SUPREME COURT OF QUEENSLAND

CITATION:	*Campbell & Anor v T. L. Clacher No. 2 Pty Ltd & Ors* [2020] QSC 35
PARTIES:	**SUZANNE CAMPBELL AND WENDY HOOK** (Applicants) **v** **T. L. CLACHER NO. 2 PTY LTD ACN 010 253 979 (AS TRUSTEE FOR THE CLACHER FAMILY TRUST)** (First Respondent) AND **FLOWON 241 PTY LTD ACN 603 200 102 (AS TRUSTEE FOR THE BLUMKE FAMILY TRUST)** (Second Respondent) AND **THOMAS LAIDLAW CLACHER** (Third Respondent)
FILE NO/S:	BS No 11662 of 2016
DIVISION:	Trial Division
PROCEEDING:	Application for costs
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	9 March 2020
DELIVERED AT:	Brisbane
HEARING DATE:	Written submissions
JUDGE:	Jackson J
ORDER:	**The order of the Court is that:** **1. The first respondent and third respondent pay the applicants' costs of the proceeding except for the costs thrown away by the amendments made by the further amended statement of claim to be assessed on the standard basis;** **2. The second respondent pay the applicants' costs of the proceeding except for the costs thrown away by the amendments made by the further amended statement of**

claim to be assessed on the indemnity basis;

3. **The applicants pay the respondents costs thrown away by the amendments made by the further amended statement of claim;**

4. **The first respondent is not entitled to have its costs of the proceeding paid out of the funds held by the trustee of the Clacher Family Trust.**

CATCHWORDS: EQUITY– TRUSTS AND TRUSTEES– POWERS, DUTIES, RIGHTS AND LIABILITIES OF TRUSTEES– REMUNERATION– RELEVANT PRINCIPLES–where the applicants applied for an order that the respondents pay their costs of the proceeding on an indemnity basis and for an order that the respondents have no entitlement to have their costs of the proceeding paid out of the fund of the Clacher Family Trust– where the respondents submit those orders should not be made– where the first respondent and third respondent submit that the offer of settlement, submitting appearance and costs thrown away by the applicants' amendment to the statement of claim should be taken into account– whether the facts of the proceeding warrant another or special order to be made against the respondents under *Uniform Civil Procedure Rules* 1999 (Qld) r 681(1) – whether the considerations in *Colgate-Palmolive Company and Anor v Cussons Pty Ltd* (1993) 46 FCR 225 were relevant in deciding whether an indemnity costs order should be made– whether the first respondent is entitled to be paid costs of the proceeding from the fund of the Clacher Family Trust.

Civil Proceedings Act 2011 (Qld)

Rules of the Supreme Court 1900 (Qld), O 91 r 15

Trusts Act 1973 (Qld), s 72

Uniform Civil Procedure Rules 1999 (Qld), r 288, r 308(2), r 310(2), r 476(1), r 681(1), r 698, r 692(2), r 700, r 700(2), r 700A, r 701, Chapter 17A Part 3

Belar Pty Ltd (in liq) v Mahaffey [2000] 1 Qd R 477, cited

Campbell & Anor v T. L. Clacher No. 2 Pty Ltd & Ors [2019] QSC 218, cited

China Shipping (Australia) Agency Co. Pty Ltd v D V Kelly Pty Ltd (No. 2) [2010] NSWSC 1557, cited

Colgate-Palmolive Company and Anor v Cussons Pty Ltd (1993) 46

FCR 225, cited

Commonwealth v Gretton [2008] NSWCA 117, cited

Free Serbian Orthodox Church Diocese for Australia and New Zealand Property Trust v Bishop Irinej Dobrijevic (No 3) [2017] NSWCA 109, cited

Frost v Bovaird (2012) 203 FCR 95, cited

Ghougassioan v Fairfax Community Newspapers Pty Ltd [2015] NSWCA 307, distinguished

Harrison & anor v Schipp [2001] NSWCA 13, cited

Haskins v Commonwealth of Australia (2011) 244 CLR 22, cited

James v Douglas [2016] NSWCA 178, cited

Kisimul Holdings Pty Ltd v Clear Position Pty Ltd (No. 2) (2014) 86 NSWLR 645, cited

Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand (2008) 237 CLR 66, cited

Menkens & Anor v Wintour & Anor [2011] QSC 53, cited

Michael Vincent Baker Superannuation Fund Pty Ltd v Aurizon Operations Ltd (No. 2) [2017] 2 Qd R 761, cited

Palmer v Parbery & Ors (No 2) [2018] QCA 268, cited

Park v Whyte (No 3) [2018] 2 Qd R 475, cited

Re Beddoe; Downes v Cottam [1893] 1 Ch 547, cited

Segal v Commonwealth Bank of Australia [2016] NSWCA 90, distinguished

Vieira v O'Shea (No 2) [2012] NSWCA 121, cited

COUNSEL:	R Treston QC and B Reading for the applicants D Kelly QC and W LeMass for the first respondent and third respondent on 6 and 7 March 2018 M Martin QC for the second respondent
SOLICITORS:	Thynne & Macartney for the applicants Cooper Grace Ward for the first respondent and third respondent Mills Oakley for the second respondent

Jackson J:

[1] Following judgment on the claim in this proceeding,[1] the parties made written submissions as to costs. There are a number of questions to be resolved. I assume that the reader has familiarity with the reasons for judgment on the claim.

