SUPREME COURT OF QUEENSLAND

CITATION:	*Binaray Pty Ltd (ACN 119 724 211) as Trustee for the Allen Family Trust v RAMS Financial Group Pty Limited (ACN 105 207 538)* [2019] QSC 280
PARTIES:	**BINARAY PTY LTD (ACN 119 724 211) as Trustee for the Allen Family Trust** (plaintiff) **v** **RAMS Financial Group Pty Limited (ACN 105 207 538)** (defendant)
FILE NO/S:	BS No 11484/13
DIVISION:	Trial Division
PROCEEDING:	Application for costs
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	19 November 2019
DELIVERED AT:	Brisbane
HEARING DATE:	6 November 2019
JUDGE:	Brown J
ORDER:	**I order that:** **1. The defendant is to pay interest on the sum of $45,174.20 up until 18 November 2019 in the sum of $20,519.00 and thereafter in accordance with the Supreme Court scale.** **2. The defendant is to pay 75 per cent of the plaintiff's costs of the proceedings, calculated on the standard basis.**
CATCHWORDS:	PROCEDURE – OFFER TO SETTLE – COSTS - Where defendant made formal offer to settle in accordance with Chapter 9, Part 5 of the Uniform Civil Procedure Rules – where offer more favourable to plaintiff than judgment – where plaintiff alleges that the inclusion of non-monetary terms in offer means that it is not a valid offer to settle under Chapter 9, Part 5 of the Uniform Civil Procedure Rules

– where offer to settle contains a requirement of confidentiality – where offer to settle contains the requirement for costs to be assessed by third party assessor – where offer to settle extends to matters which are not the subject of the claims in the proceedings – whether offer uncertain – whether offer to be considered in Court's discretion as non-complying—whether non-complying offer could be treated as a Calderbank offer

Uniform Civil Procedure Rules 1999 (Qld) r 5, r 361, r 362, r 353, r 355

Armstrong v Mitchell-Smith and Allianz Australia Insurance Limited (No 2) [2012] QSC 370
Balnaves v Smith [2012] QSC 408
Deeson Heavy Haulage Pty Ltd v Cox & Ors (No 2) [2009] QSC 348
Hanson & Anor v Goomboorian Transport Pty Ltd & Ors [2019] QCA 207
McBride v ASK Funding Ltd [2013] QCA 130
The Portland Downs Pastoral Company Pty Ltd v Great Northern Developments Pty Ltd & Ors (No 2) [2011] QSC 161

COUNSEL:	A P J Collins, with S F Lamb, for the plaintiff P Neskovcin QC, with N Andreatidis, for the defendant
SOLICITORS:	Bell Legal Group for the plaintiff Allens Linklaters for the defendant

Introduction

[1] On 27 June 2019, judgment was handed down in favour of the plaintiff in the sum of $45,174.20. Orders were made for the delivery of an affidavit by Mr David Mullins setting out the calculation of interest by the defendant to the plaintiff. Orders were also made for the delivery of submissions as to interest and costs by the parties by 19 July 2019.

Interest

[2] The calculation of interest by Mr Mullins on behalf of the defendant has not been disputed by the plaintiff.[1] The Court was informed that the amount of interest on the assessed loss up until 18 November 2019 has been agreed between the parties as

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1 Submissions on Behalf of the Plaintiff in Respect of Costs, received 2 August 2019.

being in the sum of $20,519, which includes a proportion of post-judgment interest from 28 June 2019. An order for the payment of interest in that amount will be made accordingly.

Costs

[3] Unfortunately, contrary to r 5 of the *Uniform Civil Procedure Rules 1999* (Qld) (**"UCPR"**), the process for receiving final submissions as to costs has been lengthy, no doubt involving the incurring of significant costs on both sides. Orders were made for the parties to deliver submissions as to costs on 19 July 2019. The plaintiff provided preliminary submissions on 19 July 2019 and the defendant provided submissions on the same date. The parties agreed a timetable to provide submissions in reply. The plaintiff then provided submissions in reply on 2 August 2019 and the defendant provided submissions in reply on 16 August 2019.

[4] Following the delivery of those submissions by the defendant, the plaintiff contended that the defendant had raised a matter in response that should have been raised in the defendant's submissions in chief. The matter was relisted for mention on 2 September 2019, following which orders were made for the plaintiff to provide further submissions in response to the defendant's submissions of 16 August 2019 and any affidavit evidence to the defendant, in order for the defendant to determine whether it objected to the further material of the plaintiff. Those submissions of the plaintiff were dated 8 October 2019.

