

SUPREME COURT OF QUEENSLAND

CITATION: *Williamson & McGillivray & Ors v JIA Holdings & Anor*
[2012] QCA 3

PARTIES: **JEFFREY JAMES WILLIAMSON**
(first appellant)
ROSEMARY FAY MCGILLIVRAY
(second appellant)
v
JIA HOLDINGS PTY LTD as trustee for the JIA UNIT TRUST
ACN 099 049 822
(first respondent)
A & I BARNES HOLDINGS PTY LTD as trustee for THE A & I FAMILY TRUST
ACN 099 042 547
(second respondent)
STEPHEN ASHLEY COOPER
(first appellant)
DIANE PATRICIA COOPER
(second appellant)
RONALD DAVID SMITH
(third appellant)
SEBASTIANA GRACE SMITH
(fourth appellant)
v
JIA HOLDINGS PTY LTD as trustee for the JIA UNIT TRUST
ACN 099 049 822
(first respondent)
A & I BARNES HOLDINGS PTY LTD as trustee for THE A & I FAMILY TRUST
ACN 099 042 547
(second respondent)
MARK CLINTON CRASWELL
(appellant)
v
JIA HOLDINGS PTY LTD as trustee for the JIA UNIT TRUST
ACN 099 049 822
(first respondent)
A & I BARNES HOLDINGS PTY LTD as trustee for THE A & I FAMILY TRUST
ACN 099 042 547
(second respondent)

KERRY ALLAN SHORT

(first appellant)

DENISE VADA SHORT

(second appellant)

v

JIA HOLDINGS PTY LTD as trustee for the JIA UNIT TRUST

ACN 099 049 822

(first respondent)

A & I BARNES HOLDINGS PTY LTD as trustee for THE A & I FAMILY TRUST

ACN 099 042 547

(second respondent)

GEOFFREY WILLIAM BARRITT

(first appellant)

RAE BARRITT

(second appellant)

v

JIA HOLDINGS PTY LTD as trustee for the JIA UNIT TRUST

ACN 099 049 822

(first respondent)

A & I BARNES HOLDINGS PTY LTD as trustee for THE A & I FAMILY TRUST

ACN 099 042 547

(second respondent)

GREGORY KEITH OLIVE

(first appellant)

TRACY ANN OLIVE

(second appellant)

v

JIA HOLDINGS PTY LTD as trustee for the JIA UNIT TRUST

ACN 099 049 822

(first respondent)

A & I BARNES HOLDINGS PTY LTD as trustee for THE A & I FAMILY TRUST

ACN 099 042 547

(second respondent)

FILE NO/S:

Appeal No 4038 of 2011

Appeal No 4039 of 2011

Appeal No 4040 of 2011

Appeal No 4041 of 2011

Appeal No 4042 of 2011

Appeal No 4043 of 2011

SC No 5987 of 2005

SC No 5989 of 2005

SC No 5990 of 2005

SC No 5991 of 2005

SC No 5992 of 2005
SC No 5993 of 2005

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeals – Further Orders

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: Judgment delivered on 2 December 2011
Further Orders delivered 3 February 2012

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Fraser and Chesterman JJA, and Margaret Wilson AJA
Separate reasons for judgment of each member of the Court,
each concurring as to the orders made

FURTHER ORDERS: **1. The first and second respondents are to pay the appellants’ costs of and incidental to their respective actions; the first respondent on the indemnity basis and the second respondent on the standard basis;**

2. The first and second respondents are to pay the appellants’ costs of and incidental to the appeals on the standard basis;

3. The first respondent is to pay the appellants’ costs of this application, on the standard basis.

CATCHWORDS: APPEAL – PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where the appellants succeeded on an appeal – where the appellants’ offers to settle were rejected – where respondents ordered to pay the appellants’ costs of the trials and of the appeals to be assessed on the standard basis – whether costs should be awarded to the appellants against the first respondent on an indemnity basis

Uniform Civil Procedure Rules 1999 (Qld), r 353, r 360(1)(a)
Yara Nipro Pty Ltd v Interfert Australia Pty Ltd [\[2010\] QCA 164](#), cited

COUNSEL: No appearance by the appellants, the appellants’ submissions were heard on the papers
No appearance by the respondents

SOLICITORS: Baker O’Brien Toll for the appellants
No appearance by the respondents

[1] **FRASER JA:** I agree with the reasons for judgment of Chesterman JA and the orders proposed by his Honour.

- [2] **CHESTERMAN JA:** On 2 December 2011 the court gave judgment in these six appeals which were heard together. All appellants were successful and obtained judgments in their favour for the payment of monies to them by the first respondent in sums ranging from \$276,701.70 to \$364,762.45.
- [3] Other orders made against both the respondents are of no present relevance.
- [4] The appellants are entitled to an order for their costs against the respondents and no contrary contention was made. However, pursuant to leave given when judgment was delivered, the appellants seek indemnity costs against the first respondent. Their application was made on the basis that they made offers to settle addressed to the first respondent on terms less favourable than the judgments, pursuant to *UCPR* 353.
- [5] On 17 June 2008 five of the appellants by separate written notices in compliance with the rule offered to settle their actions on the basis that the first respondent paid each appellant \$59,250 in full satisfaction of the respective claims including costs. Payment was to be made within 21 days. On 20 June 2008 the remaining appellant made a written offer in identical terms. None of the offers was accepted.
- [6] Each appellant has obtained a judgment very substantially in excess of the amount for which they offered to settle. The pre-conditions described in *UCPR* 360(1)(a) are satisfied so that the court must order the first respondent to pay the appellants' costs on the indemnity basis unless:
- (a) The first respondent showed another order for costs was appropriate in the circumstances; or
 - (b) The court is satisfied the appellants were not at relevant times willing and able to carry out what the offers proposed.
- [7] Neither impediment is established on the material. The first respondent has not replied to the appellants' application for indemnity costs. The offer did not require the appellants to do anything other than to accept receipt of the offered sums, which they were all capable of doing.
- [8] There is no apparent reason why the rule should not operate according to its terms. The appellants are therefore entitled to an order that the first respondent pay their costs of and incidental to their actions on the indemnity basis. An order for indemnity costs of an appeal may not be made where, as here, the only basis for seeking it is the operation of *UCPR* 360 on an offer to settle a trial. See *Yara Nipro Pty Ltd v Interfert Australia Pty Ltd* [2010] QCA 164 and the cases there referred to.
- [9] Accordingly the orders for costs should be that:
- (i) the first and second respondents pay the appellants' costs of and incidental to their respective actions; the first respondent on the indemnity basis and the second respondent on the standard basis;
 - (ii) the first and second respondents pay the appellants' costs of and incidental to the appeals on the standard basis;
 - (iii) the first respondent pay the appellants' costs of this application, on the standard basis.
- [10] **MARGARET WILSON AJA:** I agree with the cost orders proposed by Chesterman JA, for the reasons given by his Honour.