* [2003] 1 Qd R 26 at [84], *Sequel Drill & Blast Pty Ltd v Whitsunday Crushers Pty Ltd (No 2)* at [3]–[7], and *Chief Executive, Department of Transport and Main Roads v Cidneo Pty Ltd* [2015] QCA 168 at [1]:
>
> (a) Costs of an application in a proceeding are in the discretion of the Court but follow the event unless the court orders otherwise: UCPR r 681.
>
> (b) The word "event" is to be approached distributively with the consequence that it refers to the event of an issue or of each separate issue, if there is more than one, in the proceeding.
>
> (c) The application of the general principle may lead to costs orders which reflect different results on separate events or issues, unless the Court considers that some other order is more appropriate.
>
> (d) The circumstances which a Court might consider in determining whether some other order is more appropriate, and, if so, its form include:
>
> (i) the preference to avoid the complicated form of assessment that would follow if different issues are determined in different directions as between the parties and costs were to be awarded in respect of issues in the technical sense;
>
> (ii) the possibility of taking the approach of identifying heads of controversy or "units of litigation" (rather than what might technically be regarded as issues on the pleadings) as the criterion for awarding costs;
>
> (iii) where a party has succeeded on one of two ways to the same outcome in a particular unit of litigation, a court might regard the costs of the second way on which that party failed as not so distinct conceptually or practically as to warrant making a costs order which reflected that party's failure on the second avenue of success; and
>
> (iv) on the other hand, where, in a particular unit of litigation, there are multiple issues which are determined in different directions as between the parties, a court might form an overall impression having regard to the significance of the issues, the way they were determined, and the amount of time and cost spent on them, and order one party to pay a proportion of another party's costs as a way to reflect fairly the parties' comparative success or failure in the outcome which was obtained.

[42] I reject the submissions for the second and third defendants that a costs order in favour of the plaintiffs should be limited to particular paragraphs of the statement of claim in the way they contend.

[43] First, with limited exceptions and for the most part of the time leading up to the trial, the second and third defendants' conduct of the defence had been characterized as an exercise of putting the plaintiffs to the proof of their allegations. I agree with the plaintiffs that the second and third defendants put the question of the extent of the theft; the amount of the lawful entitlement generally in issue.

[44] Second, whilst it is possible that the plaintiffs' case concerning the payment of premiums for the Asteron life insurance proceeds could have been conducted by proving that only a particular premium was paid out of stolen monies, that proposition became persuasive because a rigorous analysis of the whole theft had been done. I agree with the plaintiffs that the alternative proportionate case also required a rigorous analysis.

[45] Third, although the amount was comparatively small, in order to establish the equitable lien over the family home in the amount of $12,622.22, it was necessary to have done the analysis which was done. Although ultimately the amount was conceded, there was no basis to conclude that that would have occurred had not a persuasive analysis been done.

[46] I do consider there is a degree of merit in the notion that there should be some form of overall proportionate reduction to reflect the extent of failure by the plaintiffs. I would not reduce their costs by as much as 30%. I would reduce them by only 5%.

[47] I do not think that the justice of the case is met by making a costs order in favour of only the third and sixth plaintiffs. The appropriate course is to make it in favour of the plaintiffs as a whole. Thus I would order the second and third defendants to pay 95% of the plaintiffs' costs of the proceeding.

[48] Finally, I note that the second and third defendants did submit that "to avoid ambiguity" I should specifically order that the plaintiffs should pay their costs thrown away by amendments which were made. I will not take that course. It defeats the purpose of UCPR r 386, which was to render such orders unnecessary. To be clear, I have not ordered otherwise within the meaning of UCPR r 386.

Other matters sought to be agitated by the plaintiffs

[49] The plaintiffs submitted that as they were unaware as to the current state of Ms Hanson's estate, Ms Moxey should be ordered to swear an affidavit as to the assets and liabilities of the estate as they now are. As to that:

(a) I did not invite submissions on that question.

(b) But, in any event, there is no merit in so doing as part of the orders which I make to resolve the issues which were litigated at trial.

(c) If the plaintiffs wish to take such steps as part of a process of enforcement of the money orders which will exist consequent upon the publication of the present reasons for judgment, then the UCPR provides a process by which that can be achieved. Whether that is a prudent course, in light of Ms Moxey's expressed intentions concerning bankruptcy of the estate, is a matter for the plaintiffs.

(d) I reject the submission that I should make such an order at this time.

[50] The plaintiffs also submitted that I ought to modify the order which I have already made (and which I recorded at [2](e) above), by converting it to an order declaring the existence of an equitable lien in favour of the plaintiffs to the extent of 2.75% of the total value of the property. As to that:

(a) I have already made an order, and the suggested change is not justified by the application of the slip rule.

(b) I did not invite submissions on that question.

(c) But further, the proposition that the equitable lien should be declared by reference to a percentage of value rather than a particular amount was not advanced at trial. And, in any event, the identification of the percentage turns on valuation evidence which was not admitted at trial, in much the same way as the identification of the percentage discussed at [23](c) above, and is objectionable for the reasons there stated.

