SUPREME COURT OF QUEENSLAND

CITATION:	*McBride v ASK Funding Ltd* [2013] QCA 130
PARTIES:	**PATRICIA ANN McBRIDE** (applicant) **v** **ASK FUNDING LIMITED** ACN 094 503 385 (respondent)
FILE NO/S:	Appeal No 11878 of 2012 DC No 2628 of 2009
DIVISION:	Court of Appeal
PROCEEDING:	Application for Extension of Time/General Civil Appeal
ORIGINATING COURT:	District Court at Brisbane
DELIVERED ON:	28 May 2013
DELIVERED AT:	Brisbane
HEARING DATE:	13 May 2013
JUDGES:	Muir and Gotterson JJA and Jackson J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
ORDERS:	**1. The application to extend time to file the notice of appeal is allowed.** **2. Grant special leave to receive exhibits PA 4 and PA 18 to the affidavit of Patricia Anne filed on 10 May 2013 as further evidence on the hearing of the appeal.** **3. Set aside the order of the District Court of Queensland dated 7 November 2012 that the defendant pay the plaintiff's costs of and incidental to this matter on the indemnity basis.** **4. In lieu thereof order that the defendant pay the plaintiff's costs of the application and the proceeding.** **5. The appeal is otherwise dismissed.** **6. The appellant pay the respondent's costs of the application and appeal.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – RIGHT OF APPEAL – WHEN APPEAL LIES – ERROR OF LAW – PARTICULAR CASES INVOLVING ERROR OF LAW – FAILURE TO GIVE REASONS FOR DECISION – ADEQUACY OF REASONS

– where judgment given by summary judgment – where primary judge gave brief reasons and did not refer to evidence – whether judge gave sufficient reasons

APPEAL AND NEW TRIAL – APPEAL - GENERAL PRINCIPLES – ADMISSION OF FURTHER EVIDENCE – IN GENERAL – where appellant sought to rely on affidavit – where appellant argued special grounds for admission of further evidence – where appellant alleged that judgment obtained by fraud and misconduct – whether whole or part of affidavit was admissible

PROCEDURE – COSTS – APPEALS AS TO COSTS – WRONG EXERCISE AS TO DISCRETION – where judgment is plainly no less favourable than the *Calderbank* offer made – where costs awarded on the indemnity basis – whether costs should be awarded on the standard basis

Acts Interpretation Act 1954 (Qld), s 27B
Evidence Act 1977 (Qld), s 59(2)
Uniform Civil Procedure Rules 1999 (Qld), r 210, r 214, r 225, r 292, r 360(1), r 440, r 766

Aircraft Technicians of Australia Pty Ltd v St Clair; St Clair v Timtalla Pty Ltd [2011] QCA 188, cited
Balnaves v Smith [2012] QSC 408, applied
Calderbank v Calderbank [1975] 3 WLR 586, cited
Coldham-Fussell & Ors v Commissioner of Taxation (2011) 82 ACSR 439; [2011] QCA 45, cited
Commonwealth Bank of Australia v Quade (1991) 178 CLR 134; [1991] HCA 61, applied
Crystal Dawn Pty Ltd v Redruth Pty Ltd [1998] QCA 373, cited
IVI Pty Ltd v Baycrown Pty Ltd [2007] 1 Qd R 428; [2006] QCA 461, cited
LCR Mining Group Pty Ltd v Ocean Tyres Pty Ltd [2011] QCA 105, cited
Maxitherm Boilers Pty Ltd v Pacific Dunlop Insurance Pty Ltd [1998] 4 VR 559, cited
McDonald v McDonald (1965) 113 CLR 529; [1965] HCA 45, cited
Ron Kingham Real Estate Pty Ltd v Edgar [1999] 2 Qd R 439; [1997] QCA 242, cited
Taske v Occupational & Medical Innovations Ltd [2007] QSC 147, not followed
Toll (FGCT) Pty Ltd v Alphafarm Pty Ltd (2004) 219 CLR 165; [2004] HCA 52, cited
Wainohu v State of New South Wales (2011) 243 CLR 181; [2011] HCA 24, cited
Wiltshire v Amos [2010] QCA 294, cited

COUNSEL: The applicant appeared on her own behalf
J K Chapple for the respondent

SOLICITORS: The applicant appeared on her own behalf
Boyd Legal for the respondent

[1] **MUIR JA**: I agree with the reasons of Jackson J and with the orders he proposes.

[2] **GOTTERSON JA:** I agree with the orders proposed by Jackson J and with the reasons given by his Honour.