[2] It is not in dispute that the respondents should be ordered to pay some of the applicants' costs. And none of the respondents applies for an order in relation either to any costs that may be awarded to the applicants, or their own costs of the proceeding, for an order that the costs be paid out of the fund of the trust property of the Clacher Family Trust.

[3] The applicants apply for:

1. an order that the respondents pay their costs of the proceeding to be assessed on the indemnity basis ("indemnity costs order"); and

2. an order that neither the first respondent nor the second respondent is entitled to have their costs of the proceeding paid out of the Clacher Family Trust or any assets comprising the "Trust Properties" the "Trust Shares" or the "Trust Funds" ("order of no entitlement out of the trust").

[4] The respondents submit those orders should not be made.

[5] The first respondent and third respondent submit that the court should order that they pay the applicants' costs of the proceeding, except for costs of the issue as to the third respondent's legal capacity, and only up to either 20 April 2018 or 25 October 2018, to be assessed on the standard basis. The grounds of that submission are that: first, on 25 October 2018 the applicants amended the statement of claim to abandon the capacity issue; second, on 20 April 2018 the applicants received an offer to settle more favourable to them than the judgment obtained after the trial; third, from 25 October 2018 the first respondent and third respondents adopted a "submitting appearance", save as to costs; and, fourth, the conduct of the first respondent and third respondent does not warrant an order for indemnity costs.

[6] The first respondent and third respondent submit further that an order of no entitlement out of the trust should be not be made against them. The grounds of that submission are that: first, an order requiring them to reinstate the assets of the Clacher Family Trust to the extent that those assets were used to pay their costs is outside the scope of the applicants' pleaded case; second, they are entitled to protection under clause 20 of the Clacher Family Trust deed; third, it is not established that any component of their costs of this litigation was not properly incurred.

[7] The second respondent does not oppose an order that it pay the applicants' costs of the proceeding to be assessed on the standard basis. It submits that no order should be made that those costs be assessed on the indemnity basis. The grounds of that submission are that: first, the second respondent's defence of the proceeding was not improper; second, the adverse findings made against Janine Blumke and Glenn Blumke do not warrant making an indemnity

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1 *Campbell & Anor v T. L. Clacher No. 2 Pty Ltd & Ors* [2019] QSC 218.

costs order; and, third, another relevant factor is that the second respondent actively promoted a settlement of the proceeding.

[8] The second respondent submits further that an order of no entitlement out of the trust should not be made against it. The ground of that submission is that such an order would be inconsistent with an order made by the court on 16 December 2016 that did not prohibit the second respondent from paying the reasonable administration costs of the Blumke Family Trust, including properly incurred legal costs, from the property held by the second respondent as trustee of the Blumke Family Trust.

Offer of settlement

[9] The trial of the proceeding was split, so that the third respondent's evidence could be heard first, on 6 and 7 March 2018, having regard to his advanced years. It was then adjourned to dates in April 2018, but those dates were vacated when the parties advised the court on or about 20 April 2018 that they had reached an in-principle agreement and expected to be able to conclude a settlement.

[10] After some months, those expectations were not met. So the trial was re-listed and resumed on 3 to 6 December 2018.

[11] Rule 700A of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") provides:

"(1) This rule applies to—

(a) …

(b) another proceeding relating to an interest in property under a will or trust.

(2) Without limiting the court's discretion under these rules to make an order about costs in relation to all or part of the proceeding, the court may, in determining an order for costs, take into account the following matters—

(a) the value of the property the subject of the proceeding and, in particular, the value of the property about which there is a disputed entitlement;

(b) whether costs have been increased because of any one or more of the following—

(i) noncompliance with these rules;

(ii) noncompliance with a practice direction;

(iii) the litigation of unmeritorious issues;

(iv) failure to make, promptly or at all, appropriate concessions or admissions;

(v) giving unwarranted attention to minor or peripheral issues;

(c) an offer of settlement made by a party to the proceeding."

[12] The first respondent and third respondent submit that they made an offer of settlement of the proceeding that should be taken in to account in determining the order for costs to be made. The applicants submit that the offer should not affect the order to be made.

[13] In my view, a relevant "offer of settlement", for the purposes of r 700A must be one capable of acceptance, at least in most cases.[2] The parties tendered evidence as to negotiations that took place with a view to reaching a settlement from 17 April 2018 to 5 September 2018. But most of the correspondence that passed between them is relevant only as background.

[14] The first respondent and third respondent rely on the in-principle agreement made on 20 April 2018 as the relevant offer of settlement. In my view, that submission should be rejected. The in-principle agreement was expressly made on the basis that it was not binding. The terms of that so-called agreement were not capable of acceptance, in any event, because they did not identify the subject matter of the contract clearly.

[15] In my view, the offer to settle for the purposes of r 700A was that made in May 2018 by the first respondent and third respondents' solicitors (and joined in by the solicitors for the second respondent in substance) that was not accepted by the applicants. The substance of that offer is contained in a draft settlement deed sent under the cover of a letter from the first respondent and third respondents' solicitors to the applicants' solicitors and the second respondent's solicitors dated 1 May 2018 ("draft deed"). Although some of the proposed annexures to the draft deed were forwarded later in May 2018 and some amendments were proposed by the second respondent's solicitors on 22 June 2018, I do not consider those points to be of great moment.

[16] On 20 June 2018, the solicitors for the applicants conveyed to the solicitors for the second respondent that the terms of the draft deed were unacceptable to the applicants. On 4 July 2018, the solicitors for the applicants wrote to the solicitors for the second respondent and the solicitors for the first respondent and the third respondent explaining why the offer contained in the draft deed was unacceptable.

