SUPREME COURT OF QUEENSLAND

CITATION:	*Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* [2020] QSC 1
PARTIES:	**CIVIL MINING & CONSTRUCTION PTY LTD (ABN 18 102 557 175)** (plaintiff) **v** **WIGGINS ISLAND COAL EXPORT TERMINAL PTY LTD (ABN 20 131 210 038)** (defendant)
FILE NO:	BS No 6050 of 2013
DIVISION:	Trial
PROCEEDING:	Claim
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	31 January 2020
DELIVERED AT:	Brisbane
HEARING DATE:	9 September 2019; further submission received 16 October 2019 and 4 November 2019
JUDGE:	Flanagan J
ORDER:	**1. WICET pay CMC's costs of the claim.** **2. CMC pay WICET's costs of the counterclaim.** **3. WICET's application filed 23 July 2019 and the amended application dated 20 August 2019 are dismissed.** **4. I will hear the parties as to costs of the application and amended application.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – OFFERS OF COMPROMISE, PAYMENTS INTO COURT AND SETTLEMENTS – OFFER OF COMPROMISE OR OFFER TO SETTLE OR CONSENT TO JUDGMENT PURSUANT TO RULES – GENERALLY – where there was a claim and counterclaim – where the parties exchanged formal offers to settle the claim and counterclaim – where both offers were for an all-up sum that did not distinguish between the claim and counterclaim – where separate judgments were given for the claim and counterclaim – whether either of the offers

were more or less favourable than the orders obtained – whether the offers could be compared with the net result of judgments on the claim and counterclaim

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – where both parties were generally successful on their claims – where the plaintiff achieved a positive net outcome – where the defendant identified various breaches by the plaintiff of the undertaking in r 5 – where the Court had previously made wasted costs orders – where the proceedings concerned a complex construction dispute – whether the "event" was the plaintiff's securing of a net positive outcome – whether the Court should depart from the general rule as to costs

Uniform Civil Procedure Rules 1999 (Qld) , r 184, r 353, r 360, r 361, r 681, r 684

Anthony Christopher Williams v Commonwealth Bank of Australia (unreported, Federal Court of Australia New South Wales District Registry, General Division, Tamberlin J, 29 November 1995, 30 November 1995), cited
Armstrong v Mitchell-Smith (No 2) [2012] QSC 370, cited
Australia & New Zealand Banking Group Ltd v Alirezai (No 2) [2002] QSC 205, applied
Balnaves v Smith [2012] QSC 408, considered
BHP Coal Pty Ltd & Ors v O & K Orenstein & Koppel AG & Ors (No 2) [2009] QSC 64, cited
Binaray Pty Ltd (ACN 119 724 211) as Trustee for the Allen Family Trust v RAMS Financial Group Pty Limited [2019] QSC 280, considered
Chapel of Angels Pty Ltd v Hennessy Builder Pty Ltd [2018] QDC 248, cited
Charter Pacific Corporation Limited v Belrida Enterprises Pty Ltd [2003] 2 Qd R 619, applied
Deeson Heavy Haulage Pty Ltd v Cox (No 2) [2009] QSC 348, cited
Emanuel Management Pty Ltd (in liq) & Ors v Foster's Brewing Group Ltd & Ors and Coopers & Lybrand & Ors [2003] QSC 299, cited
Formosa & Anor v Eminent Forms Pty Ltd (2005) 91 SASR 6, cited
Gladstone Area Water Board & Anor v AJ Lucas Operations Pty Ltd [2015] QSC 52, cited
Marriner & Ors v Australian Super Developments Pty Ltd [2016] VSCA 141, cited
Mobile Innovations Ltd v Vodafone Pacific Ltd [2003] NSWSC 423, cited
Primus Telecommunications Pty Ltd v CCP Australian

Airships Limited (No 2) [2003] VSC 141, cited
Schofield v Hopman & Anor (No 2) [2017] QSC 324, cited
Smith v Madden (1946) 73 CLR 129, cited
West v Blackgrove [2012] QCA 321, cited
Whitney v Dream Developments Pty Ltd (2013) 84 NSWLR 311, considered
Wilson Parking Australia 1992 Pty Ltd v Leda Holdings Pty Ltd (unreported, Federal Court of Australia, Tamberlin J, No NG 939 of 1993, 28 February 1997), cited

COUNSEL: B O'Donnell QC with S J Webster for the plaintiff
D A Kelly QC with S Eggins for the defendant

SOLICITORS: Thomson Geer for the plaintiff
Corrs Chambers Westgarth for the defendant

[1] On 26 March 2018, the Court gave judgment for both Civil Mining & Construction Pty Ltd on its claim and Wiggins Island Coal Export Terminal Pty Ltd on its counterclaim. There are two remaining issues. The first is the order that the Court should make regarding the costs of the proceedings. The second is whether the Court should vary its judgment under the slip rule.

[2] As to costs, each party submits that it made an offer under Part 5 of Chapter 9 of the *Uniform Civil Procedure Rules* 1999 (Qld) (**UCPR**), triggering the costs consequences prescribed by rr 360(1) and 361(1). Alternatively, if those provisions are not engaged, CMC submits that WICET should be ordered to pay its costs of the proceeding; WICET submits that each party should bear its own costs.

[3] As to the slip rule application, WICET applies to vary the Court's judgment on its counterclaim to include an additional amount reflective of GST for the amount awarded to WICET on the counterclaim. WICET submits that it has a contractual entitlement to a refund of GST, and that its entitlement was raised, but overlooked, in its written submissions. After WICET filed its application, CMC received a GST refund from the Australian Tax Office. CMC has now remitted the refunded amount to WICET. This has limited the relevance of WICET's application.

[4] For the reasons developed below, the parties' offers do not trigger rr 360(1) or 361(1). Costs are therefore within the Court's discretion. In my view, the appropriate order is that WICET pay the costs of CMC's claim and CMC pay the costs of WICET's counterclaim assessed on the standard basis. WICET's slip rule application should be dismissed.

[5] I will deal with the issue of costs before turning to WICET's slip rule application.

The costs of the proceedings

[6] Costs are in the Court's discretion unless the UCPR provides otherwise.[1] One instance where the UCPR provides otherwise is rr 360 and 361: the Court must make the order required by those rules (unless another order is shown to be appropriate). The Court may therefore only exercise its discretion as to costs if neither r 360 nor r 361 apply. Accordingly, the first issue to determine is whether either CMC or WICET has made an offer to settle that triggers those rules.

(a) Did CMC and/or WICET's offers trigger rr 360(1) and/or 361(1)?

[7] Rules 360 and 361 provide as follows:

"**360 Costs if offer by plaintiff**

(1) If—

(a) the plaintiff makes an offer that is not accepted by the defendant and the plaintiff obtains an order no less favourable than the offer; and

(b) the court is satisfied that the plaintiff was at all material times willing and able to carry out what was proposed in the offer;

the court must order the defendant to pay the plaintiff's costs calculated on the indemnity basis unless the defendant shows another order for costs is appropriate in the circumstances.

(2) If the plaintiff makes more than 1 offer satisfying subrule (1), the first of those offers is taken to be the only offer for this rule.

361 Costs if offer by defendant

(1) This rule applies if—

(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.

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[1] UCPR r 681.

(3) However, if the defendant's offer is served on the first day or a later day of the trial or hearing of the proceeding then, unless the court otherwise orders—

(a) the plaintiff is entitled to costs on the standard basis to the opening of the court on the next day of the trial; and

(b) the defendant is entitled to the defendant's costs incurred after the opening of the court on that day on the indemnity basis.

(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."

[8] As can be seen, rr 360 and 361 call for a comparison between the offer and the order obtained by the plaintiff. It is therefore necessary to set out the parties' offers and the result at trial.