[3] **JACKSON J:** The applicant ("the appellant") seeks to appeal against the judgment of the District Court of Queensland given on 7 November 2012 that "the Court gives judgment for the plaintiff [the respondent] against the defendant [the appellant] for all of the plaintiff's claim in the sum of $150,552.49" and that "the defendant pay the plaintiff's costs of and incidental to this matter on the indemnity basis". The appeal was started out of time. The appellant also applies for an order extending the time for filing the notice of appeal.

[4] The appellant also seeks to appeal against the dismissal of a cross-application she brought to dismiss the proceeding. It will only be necessary to go to that question if the judgment is ordered to be set aside.

[5] The judgment was given on an application for summary judgment made by the respondent pursuant to r 292 of the *UCPR*. The respondent's claim in the proceeding was relevantly for money owing under a loan agreement, agreed interest and costs.

[6] On the application to extend time, the appellant urged that she had misunderstood that time for filing a notice of appeal runs from the date of the judgment as opposed to "the date the judgment was entered", whatever that means,[1] and that the date of filing was only a few days late. In this case, it is convenient not to delay on this point. Instead, it is convenient to allow the requested extension.

[7] The notice of appeal sets out a number of grounds which appear to have been drafted by the appellant as a litigant in person. It is unnecessary and would be unhelpful to set them out in full. It will be appropriate to mention some of the grounds in the course of these reasons. But at the outset, it should be observed that the appellant did not confine her written or oral contentions to matters within the grounds of the notice of appeal. It will be necessary to put aside some of her contentions on that basis. Further, some of the grounds of appeal are captious. If they had been made in a pleading they would properly be characterised as scandalous, frivolous or vexatious. For example, one ground is that the appellant is a non-existent person. Others appear to have nothing to do with the circumstances of the claim and application for summary judgment.

[8] However, one of the grounds of appeal is that the learned primary Judge erred in failing to give adequate reasons for summary judgment. It may be accepted that there is a duty to give reasons in this context.[2] The reasons of the learned primary

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1 Judgments are not "entered" on a date after the judgment is given on an application under r 292 of the *UCPR*. Under the rule, on the hearing of the application the court may "give judgment" and under r 659 of the *UCPR* it is provided that final relief granted in a proceeding started by claim "is granted by giving a judgment setting out the entitlement of a party to payment of money…". The distinction in former rules between a judgment given judicially and a judgment entered administratively seems to have been removed.

2 *Crystal Dawn Pty Ltd v Redruth Pty Ltd* [1998] QCA 373 at [16]; *Wainohu v New South Wales* (2011) 243 CLR 181 at [55] – [56]; [2011] HCA 24.

Judge are extremely brief. His Honour did address whether there were loan agreements, that the appellant had received the funds advanced and had the benefit of them, that the funds had not been repaid, and that the balance claimed was correctly calculated. These were the relevant questions referred to in the reasons. However, that was done briefly and without referring to the evidence or explaining the conclusions reached.[3]

[9] In my view, it is not always necessary in the context of an application under r 292 of the *UCPR* to refer to the evidence, but in the circumstances of this case something more was required than was done, because of two issues which were live on the hearing of the application: first, whether the appellant was bound by the alleged loan agreement on the alleged terms; and, secondly, whether the amount of the loan had been advanced to or at the direction of the appellant.

[10] Thus, because of the error by the primary Judge on this ground, it is appropriate to state the reasons why, on the material filed and tendered before the primary Judge at the hearing of the application for summary judgment and on the appeal, the respondent is entitled to the judgment which was made by the District Court of Queensland.

[11] As will subsequently appear, in my view, there is nothing of substance in the appellant's other grounds of appeal, except that in the circumstances his Honour's discretion erred in making an order that the appellant pay the respondent's costs to be assessed on the indemnity basis. In exercising the discretion afresh, in my view, it should be ordered that the appellant pay the costs of the respondent to be assessed on the standard basis.

Application to receive further evidence

[12] The appellant sought to rely on a lengthy affidavit filed on 10 May 2013 ("appellant's affidavit"). The affidavit runs to 55 pages in 221 paragraphs and has more than 100 pages of exhibits. The basis of the Court's reception of further evidence on appeal is that there are "special grounds", as required under r 766(1)(c) of the *UCPR*. The usual requirements are well known, and include that reasonable diligence must have been exercised to procure the evidence which the defeated party failed to adduce at the hearing below and that there is a high likelihood that the evidence if available would have produced an opposite result. No attempt was made by the appellant to show that the evidence could not have been obtained with the use of reasonable diligence at the hearing of the application in the court below. Instead, the appellant sought to deflect that point by contending that the evidence might be received in any event because the judgment was obtained by misconduct or fraud, referring, inter alia, to *Commonwealth Bank of Australia v Quade*[4] and *McDonald v McDonald*[5].