[17] Each side of the dispute accuses the other of not adhering to the in-principle agreement made on 20 April 2018. But as that agreement was expressly made on the footing that it was non-binding and suffered, in any event, from a failure to identify the subject matter of the postulated contract, it seems clear to me that there was always the possibility of differences of the kind that subsequently emerged in the negotiations.

[18] So, in my view, the correct starting point for the assessment of the offer to settle relied upon by the first respondent and the third respondent is not in a value judgment as to which side was or was more closely adhering to the so-called in-principle agreement made on 20 April 2018, but a comparison of the actual offer to settle made by the first respondent and third respondent (that in substance was joined in by the second respondent) with the relief obtained by the applicants under the judgment in the proceeding.

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[2] Compare *Vieira v O'Shea (No 2)* [2012] NSWCA 121, [10].

[19] The relief obtained included the order in paragraph 6 of the judgment that the second respondent re-transfer to the trustee of the Clacher Family Trust the properties, shares and cash identified in the Annexure to the reasons. There is no value of that property as at the date of the judgment in evidence. The question of any further relief, including any order that the respondents account to the trustee further or pay compensation to the trustee was adjourned. Accordingly, it is difficult to value the relief obtained by the applicants, in effect on behalf of all the beneficiaries of the Clacher Family Trust, in monetary terms. Nevertheless, the first respondent and the third respondent sought to do so in the way set out below.

[20] The first respondent and the third respondent submit that under the draft deed each of the applicants would have received 25 percent of what they describe as "all of" the third respondent's assets "whether held personally or in the Clacher Family Trust". In accordance with the values asserted in the letter from the first respondent and third respondents' solicitors to the applicants' solicitors dated 17 April 2018, the first respondent and third respondent submit that those assets would have totalled in value to between $6.99 million and $7.19 million. Accordingly, the first respondent and third respondent submit that the offer made by the draft deed amounted to a monetary value to the applicants of between $3.48 million and $3.58 million, questions of costs aside, receivable in the future after the third respondent's death.

[21] In comparison, also using the values asserted in the letter dated 17 April 2018, they submit that the value of the assets of the Clacher Family Trust (before they were transferred to the Blumke Family Trust) was $3.09 million, with a possible maximum monetary value to the applicants of two thirds of that sum of $2.06 million, if the transferred property were restored to the Clacher Family Trust. The further submit, rightly, that the value of the rights of the applicants as discretionary beneficiaries of the Clacher Family Trust are not equal in value to the proposed distribution under the draft deed.

[22] However, it is apparent from what I have already summarised that the comparison made by the first respondent and third respondent is of an offer of settlement that extended to the financial affairs of the third respondent beyond the scope of the subject of this litigation, including the personal assets of the third respondent. Among other matters, it was the applicants' dissatisfaction with the extent of the personal assets that the third respondent had already transferred to Janine Blumke at the time of the negotiations that caused the negotiations on that basis to break down.

[23] Although there were sound reasons to attempt an all-up settlement of disputes that may have involved the third respondent, it does not follow that an offer of settlement that required the applicants to compromise subject matters beyond the scope of the affairs of the administration of the Clacher Family Trust may be compared with the outcome of this litigation, that is necessarily confined to a dispute over that subject matter, for the purposes of r 700A of the UCPR.

[24] In my view, it is unnecessary to go beyond this point to conclude that the offer of settlement in the draft deed is not demonstrated to be of greater value to the applicants than the orders made and that may be made under the judgment obtained in the proceeding. It follows that the applicants' failure to accept the offer to settle in the draft deed did not amount to acting unreasonably.

[25] With one exception, therefore, I do not consider the many other arguments on both sides as to the relevance or irrelevance of the in-principle agreement of 20 April 2018 or the offer of settlement made by the draft deed, including other obvious points, such as what right the applicants could have had to compromise the rights of the other beneficiaries of the Clacher Family Trust who were not intended to be parties to the draft deed.

[26] The exception is that the first respondent and the third respondent seemed to submit that the value of the personal property of the third respondent that was included in the offer to settle should be viewed having regard to the fact that the third respondent had made a 2016 will leaving all his personal property of value to Janine Blumke. A copy of the will was tendered in evidence at the trial although its direct relevance was not identified. However, the point of the submission seems to be to compare the applicants' entitlement under the will with what they may have received under the offer to settle in the draft deed.

[27] In my view, that was not a comparison that could be made on the evidence at the trial or on the question of costs, which was not concerned with the value of any applicants' personal rights against the third respondent's estate if any or the value of the rights of any person entitled under that estate in respect of any inter vivos disposition made by the third respondent in favour of Janine Blumke. I decline to do so.

[28] In my view, the correct legal framework in which to assess these facts in relation to the applicants' costs is whether what is sometimes called a "special order for costs"[3] should be made under the exception to the discretionary power to order costs under UCPR r 681(1) which provides that costs are to "follow the event unless the court orders otherwise". The question is whether those facts warrant another or special order, because of the applicants' failure to accept the offer to settle made by the draft deed. In my view, as a matter of overall discretion, they do not.

Submitting appearance

[29] On 22 October 2018, the applicants and the first respondent and third respondents entered into a deed entitled the "Capacity Settlement Deed". The deed provided that:

(a) the applicants released the first respondent and the third respondent from the claims pleaded in paragraphs of the statement of claim that were deleted by the further amended statement of claim;

(b) the first respondent and the third respondent agreed to take no further part in the proceeding other than to make submissions as to costs and to take the position that they would abide by the orders of the court in the proceeding other than in relation to costs.

