SUPREME COURT OF QUEENSLAND

CITATION:	*Wiggins Island Coal Export Terminal Pty Limited v Civil Mining & Construction Pty Ltd* [2021] QCA 8
PARTIES:	**WIGGINS ISLAND COAL EXPORT TERMINAL PTY LIMITED** ABN 20 131 210 038 (appellant) **v** **CIVIL MINING & CONSTRUCTION PTY LTD** ABN 18 102 557 175 (respondent)
FILE NO:	Appeal No 2221 of 2020 SC No 6050 of 2013
DIVISION:	Court of Appeal
PROCEEDING:	General Civil Appeal
ORIGINATING COURT:	Supreme Court at Brisbane – [2020] QSC 1 (Flanagan J)
DELIVERED ON:	29 January 2021
DELIVERED AT:	Brisbane
HEARING DATE:	8 September 2020
JUDGES:	Holmes CJ and Philippides JA and Brown J
ORDERS:	**1. The time for the respondent to file and serve its Notice of Contention is extended to 10 August 2020.** **2. The appeal is dismissed with costs.** **3. The parties are to file any further submissions on reserved costs by 5 pm on 5 February 2021.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – OFFERS OF COMPROMISE, PAYMENTS INTO COURT AND SETTLEMENTS – OFFER OF COMPROMISE OR OFFER TO SETTLE OR CONSENT TO JUDGMENT PURSUANT TO RULES – GENERALLY – where there was a claim and counterclaim – where the appellant made an "all-up" offer to settle "all claims in the proceeding" which was expressed to be under ch 9 pt 5 of the *Uniform Civil Procedure Rules* 1999 ("the Rules") – where the offer did not distinguish between the claim and counterclaim – where the trial judge held that rr 360 and 361 of the Rules did not apply to the appellant's offer to settle because it did not distinguish between the claim and counterclaim – where the trial judge ordered each party to pay the other's costs in the proceeding in which it was

unsuccessful – where the appellant appeals the costs order on the basis that the offer to settle was effective under the Rules – whether rr 360 and 361 of the Rules apply to the appellant's offer to settle

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – OFFERS OF COMPROMISE, PAYMENTS INTO COURT AND SETTLEMENTS – INFORMAL OFFERS AND CALDERBANK LETTERS – where the appellant's offer to settle was accompanied by a letter which bore the heading "Without prejudice except as to costs" – where the appellant argues that, if its offer to settle did not engage rr 360 and 361, it should have been treated as an effective *Calderbank* offer – whether the appellant's offer to settle should have been taken into account in the exercise of the costs discretion under r 681 of the Rules

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – APPEALS AS TO COSTS – RELEVANT PRINCIPLES – WHERE DISCRETION NOT EXERCISED – ADEQUACY OF REASONS – where the appellant submits that the respondent failed to comply with its obligations under r 5 of the Rules in its approach to other offers to settle made early in the proceedings – where the trial judge concluded that the complaints made by the appellant against the respondent did not warrant a departure from the general rule that costs follow the event – where the appellant argues that the trial judge erred by failing to give this matter sufficient weight in exercising the Court's discretion under r 681 – where the appellant argues that the trial judge failed to give adequate reasons for his conclusion – whether the complaint that the trial judge gave insufficient weight to the respondent's approach to the early offers warrants appellant review – whether the trial judge's reasons were adequate

Uniform Civil Procedure Rules 1999 (Qld), r 181, r 352, r 353, r 360, r 361, r 364

Arogen v Leighton (2013) 278 FLR 245; [2013] NSWSC 1099, cited
Australia & New Zealand Banking Group Ltd v Alirezai (No 2) [2002] QSC 205, cited
Calderbank v Calderbank [1975] 3 All ER 333, applied
Charter Pacific Corporation Ltd v Belrida Enterprises Pty Ltd [2003] 2 Qd R 619; [2002] QSC 319, not followed
Davies v Fay [1995] 1 Qd R 509; [1994] QSC 71, considered
Dean v Stockland Property Management Pty Ltd & Anor (No 2) [2010] NSWCA 141, considered
Drew v Makita (Australia) Pty Ltd [2009] 2 Qd R 219; [2009] QCA 66, cited
Emanuel Management Pty Ltd (in liq) v Foster's Brewing