[13] The respondent opposed the reception of the appellant's affidavit on the hearing of the appeal, with the exception of Ex PA 4. That exhibit contained a complete copy of a facsimile from the appellant to the respondent dated 9 October 2008, which included a copy of the loan agreement on which the proceeding was brought dated

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3 Compare s 27B of the *Acts Interpretation Act* 1954 (Qld).

4 (1991) 178 CLR 134; [1991] HCA 61. See also *Wiltshire v Amos* [2010] QCA 294 and *IVI Pty Ltd v Baycrown Pty Ltd* [2007] 1 Qd R 428; [2006] QCA 461.

5 (1965) 113 CLR 529 at 533, 535 and 541–543; [1965] HCA 45.

3 February 2006 and a copy of the "Standard Terms & Conditions (Version 1)" which are referred to in the text of the loan agreement. Those documents had previously been provided to the appellant by the respondent at her request. Ex PA 4 should be received as further evidence on the hearing of the appeal.

[14] The appellant's reliance on *Quade* and *McDonald* is based on her contentions that the respondent failed to make disclosure of documents and that the respondent's legal representatives made factual misrepresentations or non-disclosures to the primary Judge which are alleged to have been misconduct or fraud.

[15] The seriousness of these allegations is such that something must be said of them.

[16] As to the allegation of lack of disclosure, the point made by the appellant in oral argument was that the respondent had not made disclosure by the production or delivery of documents in accordance with r 210 of the *UCPR* which provides that "in a proceeding, disclosure is the delivery or production of documents in accordance with this part", meaning Part 1 of Chapter 7 of the *UCPR*.

[17] But by r 214(1) of the *UCPR* a party may disclose by making a list of documents and the provision of copies of documents on the list requested. Exhibit PA 3 to the appellant's affidavit is a copy of such a list made by the respondent in the proceeding dated 18 October 2010. There was no evidence that requested copies of documents had not been provided to the solicitors then on the record for and acting for the appellant. So there was no evidence of the alleged breach of the duty of disclosure.

[18] The appellant's affidavit and submissions made reference to documents not on the list said to be disclosable, such as the respondent's bank account statements. But the direct relevance of those documents was not demonstrated and, even if they were directly relevant, there is no basis for thinking that they would have advanced the appellant's case on the hearing of the application for summary judgment. They may just as well have provided further evidence in support of the respondent's case.

[19] Finally as to disclosure, the appellant relied on r 225 of the *UCPR*, contending that the respondent had not been entitled to tender documents not disclosed at the hearing of the application for summary judgment. There are two answers to this point: first, the appellant conceded in oral argument that there were no documents before the Court on the hearing of the application for summary judgment which were not on the list of documents of the respondent. Secondly, r 225 of the *UCPR* operates "at the trial". It is unnecessary to decide the point, but there is no reason to think that a "trial" for the purpose of that rule includes an application for summary judgment under r 292 of the *UCPR*.

[20] Accordingly, the appellant's points about disclosure in no way satisfied the requirements of *Quade* in relation to the reception of evidence on the hearing of an appeal outside the usual principles which inform the exercise of discretion under r 766(1)(c) of the *UCPR* where "special grounds" are required.

[21] The allegations of fraud or misconduct by the respondent's counsel at the hearing of the application made in the appellant's affidavit are so numerous that it is necessary to deal with them in a summary way by subject matter. At once, however, it should be said that they are made without any proper foundation, as will appear.

[22] First, it is complained that a document described as a "Domestic Funds Transfer Report from the National Bank" was misdescribed. The respondent's counsel described it as an "internal form request internally in the plaintiff's records requiring – requesting that the sum of $28,200 be paid into the trust account of Simonidis Shoebridge Lawyers". The appellant wishes to tender evidence to show that the form is one used to effect the transaction requested at the Bank, but that the particular copy of the document which was in evidence before the primary Judge was incomplete for that purpose. Assuming that to be so, it does not in my view make the description of it as a request to the Bank or that it is in the plaintiff's records erroneous. The transfer in question was proved on the balance of probabilities by other evidence, in any event, in particular by the evidence of a copy of the appellant's solicitors trust account ledger relating to the appellant showing receipt of the amount of $28,200 into the trust account on her behalf on 7 February 2006. The complaint made by the appellant is without substance.