[30] On 25 October 2018, the court made the following orders:

"1. The applicants have leave to file and serve their further amended statement of claim, further amended reply to the second respondent's amended defence and second

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[3] *Haskins v Commonwealth of Australia* (2011) 244 CLR 22, [70]; *Belar Pty Ltd (in liq) v Mahaffey* [2000] 1 Qd R 477, [35].

further amended reply to the first respondent and third respondent's second further amended defence ("amended pleadings");

2. Upon the filing and service of the amended pleadings, the first respondent and third respondents are excused from attendance during the course of the trial of this proceeding, except insofar as is necessary for the first respondent and third respondents to make submissions in respect of costs; and

3. Costs are reserved."

[31] The "claims" released by the Capacity Settlement Deed were allegations in the statement of claim that the third respondent lacked legal capacity to make the transactions the applicants sought to set aside.[4] However, the amendments did not change the relief sought. Abandonment of the capacity issue removed one possible basis on which the orders sought in the proceeding may have been made.

[32] The first respondent and third respondents rely upon UCPR r 692(2) under which a party who amends a document must pay the costs thrown away by the amendment unless the court orders otherwise. The costs thrown away by the amendment to delete the capacity issue are the costs of defending the issue of capacity, to the extent that they can be separated from the other facts that went to the third respondent's cognitive abilities in relation to the other issues of unconscionable conduct and undue influence the subject of the judgment. That will not be easy to do.

[33] The first respondent and third respondent submit that the applicants, as the amending party, are not permitted to recover their costs of the amendment from the opposite party, relying on *Michael Vincent Baker Superannuation Fund Pty Ltd v Aurizon Operations Ltd (No. 2)*.[5] However, in my view, that submission is not relevant, except to the extent of the costs of the formal amendment of the further amended statement of claim.

[34] Next, the first respondent and third respondent submit that from the date on which they adopted the position of a "submitting appearance", they ought not to be responsible for the applicants' costs. In support of that submission, they rely on three New South Wales cases, being *Commonwealth v Gretton*,[6] *China Shipping (Australia) Agency Co. Pty Ltd v D V Kelly Pty Ltd (No. 2)*,[7] and *Kisimul Holdings Pty Ltd v Clear Position Pty Ltd (No. 2)*.[8]

[35] In my view, the first respondent and third respondent's submissions based on those cases should not be accepted, essentially for two reasons. First, unlike either the current New South Wales rules of court or earlier rules of court of that jurisdiction referred to in those cases, neither the *Civil Proceedings Act* 2011 (Qld) nor the UCPR makes any provision for a party to

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4 The Further Amended Statement of Claim deleted paragraphs 63E(1), 74 and 80 of the prior pleading.

5 [2017] 2 Qd R 761, [17].

6 [2008] NSWCA 117 at [121].

7 [2010] NSWSC 1557, [8].

8 (2014) 86 NSWLR 645, [14].

make a "submitting appearance", either generally, or "save as to costs". Accordingly, to apply the principles applied by the courts in New South Wales under that jurisdiction's rules of court is problematic. In any event, the current guiding principle in that jurisdiction under those rules is as follows:

> "The true position is that the question should be approached not by reference to *prima facie* expectations, but according to an appraisal of the circumstances of the case."[9]

[36] Second, the only order made by this court in relation to the first respondent and third respondents' defence of the proceeding was one that excused them from further attendance except on the question of costs. That did not have the effect of withdrawal of the defence contained in the Further Amended Defence filed by the first respondent and third respondents on 23 March 2018.

[37] UCPR r 308(2) provides that:

"(2) A defendant or respondent may withdraw all or part of the defence."

[38] A defendant or respondent that withdraws a defence is placed in the position as if they had not defended[10] and may be proceeded against for judgment in default, on a claim like that in the present case.[11] That is not what occurred in this case.

[39] Because there was no withdrawal of the defence, the trial of the proceeding against the first and third respondents, which had started on 6 and 7 March 2018, resumed on 3 December 2018 and continued until 6 December 2018 when the court reserved judgment. When the trial resumed and the first respondent and third respondents did not appear, the rule of court that governed the trial as between the applicants and the first respondent and the third respondent required the applicants to call evidence to establish their entitlement to judgment, which they proceeded to do.[12]

[40] As it happened, the second respondent continued to defend all issues at the trial, so that the trial proceeded much in the way it would have, in any event, (the third respondent already having given evidence on 6 and 7 March 2018 before the first respondent and third respondent were excused from further attendance). The trial did continue without the participation of the legal representatives of the first respondent and third respondent. The effect of the order excusing the first respondent and third respondent from attendance was to recognise their intended non-appearance during the remainder of the trial, except for when the question of costs came to be considered.

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9 *Kisimul Holdings Pty Ltd v Clear Position Pty Ltd (No. 2)* (2014) 86 NSWLR 645, [14].

10 *Uniform Civil Procedure Rules* 1999 (Qld), r 310(2).

11 *Uniform Civil Procedure Rules* 1999 (Qld), r 288.

12 *Uniform Civil Procedure Rules* 1999 (Qld), r 476(1).