[5] As matters transpired, the defendant did object to some of the plaintiff's submissions and the matter was again relisted for mention on 6 November 2019. As a result of that mention, the Court determined that evidence the plaintiff had sought to adduce as to offers made by the defendant was not relevant to the matters in question. Accordingly, that affidavit evidence was not admitted and paragraph 29 of the plaintiff's further submissions on costs was struck through.

Background

[6] The plaintiff submits that it should have its costs on the standard basis, on the basis that the usual order is that costs follow the event.

[7] Based on offers to settle made by the defendant on 21 April 2016 and 11 November 2016, the defendant seeks orders from the Court that:

(a) The defendant is to pay the plaintiff's costs, calculated on the standard basis, up to and including 21 April 2016; and

(b) The plaintiff is to pay the defendant's costs, calculated on the standard basis, from 22 April 2016.

[8] In the alternative, they seek the same order with the relevant dates being 11 November 2016 and 12 November 2016 respectively.

[9] The defendant relies on offers which it submits were made under Part 5 of Chapter 9 of the UCPR. By letter dated 21 April 2016 to the plaintiff's solicitors from the defendant's solicitors, the defendant offered to settle the proceedings. The basis on which the defendant offered to settle the proceedings was that the defendant would pay the plaintiff $250,000 plus a further amount in respect of the plaintiff's costs as to be agreed between the parties or, failing the parties' agreement, as assessed by a third party costs assessor.

[10] The further terms on which the offer of 21 April 2016 was made is set out in paragraphs 2 to 5 of the letter as follows:[2]

> "The further amount in respect of costs will exclude any costs to be paid by the Defendant arising from the orders of the Court dated 26 October 2015, 27 November 2015 and 15 December 2015 and in respect of which the Plaintiff filed and served a costs statement dated 4 March 2016. The issue of the quantum of costs to be paid by the Defendant in accordance with those orders will be dealt with separately and will not be affected by the issuing of this offer of settlement.
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> Effective on the payment in accordance with paragraph 1 above, the Plaintiff is to release RAMS from all actions, claims or suits of any nature in respect of the alleged cause of action pleaded by the Plaintiff.
>
> The Defendant will procure the dismissal of the Proceeding on the basis that there be no orders as to costs (except as provided for under paragraph 2 above), and the Plaintiff will give its consent as necessary and do all other acts and things reasonably requested of the Plaintiff by the Defendant to bring about the dismissal on that basis.
>
> Each party will bear its own costs of and incidental to the Proceeding (excluding payment by the Defendant to the Plaintiff of the amount referred to above) and this settlement."

[11] The letter specifically stated that the offer was made under Part 5 of Chapter 9 of the UCPR. It was not stated that, in the alternative, the offer was relied upon as a "without prejudice" offer, such as a *Calderbank* offer, aside from the UCPR.

[12] The plaintiff's solicitors rejected that offer on 3 May 2016, stating that in light of an offer made by the plaintiff on 3 July 2015, the plaintiff was "confident of obtaining indemnity costs from your client at trial".[3] No criticism was made as to the form of the defendant's offer.

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2 Defendant's Submissions on Interest and Costs, filed 19 July 2019, Attachment A.

3 Defendant's Submissions on Interest and Costs, filed 19 July 2019, Attachment B.

[13] The defendant contends that even if the Court was to find that the offer of 21 April 2016 was not an offer made under Part 5 of Chapter 9 of the UCPR, it can rely on a further offer. By a letter dated 11 November 2016 the defendant made a further offer to settle under Part 5 of Chapter 9, pursuant to which orders should be made which accord with r 361 of the UCPR. By that offer, the defendant offered to pay the plaintiff the sum of $315,000 plus a further amount in respect of the plaintiff's costs as agreed between the parties or as determined by a third party costs assessor. The offer also provided for the plaintiff to release the defendant from all actions, claims or suits in respect of the cause of action pleaded by the plaintiff and made provision for each party to bear its own costs of and incidental to the proceeding and the settlement.

