SUPREME COURT OF QUEENSLAND

CITATION:	*Peterson v Hottes* [2012] QCA 362
PARTIES:	**DIANA LESLEY PETERSON** (appellant) **v** **JULIANNE HEIDI HOTTES** (respondent)
FILE NO/S:	Appeal No 3292 of 2012 SC No 3084 of 2008
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal – Further Orders
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	Judgment delivered 26 October 2012 Further orders delivered 18 December 2012
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGES:	Muir and Gotterson JJA and Henry J Separate reasons for judgment of each member of the Court, each concurring as to the orders made
FURTHER ORDERS:	**1. The respondent pay the costs of these proceedings including the cost of the appeal on the standard basis.** **2. The application for an indemnity certificate be refused.**
CATCHWORDS:	APPEAL AND NEW TRIAL – APPEAL PRACTICE AND PROCEDURE – QUEENSLAND – POWERS OF COURT – COSTS – where appeal was allowed and parties permitted to make written submissions as to costs after appeal – where primary judge invited parties to provide submissions on costs – where none were provided – where appellant seeks order for indemnity costs at first instance based on an offer to settle in accordance with Ch 9, Part 5 of the *Uniform Civil Procedure Rules* 1999 (Qld) – whether indemnity costs should be granted *Appeals Cost Fund Act* 1973 (Qld), s 15 *Uniform Civil Procedure Rules* 1999 (Qld), r 360 *Sultana Investments Pty Ltd v Cellcom Pty Ltd (No 2)* [2009] 2 Qd R 287; [2008] QCA 398, cited
COUNSEL:	No appearance by the appellant, the appellant's submissions were heard on the papers No appearance by the respondent, the respondent's submissions were heard on the papers

SOLICITORS: Dowd & Company Lawyers for the appellant
HWS Lawyers for the respondent

[1] **MUIR JA:** After judgment was given in this matter on 26 October 2012, the parties made written submissions on costs. The primary judge had invited the parties to provide submissions on costs, but none was made. Accordingly, no costs order was made by the primary judge. The appellant seeks an order for indemnity costs at first instance in reliance on an offer to settle made in accordance with Ch 9, Part 5 of the *Uniform Civil Procedure Rules*. It was argued that the offer was to settle the proceedings on the basis of orders and/or declarations that:

1. the respondent holds 25 per cent of the Bridgeman Downs property on trust for the appellant;

2. the Bridgeman Downs property be sold and the respondent pay to the appellant 25 per cent of the net proceeds of sale and 25 per cent of the net rent from the property between 1 January 2008 and the date of sale less 25 per cent of the rates and water expenses incurred by the respondent in relation to the property between December 2001 and 31 December 2007; and

3. the respondent pay the appellant's costs on a standard basis.

[2] It was argued that the orders made on 26 October 2012 were no less favourable than the offer in that they provided for:

1. the return of various chattels claimed by the appellant;

2. a declaration that the respondent holds her interest in the property on trust for the appellant beneficially as to 25 per cent;

3. an order that the respondent pay the appellant the sum of $18,851 (being 25 per cent of $74,324) – the amount agreed between the appellant and the respondent as the net rent received by the respondent between 2 February 2008 and 31 January 2011 and $1,858 (being interest on $18,851 for 12 months).

[3] Rule 360 of the *Uniform Civil Procedure Rules* provides:

> **"360 Costs if offer to settle by plaintiff**
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> (1) If—
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> (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
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> (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;
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> the court must order the defendant to pay the plaintiff's costs calculated on the indemnity basis unless the defendant shows another order for costs is appropriate in the circumstances.

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

[4] The appellant contended that she obtained a judgment more favourable than the offer and that the Court is required to order that the respondent pay her costs on the indemnity basis. It was submitted that the respondent had not shown that "another order for costs [was] appropriate in the circumstances". The respondent submitted that as the offer included a requirement that the property be sold, and this Court's orders did not, the orders were less favourable than the offer. The submission should be accepted. The sale of the property was a material term of the offer. It was no doubt inserted to ensure that the appellant obtain the monetary value of her interests in the property, which was under the control of the respondent, within a reasonable time. Consequently, this Court's orders have not been shown to be "no less favourable than the offer to settle".

[5] The respondent argued that this Court should not deal with the costs at first instance. Although not expressly stated, it seems likely that this stance was taken because of the possibility that an order for indemnity costs might be made. No reason was put forward in the respondent's written submissions as to why the respondent should not be ordered to pay the appellant's costs at first instance on the standard basis. Nor was it submitted that the respondent should not pay the appellant's costs of the appeal on the standard basis. It is obviously highly desirable that this unfortunate saga be concluded as quickly as possible. Remitting the question of the award of costs at first instance to the primary judge would be pointless and time consuming and would involve unnecessary expense.

[6] The respondent applies for the grant of an indemnity certificate under s 15 of the *Appeal Costs Fund Act* 1973. The basis for the application is as follows. This Court decided, contrary to the primary judge's conclusion, that the facts as found by the primary judge merited the imposition of a constructive trust. The remedy appropriate to address the respondent's unconscionable conduct is a question of law. That question was fairly arguable and the respondent did not invite the primary judge to impose the relief that she did.

[7] I do not consider it appropriate that an indemnity certificate be granted. It is correct that the respondent did not invite the primary judge to grant the relief that she did. The respondent opposed the granting of any relief in respect of the property. She claimed that the appellant had no interest in it and it appears to me that the arguments advanced on behalf of the respondent at first instance contributed to the primary judge's error. That, in itself, is not fatal to the success of the application.[1] More significantly for present purposes, the issue of costs loomed even larger in the appeal than did the question of whether a constructive trust should have been imposed. An appeal was necessary to determine the question of costs and the appellant succeeded in part on that issue. Also, this is not the sort of case in which a certificate is usually granted: for example, where issues of law are finely balanced, where the order under appeal could not properly have been made and was not sought by the applicant and where the appellant played no material role in the judge's error.

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[1] See, for example, *Sultana Investments Pty Ltd v Cellcom Pty Ltd (No 2)* [2008] QCA 398.

Conclusion

[8] I would order that:

1. The respondent pay the appellant's costs of these proceedings including the cost of the appeal on the standard basis.

2. The application for an indemnity certificate be refused.

[9] **GOTTERSON JA:** I agree with the orders proposed by Muir JA and with the reasons given by his Honour.

[10] **HENRY J:** have read the reasons of Muir JA. I agree with those reasons and the orders proposed.