[41] In my view, that is not the equivalent of a "submitting appearance", in any event. Although the Capacity Settlement Deed contained a promise by the first respondent and third respondent to take no further part in the proceeding, that was not a matter of which the court took any cognisance or which regulated the rights and liabilities of the parties in the hearing and determination of the proceeding at trial. For example, it was never suggested that the evidence of the applicants' witnesses when cross-examined by the second respondent or the evidence called in the second respondent's case was not admissible upon the issues joined in the pleadings as between the applicants and the first respondent and third respondent.

[42] As a matter of substance, it does not seem to me that the first respondent and third respondents' non-participation did much to reduce the applicants' costs of the proceeding or that the applicants' allegations that the third respondent lacked legal capacity did much to increase the applicants' costs of the proceeding. The so-called "submitting appearance" was not all that significant in relation to the applicants' costs, although it is to be hoped that it saved the first respondent and the third respondent a significant amount in costs.

[43] Again, the correct legal framework in which to assess these facts in relation to the applicants' costs is whether they warrant another or special order under UCPR r 681(1), because of the first respondent and second respondents' non participation in the trial after 25 October 2018. In my view, as a matter of overall discretion, they do not, save for any additional costs of the capacity issue. The applicants should be awarded their costs except for the costs of that issue.

Costs thrown away by the amendment

[44] Before the UCPR were introduced in 2000, a usual order made when a party amended a pleading was that the costs of the other party or parties thrown away by the amendment be paid by the amending party.

[45] However, the UCPR are framed to expressly deal with the question of costs thrown away by amending a document without the need for an order. Under UCPR r 692, those costs are to be paid by the party who amends unless the court orders otherwise. There is no reason to order otherwise in this case. Accordingly, the applicants must pay the respondents costs thrown away by the amendment of the further amended statement of claim to delete the capacity issue.

[46] But it is not necessary to make an order in most cases. Assessment is provided for without an order of the court.[13] Nevertheless, for clarity I will do so in this case.

Indemnity costs order

[47] The applicant submits that all of the respondents should be ordered to pay the applicants costs assessed on the indemnity basis. I will consider the position of the second respondent before the position of the first respondent and third respondent.

[48] The categories of cases or circumstances in which an indemnity costs order will be made are not closed. However, the most frequently cited judgment as to the relevant principles of

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13 *Uniform Civil Procedure Rules* 1900 (Qld), r 701 and Chapter 17A Part 3.

categories is that of Sheppard J in *Colgate-Palmolive Company and Anor v Cussons Pty Ltd*.[14] Some of the relevant considerations are where there is evidence of particular misconduct that causes loss of time to the court and to other parties, or wilful disregard of known facts or clearly established law or the making of allegations which were never to have been made, or the undue prolongation of a case by groundless contentions.

[49] The applicants submit that each of those considerations is relevant in the present case. They extract 14 passages from the reasons for judgment on the claim in the proceeding in support of that submission.[15] Simplifying, the applicants identify paragraphs in the reasons that rejected the second respondent's contentions that the applicants and their families did not generally enjoy close and loving relationships with the third respondent up until September 2014, that the June 2014 resolutions of the first respondent were made for reasons that were not objectively apparent, that the second respondent's witnesses sought to falsely smear Jon Campbell's character, and made a false allegation against him of stalking the third respondent, that Glenn Blumke actively misled Suzanne Campbell or sought to do so by saying that he and Janine Blumke were doing nothing adverse and that Janine Blumke and Glenn Blumke were content to encourage the third respondent in the irrational view that there was a plot by Wendy Hook and Suzanne Campbell and Jon Campbell to put the third respondent into a home. It is unnecessary to set out all of the particular references.

[50] From that group of references, the applicants submit that the examples go on, giving references to 12 other paragraphs of the reasons for judgment.[16] They submit generally that the "uncontroversial" themes included:

(a) obvious (sometimes preposterous) disparities between what uncontested documentary evidence showed and the allegations made in the second respondent's affidavits (wilful disregard for known facts);

(b) deliberate and brazen lies in sworn affidavit material deployed in a disturbing attempt to discredit the applicants and their husbands (allegations which ought never to have been made);

(c) allegations of disharmony between members of the Clacher family that were simply untrue (caused loss of time); and

(d) undue prolongation of the proceeding by groundless contentions, for example, the plot to put the third respondent in a home and the allegations made against Jon Campbell.

[51] The applicants submit that, overall, the examples they cite illustrate a determined effort on the part of the second respondent and its witnesses to establish a defence on critical issues which they knew to be false (wilful disregard of known facts).

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14 (1993) 46 FCR 225, 230.

15 *Campbell & Anor v TL Clacher No. 2 Pty Ltd & Ors* [2019] QSC 218, [4], [5], [55], [92], [114], [117], [143] – [144], [160], [164], [183], [198], [232], and [243].

16 Paragraphs [187], [188], [199], [201], [240], [242], [247], [257], [262], [268], [272], and [274].

[52] The second respondent submits that its defence of the proceedings was not improper. There was no particular aspect of its defence that was false or spurious resulting in a significantly longer trial of greater costs being incurred. It submits that the adverse findings as to Janine Blumke and Glen Blumkes' credibility did not of themselves warrant an award of costs on the indemnity basis.[17]

[53] In *Menkins & Anor v Wintour & Anor*,[18] McMurdo J said:

> "It is not uncommon for cases to turn on the questions of fact, where evidence tendered by the unsuccessful party is rejected as being untrue. That circumstance, of itself, is not thought to warrant an award of costs on the indemnity basis. But where there are further circumstances, such as the knowledge by the unsuccessful party of the falsity of the evidence, particularly where the tender of that evidence results in a significantly longer trial, that party's conduct might tend to place the case within the exceptional class for which indemnity costs are granted."

