

SUPREME COURT OF QUEENSLAND

CITATION: *Australia & New Zealand Banking Group Ltd v Alirezai (No 2)* [2002] QSC 205

PARTIES: **AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522)**
(plaintiff)
v
MOHSEN ALIREZAI
(defendant)
and
MOHSEN ALIREZAI
(plaintiff by counterclaim)
v
AUSTRALIA AND NEW ZEALAND BANKING GROUP LIMITED (ACN 005 357 522)
(first defendant by counterclaim)
and
MALCOLM JACKSON
(second defendant by counterclaim)

FILE NO: S1049 of 1997

DIVISION: Trial Division

DELIVERED ON: 25 July 2002

DELIVERED AT: Brisbane

HEARING DATE: Written submissions

JUDGE: Mullins J

ORDER: **1. That the defendant pay the plaintiff's costs, including reserved costs, of the claim to be assessed.**
2. That the plaintiff by counterclaim pay the defendants by counterclaim's costs, including reserved costs, of the counterclaim to be assessed.

CATCHWORDS: COSTS - INDEMNITY COSTS - OFFERS TO SETTLE - plaintiff successful on claim and counterclaim - whether costs can be ordered pursuant to r 360 *UCPR* in favour of the plaintiff in respect of both claim and counterclaim - whether judgment no less favourable than offer to settle - not appropriate to order indemnity costs under either rr 360 or 361 *UCPR*.

UCPR r 360, r 361

Smith v Madden (1946) 73 CLR 129

COUNSEL: K Buxton for the plaintiff/defendants by counterclaim

SOLICITORS: Blake Dawson Waldron for the plaintiff/defendants by counterclaim
Lynch & Company for the defendant/plaintiff by counterclaim

- [1] **MULLINS J:** On 17 June 2002 after the trial of this proceeding I published my reasons for judgment (*Australia & New Zealand Banking Group Ltd v Alirezai* [2002] QSC 175) (“the reasons for judgment”) and ordered that the plaintiff recover against the defendant possession of the land described as Lot 6 on RP 803163 in the County of Aubigny Parish of Drayton and that the counterclaim be dismissed. I reserved the question of costs to enable the parties to deliver written submissions.
- [2] Written submissions from the plaintiff were delivered on 20 June 2002. Although I had directed that any written submissions on the issue of costs be delivered by the defendant on or before 4pm on 28 June 2002, no written submissions have been forthcoming from the defendant, nor has any extension for delivering those submissions been sought on behalf of the defendant.
- [3] In para [197] of the reasons for judgment, subject to giving the parties an opportunity to make submissions on the question of costs, I indicated that my inclination was to order that the defendant pay the plaintiff’s costs, including reserved costs, of the claim to be assessed and that the plaintiff by counterclaim pay the defendants by counterclaim’s costs including reserved costs, of the counterclaim to be assessed. That proposed order reflected the complete success which the plaintiff and the defendants by counterclaim had on both the claim and counterclaim.
- [4] The issue which has arisen in the plaintiff’s submissions as to costs (which I will make Exhibit 133) is whether the plaintiff is entitled to its costs on an indemnity, rather than a standard, basis in respect of both the claim and counterclaim. That issue does not arise in respect of the costs of the second defendant by counterclaim, as he was not a party to the plaintiff’s offers to settle.

Offers to settle

- [5] The plaintiff made two offers to settle under Pt 5 of ch 9 of the *UCPR*. The first offer dated 7 April 2000 was sent by the plaintiff’s solicitors to the defendant’s solicitors and is in the following terms:
- “Our client has instructed us that it will accept, in settlement of its claim a sum equal to the current market value of the Lot 6 property plus party and party costs to be assessed or agreed, provided your client releases our client from any and all claims and discontinues his counter-claim.

In order to determine the current market value of the property our client proposes to identify three property valuers for your client's consideration. Once your client selects a valuer and that valuer conducts a full market valuation of the property then that amount will be the market value for the purposes of the settlement."

- [6] The second offer dated 3 October 2001 was from the plaintiff's solicitors to the defendant's solicitors and is in the following terms:
 "Our client has instructed us that it will accept, in settlement of its claim, the sum of \$200,000 plus party and party costs to be assessed or agreed, provided your client releases our client from any and all claims and discontinues its counterclaim."
- [7] The evidence at the trial was that the current market value of Lot 6 was in the order of \$200,000: see para [111] of the reasons for judgment. The defendant also pleaded at para 48 of the fourth further amended defence and counterclaim that the market value of Lot 6 was \$200,000.

Plaintiff's submissions

- [8] The plaintiff seeks an order that its costs of both the claim and counterclaim be paid by the defendant on an indemnity basis pursuant to r 360 of the *UCPR*.
- [9] Rule 360(1) of the *UCPR* which deals with offers to settle by a plaintiff provides:
 "360.(1) If-
 (a) the plaintiff makes an offer to settle that is not accepted by the defendant and the plaintiff obtains a judgment no less favourable than the offer to settle; 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."
 Rule 361 of the *UCPR* deals with offers to settle by a defendant.
- [10] The term "plaintiff" is defined in schedule 4 to the *UCPR* to include a party who files a counterclaim. The term "defendant" is defined in schedule 4 to the *UCPR* to include a person who is served with a counterclaim.
- [11] It is submitted on behalf of the plaintiff that it does not follow from the fact that a party who commences a counterclaim may be entitled to the benefit of r 360 of the *UCPR* in relation to any formal offer made to settle that counterclaim, that a plaintiff loses its status as plaintiff for the purpose of r 360, because a defendant mounts a counterclaim against the plaintiff. It is submitted that this must be so in circumstances where, as in this case, the matters raised in the counterclaim are pleaded, and are necessary, as a basis for the defence of the primary claim. No authority is cited for this proposition.