The offers and the result at trial

[9] On 14 March 2016, WICET made an offer expressed to be under Chapter 9 Part 5 of the UCPR in the following terms (**WICET Formal Offer**):

> TAKE NOTICE that the defendant offers to settle all claims in this proceeding on the following terms:
> The defendant pay to the plaintiff:
> within 14 days of any acceptance of this offer:
> the sum of $1.5 million (inclusive of any GST);
> interest pursuant to the Civil Proceedings Act 2011 (Qld);
> the plaintiff's costs of the proceeding on the standard basis to be assessed, if not agreed.
> The parties shall discontinue the proceeding by filing a Notice of Discontinuance in the Court.

[10] On 21 March 2016, CMC also made a formal offer in the following terms (**CMC Formal Offer**):

> TAKE NOTICE that pursuant to Part 5 of Chapter 9 of the Uniform Civil Procedure Rules 1999 (Qld), the Plaintiff offers to settle all amounts and claims made in Supreme Court of Queensland proceeding number S6050/13 (Proceeding), being the claim by the Plaintiff and the counterclaim by the Defendant, on the following terms:
> That the Defendant pay to the Plaintiff, within 14 days of accepting this offer in the following amounts:
> the sum of $3,000,000;
> interest on the sum of $3,000,000 pursuant to clause 42.9 of the contract; and
> the plaintiff's costs of and incidental to the Proceeding, to be assessed on the standard basis if not agreed.

[11] It should also be noted that prior to the CMC Formal Offer, CMC served a *Calderbank* offer to settle in exchange for a payment by WICET of $5,391,202.54 inclusive of interest and legal fees.

[12] Both the CMC Formal Offer and the WICET Formal Offer were expressed as settling both CMC's claim and WICET's counterclaim, but by their terms failed to distinguish between the claim and counterclaim.

[13] On 26 March 2018, the Court made the following orders:

(a) in respect of CMC's claim:

(i) judgment for CMC against WICET in the sum of $3,562,586.38 plus GST in the amount of $356,258.65 together with interest;

(ii) the payment by WICET of GST in the amount of $356,258.65 was conditional on CMC issuing a valid tax invoice; and

(iii) WICET was ordered to return CMC's bank guarantee; and

(b) in respect of WICET's counterclaim, judgment for WICET against CMC in the sum of $2,936,844.61 together with interest.

[14] The parties' positions on the effect of the 26 March 2018 orders differ slightly:

(a) CMC submits that it obtained $5,163,577.42 in respect of its claim, whereas WICET obtained $3,359,566.43 on its counterclaim. The net award to CMC is $1,796,368.55.[2]

(b) WICET submits that CMC obtained $5,155,750.75, and it obtained $3,359,566.44. On WICET's calculations, the net outcome is a surplus of $1,796,184.31.[3]

[15] In light of the approach taken below, nothing turns on this discrepancy.

The parties' submissions

[16] The parties' submissions can be summarised as follows.

[17] **CMC's primary submission**. CMC submits that it obtained a more favourable order than the CMC Formal Offer, triggering r 360. On a proper construction of r 360, where separate judgments are given on a claim and counterclaim, the comparison is between a plaintiff's offer and any order on the claim – without reference to the counterclaim.[4] Therefore, the comparison under r 360 is between the CMC Formal Offer, the value of which was $3,840,828.18 (inclusive of interest accruing from 31 January 2013), and the order obtained by CMC in respect of its claim, which was an order for a money judgment totalling $5,163,577,42 as well as the return of the bank guarantee.[5] CMC bettered its offer, triggering r 360. CMC concedes that, by the same logic, the WICET

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2 CMC's Submissions on Costs filed 1 August 2019, paragraph 52.
3 Costs Submissions of the Defendant filed 20 August 2019, paragraph 59.
4 CMC's Submissions on Costs filed 1 August 2019, paragraph 16.
5 CMC's Submissions on Costs filed 1 August 2019, paragraphs 17-18.

Formal Offer triggers r 360, meaning that WICET is entitled to indemnity costs on its counterclaim.[6]

[18] **CMC's alternative submission**. In the alternative, CMC's position is that neither of the parties' offers engage rr 360 or 361. CMC submits that the WICET Formal Offer does not trigger r 360 because it was expressly made by WICET as defendant and because if (contrary to its position below) the Court compares the offer to the net result of the trial, WICET did not obtain a net result in its favour.[7] As for r 361, CMC submits that there are two reasons why the WICET Formal Offer does not trigger that rule. First, the offer is ineffective for uncertainty. Specifically, CMC argues that the interest component of the WICET Formal Offer was uncertain in three respects: the offer failed to identify the date from which interest was to be accruing; it failed to identify the applicable rate; and it did not make clear whether interest was payable on the entire $1.5 million settlement sum, or the GST exclusive amount.[8]

[19] Secondly, CMC contends that WICET cannot show that CMC failed to obtain an order that was more favourable than the WICET Formal Offer. It cannot do so for three reasons.

(a) First, the comparison required by r 361 is not possible in the present case. Rule 361 does not contemplate a comparison of an offer and the net effect of orders in disposition of a claim and counterclaim. Rather, r 361 requires a comparison between the order that the plaintiff obtains and the offer made by the defendant.[9]

(b) Secondly, the orders that CMC obtained on its claim were more favourable than the WICET Formal Offer because WICET was ordered to return the bank guarantee for $1.9 million whereas WICET did not offer to do so. The fact that WICET confirmed in correspondence two days after service of its offer that it would return the bank guarantee after the filing of a notice of discontinuance is irrelevant because such correspondence does not form part of the WICET Formal Offer.[10]

(c) Thirdly, the uncertainty surrounding the interest component of the WICET Formal Offer prevents ready comparison between the offer and orders obtained by CMC. CMC has calculated the value of the WICET Formal Offer in a number of ways, accounting for the possible amounts of interest that WICET might have been offering to pay. The highest possible value of the WICET Formal Offer is $1,780,799.46. For the purposes of this part of its argument, CMC assumes that r 361 allows a comparison between the defendant's offer and the net result at trial. CMC has compared the calculated amounts to the net result of the orders, which it identifies as a net amount of $1,796,368.55. Accordingly, it cannot be fairly demonstrated that CMC failed to obtain a result more favourable than the WICET Formal Offer.[11]

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6 CMC's Submissions on Costs filed 1 August 2019, paragraph 22.
7 CMC's Submissions on Costs filed 1 August 2019, paragraph 25.
8 CMC's Submissions on Costs filed 1 August 2019, paragraphs 27-37.
9 CMC's Submissions on Costs filed 1 August 2019, paragraph 41.
10 CMC's Submissions on Costs filed 1 August 2019, paragraphs 42-50.
11 CMC's Submissions on Costs filed 1 August 2019, paragraphs 51-54.

[20] CMC has also made submissions as to why another costs order is appropriate in the event that the Court finds that the WICET Formal Offer triggers r 361.