[54] I take into account that a number of the matters relied upon by the applicants would fall within the description of evidence rejected as being untrue but without making a finding of knowledge of the falsity of the evidence by the second defendant.

[55] Second, I do not give weight to the submission by the applicants that the passages in the reasons for judgment that might be relevant to their application for an indemnity costs order are so numerous that it is difficult to conveniently summarise them all because it would take many pages to list. The applicants identify 26 individual paragraphs as examples. If they are not enough, the scales will not be tipped by scouring over the remainder of the reasons for judgment to see if there are other examples. In my view, it is not necessary to go through the reasons for judgment paragraph by paragraph to decide that the second respondent made or concurred in making allegations which ought never to have been made and in some respects, wilfully disregarded known facts.

[56] Two further observations may be made. Frist, the applicants' grounds for an indemnity costs order are sometimes labelled in the case law as conduct by a party involving "delinquency" or that is "plainly unreasonable".[19] Second, the relevant conduct is that in conducting the proceeding, not the underlying unconscionable conduct or undue influence that was the subject of the claim in the proceeding.[20]

[57] Overall, in my view, there is enough in the present case to constitute a "special or unusual feature" to warrant an indemnity costs order against the second respondent.[21]

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17 *Menkens & Anor v Wintour & Anor* [2011] QSC 53, [6] – [7].

18 [2011] QSC 53.

19 *James v Douglas* [2016] NSWCA 178, [63] and [64].

20 *Harrison & anor v Schipp* [2001] NSWCA 13, [132]-[137].

21 *Palmer v Parbery & Ors (No 2)* [2018] QCA 268, [8].

[58] The applicants submit that an indemnity costs order should be made against the first respondent and third respondent because they were not passive participants in the proceeding and actively defended it. But that is not a relevant consideration to warrant an indemnity costs order. They submit further that there is a special or unusual feature in this case against those respondents, because the first respondent and the third respondent "abandoned" their defence without any explanation midway through the trial, when they had ample opportunity to form a view as to the strength of their defence much earlier.

[59] In my view, these submissions are unpersuasive. First, for the reasons I have already outlined, the first respondent and third respondent's non-participation in the second part of the split trial did not amount to a withdrawal of their defence. The cases of "abandonment" relied on by the applicants are not relevant here.[22] Second, a party is not required in all circumstances to explain why midway through a trial they may decide not to participate further, lest an order for indemnity costs will be made. Third, whether or not the first respondent and third respondent had ample opportunity to form a view as to the strength of their defence earlier in the proceeding will not usually be a special or unusual feature of a case for an indemnity costs order where it is not also concluded that the case was hopeless or so weak as to make its continued prosecution or defence plainly unreasonable.

[60] The applicants submit further that the conduct of the first respondent and third respondent through the evidence of the third respondent, was given in wilful disregard of known facts, identifying one paragraph of the reasons for judgment[23] and other paragraphs of the third respondent's affidavit,[24] which contained allegations that the applicants submit were "simply untrue". They also identify the paragraph of the reasons for judgment concerned with the deliberate attempt to falsely smear Jon Campbell's character.[25] If the relevant exercise were to find passages in the evidence of the third respondent that demonstrated his detachment from reality in making allegations against the applicants and their witnesses, the exercise would not stop there. But in my view, it is pointless to do so.

[61] The applicants' submissions recognised that a potential complicating factor for this ground for an indemnity costs order is the finding made in the reasons for judgment that the third respondent suffered from reduced cognitive capability.[26] The applicants submit that is beside the point in considering the question of indemnity costs because that was not the case advanced on his behalf and he had capable solicitors and counsel.

[62] All that may be accepted, but nevertheless, there is something of an inconsistency in the applicants' stance on the question of indemnity costs to that advanced by them at trial in support of the relief based on unconscionability in the proceeding. Simplifying, the applicant's

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22 *Ghougassioan v Fairfax Community Newspapers Pty Ltd* [2015] NSWCA 307, [57]; *Segal v Commonwealth Bank of Australia* [2016] NSWCA 90.

23 Paragraph [104].

24 Affidavit of T Clacher.

25 Paragaph [160].

26 Paragraph [107].

case at trial was that from June 2014, the third respondent was a vulnerable old man who became suspicious of them and accused them of wrong doing without any rational basis and his actions were affected by unconscionable conduct and undue influence of Janine Blumke and Glenn Blumke. In other words, the applicants' case at trial was premised on the third respondent not having full cognitive capability to act on his own in the best interests of the members of his family who are the members of the Clacher Family Trust free from the influence of inequitable conduct engaged in by Janine Blumke and Glenn Blumke.

[63] Yet, on the question of whether an indemnity costs order should be made, the applicants wish to treat the third respondent and through him, the first respondent, as being fully responsible and capable, free from any misconceptions as to the facts, or from the same influences of Janine Blumke and Glen Blumke in the conduct of this proceeding, so as to make adverse findings about particular misconduct constituting wilful disregard of known facts by him. I do not propose to do so.

[64] In my view, in the circumstances of the case as outlined in the reasons for judgment, it is true to say that the conduct of the third respondent was lamentable, and he steadfastly maintained his position when the proceeding was brought against the first respondent and him personally, at least up to the point of his non-participation from October 2018. But it was conduct engaged in by him, as an old man, who did not have the same capabilities and qualities that he once did have. As regrettable as the third respondent's story is, it is not an unknown phenomenon.