Parties' contentions

[14] The plaintiff submits that the two offers were not offers which complied with the requirements of Part 5 of Chapter 9 of the UCPR. The plaintiff contends that there was therefore no offer for the purposes of r 361 of the UCPR and that costs should follow the event. In the alternative, the plaintiff contends that even if one of the offers did qualify as an offer under r 361, the circumstances of the present case justify an alternative order being made because of the lateness of disclosure and late provision of the evidence of Mr Choo and further reports of Mr Potter, such that the exception ought to apply as provided for in r 361.

[15] The defendant seeks orders on the basis that the 21 April offer or alternatively 11 November offer are compliant with the UCPR and it can satisfy the preconditions in r 361 of the UCPR. By way of reply, the defendant rejected the argument by the plaintiff that the offers were not in accordance with Part 5 of Chapter 9, submitting that the offers were conventional and the plaintiff's complaint that the offer of 11 November 2016 was not open for 14 days from the date of service raises a mere technicality. Alternatively, the defendant contends that even if the offers did not comply with Part 5 of Chapter 9 and r 361 does not apply, the Court should exercise its discretion to make an order that the defendant pay the plaintiff's costs to the date of the first offer and the plaintiff pay the defendant's costs thereafter, given that both offers exceeded the judgment obtained by the plaintiff. It was the latter submission that resulted in the plaintiff seeking to make further submissions.

[16] The plaintiff submits that the offers did not comply with the UCPR. They further contend that by the terms of the offer, it was not contemplated that either offer would be relied upon even if neither were offers made in accordance with the UCPR.[4] Thus, it contends the Court should not consider the offers in the exercise of its discretion.

Was the offer of 21 April 2016 an offer made under Part 5 of Chapter 9?

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[4] Such as in the same way as a *Calderbank* offer.

[17] Rule 361 of the UCPR provides that:

> "(1) This rule applies if—
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> (a) the defendant makes an offer that is not accepted by the plaintiff and the plaintiff does not obtain an order that is more favourable to the plaintiff than the offer; and
>
> (b) the court is satisfied that the defendant was at all material times willing and able to carry out what was proposed in the offer.
>
> (2) Unless a party shows another order for costs is appropriate in the circumstances, the court must—
>
> (a) order the defendant to pay the plaintiff's costs, calculated on the standard basis, up to and including the day of service of the offer; and
>
> (b) order the plaintiff to pay the defendant's costs, calculated on the standard basis, after the day of service of the offer…
>
> (4) If the defendant makes more than 1 offer satisfying subrule (1), the first of those offers is taken to be the only offer for this rule."

[18] The defendant contends that the judgment in the present case is not more favourable to the plaintiff than the offer to settle. It contends that the defendant had the means and was at all material times willing and able to carry out what was proposed in the offer. That is uncontentious. If the offer of 21 April 2016 is one made in accordance with the UCPR, the onus is on the defendant to establish that the judgment is not more favourable to the plaintiff than the offer to settle.

[19] The defendant contends that the consequences provided for in r 361(2) should flow from the offer of 21 April 2016 and that from the date of service of the offer, the plaintiff should pay the defendant's costs, calculated on a standard basis.

Consideration

[20] The requirements for an offer to settle are set out in Part 5 of Chapter 9 of the UCPR. "Offer" means an offer to settle made under that Part.[5]

[21] Rule 353 of the UCPR provides that:

> "(1) A party to a proceeding may serve on another party to the proceeding an offer to settle 1 or more of the claims in the proceeding on the conditions specified in the offer.

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5 *Uniform Civil Procedure Rules 1999* (Qld), r 352.

(2) A party may serve more than one offer.

(3) An offer must be in writing and must contain a statement that it is made under this part."

[22] The offer of 21 April 2016 was in writing, contained a statement that it was made under Part 5 of Chapter 9 of the UCPR and stipulated that the offer was open for acceptance for a specified period ending not less than 14 days after the date of service.[6] It offered to settle the claim in the proceeding.

[23] The plaintiff, however, submits that the offer of 21 April 2016 was not an offer to settle for the purposes of Part 5 of Chapter 9 of the UCPR. In that regard, it identifies two non-complying features.

[24] First, the plaintiff submits that the provision for costs in the offer is by way of some type of unspecified negotiated separate agreement not contemplated by the UCPR, given that it refers to the involvement of a third party costs assessor, rather than costs being assessed on the standard basis. It further contends that the wording of the offer as to costs is confusing and that the entirely different framing of costs as some separate agreement is highlighted by paragraph 5 of the offer, which provides that each party will bear their own costs, excluding the payment by the defendant to the plaintiff referred to in paragraph 1 of the offer.