[23] Secondly, the appellant complained that the respondent's counsel misdescribed a deposit book stub evidencing the deposit of $21,283.78 on 7 February 2006 into a bank account, which bears part of the bank teller's stamp, as a "cheque butt". The stub plainly evidenced a payment of $21,283.78 being deposited into a bank account on 7 February 2006. The description of it as a cheque butt was erroneous, but it was not likely one made deliberately as no advantage to the respondent could flow from the error. The complaint that it was fraudulent or misconduct is without substance.

[24] Thirdly, the appellant complained that the respondent's counsel's written submission described the payment of $21,283.78 as to "itself" and described itself as "then known as Impact Funding Ltd before it was acquired by the plaintiff". The point made is that Impact Funding Ltd was a separate company. It is true to say that the descriptions are inexact. However, the evidence before the primary Judge plainly showed that Impact Funding Ltd ("IFL") was the lender under a loan made to the plaintiff in September 2005. The respondent, then known as Impact Capital Ltd acquired the shares in IFL in 2005 and that it was common for original advances made by IFL to be consolidated into advances made by the respondent. In substance, that was what happened when the respondent entered into the loan agreement with the appellant on which the proceeding in the present case was brought. There was no misconduct or fraud employed in the respondent's counsel's descriptions.

[25] Fourthly, the appellant complained that the respondent's counsel submitted that the Standard Terms & Conditions "had clearly been provided to the Defendant earlier in January 2006 when the second application did not proceed…". There is a set of Standard Terms & Conditions[6] which appear to have been part of the document described as a document signed on 17 January 2006, according to the index to exhibit "RET 1"to the affidavit of Russell Templeton filed on 23 October 2012. The "second application" referred to is one for a loan agreement dated 17 January 2006 which Mr Templeton swore did not proceed.[7] So the submission was not misleading, nor is there any basis to assert it was made fraudulently. Nor was the appellant in any way disadvantaged by any inaccuracy in the affidavit. The relevant Standard Terms & Conditions (Version 1) do not vary in any material term from the slightly different terms and conditions to which the respondent's counsel's submissions referred.

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6 AB 150 – 155.

7 AB 38.

[26] Fifthly, the appellant complained that the respondent's counsel in oral argument described "Impact Funding" as the "predecessor of the plaintiff". This is in substance the same as the third complaint. The statement was accurate, for the reasons set out above.

[27] Sixthly, the appellant complained that the respondent's counsel wilfully misled the primary Judge in answering "yes" to the Judge's question whether "proceeds of sale of assets" in another proceeding were "paid into court". It is asserted in the appellant's affidavit that the statement was wrong. Whether or not that be so, there was no evidence before the primary Judge to that effect and no reason to think that the respondent's counsel acted wilfully in a misleading way. In any event, the question was irrelevant to any matter decided by the primary Judge upon the application for summary judgment.

[28] Seventhly, there are numerous other assertions in the affidavit, by and large related to the subject matters already dealt with, but which pick up another theme, namely that the respondent's counsel knowingly failed to correct misconceptions that the primary Judge was acting under and failed to draw the primary Judge's attention to alleged inconsistencies in the affidavit material relied upon by the respondent.

[29] It is unnecessary to dilate further upon the way in which these allegations are repeatedly and improperly made, without any factual or legal foundation. They do not justify the reception of the appellant's affidavit in accordance with the principles stated in *McDonald*.

[30] As well, the affidavit is in a large part scandalous because of the allegations of misconduct and fraud. The degree of the scandalous material would warrant an order that the affidavit be removed from the file or that scandalous matter in the affidavit be struck out.[8] However, the respondent did not make an application for that order. A good deal of the balance is not properly evidence but argument and should not be received either as evidence or further written argument. In general, the remaining factual material is not material which the applicant showed could not have been obtained at the hearing of the application with reasonable diligence and should not be received over the respondent's objection.

[31] However, in my view, there is one further matter in the appellant's affidavit which should be received by way of further evidence on the hearing of the appeal. In support of its application for indemnity costs made to the primary Judge the respondent relied upon an affidavit sworn by its former solicitor deposing to two "offers to settle" made by the respondent to the appellant. The appellant was not served with the affidavit prior to the hearing of the application for summary judgment. Thus, the appellant had no real opportunity to respond to it.