[65] In these circumstances, in my view, it is not appropriate to make an order that the third respondent or the first respondent pay costs of the proceeding to be assessed on the indemnity costs basis.

Reserved costs

[66] Under prior rules of court it was necessary for a court to expressly deal with any reserved costs of an application in a proceeding.[27] The applicants apply for orders for costs that expressly include the reserved costs. It is not necessary to make an express order under the UCPR dealing with reserved costs when a proceeding is finally decided. Rule 698 provides that the reserved costs of an application follow the event in the proceeding unless the court orders otherwise.

Order of no entitlement out of the trust fund

[67] The applicants seek an order or declaration that the first respondent and the second respondent are not entitled to have their costs of the proceeding paid out of the Clacher Family Trust or any assets comprising the "Trust Properties" the "Trust Shares" or the "Trust Funds" ("order of no entitlement out of the trust fund").

[68] The applicants' submissions did not define the properties, shares or funds upon which the proposed order of no entitlement would operate. For present purposes, I assume that the property transferred from the Clacher Family Trust to the Blumke Family Trust that is the

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[27] *Rules of the Supreme Court* 1900 (Qld), O 91 r 15.

subject of the order numbered 6 in the judgment on the claim is the relevant property ("transferred property").

[69] The suggested source for an order of no entitlement out of a trust fund is UCPR r 700 which provides:

"(1) This rule applies to a party who sues or is sued as trustee.

(2) Unless the court orders otherwise, the party is entitled to have costs of the proceeding that are not paid by someone else, paid out of the fund held by the trustee."

[70] The rule is expressed in terms that are not confined to circumstances where the trustee's costs have been ordered to be paid. On the face of it, the rule authorises payment of a trustee's costs of a proceeding from the property of a relevant trust, unless the court orders otherwise, although subject to reduction for the costs paid by someone else, from time to time.

[71] I discussed the statutory origins of and the inter-relationship of r 700 and s 72 of the *Trusts Act* 1973 (Qld) in *Park v Whyte (No 3)*[28] and need not repeat the discussion here. A similar discussion about the New South Wales comparators may be found in *Free Serbian Orthodox Church Diocese for Australia and New Zealand Property Trust v Bishop Irinej Dobrijevic (No 3)*.[29]

[72] If a party sued as trustee pays costs of a proceeding out of the fund held by it as trustee, before the court orders otherwise, the power to order the trustee to account for any costs exonerated or recouped from the trust property that are not expenses reasonably (meaning properly) incurred is not exhausted. That conclusion follows from a number of matters. First, it follows from the terms of s 72 of the *Trusts Act* 1973 (Qld), under which a trustee's entitlement to indemnity for expenses is for expenses reasonably incurred and the general law principles relating to a trustee being required to account for exoneration of expenses found not to have been properly incurred. Second, at least some authority supports the general statement that a trustee sued for breach of trust should not resort to the trust property for costs as expenses until the proceeding is resolved in their favour.[30] Third, even so, a trustee faced with the dilemma of defending such a proceeding without funds unless they are paid from the trust property, without that too constituting a breach of trust has an ability to apply to obtain the sanction of the court to permit the trustee to do so and the court will in some cases find that the trustee is justified to do so, thereby protecting the trustee from having to account for the exoneration of the costs made from the trust property if the proceeding is unsuccessful.[31]

[73] Returning to the facts in the present case, as stated at the outset, the first respondent does not apply for an order that either its costs or the costs of the applicants that the first

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28 [2018] 2 Qd R 475, [49]-[56].

29 [2017] NSWCA 109.

30 *Frost v Bovaird* (2012) 203 FCR 95, 107 [73].

31 *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66, 93-94 [70]-[74].

respondent might be ordered to be paid should be paid from the property of the Clacher Family Trust. Accordingly, there is no particular reason for UCPR r 700(2) to be engaged in relation to the orders for costs to be made. As the reasons for judgment on the claim show, there is no doubt that if any such order were sought the court would make an order otherwise.

[74] However, the applicants seek to deploy r 700(2) in a different way, as a basis to establish by order that the first respondent was not entitled to use the assets of the Clacher Family Trust to pay the first respondent and third respondents' costs.

[75] It should be observed that after the transferred property was transferred to the second respondent as trustee of the Blumke Family Trust, there seems to have been little likelihood that the costs of the first respondent and third respondent were paid from the property of the Clacher Family Trust as such, so a factual basis for the order sought against the first respondent does not clearly appear. Affidavit evidence from the respondents is that the third respondent received cheques to pay those costs from Glenn Blumke although the account on which they were drawn is not identified.

[76] Both the applicants' submissions and the first respondent and third respondents' submissions were predicated on an assumption that an order of no entitlement out of the trust would operate in respect of any past use of the property of the Clacher Family Trust to pay the first respondent and third respondents' legal costs. In my view, the assumption is unwarranted. An order under UCPR r 700(2) is prospective in operation. That does not mean that the first respondent will not be accountable for exonerating or recouping expenses by way of legal costs that were not reasonably (also meaning properly) incurred.[32] But, in my view, it is not a matter dealt with by making an order under r 700(2) as though it would operate retrospectively.

[77] Whether the first respondent should be ordered to account for expenses exonerated in the past from the property of the Clacher Family Trust on the ground that the expenses were not reasonably (also meaning properly) incurred is not, in my view, a matter that should be determined by making the orders for costs in consequence of the order made on the claim in this proceeding to date.