Group Ltd [2003] QSC 299, cited
Gladstone Area Water Board & Anor v AJ Lucas Operations Pty Ltd [2015] QSC 52, cited
House v The King (1936) 55 CLR 499; [1936] HCA 40, cited
Marriner v Australian Super Developments Pty Ltd [2016] VSCA 141, considered
Marshall v Megna; Megna v Tory; Tory v Megna (No 2) [2013] NSWCA 456, cited
Old v McInnes and Hodgkinson [2011] NSWCA 410, considered
Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11, cited
Panorama Investments Pty Ltd v Summit Tower Pty Ltd [2017] VSC 390, cited
Singapore Airlines Cargo PTE Limited v Principle International Pty Ltd (No 2) [2017] NSWCA 340, considered
Smith v Madden (1946) 73 CLR 129; [1946] HCA 19, cited
Whitehouse Properties v Bond Brewing (NSW) Ltd (1992) 28 NSWLR 17, cited
Whitney v Dream Developments Pty Ltd (2013) 84 NSWLR 311; [2013] NSWCA 188, considered
Ziliotto v Hakim [2013] NSWCA 359, considered

COUNSEL: D F Kelly QC, with S R Eggins, for the appellant
B O'Donnell QC, with D J Butler, for the respondent

SOLICITORS: Corrs Chambers Westgarth for the appellant
Thomson Geer for the respondent

[1] **HOLMES CJ:** Wiggins Island Coal Export Terminal Pty Ltd ("Wiggins") appeals, by leave of the trial judge, against costs orders made in proceedings in which Civil Mining & Construction Pty Ltd ("Civil Mining") obtained judgment on its claim against Wiggins in the sum of $3,562,586.38 with interest, plus GST of $356,258.65, with a further order for return of its bank guarantee, and Wiggins obtained judgment on its counterclaim against Civil Mining in the sum of $2,936,844.61, with interest. The difference between the amounts of the two judgments, once interest and GST were added, was $1,796,368.55.

Background to the appeal

[2] The relevant costs arguments arose principally from the fact that Wiggins had made an "all-up" offer, expressed to be under ch 9 pt 5 of the *Uniform Civil Procedure Rules* 1999 ("the *Rules*"), to settle "all claims in the proceeding" on terms which were, firstly, payment by it to Civil Mining of $1,500,000, exclusive of GST, with interest pursuant to the *Civil Proceedings Act* 2011, together with Civil Mining's costs; and, secondly, the parties' discontinuance of the proceeding. Wiggins argued that the offer, once interest was calculated, was worth $1,813,511.79. The offer was accompanied by a letter which bore the heading "Without prejudice except as to costs" and, after setting out the names of the parties by way of reference, continued,

> "Please find **attached**, by way of service, a formal offer to settle pursuant to Chapter 9, Part 5 of the *Uniform Civil Procedure Rules 1999* (Qld)."

The letter then set out some reasons why Wiggins considered that the offer ought to be accepted.

[3] Before the trial judge, Wiggins contended that it had made an effective offer under rr 360 and 361 of the *Rules*, one which was not uncertain as to interest (as Civil Mining contended) and which was more favourable to Civil Mining than the outcome of the proceedings. Under r 361, Civil Mining should pay Wiggins' costs of the claim on the standard basis from the day the offer was served and under r 360 should pay the entirety of Wiggins' costs of the counterclaim on the indemnity basis. If that submission were not accepted, its offer, having been accompanied by the letter with the "Without Prejudice" heading, should be treated as a *Calderbank*[1] offer (but not one giving rise to an order for indemnity costs); and should in any case have been taken into account in the exercise of the general discretion as to costs. The order which Wiggins sought if its offer were not treated as falling within the *Rules* was that each party bear its own costs; in effect, no order as to costs. Wiggins submitted to the trial judge that departure from the general rule that costs followed the event was warranted having regard to its offer and a claimed failure by Civil Mining in various identified respects to comply with r 5 of the *Rules* in its conduct of the proceedings, including by its approach to an exchange of informal offers at the outset.

[4] Wiggins also sought, under the slip rule, a variation to the judgment in its favour to include an amount for GST of $293,684.46, although that amount had since been remitted to it by Civil Mining. If that application were granted, it would defeat arguments Civil Mining made that the interest payable on the offered amount was less than that contended for by Wiggins, so that the latter's offer did not in fact better the net result that Civil Mining had achieved under the judgments.