[21] **WICET's submissions**. WICET submits that the WICET Formal Offer engaged rr 360 and 361. This is for two reasons. First, the WICET Formal Offer was not uncertain as to interest. Secondly, the WICET Formal Offer was more favourable to CMC than the outcome of the proceeding.[12]

[22] Regarding the alleged uncertainty,[13] WICET emphasises that the Court should apply normal principles of contractual interpretation. One of those principles is that "the court will endeavour to uphold the validity of the contract, particularly in the case of a contract between businessmen." [14] In particular, WICET relies on *Primus Telecommunications Pty Ltd v CCP Australian Airships Limited (No 2)*,[15] where Habersberger J explained that offers of compromise should not be viewed with excessive formality or technicality. His Honour there found that the words "plus interest" did not render an offer under the Victorian rules of court uncertain. In dealing with the particular elements of uncertainty that CMC alleges:

(a) WICET submits that the date from which interest was to be accruing under its offer was clear when one considers the state of the pleadings at the time that the offer was served on CMC. CMC had alleged a contractual entitlement to interest accruing from 31 January 2013. WICET had denied CMC's entitlement but had not disputed that date. CMC had also claimed interest under the *Civil Proceedings Act* 2011 in the alternative, which was what WICET had offered to pay. Accordingly, it was reasonably clear to CMC that WICET was offering to pay interest accruing from 31 January 2013.[16]

(b) WICET submits that its offer was also reasonably certain as to the rate of interest that was to apply.[17] It is conventional to apply the practice direction rate to awards pursuant to s 58(3) of the *Civil Proceedings Act* 2011, and that convention is well-known to practitioners. As a result, a reasonable person in CMC's position would appreciate that WICET was offering to pay interest at the rate stipulated by the practice directions that then applied.[18]

(c) WICET submits that it was clear that WICET was offering to pay interest on the entire $1.5 million settlement sum, and not the GST exclusive amount.[19] At the time that the offer was served, CMC had not claimed GST. By saying in its offer that the settlement sum of $1.5 million was "inclusive of any GST", WICET was making clear that it was not offering to pay any additional amount to CMC if CMC had to pay GST on the settlement sum.

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12 Costs Submissions of the Defendant filed 20 August 2019, paragraph 2.
13 Costs Submissions of the Defendant filed 20 August 2019, paragraphs 20-51.
14 Citing *Whitehouse Properties Pty Ltd v Bond Brewing (NSW) Ltd* (unreported, NSW Sup Ct, Giles J, 16 March 1990, No 28746 of 1988) at 11.
15 [2003] VSC 141, [6].
16 Costs Submissions of the Defendant filed 20 August 2019, paragraphs 31-34.
17 Costs Submissions of the Defendant filed 20 August 2019, paragraphs 35-41.
18 PD 22 of 2012; PD 7 of 2013.
19 Costs Submissions of the Defendant filed 20 August 2019, paragraphs 42-49.

[23] As for the comparison required by rr 360-361, WICET submits that the value of the WICET Formal Offer was $1,813,511.79 (in contrast to CMC's calculations).[20] The net result obtained by CMC was a payment from WICET of $1,796,368.55.[21] Regarding the bank guarantee issue, WICET points out that had CMC accepted the WICET Formal Offer, WICET would have had a net liability to CMC. This necessarily meant that WICET would have had to return the bank guarantee under the terms of the contract. In this sense, so far as the bank guarantee is concerned, the position that would have obtained had CMC accepted the WICET Formal Offer and the effect of the Court's orders were the same.[22] Accordingly, the orders obtained by CMC were not more favourable than the WICET Formal Offer.

[24] WICET refutes CMC's submission that the only possible comparison under r 361 is between the orders CMC obtained on its claim and the WICET Formal Offer. This is because the rules permit offers to settle both a claim and counterclaim.[23] There is no difficulty in making a comparison between the sum offered to settle the claim and counterclaim and the net result of the judgments on the claim and counterclaim.[24] WICET submits that this type of comparison is permitted by r 361 (and r 360 for that matter) because "order" is defined as including a "decision" or "determination", which is broad enough to encompass the net effect of the orders made on the claim and counterclaim.[25]

[25] WICET points out that if CMC's submission were correct, it would significantly curtail a defendant's ability to make an offer to settle an entire action (claim and counterclaim) and to obtain the costs benefit afforded by the rules if the offer is rejected. This is because in determining whether such an offer was more favourable than the final order, the offer could only be compared to the amount the plaintiff recovered from its claim, ignoring the result on the counterclaim – even though the offer encompassed the counterclaim. That cannot be the intention of the rules.[26]

[26] As for the CMC Formal Offer, WICET submits that it does not engage rr 360 or 361. By that offer, CMC was prepared to accept $3,000,000 plus interest. The actual result CMC achieved was a net principal award of $625,741.77 plus GST and interest – significantly less than the value of the CMC Formal Offer.[27] WICET contends that CMC's argument that the CMC Formal Offer must be compared with the orders obtained by CMC on its claim – without reference to the counterclaim – is without merit and antithetical to Part 5 of Chapter 9 of the UCPR.[28] WICET submits the proposition that if a party has offered to settle the whole of an action for a specified sum, this would need to be compared with the result of the whole of the action to determine properly whether a more favourable outcome has been achieved.[29] There can be no true

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20 Costs Submissions of the Defendant filed 20 August 2019, paragraphs 55 and 58.
21 Costs Submissions of the Defendant filed 20 August 2019, paragraph 59.
22 Costs Submissions of the Defendant filed 20 August 2019, paragraph 89.
23 Costs Submissions of the Defendant filed 20 August 2019, paragraphs 101-102 citing *Charter Pacific Corporation Limited v Belrida Enterprises Pty Ltd* [2003] 2 Qd R 619, 625-627 [14]-[18].
24 Costs Submissions of the Defendant filed 20 August 2019, paragraph 106.
25 Transcript of Proceedings, 9 September 2019, T1-50 lines 15-31.
26 Costs Submissions of the Defendant filed 20 August 2019, paragraph 107.
27 Costs Submissions of the Defendant filed 20 August 2019, paragraph 113.
28 Costs Submissions of the Defendant filed 20 August 2019, paragraph 120.
29 Costs Submissions of the Defendant filed 20 August 2019, paragraph 125.

comparison if an offer to settle both claims is compared with the result of only one of those claims.[30] In support of that proposition, WICET relies on two decisions of Tamberlin J dealing with the then Federal Court equivalent of r 360 of the UCPR.[31] In my view, an analysis of those cases is unhelpful given the different wording of the rules of court[32] in those cases, but it is noteworthy that both of the offers before Tamberlin J distinguished between the relevant application and the crossclaim.

[27] WICET offers a hypothetical scenario to illustrate the flaw in CMC's primary submission. If a plaintiff were to offer an amount of money to settle its claim only (and not the defendant's counterclaim also), this would have, on CMC's construction, precisely the same consequences as if the plaintiff had offered to settle both the claim and the counterclaim for the same amount. It is nonsensical that two very different offers would have the same costs consequences under the rules.[33]

The issue

[28] Even in summary form, one can appreciate that the parties' submissions are intricately layered. In my view, however, the core of the present issue can be distilled into one question: how do rr 360 and 361 apply to offers to settle multiple claims? This turns upon the proper construction of those rules, and Part 5 of Chapter 9 of the UCPR generally. Once those rules are properly construed, it becomes unnecessary to resolve the other intricacies of the parties' submissions.

Part 5 of Chapter 9 of the UCPR

[29] Part 5 of Chapter 9 of the UCPR encourages parties to make offers to settle. It does so by prescribing costs consequences where an offeree rejects an offer that is more advantageous to the offeree than the result at trial. The consequences differ depending on whether the offer is made by the plaintiff or the defendant.

[30] Rule 353 is the starting point:

> "**353 If offer available**
>
> (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.
>
> (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."

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30 Costs Submissions of the Defendant filed 20 August 2019, paragraph 126.

31 Costs Submissions of the Defendant filed 20 August 2019, paragraphs 127-129 citing *Anthony Christopher Williams v Commonwealth Bank of Australia* (unreported, Federal Court of Australia New South Wales District Registry, General Division, Tamberlin J, 29 November 1995, 30 November 1995); *Wilson Parking Australia 1992 Pty Ltd v Leda Holdings Pty Ltd* (unreported, Federal Court of Australia, Tamberlin J, No NG 939 of 1993, 28 February 1997).