Application of rr 360 and 361 UCPR

- [12] Having regard to the definitions of “plaintiff” and “defendant” for the purposes of the *UCPR*, as a matter of construction, r 360 must apply to the plaintiff in respect of the plaintiff’s claim and to the plaintiff by counterclaim (ie the defendant) in respect of the counterclaim and r 361 must apply to an offer to settle by the defendant in respect of the plaintiff’s claim and to the defendant by counterclaim (ie the plaintiff) in respect of the counterclaim.
- [13] It is necessary to maintain the distinction between the approach of the court in exercising its jurisdiction to order costs pursuant to rr 360 and 361 in a proceeding where there is both a claim and counterclaim affected by offers to settle and the approach to an assessment of costs after the order for costs has been made.
- [14] The approach that is relevant to an assessment was referred to by Dixon J in his judgment on a review of taxation by the taxing officer in *Smith v Madden* (1946) 73 CLR 129, 133-134:
- “In such a case 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 recover the further or increased costs reasonably incurred in bringing and maintaining or defending the counterclaim.”
- [15] In this proceeding the real dispute between the parties was raised by the defendant’s counterclaim. Very little time was spent during the trial on the matters that were necessary to prove the plaintiff’s entitlement to recover possession of the land. The trial was primarily concerned with the issues raised by the defendant’s counterclaim. Without the defendant’s counterclaim, there would have been no defence based on the counterclaim.
- [16] If the plaintiff were correct in its submission that the defendant was defending the plaintiff’s entitlement to recover possession of Lot 6 by virtue of the matters raised in the counterclaim, so that the steps taken by the plaintiff in defending the counterclaim should be treated as steps for the purpose of the claim, that would result in a distortion of the characterisation of the proceeding.
- [17] If the plaintiff’s submissions were correct, the result that would follow in allowing the plaintiff to recover costs pursuant to r 360 on the basis that the costs of the plaintiff of both the claim and counterclaim were caught within r 360 would not accord with the substance of the proceeding and should be addressed by the exercise of the residual discretion which still applies where the offer to settle triggers the application of r 360.
- [18] In any case, it is difficult to characterise the judgment obtained by the plaintiff as one being no less favourable than either offer to settle.

- [19] The only relief that the plaintiff obtained was recovery of possession of Lot 6. Neither offer to settle was concerned with such relief. The purpose of the plaintiff's obtaining recovery of possession is to sell Lot 6. If the position of the plaintiff in obtaining Lot 6 for sale is compared with that proposed in each offer to settle, the plaintiff has not done better by the judgment. Neither offer to settle takes into account the selling costs in respect of Lot 6 or the costs of maintaining Lot 6 between possession and sale. The only means by which Lot 6 can be converted into a monetary sum, in order to compare the judgment with each offer to settle is by looking at what would be obtained on the sale of Lot 6. I am therefore not able to conclude that the plaintiff has obtained a judgment no less favourable than the offer to settle.
- [20] Even if I could conclude that the plaintiff had obtained such a judgment, as foreshadowed I am not satisfied that it is appropriate in the circumstances of this proceeding to make the order for costs on an indemnity basis in favour of the plaintiff.
- [21] Although there is no limitation as to the type of proceeding to which rr 360 and 361 can apply, both rules are easier to apply in a proceeding where the outcome is a monetary amount. It is much easier to compare offers to settle for a monetary amount with the monetary amount for which judgment is given, than to compare offers to settle with a judgment which compels a particular act. The circumstances of this proceeding whereby the defendant was seeking to resist giving up possession of Lot 6 which was mortgaged to the plaintiff as third party security was such that the result was all or nothing for the defendant. Each offer to settle, if accepted, would have had the consequence of requiring the defendant to sell Lot 6 which was what the defendant was seeking to avoid by pursuing the counterclaim. In the circumstances of this particular case, it is not appropriate to penalise the defendant by ordering indemnity costs instead of standard costs, because the defendant unsuccessfully pursued his claim of unconscionable dealing and the other claims on which he sought to rely to prevent the plaintiff from enforcing its mortgages.
- [22] If it were necessary to consider each of the offers to settle made by the plaintiff, as offers to settle the counterclaim for the purpose of r 361, I would reach the same conclusion that the defendant has not obtained a judgment that was not more favourable to the plaintiff than each offer to settle or that it was not appropriate in the circumstances of this particular case to make an order for costs in favour of the plaintiff under r 361.

Orders

- [23] It follows that the order which I make are:
1. That the defendant pay the plaintiff's costs, including reserved costs, of the claim to be assessed.
 2. That the plaintiff by counterclaim pay the defendants by counterclaim's costs, including reserved costs, of the counterclaim to be assessed.