[25] The second aspect of challenge by the plaintiff is that the offer provides for the terms of the offer to be confidential and not disclosed to any third party. The plaintiff contends that such a provision is not contemplated by the UCPR. It contends that the inclusion of that provision results in the offer not being an offer within the rules and not satisfying r 361.

[26] The defendant rejects the submission of the plaintiff and contends that the offer was in clear terms capable of being given effect to without the need for further resolution of the terms upon which the proceedings would be resolved.

[27] The plaintiff particularly relies on the case of *Balnaves v Smith*.[7] In *Balnaves v Smith*, Byrne SJA discussed the requirements for an offer to be compliant with Part 5 of Chapter 9 in order for a party to take advantage of r 361 of the UCPR.

[28] In particular, his Honour rejected a submission that an offer was not compliant if it extended beyond the claims in the proceeding.[8]

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6 As required by *Uniform Civil Procedure Rules 1999* (Qld), r 355.

7 [2012] QSC 408, which was referred to with approval by Jackson J in *McBride v ASK Funding Ltd* [2013] QCA 130 at [72], although the point was not finally decided.

8 *Balnaves v Smith* [2012] QSC 408 at [8]. His Honour disagreed with the decision of Moynihan SJA in *Taske v Occupational & Medical Innovations Ltd* [2007] QSC 147 at [17] that an offer did

[29] Byrne SJA considered the terms of r 353(1) of the UCPR, noting that it provides that the offer may be "on the conditions specified in the offer" and does not preclude the inclusion of a condition for the resolution of other contests between the parties.[9] His Honour stated that for the Part 5 scheme to work, "there is no need to interpret rules that prescribe just a handful of formal requirements as impliedly invalidating an offer that incorporates proposals that extend 'beyond the claims in the proceeding'".[10]

[30] His Honour stated that to be effective for the purpose of enabling the comparison to be carried out under the Part 5 regime an offer must permit fairly ready comparison between the nature and extent of the advantages (and disadvantages) arising from the judgment with the situation that would have been obtained had the offer been accepted. His Honour stated that an offer to settle should be clear in its terms and "its effect should be capable of prompt, comparatively inexpensive, assessment by the recipient".[11]

[31] His Honour, relevant to the present matter, rejected the contention that an offer would be a non-complying offer if it included a provision that the parties sign a release incorporating a confidentiality clause.[12] His Honour stated that "an offer may be rules-compliant even if its terms create such problems in evaluating its worth that it proves to be ineffective in engaging in the special Part 5 costs regime".[13] In his Honour's view an offer may be a valid Part 5 "offer to settle" even though it is inefficacious.[14]

[32] His Honour concluded that even if a confidentiality provision may not be able to form part of the judgment, that did not necessarily mean that the offer must be no more favourable to the plaintiff than the judgment.[15] In his Honour's view, it would be a matter for the Court's judgment as to whether the effect of the judgment overall was "no less favourable" to the plaintiff than the offer. In *Balnaves v Smith*, the inclusion of a confidentiality provision and a consent discontinuance did not result in the offer being invalid under the rules or less favourable than the judgment obtained.

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not comply with the procedural requirements of Part 5 because it "extended beyond the claims in the proceeding" insofar as it was referring to terms other than the deed of release.

9 *Balnaves v Smith* [2012] QSC 408 at [12].

10 *Balnaves v Smith* [2012] QSC 408 at [22].

11 *Balnaves v Smith* [2012] QSC 408 at [21].

12 *Balnaves v Smith* [2012] QSC 408 at [24].

13 *Balnaves v Smith* [2012] QSC 408 at [25].

14 *Balnaves v Smith* [2012] QSC 408 at [28].

15 *Balnaves v Smith* [2012] QSC 408 at [33].

[33] In my view, his Honour's analysis is correct. *Balnaves v Smith* does not support the plaintiff's contention that the offer was not a complying offer because of the inclusion of a condition as to confidentiality.

[34] The condition as to the existence and terms of the offer being confidential is referred to at the end of the letter of 21 April 2016. The defendant accepts that the offer was subject to a term of confidentiality. Consistent with his Honour's decision in *Balnaves v Smith* I do not consider the inclusion of such a provision means it is a non-complying offer.

[35] However, the condition as to costs included in the offer of 21 April 2016 is a different issue.