[32] Inaccurately, in the affidavit the first offer was said to be a copy of a facsimile from that solicitor's firm to the appellant's solicitor dated 31 March 2010. However, Ex PA 18 to the appellant's affidavit is a copy of an email from an employee of the respondent's former solicitor's firm to the appellant's solicitor dated 1 April 2010 which qualified the terms of the offer to settle made on the previous day, and which would have been material upon the hearing of the application for indemnity costs. In those circumstances, it is appropriate to receive Ex PA 18 on the hearing of the appeal.

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[8] Rule 440 of the *UCPR*.

[33] Accordingly, with the exception of Ex PA 4 and Ex PA 18 to the appellant's affidavit, the material in that affidavit should not be received into evidence on the hearing of the appeal.

Loan agreement dated 3 February 2006

[34] By a written loan agreement dated 31 August 2005 signed by the appellant,[9] she borrowed $20,000 from IFL, of which $18,400 was credited to her solicitor's trust account on 16 September 2005, the balance apparently being deducted for what were described as an assessment fee of 2.5 per cent and a facility fee of up to 5.5 per cent in the loan agreement.[10] Thus it appears that the appellant borrowed $20,000 and it will presently appear that the sum of $21,283.78 which was lent under the written loan agreement dated 3 February 2006 was used to repay the balance owing in respect of that loan, as alleged in the statement of claim.

[35] On 28 November 2005, the respondent's solicitors requested "an additional $30,000 on behalf of our client to be used for mortgage payments and legal fees" from Impact Funding. It was that request which led to the written loan agreement dated 3 February 2006.

[36] The further amended statement of claim ("statement of claim") alleged that by a written loan agreement dated 3 February 2006 the respondent agreed to lend to the appellant and the appellant agreed to repay to the respondent the sum of $51,283.78 with interest. It was alleged that on 7 February 2006 the respondent advanced and applied that amount, described as principal, as follows:

(i) To the [respondent], being for its initial fees and charges for the Loan Agreement	$1,800.00
(ii) To Simonidis Shoebridge, a law firm that was acting on the [appellant's] behalf in the Matter on account of anticipated professional fees and disbursements in the Matter	$28,200.00
(iii) To Impact Funding Limited ACN 109 006 126 (IFL) to repay the amount owed by the [appellant] to IFL under a Loan Agreement dated 31 August 2005 between IFL, as lender, and the [appellant], as borrower	$21,283.78
TOTAL	**$51,283.78**[11]

[37] The appellant took issue with the allegation of those disbursements under the loan agreement, particularly the amount of $21,283.78 to be applied to IFL, on the footing that there are statements of account which post that amount as having been disbursed on 1 February 2006, not 7 February 2006 and that it was not proved that IFL was paid.

[38] As to the amount of $1,800, the loan agreement dated 3 February 2006 which bears the appellant's signature,[12] signifies her agreement to the "Financial Table" for the loan which provided as follows:

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9 The appellant dated her signature 16 September 2005.
10 AB 127.
11 AB 425.
12 AB 172.

> "$1,800 to the Lender on account of the Total Ascertainable Credit Fees and Charges (item 9)
>
> $28,200 to be paid to the Borrower Solicitor's trust account on account of the Borrower's professional costs or disbursements in the Matter
>
> $21,283.78 to be (*sic*) repay (IFL) loan dated 31 August 2005."[13]

[39] On the pleadings, the appellant had denied that she executed the loan agreement dated 3 February 2006. However, at the hearing of the application for summary judgment, she tendered no evidence in support of the denial. Her signature and initials appear on the copy of the loan agreement which was in evidence before the primary Judge. The signature and initials are similar to those appearing on other loan agreements which the appellant admits that she signed.[14] Before the primary Judge, the appellant did not argue that she had not signed the loan agreement on which the claim was brought. She said in a written submission that: "I am unsure whether I signed the loan agreement pleaded. There are now three approved loan contracts alive".[15] The last point was erroneous. Mr Templeton had sworn that the loan agreement dated 17 January 2006, sometimes described as the second loan agreement, had not proceeded.

[40] At the hearing of the appeal, the appellant sought to tender fresh evidence in support of her denial that she had signed the loan agreement dated 3 February 2006 in her affidavit. As previously stated, the appellant's affidavit does not meet the requirements for leave to file and read an affidavit as to that matter.

[41] There was also no ground of appeal directed to challenge the conclusion that the appellant had executed the loan agreement dated 3 February 2006.