(d) Accordingly, I reject the submission that I should make any change to the order.

[51] The plaintiffs advanced the submission that statutory trustees for sale of the family home should be appointed. As to that:

(a) No such claim for relief was advanced at the trial.

(b) I did not invite submissions on that question.

(c) Such a claim for relief is one of the ways in which an equitable lien may be enforced. As I have earlier commented, if the parties cannot reach agreement on the pecuniary consequences of the declarations, the plaintiffs will have to take other steps to enforce their rights as against the second and third defendants, having regard to the extent that those rights have now been settled by the fact of the declaration. The suitability of the making of an order for the appointment of statutory trustees for sale is something which could then be considered, consequent upon an application on proper material having been made.

(d) I reject the submission that I should make such an order at this time.

[52] The plaintiff advanced submissions on "further relief that should be granted consequent upon the finding that the proceeds of the payout from the Asteron policy … was held on trust by the second and third defendants". They submit that it is unlikely that the second and third defendants can "reconstitute the whole of the trust that came into their hands by way of the insurance benefit". The plaintiffs submitted (partially in reliance on evidence adduced at trial, and partially in reliance on further evidence which they sought to adduce) that the evidence demonstrates that the second and third defendants have lent some of the insurance proceeds to a family member ($200,000 to John Hanson), gifted some to another family member ($148,300 to Glen Hanson), and spent some of it on funeral expenses and that their means are such that they are unlikely to be able to reconstitute the trust themselves.

[53] The plaintiffs then submitted that orders to the following effect should be made:

(a) the assets of the second and third defendants should be frozen, with appropriate allowance for them by way of ensuring that social security entitlements are not affected; and

(b) the second and third defendants should be compelled to swear affidavits in the proceeding accounting for all of the proceeds of the insurance benefit.

[54] As to the submissions referred to in the previous two paragraphs:

(a) Although claim for relief I of the amended statement of claim did seek "all necessary accounts and inquiries", no submission was made at the trial that any order for accounts and inquiries should be made at the trial, and the question whether any such orders should be made was not litigated at the trial. No claim for equitable compensation has been litigated. If the plaintiffs seek to have me make orders for

accounts and inquiries, or wish to pursue personal claims against the second and third defendants, then the proper course is to take separate steps to achieve that outcome, not to seek to introduce it as part of the submissions which I have invited in order to resolve finally the orders which should be made consequent upon the trial.

(b) As to the proposal that I should make freezing and ancillary orders, a similar proposition applies. No proper application for such relief has yet been made. If the plaintiffs wish to do so, the plaintiffs should advance a properly constituted application for freezing orders and ancillary orders (together with a clear identification of the evidence which supports it). They will then need to prepare submissions addressing the issues which the law requires to be addressed on such applications. I have recently discussed these principles in detail in *Parbery v QNI Metals Pty Ltd* (2018) 127 ACSR 582; [2018] QSC 107.

(c) I reject the submission that I should make such orders at this time.

[55] The plaintiffs submitted that I should make a declaration in these terms:

> As at and from 13 April 2015, the second and third defendants held their right to recover the loan they made on that date to John Hanson of $200,000 on trust for the third and sixth plaintiffs.

[56] As to this:

(a) It had been admitted on the pleadings that on 13 April 2015 a loan to John Hanson repayable by July 2015 in the amount of $200,000 was made by the second and third defendants out of the Asteron life policy proceeds.

(b) Whilst the proposition advanced by the plaintiffs does seem to follow inexorably from the admitted facts and from the declaration I have previously made about the Asteron life policy proceeds, no claim for any such relief was advanced at the trial concerning that fact.

(c) I did not invite submissions on any question touching upon the loan.

(d) As I have earlier commented, if the parties cannot reach agreement on the pecuniary consequences of the declaration which I have made concerning the proceeds of the Asteron life policy, the plaintiffs will have to take other steps to enforce their rights as against the second and third defendants, having regard to the extent that those rights have now been settled by the fact of the declaration.

[57] No order was sought or obtained before trial (e.g. pursuant to UCPR r 483), the effect of which would be to permit the plaintiffs to postpone, for subsequent determination within this proceeding, the question of their entitlement to orders for accounts or inquiries or other relief consequential upon any declaratory relief obtained at the trial. However on the first day of the trial, senior counsel for the plaintiffs made remarks (without demur from the defendants) which seemed to indicate that the plaintiffs assumed the appropriateness of that course: see transcript p 1-10. And in the submissions which I have received on the other matters dealt with under this heading, the second and third defendants seem to accept that directions could be made within this proceeding which would establish a procedure for resolving such issues.

[58] In those circumstances, the appropriate course is to order that the questions whether the plaintiffs are entitled to –

(a) any orders for accounts and inquiries; or

(b) any further relief to give effect to the plaintiffs' rights,

having regard to the extent to which the plaintiffs' rights have been settled by the declarations made on 12 June 2018 and by the orders which I have identified above, are adjourned to a date to be fixed, for directions.