[36] The conditions of the offer as to costs are confusing. The reference in paragraph 1 of the offer to costs being assessed by a third party costs assessor in the event the parties do not reach agreement is silent as to the basis upon which the costs are to be assessed. No provision is made for costs to be paid as assessed on the standard basis. Paragraph 5 of the offer creates further uncertainty as to what costs are to be assessed by the "third party costs assessor", given that it contemplates that the costs will remain such that each party will bear its own costs, outside the payment of costs referred to in paragraphs 1 and 2. The inclusion of paragraph 5 suggests that the assessment by the third party costs assessor would not be an assessment of all costs aside from those referred to in [2]. The plaintiff would not have been able to determine from the terms of the offer what costs it would be entitled to if it accepted the offer and whether the costs would be lesser or greater than it would otherwise be entitled to if it were successful in the proceedings, in which case costs usually follow the event and would be assessed on the standard basis. The terms of the offer were so uncertain that the plaintiff would not have known what it was committing to, in terms of the separate regime contemplated by agreeing to a third party costs assessor assessing costs on an unspecified or yet to be agreed basis. In those circumstances, the plaintiff would not have been able to assess the overall value of the offer and the benefits thereunder.

[37] In my view, for that reason, the offer is not one which is clear in its terms and capable of prompt, comparatively inexpensive assessment by the recipient.

[38] It is unclear whether Byrne SJA's reference in *Balnaves v Smith* to the need for clarity in the terms of the offer was a precondition for an offer being a complying offer, or whether the uncertainty arising from such a lack of clarity is a matter that is relevant in deciding whether a party relying on the offer has met its burden of proof.[16] However, in the present case, I do not need to decide this question because to the extent that the offer contemplates a costs assessment regime beyond that stated in

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[16] See *Balnaves v Smith* [2012] QSC 408 at [27], referring to *Rooney (Litigation Guardian of) v Gray* 53 OR (3d) 685, 198 DLR (4th) 1; 2001 CanLII 24064.

terms of the offer, it would be a non-complying offer.[17] It is analogous to a provision for a deed of release being included in an offer the terms of which are not disclosed.[18] Rule 353(1) provides for the offer to settle the proceeding "on the conditions specified in the offer" (emphasis added).

[39] I consider that to the extent the offer fails to specify the basis of the assessment of costs by the third party assessor, it is not an offer made in accordance with Part 5 of Chapter 9.

[40] Alternatively, if I am wrong in this regard, I consider that, notwithstanding the significant difference between the principal payment of $250,000 to be made under the offer and the judgment, by which the plaintiff was awarded damages in the sum of $45,174 and which is less favourable to the plaintiff,[19] the costs incurred in this matter even as at 21 April 2016 would have been significant. The lack of clarity as to the costs to be paid under the offer, and the fact that the costs may have been less than those payable under a favourable judgment, result in the defendant having failed to discharge its onus of showing that the judgment would not be more favourable to the plaintiff than the offer to settle. I am not persuaded that the offer made satisfies the preconditions necessary to attract the operation of the rules.

[41] The 21 April offer is not an offer under Part 5 of the UCPR. Even if it was such an offer, the defendant has not persuaded me that it is more favourable than the judgment.

Did the offer of 11 November 2016 comply with the UCPR?

[42] The defendant made a further offer dated 11 November 2016 by way of letter to the plaintiff's solicitors. That offer has been described above. By r 362(4) of the UCPR, if a defendant makes more than one offer, the first of those offers is taken to be the only offer to be considered under r 361. Thus, consideration of the offer of 11 November 2016 only arises if the court determines that the offer of 21 April 2016 was not in accordance with the UCPR. On the basis that the 21 April 2016 is a non-complying offer, I will consider whether the offer of 11 November 2016 complied with Part 5 of Chapter 9.

[43] The plaintiff contends that the offer does not comply with Part 5 of Chapter 9 on the basis that the offer was not open for 14 days. The offer was served at 4:32PM on

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17 *Armstrong v Mitchell-Smith and Allianz Australia Insurance Limited (No 2)* [2012] QSC 370 at [10]–[13].

18 See *Armstrong v Mitchell-Smith and Allianz Australia Insurance Limited (No 2)* [2012] QSC 370 at [10]–[13]. In this regard, Byrne SJA in *Balnaves v Smith* did not appear to differ from the view of Moynihan SJA in *Taske*: see *Balnaves v Smith* [2012] QSC 408 at [8].