32 *Charter Pacific Corporation Limited v Belrida Enterprises Pty Ltd* [2003] 2 Qd R 619, 626 [16].

33 Costs Submissions of the Defendant filed 20 August 2019, paragraphs 130-132.

[31] In *Charter Pacific Corporation Limited v Belrida Enterprises Pty Ltd*,[34] Fryberg J made two observations of r 353. First, r 353 refers to "a party", meaning it applies to plaintiffs, defendants, or any other party to a proceeding. Second, an offer to settle under Part 5 of Chapter 9 is one that settles one or more claims in the proceeding. A "claim" is defined as a document under Part 3 of Chapter 2. Accordingly, an offer to settle one of several causes of action is not an "offer to settle 1 or more of the claims in the proceeding" as allowed by r 353. Justice Fryberg considered that the prima facie meaning of "claim" did not preclude Part 5's application to counterclaims or third party notices.

[32] Here, there were two claims: CMC's claim and WICET's counterclaim. Both the CMC Formal Offer and the WICET Formal Offer complied with r 353 insofar as they were expressed as settling all matters contained in the claim and counterclaim.

[33] In *Balnaves v Smith*[35] (***Balnaves***), Byrne SJA observed that an offer to settle met the formalities required by Part 5 if, in addition to r 353, the offer satisfied the requirements of rr 354 and 355.[36] Generally, the offer must be served before the Court grants final relief: r 354. An offer must also be stated to be open for a period not less than 14 days: r 355. There is no suggestion that either the CMC Formal Offer or WICET Formal Offer failed to observe these formalities.

[34] Instead, CMC submits that the WICET Formal Offer is ineffective under r 361 because it is uncertain as to interest:[37]

> "To be effective under the rules, an offer must be sufficiently certain. An offer which contains a provision for the payment of interest which is reasonably susceptible to more than one meaning is not sufficiently certain or clear to be effective [citing *Kemp v Ryan* [2012] ACTCA 12, [12]-[14] and [28]-[31]: This case concerned a *Calderbank offer* and thus is not strictly to the point].
>
> Because of the way the WICET Formal Offer dealt with interest, the offer was uncertain and so ineffective."

[35] The sense in which CMC uses the word "ineffective" is itself uncertain. To the extent CMC is suggesting that Part 5 requires offers to have a degree of certainty, one can observe immediately that there is no express requirement of certainty in the rules. Also relevant are Byrne SJA's remarks in *Balnaves*:

> "[19] To gain the benefit of the Part 5 regime, the offer must, in a phrase, better the judgment: a plaintiff needs to show that the judgment was 'no less favourable'[38], a defendant, that it was 'not more favourable to the plaintiff'[39], than the offer.

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34 [2003] 2 Qd R 619.
35 [2012] QSC 408.
36 [2012] QSC 408, [11].
37 CMC's Submissions on Costs filed 1 August 2019, paragraphs 27-28.
38 r 360(1)(a).
39 r 361(1)(a).

> [20] To be effective for that purpose, the offer must permit fairly ready comparison between the nature and extent of the advantages (and any disadvantages) arising from the judgment with the situation that would have been obtained had the offer been accepted. As the contest will be about costs only, the assessment of the ramifications of the offer should not involve prolonged examination of documents or costly exploration of other information. The UCPR are to be applied with the objective of avoiding undue expense[40]. Determining a contest about costs should not increase them substantially.[41]
>
> [21] So an offer to settle should be clear in its terms[42]. And its effect should be capable of prompt, comparatively inexpensive, assessment – by the recipient, and, where a judicial evaluation needs to be made of the relative benefits and burdens of offer and judgment, by the court." [footnotes included]

[36] *Balnaves* concerned a submission that an offer that included non-monetary terms (ie, a confidentiality condition, the requirement for consent discontinuance and that it was without prejudice to other proceedings) was not made under the rules. Byrne SJA rejected that submission; the offer complied with rr 353-355. Justice Brown recently considered *Balnaves* in *Binaray Pty Ltd v RAMS Financial Group Pty Ltd*[43] (***Binaray***). Her Honour was dealing with an offer to settle on terms that included third party assessment of certain costs on an undisclosed basis. At [38], her Honour stated:

> "[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.[44] 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 terms of the offer, it would be a non-complying offer.[45] It is analogous to a provision for a deed of release being included in an offer the terms of which are not disclosed.[46] Rule 353(1) provides for the offer to settle the proceeding "on the conditions specified in the offer" (emphasis added).

[37] My view is that Byrne SJA was not suggesting that certainty is a strict requirement of Part 5 of Chapter 9, but that some degree of certainty is necessary to allow ready

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40 r 5(1).

41 cf in the context of *Calderbank* offers, *Elite Protective Personnel Pty Ltd & Anor v Salmon* [2007] NSWCA 322, [111]-[112]; [144].

42 *Dover Beach Pty Ltd v Geftine Pty Ltd* [2008] VSCA 248, [118].

43 *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.

44 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

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

46 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].

comparison between the offer and the order obtained for the purposes of rr 360 and 361. This accords with a plain reading of the rules. In some cases, the uncertainty will be immaterial because it is plain that the offer, despite some ambiguity, is less (r 360) or more (r 361) favourable than the order obtained. Conversely, the uncertainty in an offer may prevent a party from engaging rr 360 and/or 361. It may also be relevant to consider the uncertainty of an offer in deciding whether another costs order is appropriate. Finally, as in *Binaray*, the uncertainty in an offer may stem from the fact that it is on unspecified terms. Such an offer is not rules-compliant because it fails to satisfy r 353(1), and not because of uncertainty per se.

[38] However, like Brown J in *Binaray*, it is unnecessary for me to come to a final view on this point of law. This is because there is a more fundamental reason why the WICET Formal Offer – and the CMC Formal Offer for that matter – do not engage rr 360 and/or 361: neither offer distinguished between CMC's claim and WICET's counterclaim. This becomes apparent once rr 360 and 361 are properly construed.

The comparison required by rr 360 and 361

[39] Two observations can be made of rr 360 and 361. First, both rules require a comparison between the offer to settle and the "order" obtained by the plaintiff. The UCPR defines "order" as including a "judgment, direction, decision or determination of a court whether final or otherwise". Rules 360 and 361 previously referred to a "judgment" instead of an "order". The use of the word "judgment" compelled Chesterman J in *Emanuel Management Pty Ltd (in liq) & Ors v Foster's Brewing Group Ltd & Ors and Coopers & Lybrand & Ors*[47] to the conclusion that r 361 could not apply in the scenario where a defendant made an offer to settle, which the plaintiff rejected, and the plaintiff subsequently did not obtain any judgment. It is unclear whether the result would be different now given the more expansive definition of "order", although it was followed by McMeekin J in *Schofield v Hopman & Anor (No 2)*.[48]

[40] Secondly, a defendant who makes an offer to settle its counterclaim is treated as a plaintiff under r 360. Conversely, a plaintiff who makes an offer to settle the defendant's counterclaim is treated as a defendant under r 361. As noted by Mullins J in *Australia & New Zealand Banking Group Ltd v Alirezai (No 2)*,[49] this stems from the UCPR's definitions of "plaintiff", which includes "a party who files a counterclaim", and "defendant", which includes "a person who is served with a counterclaim".