Disbursements of amounts under the loan agreement

[42] There is no apparent dispute that $1,800 was to be paid to the respondent under the loan agreement.

[43] As to the amount of $28,200, the respondent's statement for the appellant's account number 101539-2 shows that amount as being debited on 7 February 2006. As well, the trust account ledger for Simonidis Shoebridge Lawyers, the appellant's lawyers at the time, shows a deposit of $28,200 was made to that account on 7 February 2006 and disbursed from that account in various ways thereafter.[16]

[44] As to the amount of $21,283.78, by her signature of the loan agreement dated 3 February 2006[17] the appellant agreed to the provision of the amount of credit stated in the Financial Table,[18] including $21,283.78 for the repayment of the IFL loan "dated 31 August 2005", which correlates with the loan agreement dated 31 August 2005 for $20,000 mentioned above.[19]

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13 AB 167.
14 Section 59(2) of the *Evidence Act* 1977 (Qld); *Ron Kingham Real Estate Pty Ltd v Edgar* [1999] 2 Qd R 439 at 446.
15 AB 374.
16 AB 178.
17 AB 172.
18 AB 167.
19 AB 127.

[45] The second loan agreement, dated 17 January 2006,[20] which did not proceed, showed an amount to be repaid to IFL of slightly less than $21,283.78. However, from the statements for account number 101539-1,[21] it appears that the difference is accounted for as the difference in the balance owing on that account as at 30 November 2005 and that balance as at 1 February 2006 when it was to be refinanced into account number 101539-2 by the posting of $21,283.78 to the credit of account number 101539-1.

[46] It is true that those statements record the posting of $21,283.78 to the credit of account number 101539-1 as having been made on 1 February 2006 and the corresponding opening debit appears in the statement of account number 101539-2 on the same date.[22] The contemporaneous document in the form of the deposit book stub shows the deposit of the payment of $21,283.78 as having been made on 7 February 2006.[23]

[47] However, no disadvantage was suffered by the appellant in that respect. Although earlier statements for account number 101539-2 showed that $55.87 was debited as interest from 1 February 2006 until 7 February 2006, the calculation of interest was corrected in an affidavit filed at the hearing of the application for summary judgment. The interest and balances were recalculated so that no interest was debited as between 1 February and 7 February.[24]

[48] The appellant complained that both this affidavit and an earlier version of the same affidavit,[25] but which did not recalculate the interest correctly as just described, were served on the day of the hearing of the application and not eight days before under r 296(1) of the *UCPR*. However, where the affidavit is merely one of continuing debt, that is to say that the respondent had not been paid, and a calculation of the interest up to the date of the judgment, which is a matter of arithmetic, usually there can be no objection to leave being granted to read and file the affidavit under *UCPR* 438.

The amount repayable

[49] As alleged in the statement of claim, interest on the loan was payable at 15.95 per cent per annum by item 6 of the Financial Table to the loan agreement.[26] The first page of the loan agreement,[27] provided that the loan was made on "terms and conditions set out in this contract which includes (*sic*) the attached Standard Terms & Conditions (version 1)".

[50] The appellant complained that the standard terms and conditions were not in fact attached to the loan agreement. Accepting that fact, it does not alter the conclusion that the standard terms and conditions were part of the contractual terms. That is because "The general rule… is that… a person who signs a document which is known by that person to contain contractual terms, and to affect legal relations, is bound by those terms and it is immaterial that the person has not read the document".[28]

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20 AB 143-148.
21 AB 397 and 398.
22 AB 403.
23 AB 175.
24 AB 354.
25 AB 347.
26 AB 167.
27 AB 167.
28 *Toll (FGCT) Pty Ltd v Alphafarm Pty Ltd* (2004) 219 CLR 165; [2004] HCA 52 at [57].

[51] More particularly, the making of an offer on the other party's standard terms and conditions by a person who does not know what the standard terms and conditions are but goes ahead and makes the offer will not usually affect the conclusion that the standard terms and conditions are a contractual document.[29] The failure to attach the standard terms, even where they are described as attached, does not affect that conclusion.[30]

[52] By cl 4.1 and cl 4.2 of those standard terms and conditions,[31] interest at the agreed rate accrued and was to be compounded daily to the amount owing by the appellant until repayment.

[53] The repayment date of the loan was, at the latest, 365 days from 3 February 2006 which was 4 February 2007.

[54] The statement of claim alleged that the repayment date of the loan was extended on 3 February 2007.