[78] The applicants also submit that the first respondent was not entitled to pay its costs of the proceeding out of the transferred property because of an order of the court made on 16 December 2016. That order contained the following undertaking to the court by the first respondent:

"the first respondent undertakes that it will not… deal with… the property of the Clacher Family Trust, except for the purpose of paying the reasonable expenses of the administration of the trust (including costs properly incurred in defending the proceedings)…" ("CFT costs exception")

[79] I pass by the obvious question as to what was the "the property of the Clacher Family Trust" within the meaning of the undertaking as at 16 December 2016 and thereafter. The applicants

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[32] *Trusts Act* 1973 (Qld), s 72.

assume that it included that transferred property held by the second respondent for the Blumke Family Trust.

[80] In any event, in my view, the applicants' submissions are founded on an unlikely construction of the CFT costs exception. It must not be forgotten that the CFT costs exception was made to an undertaking otherwise prohibiting the first respondent from dealing with the property of the Clacher Family Trust. Breach of the undertaking would be a contempt of court. It is unlikely that the parties contemplated that the CFT costs exception would operate to prevent the first respondent from being able to pay its legal costs of the proceeding from the property of the trust until after it was established at trial that the transfers of the transferred property were not invalid and not liable to be set aside. If that were the case, the CFT costs exception would only operate if the respondents won the case - a dangerous game of chance.

[81] In my view, the better construction of the CFT costs exception is that the first respondent was permitted to have access to the property of the Clacher Family Trust (whatever that was) for the purpose of paying the reasonable administration expenses of the trust including costs properly incurred in defending the proceedings. The CFT costs exception did not operate to free the first respondent from liability as an accounting party to account or compensate for the full value of the transferred property in the proceeding, if ultimately unsuccessful. Nor did it make the first respondent's costs of the proceeding an amount that is to be allowed in its favour in the taking of any such account. But it did operate to limit the scope of the prohibition of the undertaking that was given.

[82] Still, I do not doubt that the court has the discretionary power to order that the first respondent who was sued in this proceeding as trustee of the Clacher Family Trust is not entitled to have the costs of the proceeding that are not paid by someone else paid out of the fund of the Clacher Family Trust on the basis that such an order would operate prospectively, in respect of the property of the Clacher family Trust in the past.

[83] These reasons are enough to explain why it is appropriate to make an order of no entitlement out of the trust fund against the first respondent. It is unnecessary to deal with the first respondent's further grounds for opposing the order.

[84] There is no basis for such an order against the third respondent who was not the trustee of the Clacher Family Trust otherwise entitled to the benefit of UCPR r 700(2).

[85] The second respondent's position is similar to the third respondent. The second respondent was not sued as the trustee of the Clacher Family Trust. It was sued as the disponee under the challenged transfers and as the legal title holder of the transferred property or its proceeds. Accordingly, there is not and never was, any question of the second respondent being entitled to its costs of the proceeding as trustee of the Clacher Family Trust from the fund of the property of that trust.

[86] The applicants seek an order of no entitlement out of the fund against the second respondent because it received the transferred property being trust assets of the Clacher Family Trust with actual or constructive notice of the transfers being in breach of trust. But those alleged facts go to the second respondent's liability to account to or compensate the trustee of the Clacher Family Trust for receipt of the transferred property of the Clacher Family Trust. They do not

concern whether the second respondent ever was or is entitled to be paid its costs of the proceeding from the fund held by the trustee of the Clacher Family Trust.

[87] The applicants also submit that the second respondent was not entitled to pay its costs of the proceeding out of the transferred property because of the order of the court made on 16 December 2016. That order contained the following undertaking to the court by the second respondent:

"the second respondent undertakes that it will not… deal with… any property transferred to it by the first respondent as trustee of the Clacher Family Trust… except for the purpose of paying the reasonable expenses of the administration of the Blumke Family Trust (including costs properly incurred in defending the proceedings)" ("BFT costs exception").

[88] The applicants submit that the BFT costs exception did not authorise payment of the second defendant's legal costs of the proceeding, because the second defendant did not obtain a "*Beddoe* order"[33] that it was justified in defending the proceeding and because it received the transferred property from the Clacher Family Trust with actual or constructive notice of that the transfers were being made in breach of trust by the first respondent. In my view, these considerations are beside the point in considering whether an order of no entitlement can or should be made against the second respondent under r 700(2) in relation to the Clacher Family Trust. There is no proceeding before the court concerning the administration of the Blumke Family Trust.

[89] For those reasons, in my view the order of no entitlement to be paid costs from the fund sought should be made against the first respondent but should not be made against the second respondent.

Postscript

[90] The applicants' submissions as to costs also sought that the court order the second respondent to continue the undertaking it gave in the order of 16 December 2016. The second respondent's submissions rightly responded that the court does not have power to order a party to continue an undertaking of that kind. Of course, that does not prevent the court from granting an interlocutory injunction in aid of equitable execution. Accordingly, I called the parties to a mention of the proceedings in December 2019 to raise that point and to make it clear that I considered the question not to be within the ambit of resolving the questions of costs on written submissions as directed. It is unnecessary to deal with it further in these reasons.

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[33] *Re Beddoe; Downes v Cottam* [1893] 1 Ch 547; *Macedonian Orthodox Community Church St Petka Inc v His Eminence Petar the Diocesan Bishop of the Macedonian Orthodox Diocese of Australia and New Zealand* (2008) 237 CLR 66, 87 [48].