[41] It follows from the second observation that an offer to settle both a claim and counterclaim can simultaneously engage rr 360 and 361. However, it is difficult to apply those rules to an offer to settle a claim and counterclaim that, by its terms, does not distinguish between the claim and counterclaim. What part of the offer relates to the claim and what part relates to the counterclaim for the purposes of undertaking the comparison required by the rules? Absent any breakdown of the offer, is the appropriate comparison between the offer and the net outcome of the trial? This

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47 [2003] QSC 299, [36].
48 [2017] QSC 324.
49 [2002] QSC 205.

difficulty was identified by Porter QC DCJ in *Chapel of Angels Pty Ltd v Hennessy Builder Pty Ltd & Anor*, where his Honour considered offers of this kind:[50]

> "[49] It might be argued that the offers should be considered against the net outcome on the claim and counterclaim. That is plainly how it was put by the first defendant and is consistent with the form of the judgment. However, I cannot see how the fact that a judgment may be given for a net sum under Rule 173 permits the Court to ignore Rules 360 and 361 and to instead consider the offers as offers which ignore the claim and focus just on the net result of claim and counterclaim."

[42] More generally, uncertainty in an offer will be construed against the party seeking to rely upon rr 360-361, that is, the offeror. Referring back to *Binaray*, Brown J overlooked the offer's non-compliance with r 353(1) and considered whether the defendant had discharged its onus under r 361:[51]

> "[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, 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."

[43] This should not be seen as detracting from the discussion above at [36]-[38] of these Reasons. An offer can comply with Part 5 but nevertheless fail to trigger rr 360 and/or 361. As Byrne SJA noted in *Balnaves*, "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 the special Part 5 costs regime."[52]

[44] To summarise, Part 5 of Chapter 9 of the UCPR allows offers to settle both a claim and a counterclaim.[53] A party who seeks to take advantage of the costs consequences in rr 360 and 361 has the onus of showing that its offer is less favourable (r 360) or more favourable (r 361) than the order obtained by the plaintiff (to the claim or counterclaim, as the case may be).[54] An offer to settle a claim and counterclaim can trigger both rr 360 and 361. A plaintiff who makes such an offer is a plaintiff under r 360 in respect of the claim and a defendant under r 361 in respect of the counterclaim, and vice versa if the offer is made by a defendant to the claim. This proposition flows from the UCPR's

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50 [2018] QDC 248: there was a further complication that the offers were made by multiple defendants jointly.
51 [2019] QSC 280.
52 [2012] QSC 408, [25].
53 UCPR r 353.
54 *Deeson Heavy Haulage Pty Ltd v Cox (No 2)* [2009] QSC 348, [48]; *Armstrong v Mitchell-Smith (No 2)* [2012] QSC 370, [13].

definitions of "plaintiff" and "defendant". It is further supported by the fact that a claim and counterclaim in a proceeding are in form two separate claims. The different costs consequences prescribed by rr 360 and 361 can only work if that distinction is observed.

[45] It follows that WICET's submission that an "order" can be taken to mean the net outcome of a trial should be rejected. In addition to the analysis above, WICET's submission is inconsistent with the approach of Mullins J in *Australia & New Zealand Banking Group Ltd v Alirezai (No 2)*; her Honour did not consider the net outcome of the claim and counterclaim in that case.[55] Further, WICET's submission purports to treat offers to settle both claim and counterclaim differently to an offer to settle a claim. Where an offer is made to settle a single claim, it cannot be doubted that the comparison is between the offer and the order obtained by the plaintiff on the claim. There is nothing in the text of the rules to suggest that a different approach should be taken in relation to offers to settle multiple claims.

[46] Having identified what must be compared, it must then be demonstrated that the offer is less favourable (r 360) or more favourable (r 361) than the order obtained by the plaintiff to the claim under consideration. In my view, where there is an offer to settle multiple claims, the comparison required by rr 360 and 361 must focus on the terms of the offer that relate to the claim under consideration. Here, both the CMC Formal Offer and the WICET Formal Offer stipulated a single amount payable to CMC in settlement of both the claim and counterclaim (plus interest and costs). Evidently, the amount payable under each offer reflected an element of compromise between CMC's claim and WICET's counterclaim. However, it cannot be discerned from the terms of the offers the components of those amounts that were referable to the claim and counterclaim respectively. In my view, this uncertainty prevents either party from demonstrating that their offer triggers rr 360 or 361. For example, contrary to its primary submissions, CMC cannot demonstrate that it obtained orders that were no less favourable than the CMC Formal Offer by simply comparing the overall value of their offer against the orders on the claim. That is too crude of a comparison. In determining whether an offer is more or less favourable under rr 360 and 361, one must compare the part of the offer that relates to the claim under consideration with the orders obtained on the claim. That comparison is not possible in the present case. Accordingly, neither rr 360 nor 361 apply.

[47] It might be argued that this outcome does not accord with the purpose of Part 5 of Chapter 9 of the UCPR. In my view, the problem can be overcome if the offer to settle distinguishes between the various claims to which it relates. As to that, it might be said that it is unduly prescriptive to be required to stipulate individual sums for each claim, rather than a single sum for all claims. That concern is less acute, however, when one considers that parties should, in deciding on the terms of settlement that they are comfortable with, consider the individual merits of each claim.

[48] As neither CMC nor WICET can demonstrate that its offer was less favourable or more favourable than the orders obtained on the claim and counterclaim respectively, the costs of the proceedings fall within the Court's discretion under r 681(1). It is also

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[55] [2002] QSC 305.

unnecessary for me to determine the issues concerning the certainty of the WICET Formal Offer as well as its precise value.

[49] Although not dispositive of the present issue, something should be said about how rr 360 and 361 might interact with a single judgment given in exercise of r 184. Rule 184 provides:

> "If a defendant establishes a counterclaim against the plaintiff and there is a balance in favour of 1 of the parties, the Court may give judgment for the balance."

[50] As explained in the principal Reasons and below, I declined to give a single judgment in favour of CMC.

[51] It might be said that the WICET Formal Offer would have triggered r 361[56] had there been a single judgment under r 184 in favour of CMC. Such a judgment would have reflected the net outcome of CMC's claim and WICET's counterclaim. The WICET Formal Offer was expressed as a single sum that accounted for the claim and counterclaim. In that sense, the Court would be comparing like with like. If the outcome would have been different had a single judgment been given under r 184, that might cast doubt on the construction of rr 360 and 361 above.

[52] My view is that the WICET Formal Offer would still not trigger r 361 even if there had been a single judgment for the balance in favour of CMC. The only distinction to the present circumstances is that there would be a single judgment. That distinction does not alter the points of comparison under r 361. As identified above, where there is an offer to settle a claim and counterclaim, the points of comparison under r 361 are the order(s) obtained by the plaintiff and the portion of the defendant's offer that relates to the plaintiff's claim. Referring to those points of comparison, the defendant then has the task of showing that the offer was more favourable. Where a single judgment is given under r 184, the question of whether the offer was more "favourable" in my view would require consideration of the part of the Court's reasoning concerning the quantification of the plaintiff's claim. That approach would be consistent with Part 5's emphasis on separating the multiple claims to which a formal offer relates.

[53] In any event, even if the result as to r 361 might have been different had a single judgment been given under r 184, there could have been no confusion had WICET distinguished between its counterclaim and CMC's claim in drafting its offer under the rules. Such an offer would have accounted for both a single judgment under r 184 and the present circumstances.

(b) What should be the Court's orders as to the costs of the proceedings?

The general rule

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[56] If a single judgment were given to CMC under r 184, the WICET Formal Offer could not trigger r 360 as WICET would not have obtained an order: see *Emanuel Management Pty Ltd (in liquidation) & Ors v Foster's Brewing Group Ltd & Ors and Coopers & Lybrand* [2003] QSC 299, [36] (Chesterman J).

[54] Rule 681 of the UCPR states the general rule about costs:

> "(1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the Court but follow the event, unless the Court orders otherwise.
>
> (2) Subrule (1) applies unless these rules provide otherwise."