[5] The trial judge held that rr 360 and 361 on their proper construction did not apply to Wiggins' offer to settle, because it did not distinguish between the claim and the counterclaim, making it unnecessary to consider whether it was sufficiently certain; and that the offer did not take effect as a *Calderbank* offer. The history of Civil Mining's conduct of the litigation did not justify a departure from the usual order. That was so even if Wiggins' offer were regarded as a *Calderbank* offer. His Honour ordered each party to pay the other's costs in the proceeding (claim or counterclaim) in which it was unsuccessful and dismissed the application under the slip rule, on the bases that the GST in question had now been paid, and that since the offer to settle did not comply with rr 360 and 361, whether the GST component would have made a difference for comparison purposes was irrelevant.

[6] The order that costs follow the event was significantly less advantageous to Wiggins than even its second option, of each party's bearing its own costs. Applying the approach to assessment prescribed in *Smith v Madden*,[2] to which the trial judge adverted, Civil Mining, as plaintiff, will recover its costs of bringing its action as if there had been no counterclaim, and Wiggins will receive only its added costs of maintaining the counterclaim.

The appeal and Notice of Contention

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1 *Calderbank v Calderbank* [1975] 3 All ER 333.

2 (1946) 73 CLR 129.

[7] Wiggins appeals against both the costs order and the dismissal of the application under the slip rule. It asserts error in each of the trial judge's conclusions and also contends that his Honour failed to provide adequate reasons as to why neither Civil Mining's approach to earlier offers, nor the formal offer if it were indeed a *Calderbank* offer, caused him to change his view that the usual order as to costs was appropriate. Civil Mining seeks an extension of time (which was not opposed, and should be granted) within which to file a Notice of Contention by which it seeks to advance arguments that Wiggins' offer was not a valid offer under r 353; that it was ineffective because it was ambiguous and uncertain; that it did not produce a better result than the judgment given in Civil Mining's favour; that if rules 360 and 361 were engaged, another order for costs was appropriate; that even if the judge had taken the offer into account in the exercise of his discretion, it would not have changed the result; and that it was appropriate to dismiss the slip rule application because, for various reasons, Wiggins was not entitled to the GST as a component of the judgment.

The Uniform Civil Procedure Rules relating to offers to settle and costs consequences

[8] The relevant rules are contained in pt 5 of ch 9 of the *Uniform Civil Procedure Rules*. Rule 352 provides definitions for that part:

> "**352 Definitions for pt 5**
>
> In this part—
> ***offer*** means an offer to settle made under this part.
> ***proceeding*** means a proceeding—
>
> (a) started by claim; or
>
> (b) in which the court has made an order under rule 14 ordering the proceeding to continue as if started by claim; or
>
> (c) started by originating application if an order or direction has been made for pleadings, or other documents defining the issues, to be filed and served."

(Rule 14 permits the court, where it considers it appropriate, to order that a proceeding started by application continue as if started by claim.)

[9] Rule 353 provides for service of an offer to settle:

> "**353 If offer available**
>
> (1) A party to a proceeding may serve on another party to the proceeding an offer to settle 1 or more of the claims in the proceeding on the conditions specified in the offer.
>
> (2) A party may serve more than one offer.
>
> (3) An offer must be in writing and must contain a statement that it is made under this part."

[10] The cost consequences of an offer made by a plaintiff who obtains a result as good or better are set out in r 360, and those for a defendant whose offer the plaintiff has failed to better, in r 361:

> "**360 Costs if offer by plaintiff**
>
> (1) If –
>
> (a) the plaintiff makes an offer that is not accepted by the defendant and the plaintiff obtains an order no less favourable than the offer; 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.
>
> (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.
>
> **361 Costs if offer by defendant**
>
> (1) This rule applies if—
>
> (a) the defendant makes an offer that is not accepted by the plaintiff and the plaintiff does not obtain an order that is more favourable to the plaintiff than the offer; and
>
> (b) the court is satisfied that the defendant was at all material times willing and able to carry out what was proposed in the offer.
>
> (2) Unless a party shows another order for costs is appropriate in the circumstances, the court must—
>
> (a) order the defendant to pay the plaintiff's costs, calculated on the standard basis, up to and including the day of service of the offer; and
>
> (b) order the plaintiff to pay the defendant's costs, calculated on the standard basis, after the day of service of the offer.
>
> (3) However, if the defendant's offer is served on the first day or a later day of the trial or hearing of the proceeding then, unless the court otherwise orders—
>
> (a) the plaintiff is entitled to costs on the standard basis to the opening of the court on the next day of the trial;

(b) the defendant is entitled to the defendant's costs incurred after the opening of the court on that day on the indemnity basis.