19 The amount of interest on the damages is to be disregarded: *Uniform Civil Procedure Rules 1999* (Qld), r 362.

Friday, 11 November 2016, with the result that the offer is deemed to have not been served until Monday, 14 November 2016.[20] It was stipulated that the offer was only open until 25 November 2016. It did not say that the offer was open for 14 days from the date of service.

[44] The defendant accepts that the offer was served after 4:00PM on 11 November 2016 and was not expressed to be open for acceptance for 14 days from the date of service, but describes the non-compliance as a mere legal technicality. Alternatively, it contends that the existent terms and timing of the offer are crucial to the exercise of the Court's discretion on costs. That will be considered further below.

[45] Pursuant to r 355(1), "[a] party must specify in an offer a period, ending not less than 14 days after the day of service of the offer, during which the offer is open for acceptance, and [for the duration of which] the offer may not be withdrawn" (emphasis added). The consequence of the offer being served after 4:00PM on 11 November 2016 is that the minimum 14 day period required by r 355 was not satisfied. The offer did not comply with the requirements of r 355. It therefore was not an offer to settle in accordance with Part 5 of Chapter 9 and rule 361 has no application.

Should the offers be taken into account in the exercise of the Court's discretion?

[46] The defendant contends that if the Court were to find that the offers did not comply with Part 5 of Chapter 9, the Court should exercise its discretion in relation to costs and make an order effectively in the same terms as those provided in r 361 of the UCPR. In that regard, it relies on the decision of de Jersey CJ in *The Portland Downs Pastoral Company Pty Ltd v Great Northern Developments Pty Ltd (No 2)*.[21] However, in that case, r 361 of the UCPR did not apply because the plaintiff had obtained no judgment in its favour.

[47] The plaintiff, however, contends that the Court should not consider the offers where they have been found not to comply with requirements for offers to settle under the UCPR. In particular, it relies on the decision of Gotterson JA in *Hanson & Anor v Goomboorian Transport Pty Ltd & Ors,*[22] where his Honour drew a distinction between the effect of offers made under the UCPR and, in that case, the effect of a Calderbank offer. His Honour stated at [7]-[9] that:

> "A relevant consideration is that on 28 March 2017, and before the first day of the trial, the second and third defendants served a written offer

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20 *Uniform Civil Procedure Rules 1999* (Qld), r 103.

21 [2011] QSC 161 at [3], referring to *Foster v Galea (No 2)* [2008] VSC 331. In that case, the Court considered the offer had no work to do under the offer of compromise regime, and was not ineffective for some formal or other deficiency.

22 [2019] QCA 207, with whom McMurdo JA and Douglas J agreed.

> to settle the plaintiff's claims in full for $500,000 with each party to pay its own costs. The offer was open for acceptance until 4 pm on 31 March 2017. It was not accepted.
>
> This offer stated that it was "made pursuant to the principles described in *Calderbank v Calderbank*". It did not contain a statement that it was made under Part 5 of Chapter 9 *UCPR*. It was therefore not an offer to which Part 5 applies: r 353(3).
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> Consistently with the decision of this Court in *McBride v ASK Funding Ltd*, the costs consequences of the failure to accept the offer fall to be determined according to the principles in *Calderbank*, and not by the application of r 361 *UCPR*. The central question posed by those principles is whether the plaintiffs acted "unreasonably or imprudently" in not accepting the offer."

[48] The plaintiff contends that the effect of r 361 is that by way of regulation, it alters the usual position in respect of costs and imposes a mandatory requirement which applies unless the plaintiff establishes another order is appropriate. Proper compliance with Part 5 is therefore required for an offeror to have the advantage of the provisions of r 361.

[49] Further, the plaintiff contends that the defendant is prevented from relying upon the offer as a *Calderbank* offer as it failed to specify any intention to do so. In that regard, it relies on the case of *Dean v Stockland Property Management Pty Ltd (No 2)*,[23] where the New South Wales Court of Appeal, whilst acknowledging that an offer that does not comply with rules relating to the making of offers to compromise can operate and be taken into account as a *Calderbank* offer, considered that it depended upon the intention of the offeror as revealed by the terms of the offer. The Court stated at [34]:

> "The intention must be made clear. It would be unfair for a party to be subject to the consequences of a Calderbank offer if it was not made clear that the offer should be treated as such. A party receiving an offer of compromise apparently made under the rules should be entitled to decide whether or not to accept it according to the offer of compromise regime in the rules, including deciding whether or not it is an effective offer of compromise."