[55] For the purposes of the Court exercising the discretion under r 681(1) there are two separate "events". A separate judgment was entered for CMC as plaintiff on the claim and for WICET as plaintiff by counterclaim on the counterclaim. Justice Dixon in *Smith v Madden*[57] observed that in such circumstances costs should be assessed as follows:

> "… the taxation of the costs of the action and of the counterclaim is governed by the principle that the party receiving the costs of the claim should recover the general costs and whatever was reasonably incurred in bringing and maintaining or defending the action, as the case may be, considered as if there had been no counterclaim, and that the party receiving the costs of the counterclaim should receive the further or increased costs reasonably incurred in bringing and maintaining or defending the counterclaim."

[56] To similar effect are the observations of Jackson J in *Gladstone Area Water Board & Anor v AJ Lucas Operations Pty Ltd* where his Honour confirmed the separate nature of proceedings on a claim and counterclaim under the UCPR and confirmed that they would normally result in two orders for costs:[58]

> "… in the context of a trial of a claim and counterclaim in a civil proceeding, where there may be a verdict and judgment in favour of one party on the claim and there may be a verdict and judgment in favour of the other party on the counterclaim, it has long been recognised that the judgment of the claim may be treated as one event and the judgment on the counterclaim may be treated as another event."

CMC's alternative submission

[57] CMC initially contended in its submissions in chief, but now submits in the alternative, that in a building and construction case like the present, there is a general principle to the effect that where there are money claims and money cross claims arising out of the same construction contract, it is appropriate to regard the party who secures the net flow of money as having won, and to order that the party recover its costs of the whole proceeding (either in total, or by reference to a percentage fixed by the Court).[59] Further, there is no reason why, in cases where separate judgments are given on a claim

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[57] (1946) 73 CLR 129, 133-134.

[58] [2015] QSC 52, [12].

[59] CMC's Submissions in Reply on Costs, paragraph 42. See also CMC's Submissions on Costs filed 1 August 2019, paragraph 60-63 citing *Hanak v Green* [1958] 2 QB 9; *Yara Nipro Pty Ltd v Interfert Australia Pty Ltd* [2010] QSC 19 (McMurdo J); *Miles v Palmbridge Pty Ltd* [2001] WASC 42, [51] (Hasluck J); *Badge Constructions Pty Ltd v Penbury Coast Pty Ltd* [1999] SASC 6, [14] (Debelle J); *BMD Major Projects (No 2)* [2007] VSC 441, [9] (Pagone J); *Formosa & Anor v Eminent Forms Pty Ltd* (2005) 91 SASR 6 (Bleby J).

and counterclaim, the Court cannot under r 681 consider the net effect of the judgment and identify the relevant "event" as CMC's established entitlement to a net payment.[60]

[58] I do not accept CMC's alternative submission. The mere fact that the claims arose from the same construction contract does not alter how the discretion under r 681 should be exercised. None of the cases referred to by CMC concern how the discretion under r 681(1) is to be exercised.[61] I do not consider that treating the net result as the "event" for the purposes of r 681 results in costs orders which really reflect the outcome of the proceedings.[62] I accept WICET's submissions[63] that the cases relied on by CMC for the proposition that in construction cases the usual approach is that the party receiving the net award should receive all of its costs do not reveal any such general principle. One of the cases referred to by CMC to establish this general principle is *Formosa & Anor v Eminent Forms Pty Ltd* in which Bleby J doubted the existence of such a general principle:[64]

> "Even if the successful party is defined as including a person who becomes entitled to a balance judgment after a series of contested claims and counterclaims, it does not follow that a proper exercise of the discretion will result in an award of costs in his favour, or that it will require special or exceptional circumstances to depart from what might be perceived as a general rule."

[59] That there are two separate events here for the purposes of r 681(1) is supported by the fact that in giving separate judgments on the claim and counterclaim I specifically considered r 184 of the UCPR. Rule 184 provides:

> "If a defendant establishes a counterclaim against the plaintiff and there is a balance in favour of 1 of the parties, the Court may give judgment for the balance."

[60] I declined to exercise the discretion under r 184 to give judgment for the balance of the claim and counterclaim.[65] The reason for separate judgments was for the calculation of interest. I determined that CMC was entitled to interest pursuant to s 67P of the *Queensland Building and Construction Commission Act* 1991 (Qld) in respect of the Earthworks Claim, the Piling Claim, the Bebo Arch Claim, Environmental Claim and the Geolon 600 Claim. For some of these claims the date from which interest accrued varied. Further, such interest pursuant to s 67P ran until payment was made, meaning the balance of the claim and counterclaim could not be precisely quantified when the judgments were given. The only CMC claim that attracted interest under s 58(3) of the *Civil Proceedings Act* was the Piling Hammer Claim. In such circumstances, I considered it appropriate to give judgment for an amount in each proceeding. Similarly, having determined that the amount of $1,782,162.01 was payable by CMC to WICET in

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60 CMC's Submissions on Costs, paragraph 65.

61 *Hanak v Green* [1958] 2 QB 9; *Miles v Palm Bridge Pty Ltd* [2001] WASC 42; *Badge Constructions Pty Ltd v Penbury Coast Pty Ltd* [1999] SASC 6, [14].

62 Costs Submissions of the Defendant, paragraph 156 citing *Commonwealth v Gretton* [2009] NSWCA 279 per Hodgson JA at [121].

63 Costs Submissions of the Defendant filed 20 August 2019, paragraphs 157-161.

64 (2005) 91 SASR 6, 12-13 [24].

65 *Civil Mining Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd (No 3)* [2018] QSC 60, [169]-[171].

respect of WICET's counterclaim concerning the Final Certificate, WICET sought interest on this amount pursuant to s 58(3) from 15 May 2014 to the date of judgment. CMC had submitted that the Court should not have awarded interest to WICET. I did not accept this submission and determined:[66]

> "In circumstances where the totality of those claims would have been reduced by the amount payable by CMC to WICET pursuant to the Final Certificate, it would be unjust to deprive WICET of interest from 15 May 2014. WICET is entitled to interest pursuant to s 58(3) on the amount of $1,782,162.01 from 15 May 2014 to the date of judgment."

Separate judgments were therefore given on both the claim and the counterclaim to ensure appropriate awards and calculation of interest.

[61] In summary, there were two events: judgment for CMC on its claim and judgment for WICET on its counterclaim. Absent any departure, the general rule in r 681(1) dictates that CMC receive its costs of the claim, and WICET receive its costs of the counterclaim.

Should the Court depart from the general rule?

[62] The Court should only depart from the general rule that costs follow the event in exceptional circumstances. In *BHP Coal Pty Ltd & Ors v O & K Orenstein & Koppel AG & Ors (No 2)*[67] McMurdo J (as his Honour then was) considered r 684 and its relationship with r 681(1). Rule 684(1) provides that the Court may make an order for costs in relation to a particular question in, or a particular part of, a proceeding. His Honour observed:

> "However, r 684 has not so broadened the discretion as the defendants argue. The general rule remains that costs should follow the event and r 684 provides an exception. Necessarily the circumstances which would engage r 684 are exceptional circumstances, and the enquiry must be: what is it about the present case which warrants a departure from the general rule? That this remains the approach under r 681 and r 684 comes not only from the terms of the rules themselves but also from the recognised purposes for it. In *Oshlack v Richmond River Council*, McHugh J explained the basis for the usual order as to costs as follows:[68]
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> > 'The expression the "usual order as to costs" embodies the important principle that, subject to certain limitations, a successful party in litigation is entitled to an award of costs in its favour. The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party. If the litigation had not been

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66 *Civil Mining Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd (No 3)* [2018] QSC 60, [175].