[55] Clause 5.2 of the standard terms and conditions,[32] prohibited the borrower from changing the borrower's solicitor without first obtaining the lender's consent in writing to do so. Clause 6.1(14) made a breach of the borrower's obligations an event of default. A default had the effect of making the balance of the loan due and payable at the respondent's option under cl 6.1(1).[33]

[56] The statement of claim alleged that on 22 August 2008 the appellant terminated her retainer with her solicitors without the respondent's prior written consent which was a default and that the principal and accrued interest became due and owing immediately, apparently without any option being exercised by the respondent to bring that about. That does not seem to be in accordance with the terms of the loan agreement as set out above.

[57] However, in my view, whether or not the term of the loan was extended or whether it became repayable on 22 August 2008 does not make any difference. The respondent demanded the amount owing by service of the claim in the proceeding, if not before.

[58] The calculation of the amount of the claim at the time of the hearing of the application for summary judgment was $150,552.49.[34] That was a straight calculation of interest at the annual rate of 15.95 per cent per annum on the amount advanced as previously discussed showing monthly amounts of interest and monthly balances. No sum other than the calculation of interest is debited in the calculation.

[59] The inevitable conclusion of the foregoing analysis is that there is no real prospect of the appellant successfully defending any part of the claim or that there is a need for a trial as provided under *UCPR* 292(2).[35]

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29 *Maxitherm Boilers Pty Ltd v Pacific Dunlop Insurance Pty Ltd* [1998] 4 VR 559 at 561.50 – 562.05.

30 *Maxitherm* at 567.35; cf 568.30; *Ange v First East Auction Holdings Pty Ltd* (2011) 284 ALR 638 at [38] – [52]; [2011] VSCA 335.

31 Ex PA 4 to the appellant's affidavit.

32 Ibid.

33 Ibid.

34 AB 356.

35 *LCR Mining Group Pty Ltd v Ocean Tyres Ltd* [2011] QCA 105 at [26] – 30]; *Coldham-Fussell & Ors v Commissioner of Taxation* (2011) 82 ACSR 439 at [97] – [102]; [2011] QCA 45.

[60] It follows that there is no reason to consider separately the appellant's cross-application to dismiss the proceeding.

Indemnity costs

[61] The respondent successfully applied for an order for indemnity costs. Again, the learned primary Judge failed to give any reasons for the order, save that "I am satisfied that offers more favourable than the judgment were made to the defendant".

[62] The respondent relied upon two such offers. The first offer was made by a facsimile letter from the respondent's solicitor to the appellant's solicitor dated 31 March 2010. It was marked without prejudice as to costs and offered to settle the matter on the basis that the appellant pay to the respondent the sum of $77,302.60 inclusive of interest and costs an in full and final satisfaction of the respondent's claim against the appellant. The offer was expressed to be open for 14 days from the date of the letter and made pursuant to the principles enunciated in *Calderbank v Calderbank*.[36]

[63] As at 31 March 2010 the balance owing was $99,324.41, as calculated in Ex RET 2 to the affidavit of Mr Templeton filed on 7 November 2012.[37] The judgment reflects recovery of the amount of $99,324.41 as at 31 March 2010 and interest thereafter until the date of judgment. The judgment is plainly no less favourable to the respondent than the first offer.

[64] However, the first offer did not contain a statement that it was made under Part 5 of Chapter 9 of the *UCPR*. It was, therefore, not an offer to settle within the meaning of that Part.

[65] It does not appear that his Honour considered whether the appellant acted "unreasonably or imprudently" in not accepting the offer which is the relevant question in relation to a *Calderbank* offer.[38] In any event, he did not have before him all the evidence about it which is now before this Court.

[66] That is, the first offer was made subject to two further conditions which were added by email from the employee of the respondent's solicitor's firm to the appellant's solicitor dated 1 April 2010 previously mentioned: first, that the appellant must make an application to the Supreme Court for an order that the Public Trustee pay the settlement amount from money held in a trust fund to the respondent's lawyers' trust account; secondly, if that order was not made, that the appellant pay further sums by way of interest until payment was received.

[67] These factors are enough to warrant that this Court exercise the discretion as to costs in relation to the first offer afresh, unless the second offer would justify the order which was made by the primary Judge, in any event.

[68] The second offer was made by letter from the respondent's solicitor to the appellant's solicitor dated 18 July 2011. It was marked without prejudice and offered to settle the matter on terms that the appellant pay $78,431.87 to the respondent, within 30 days of acceptance, in compromise of all claims which either

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36 [1975] 3 WLR 586.