[50] The plaintiff further contends that *Calderbank* offers "nearly always" arise for consideration in circumstances where the successful defendant is seeking indemnity costs against a wholly unsuccessful plaintiff who has acted unreasonably in rejecting the offer. The defendant refutes that that is in accordance with authority. It is not a matter which I need to resolve, given my findings below.

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[23] [2010] NSWCA 141.

[51] A regime has been established by Part 5 of Chapter 9 to encourage settlements of litigation by parties. I do not consider it is open for the Court to exercise its discretion to give the offers the same effect as if they were made in compliance with the UCPR.

[52] Part 5 of Chapter 9 of the UCPR provides a mandatory costs regime for the making of offers to settle if r 361 of the UCPR is satisfied, unless a party can show another costs order is appropriate.[24]

[53] The decision of *The Portland Downs Pastoral Company Pty Ltd v Great Northern Developments Pty Ltd & ORs (No 2)*,[25] where his Honour had regard to the terms of an offer in his discretion, is unlike the present case given that there was no judgment obtained by the plaintiff to which r 361 could apply.[26] That characterisation is supported by *Foster v Galea (No 2)*,[27] where Byrne J drew a distinction between a situation where the offer was one to which the rules did not apply as opposed to being ineffective under the rules.

[54] In *Deeson Heavy Haulage Pty Ltd v Cox (No 2)*,[28] McMeekin J at [48] stated that a party had to demonstrate that an offer fell within the rules in order to take effect of the provisions. In that case the relevant party had failed to do so and his Honour considered the question of costs in accordance with the general discretion of the Court.[29] That was acknowledged by Gotterson JA in *Hanson & Anor v Goomboorian Transport Pty Ltd & Ors*.[30]

[55] If an offer is made in accordance with the UCPR and the plaintiff does not obtain an order more favourable to the plaintiff than the offer, the defendant is then entitled to its costs notwithstanding the success of the plaintiff, contrary to the usual costs order. There is no requirement under the UCPR, as is the case with *Calderbank* offers, to demonstrate that the relevant party acted unreasonably or imprudently in not accepting the offer. This supports the fact in order to rely on an offer made under the rules, it must comply with the rules, unless the intention to rely on it, notwithstanding its non-compliance, is made clear.

[56] In the circumstances in which the offers were made and not accepted, and where the offers were not compliant with the UPCR, it is not appropriate for the circumstances

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24 *Cameron v Nominal Defendant* [2001] 1 Qd R 476.

25 [2011] QSC 161 at [3].

26 See also the discussion in *Rathie v ING Life* [2004] QSC 146 at [52]-[53].

27 [2008] VSC 331.

28 [2009] QSC 348.

29 At [61]-[81].

30 [2019] QCA 207, with whom McMurdo JA and Douglas J agreed.

to influence the exercise of the Court's discretion to make the same orders available under the UCPR. Nor does either offer fall to be considered as a *Calderbank* offer, as neither stated any intention for the offer to be relied upon as a *Calderbank* offer alternatively to the UCPR.

The discretion under rule 681 of the UCPR

[57] The Court must therefore determine the question of costs in accordance with its general discretion under r 681 of the UCPR.

[58] The relevant principles were relevantly have been stated numerous times. A convenient summary was set out by McMeekin J in *Deeson Heavy Haulage Pty Ltd v Cox & Ors (No 2)* at [54]-[58],[31] as follows :

> "I take the relevant principles to be as follows. Firstly the defendant's right to recover costs is governed by the provisions of the *UCPR*. In particular the usual rule is that the costs of a proceeding should follow the event unless the court orders otherwise: r 681 *UCPR*. Nonetheless the rule makes plain that there is a general discretion in the court. Whilst the discretion is often described as "absolute and unfettered" or the like it is apparent that the obligation to act judicially requires that close regard be had to the many decisions from appellate courts as to the proper exercise of the discretion.
>
> I may make an order for costs in relation to a particular question or in relation to a particular part of a proceeding and for those purposes I can declare what percentage of the cost of the proceeding is attributable to the question or part of the proceeding to which the order relates: r 684 *UCPR*. Where the relief obtained by a plaintiff in a proceeding in the Supreme Court is a judgment that, when the proceedings began, could have been given in the Magistrates' Court then the costs that the plaintiff recovers must be assessed as if the proceeding had been started in the Magistrates' Court, unless I order otherwise: r 697 *UCPR*.
>
> Generally speaking a "successful" litigant is entitled to an order of costs and to deprive a successful party of their costs or to require such a party to pay some or all of the costs of the other side is an exceptional measure: *Smeaton Hanscomb v Sassoon I Setty, Son & Co (No 2)* [1953] 1WLR 1481 at 1484 cited with approval by McHugh J in *Oshlack v Richmond River Council* [1988] HCA 11; 193 CLR 72 at [66].
>
> Reasons of fairness and policy lie behind that usual approach. Costs are not awarded to punish an unsuccessful party but to indemnify the successful party. The relevant point is that if the litigation had not been