67 [2009] QSC 64, [7].

68 (1998) 193 CLR 72, 97.

> brought, or defended, by the unsuccessful party, the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for costs of the unsuccessful litigation.'"

[63] Justice McMurdo also referred to the observation of Einstein J in *Mobile Innovations Ltd v Vodafone Pacific Ltd*:[69]

> "Notwithstanding that the Court has power to deprive a successful party of costs, or even order a successful party to pay costs, that is a course to be taken in unusual cases and with a degree of hesitancy."

[64] CMC's primary submission is that the Court should not depart from the general rule in r 681(1). WICET submits that given CMC's limited success and its alleged disentitling conduct, there should be no order as to costs. Before I consider these competing submissions it is convenient to set out my reasoning why I consider that both CMC and WICET were generally successful in pursuing their respective claim and counterclaim.

[65] As a preliminary observation, I note that the parties, both in their written submissions and in their affidavit material, sought to either maximise the extent of their own success or minimise the success of the opposing party at trial. I found the submissions and material in this respect to be of limited assistance. As I was the trial judge and was also responsible for case managing the matter to trial, I am well aware of the individual claims made by each party and the relative success of each party in relation to those claims. Each party's claims were considered separately and in detail in the course of two separate judgments extending over 350 pages.

[66] The following is apparent from how CMC's claim and WICET's counterclaim were disposed of:[70]

(a) As to liability, CMC enjoyed success on all of its claims;

(b) As to liability, WICET enjoyed success in respect of the Final Certificate and Variation 17 but failed in relation to its claim for liquidated damages, adjudication fees and interest under the BCIP Act, the OLC Claim and the Environmental Management Claim;

(c) Of its total claim of $14.4 million, CMC recovered $3,562,586.38 plus GST and interest;

(d) Of its total counterclaim of $12.5 million, WICET recovered $2,936,844.61 together with interest.

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[69] [2003] NSWSC 423, [4].

[70] *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* [2017] QSC 85 at [1069] and *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd (No 3)* [2018] QSC 60 at p 46.

[67] The litigation was lengthy and hard fought, with both parties ultimately achieving, in monetary terms as a percentage of their total claims, not dissimilar results. Both parties were generally successful in obtaining a substantial monetary judgment.

WICET's submissions as to the appropriate costs order

[68] First, WICET submits that no order as to costs should be made because it was "largely successful"[71] at trial given that it was able to reduce CMC's net primary award to only $625,744.71, being only 4.3 per cent of CMC's claimed entitlement of almost $14.4 million. I do not accept this submission. It proceeds on the erroneous basis that the relevant "event" for the purposes of r 681(1) is the net result of the proceedings. For the reasons given above, there are in my view two events for the purposes of r 681(1). CMC's success as well as WICET's success at trial should properly be analysed by reference to each party's separate monetary awards.

[69] Secondly, WICET asserts that CMC's failure to comply with its obligations under r 5 of the UCPR is relevant to the Court's discretion as to costs and why the Court should be inclined to make no order as to costs. WICET refers to the decision of Muir JA (Holmes JA and Daubney J agreeing) in *West v Blackgrove* where his Honour observed:[72]

> "As is implicit in r 681(1), the Court has a discretion to make another order if that is required in the interests of justice where, for example, '... the successful party by its lax conduct effectively invites the litigation; unnecessarily protracts the proceedings; succeeds on a point not argued before a lower court; ... or obtains relief which the unsuccessful party had already offered in settlement of the dispute'.[73]"

[70] The conduct alleged to be in breach of r 5 identified by WICET is as follows:

(a) CMC's conduct in respect of the Delay Claim. As explained by WICET:[74]

> "For the life of the proceeding until the completion of the trial, CMC sought to quantify the delay claim by reference to resources *during* the period of delay. The pleading was put on that basis, and the expert evidence of both parties was prepared on that basis. There were expert reports, court ordered expert conferences, a joint expert report and concurrent expert evidence. …
>
> CMC advanced an entirely new and alternative case at the end of the trial, based on the quantification of resources after the date of practical completion (rather than by reference to early periods of delay). [emphasis in original]"

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71 Costs Submissions of the Defendant filed 20 August 2019, paragraph 180.
72 [2012] QCA 321, [49].
73 *Oshlack v Richmond River Council* (1998) 193 CLR 72, 97 [69] (McHugh J).
74 Costs Submissions of the Defendant filed 20 August 2019, paragraphs 192 and 194.

(b) CMC advanced a claim for approximately $5.6 million in respect of the "soft-spots" claim. This claim was abandoned at trial when CMC's principal lay witness gave evidence which fundamentally undermined the case;[75]

(c) CMC's conduct surrounding the making of its formal offer on 21 March 2016 in circumstances where it was not disclosed to WICET or the Court that CMC was proposing to abandon reliance on its then existing quantity surveyor and rely on a new expert report from Mr Roberts;[76]

(d) CMC maintained unrealistically high quantum claims, thereby impeding the potential settlement of the case – whereas WICET indicated its willingness to pay a substantial sum by way of compromise;[77]

(e) CMC made numerous significant amendments to its case throughout the proceeding;[78]

(f) CMC's witness statements were inadequately, preventing the real issues emerging earlier than the trial;[79] and

(g) CMC's approach to the offers exchanged at the start of proceedings minimised the prospects of a commercial settlement.[80]

[71] None of this alleged conduct by CMC warrants a departure from the general rule. As a preliminary observation, WICET's submissions concentrate on CMC's conduct of the litigation but neglect to consider its own conduct. As I have already observed, this was lengthy and hard fought litigation. As correctly submitted by CMC:

> "In relation to the pre-trial conduct of the parties, both parties changed and refined their cases during the course of the proceeding and were late in complying with various orders at different times[81]. What occurred was no more than the usual cut and thrust of a substantial case in the Supreme Court. There is little to be gained now by attempting to retrace and evaluate each individual step and misstep by each party in the run up to trial. In particular, any pleading amendment that either party made which caused costs to be thrown away by the other party will be dealt with by the operation of r 386. It is not relevant to the exercise of the … general costs discretion in relation to the (other) costs of the proceeding."[82]

[72] As to CMC's conduct in changing the quantity surveyor expert and in reformulating its Delay Claim, CMC has already been penalised by costs orders including indemnity costs orders made against it.

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75 Costs Submissions of the Defendant filed 20 August 2019, paragraph 203.
76 Costs Submissions of the Defendant filed 20 August 2019, paragraphs 207-210.
77 Costs Submissions of the Defendant filed 20 August 2019, paragraphs 211-216.
78 Costs Submissions of the Defendant filed 20 August 2019, paragraphs 217-222.
79 Costs Submissions of the Defendant filed 20 August 2019, paragraphs 223-228.
80 Costs Submissions of the Defendant filed 20 August 2019, paragraph 229-231.
81 Affidavit of Shannon Carl Schwartz filed 1 August 2019, paragraphs 9-11.
82 CMC's Submissions on Costs filed 1 August 2019, paragraph 70(c).

[73] It is not surprising that in the course of complex litigation CMC abandoned one aspect of its Earthworks Claim relating to "soft spots".

[74] As to the allegation that CMC maintained "unrealistically high quantum claims" an examination of the offers exchanged between the parties reveals that there was a realistic effort on the part of both parties to settle the litigation. For example, CMC's *Calderbank* offer on 17 March 2016 sought payment from WICET of $1.5 million plus interest of $416,698.32 plus legal costs fixed in the sum of $3,474,504.22. This offer in the context of complex construction litigation was not, in my view, so "unrealistically high" as to constitute conduct on the part of CMC in contravention of r 5 of the UCPR.