37 AB 355.

38 *Aircraft Technicians of Australia Pty Ltd v St Clair; St Clair v Timtalla Pty Ltd* [2011] QCA 188 at [141].

party had against the other in relation to the credit contract or their dealings, with each party to pay their own costs and the parties to sign a discontinuance of the claim.

[69] The offer was in writing, contained a statement that it was made under Part 5 of Chapter 9 of the *UCPR* and specified a period ending not less than 14 days after the date of service during which the offer was open for acceptance. It offered to settle the claim in the proceeding. It was an offer to settle within the meaning of Part 5 of Chapter 9 of the *UCPR*.

[70] As at 30 June 2011, the balance owing was $121,220.81, as calculated in Ex RET 2 to the affidavit of Mr Templeton filed on 7 November 2012.[39] The judgment given reflects recovery of the amount of $121,220.81 as at 30 June 2010 and interest thereafter until the date of judgment. The judgment is plainly no less favourable to the respondent than the offer to settle, except for the possible effect of the term that the appellant also compromise any claim she had against the respondent in relation to the credit contract or their dealings, which was not part of the respondent's claim.

[71] If the conclusion is reached that the judgment is no less favourable, and the Court is satisfied that the respondent was at all material times willing and able then r 360(1) of the *UCPR* is engaged. In that event, the Court must order the appellant to pay the respondent's costs calculated on the indemnity basis unless the appellant shows another order for costs is appropriate in the circumstances.

[72] The appellant submitted that the second offer was flawed because it was not made solely in settlement of the matter before the Court. There are conflicting decisions of Judges of the Trial Division of this Court on that question, being *Taske v Occupational & Medical Innovations Ltd*[40], which might support the appellant's position on the one hand and *Balnaves v Smith & Anor*[41] which might support the position of the respondent, on the other hand.

[73] For myself, I would prefer the comprehensive and precise analysis of the operation of r 360 of the UCPR by Byrne SJA in *Balnaves*, to which I could add nothing of use. However, in this case I find it is unnecessary to decide the point because I have come to the conclusion that the order for indemnity costs ought to be set aside for other reasons, in any event. That, together with the circumstance that the question was not fully argued in the present case, makes it preferable not to decide this point finally.

[74] The reason why the order for indemnity costs should be set aside in any event, in my view, is that even under r 360(1) of the *UCPR* another order for costs is appropriate in these circumstances. But for the appellant's tender on the hearing of the appeal of Ex PA 4 to the appellant's affidavit, the Standard Terms & Conditions (Version 1) would not have been in evidence in full. There was no evidence before the primary Judge that the loan agreement contained a provision for interest at the agreed rate to be accrued and to be compounded daily to the amount owing by the appellant until repayment. In that state of the evidence, the respondent would not have been entitled to judgment on the application for that part of its claim that comprised a calculation of interest accruing daily. The principal of the loan was

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39 AB 355.

40 [2007] QSC 147.

41 [2012] QSC 408.

$51,283.78. The interest calculated on that basis up to 7 November 2012 was $99,268.71. Thus the total of the judgment given was $150,552.49.

[75] But for the further evidence received on the appeal in Ex PA 4, the respondent would have been entitled on the evidence to judgment only for the part of its claim comprising principal. The judgment amount to which the respondent would have been entitled on the evidence before the primary Judge would have been less than the second offer.

[76] Accordingly, in my view, an order for costs other than an order for indemnity costs is appropriate in the circumstances. I would order that the appellant pay the respondent's costs of the application and the proceeding in the court below to be assessed on the standard basis.

[77] Notwithstanding this minor exception, in my view the appellant has been largely unsuccessful on the appeal. The respondent will have incurred most of its costs in relation to the appeal in response to the large number of grounds raised or sought to be raised by the appellant on which she has failed.

[78] In my view, it follows that the appellant should pay the respondent's costs of the appeal.

[79] In my view, the orders which should be made are:

1. the application to extend the time for filing the notice of appeal is allowed;
2. Grant special leave to receive exhibits PA 4 and PA 18 to the affidavit of Patricia Anne filed on 10 May 2013 as further evidence on the hearing of the appeal.
3. set aside the order of the District Court of Queensland dated 7 November 2012 that "the defendant pay the plaintiff's costs of and incidental to this matter on the indemnity basis";
4. in lieu thereof order that the defendant pay the plaintiff's costs of the application and the proceeding;
5. the appeal is otherwise dismissed; and
6. the appellant pay the respondent's costs of the application and the appeal.