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31 [2009] QSC 348.

> defended by the unsuccessful party then the successful party would not have incurred the expense which it did.
>
> A successful plaintiff generally would only be deprived of their costs or made to pay the costs of the other side if they had been guilty of some sort of misconduct…" (footnotes omitted)

[59] The plaintiff does not contend that the fact the offers were made restricts the Court in the exercise of its discretion under r 681 of the UCPR but contends that where the offers were clearly intended to be made only under the UCPR and not to take effect as *Calderbank* offers it would not be appropriate for the Court to exercise the discretion to make anything other than the usual order for costs, given the deficiencies of the offer. It contends that the usual rule should apply; costs should follow the event such that the defendant should pay its costs on the standard basis.

[60] The defendant submits that the plaintiff did not accept the offers in question because of an over-inflated assessment of its own case arising out of its expert reports and its belief that it could have achieved a 25 per cent conversion rate of broker-originated customers. It contends that it had the benefit of the defendant's expert report prior to the offer of April 2016, which did not change in approach from that set out in the first report and the lack of disclosure as to the number of broker-originated customers in the territory did not affect its ability to assess the offers made. It notes that the quantum was of a level that could have been obtained in the Magistrates Court.

[61] However, while the plaintiff was successful in establishing liability, its case as to damages was largely unsuccessful, being well below the bottom of the range of the numerous calculations carried out by its expert. The Court generally favoured the defendant's expert, although not in all respects. In particular, the plaintiff failed to establish the conversion rate of 25 per cent, which was a significant factor in the assessment of damages, and many of the assumptions relied upon by its expert.[32] Given the amount of damages awarded, it was relief that could have at least been granted by the District Court, although the level of the claim did require it to be issued in the Supreme Court.

[62] Even if I consider the offers made by the defendant to the plaintiff I would not have reached the view that the plaintiff's failure to accept either of the offers was so unreasonable or imprudent that the plaintiff should be ordered to pay the defendant's costs from the date of the offer and disentitled to its costs. At the time the offers were made, the plaintiff was still receiving disclosure as to the number of broker-originated customers in Binaray's territory, together with updated expert reports from Mr Potter on the basis of those figures, which differed in part from

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[32] See, for example *Binaray Pty Ltd (ACN 119 724 211) as Trustee for the Allen Family Trust v RAMS Financial Group Pty Limited (ACN 105 207 538)* [2019] QSC 33 at [400], [180] and [376].

those disclosed and from those provided to its expert. While Mr Potter's approach did not fundamentally change from his first report, the figures upon which he relied, namely the numbers of broker-originated customers, were in a state of flux. Further, the plaintiff was not provided with the list of broker-originated customers referred to in Mr Choo's summary of evidence and relied upon by Mr Potter until 23 March 2017. In the context of a loss of opportunity case arising from lack of access to broker-originated customers in the area, that information was significant to any assessment by the plaintiff.

[63] In the circumstances, however, I do not consider the plaintiff should be paid all of its costs and its costs should be reduced to take into account its lack of success as to damages. The circumstances of that determination were set out extensively in the reasons for judgment. The level of damages awarded was significantly less than the amount claimed as a result of the plaintiff's failure to prove critical aspects of its damages claim. While that does not disentitle the plaintiff from being awarded costs, it would not be appropriate for the plaintiff to be awarded all of its costs. I determine that the plaintiff should be paid 75 per cent of its costs on the standard basis.

Orders

[64] The orders of the Court will be:

(1) The defendant is to pay the plaintiff the sum of $45,174.20 as damages and interest up until 18 November 2019 in the sum of $20,519.00 and thereafter in accordance with the Supreme Court scale;

(2) The defendant is to pay 75 per cent of the plaintiff's costs of the proceedings, calculated on the standard basis.