[75] Thirdly, WICET submits that CMC's rejection of the WICET Formal Offer is a matter that the Court should consider in exercising its discretion as to costs. I gave the parties leave to file further submissions on this issue. CMC's submissions addressed the following question: If an offer is made under the UCPR, but fails to comply with the UCPR, in what circumstances can the Court have regard to the offer in exercising its general discretion as to costs?[83] WICET articulated the issue in a similar fashion.[84] In light of the discussion at [36]-[38] above, in my view the parties' submissions proceed on an incorrect premise. The WICET Formal Offer was in fact an offer under Part 5, but it failed to trigger rr 360 or 361.

[76] Notwithstanding this slight discrepancy, the parties have identified a number of interstate authorities that are of some assistance.[85] The seminal decision is the New South Wales Court of Appeal's in *Whitney v Dream Developments Pty Ltd (**Whitney**)*.[86] The plaintiff made an offer to settle that included a term whereby the defendant was to pay the plaintiff's costs as agreed or assessed. The rules prescribed that formal offers had to be exclusive of costs. The Court of Appeal (sitting as a court of five) held that the offer failed to comply with this formality and accordingly was not an offer under the rules. The Court then addressed whether the offer could be considered when exercising the general costs discretion. The Court unanimously decided that for an offer that is expressed to be made pursuant to the rules to be able to be relied on outside of the rules, there must be something in the offer itself, in the correspondence enclosing it or other surrounding circumstances to indicate that, irrespective of its effectiveness as an offer under the rules, reliance will be placed on the offer as the basis for a special order as to costs.[87]

[77] *Whitney* has been applied by the Victorian Court of Appeal in *Marriner & Ors v Australian Super Developments Pty Ltd* where the Court observed:[88]

> "The court may, in the exercise of its general costs discretion, be prepared to pay some regard to an offer of compromise which purports to be in

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83 Post-Hearing Submission of the Plaintiff filed 16 October 2019, paragraph 1.

84 Post-Hearing Submissions of the Defendant dated 4 November 2019, paragraph 1.

85 *Marriner v Australian Super Developments Pty Ltd* [2016] VSCA 141; *Dean v Stockland Property Management (No 2)* [2010] NSWCA 141; *Ord v McInnes* [2011] NSWCA 410; *Singapore Airlines v Principle International Pty Ltd (No 2)* [2017] NSWCA 340; *Chapel of Angels Pty Ltd v Hennessy Builder Pty Ltd* [2018] QDC 248, [53].

86 (2013) 84 NSWLR 311.

87 Post Hearing Submissions of the Defendant dated 4 November 2019, paragraph 3(c).

88 [2016] VSCA 141, [231].

> accordance with the 2005 Rules or the 2015 Rules but which, for some reason, is technically deficient. In certain cases, an ineffective or deficient offer purportedly made in accordance with the relevant court rules may take effect as a *Calderbank* offer. … An offer made pursuant to O 26 of the 2005 Rules or the 2015 Rules can take effect as a *Calderbank* offer if there is something in it or in the surrounding circumstances to indicate, either expressly or by implication, that it is proposed to be relied upon on the question of costs irrespective of its effectiveness as an offer under the relevant rules. [footnotes omitted]"

I am prepared to accept that these principles are broadly applicable here, notwithstanding my view that, unlike the offer in *Whitney*, the WICET Formal Offer complied with the formalities required by Part 5.

[78] WICET submits that these authorities do not support a conclusion that its offer cannot be relied upon in the exercise of the general discretion under r 681(1). WICET relies on the following passage in *Whitney*:[89]

> "… the maker of it is shown to intend that the fact of its non-acceptance may be deployed as a basis for seeking a special costs order in the event of that party's ultimate success in the action. Everything therefore depends on the message conveyed by the offer itself and any covering letter or other attendant circumstance."

[79] Referring to this passage WICET submits that the effect of the principle is that if an offer does not comply with the UCPR, "it could not be relied upon as a Calderbank offer for the purpose of seeking an indemnity costs order unless the offer indicated that the offeror intended to rely upon it for that purpose."[90] According to WICET, this does not mean that if a failed offer under the rules does not satisfy this test, it is rendered wholly inadmissible on the question of costs. I do not accept this submission. The reference in *Whitney* to "seeking a special costs order" is not necessarily a reference to a party seeking an indemnity costs order. What is sought by WICET in the present case, namely no order as to costs, constitutes a departure from the general rule. That is, WICET seeks to rely on an offer under Part 5 of Chapter 9 of the UCPR for the purposes of achieving a different costs order to that ordinarily envisaged by an exercise of discretion under r 681(1). The principles identified in *Whitney* and *Marriner* are, in my view, equally applicable to a situation where a party seeks a costs order that departs from the general rule.

[80] The WICET Formal Offer was stated to be an offer made under Part 5 of Chapter 9 of the UCPR. That was both stated on the face of the offer and in the covering letter of 14 March 2016. There was nothing in the offer or in the covering letter to indicate that the offer was intended to have effect other than as an offer pursuant to Part 5. The fact that the letter contained the notation "without prejudice except as to costs" does not, without more, convert what was clearly an offer under Part 5 of Chapter 9 of the UCPR into a *Calderbank* offer. More specifically, there was nothing in the offer or in the covering letter to indicate to CMC as the recipient that WICET would, in addition to

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89 (2013) 84 NSWLR 311 per Barrett JA (Beazley P and McColl JA agreeing) at [57].

90 Post Hearings Submissions of the Defendant dated 4 November 2019, paragraph 17.

invoking Part 5, rely on the offer to ask for a special order as to costs.[91] The WICET Formal Offer did not therefore take effect as a *Calderbank* offer that would justify the special costs order contemplated by WICET.

[81] In any event, in the context of lengthy and complex litigation, even if I were to treat the offer as a *Calderbank* offer, it does not alter my view that in the context of this litigation the costs order that best achieves justice between the parties is that the claim and counterclaim are viewed as separate events and the general rule is applied.

Disposition of the costs of the proceedings

[82] The appropriate orders are as follows:

1. WICET pay CMC's costs of the claim.

2. CMC pay WICET's costs of the counterclaim.

WICET's slip rule application

[83] By application filed 23 July 2019 and amended application dated 20 August 2019 WICET, pursuant to r 388(2) of the UCPR, sought a variation to the judgment delivered on 26 March 2018 so as to include an amount for GST of $293,684.46 in respect of the judgment for WICET against CMC on the counterclaim.

[84] At the time the Court pronounced its orders on 26 March 2018, CMC had not obtained any credit in respect of the GST adjustment from the Australian Tax Office. It subsequently obtained the credit on 11 June 2019.[92] According to CMC, it was at that time that WICET's entitlement to a refund arose. Consistent with this, CMC remitted the amount of $293,684.46 to WICET on 30 August 2019.[93]

[85] As CMC has now paid WICET the amount sought for GST, I raised with Mr Kelly QC in oral submissions why WICET's application under r 388(2) should not be dismissed. The only reason identified by Mr Kelly was that the application would have to be decided if the Court was called upon to compare the offers made by the parties under rr 360 and 361 of the UCPR with the orders obtained.[94] As I have decided that neither of the parties' offers engaged Chapter 9 Part 5 of the UCPR, it is unnecessary for the Court to determine the application and amended application under r 388(2).

Disposition of WICET's slip rule application

[86] Both the application and the amended application are dismissed and I will hear the parties as to costs.

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91 Post Hearing Submissions of the Plaintiff filed 1 November 2019, paragraph 4.
92 Affidavit of Shannon Schwartz filed 5 September 2019.
93 Affidavit of Shannon Schwartz filed 5 September 2019.
94 Transcript of Proceedings on 9 September 2019, 1-66 ll 3-5, 40-45.