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

"Order" is defined in the Dictionary in Sch 3 to the *Rules* as including "A judgment, direction, decision or determination of a court whether final or otherwise".

[11] Rule 364 provides for an offer where there is a contribution or indemnity claim:

"**364 Offer to contribute**

(1) This rule applies if a defendant makes a claim (a ***contribution claim***) to recover contribution or indemnity against a person, whether a defendant to the proceeding or not, in relation to a claim for a debt or damages made by the plaintiff in the proceeding.

(2) A party to the contribution claim may serve on another party to the contribution claim an offer, subject to any conditions specified in the offer—
(a) to settle the contribution claim; or
(b) to contribute towards an offer to settle the claim made by the plaintiff.

(3) The court may take account of an offer under subrule (2) in deciding whether it should order that the party on whom the offer was served should pay all or part of—
(a) the costs of the party who made the offer; and
(b) any costs the party is liable to pay to the plaintiff.

(4) Rules 356 and 357 apply, with any changes necessary, to an offer to contribute as if it were an offer.[3]"

Civil Mining's contention that the offer was not a valid offer under r 353

[12] The trial judge accepted that Wiggins' offer complied with r 353, that rule permitting an offer to settle more than one claim. In reaching that conclusion, his Honour had regard to the decision of Fryberg J in *Charter Pacific Corporation Ltd v Belrida Enterprises Pty Ltd*.[4] By its Notice of Contention, Civil Mining argued that the trial judge's ruling was wrong: for the purposes of r 353, a counterclaim was a separate proceeding from that commenced by the plaintiff's claim, and an offer to settle could not be made in respect of more than one proceeding. Although one would not normally address an argument in a Notice of Contention before considering the viability of the appellant's arguments, it is convenient to deal with the contention now, because it is a logical starting point in the exercise of construing pt 5.

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3 Rules 356 and 357 respectively deem an offer under pt 5 to be made without prejudice and preclude its disclosure until after judgment or on the making of an application for leave to withdraw it.

4 [2003] 2 Qd R 619.

[13] In *Charter Pacific*, Fryberg J considered the meaning of the term "claims" in the phrase "claims in the proceeding" in r 353(1). The definition of "claim" in the Dictionary[5] to the *Rules* was (as it is now)

> "claim—
>
> 1 A *claim* is a document under chapter 2, part 3 starting a proceeding.
>
> 2 If the court orders a proceeding started by application to continue as a claim, the application is also a *claim* for these rules."

That was, his Honour said, the term's prima facie meaning in pt 5 of ch 9, which did not preclude the part's application to a document by which a counterclaim or claim against a third party was commenced. The claims in respect of which r 353 permitted offers to settle were the plaintiff's claim, a counterclaim or a third party proceeding. Thus, a complying offer had to offer to settle every dispute or matter in the document constituting the claim. Fryberg J rejected an argument that to read "claim" in r 353 by reference to the Dictionary definition of the term defeated the objects of pt 5, because it precluded, for example, an offer to settle a particular cause of action or a particular element in the relief claimed. His Honour was similarly unmoved by the prospect that the approach would differ from that in other jurisdictions. Whatever meaning was adopted, "problematical outcomes" [6] could be imagined. His Honour concluded that there were two claims in the proceedings before him, the original claim and the counterclaim, and the parties by offering to settle the action were offering to settle both.

[14] Civil Mining argued that Fryberg J's approach of reading the expression "claims in the proceeding" in r 353 by reference to the Dictionary definition of "claim" was an error. His Honour had overlooked the significance of the definition of "proceeding" in r 352. Once it was accepted (as Fryberg J did) that "claim" could incorporate both a counterclaim and a third party notice, each such procedure was to be regarded as a separate "proceeding… started by claim" within the meaning of r 352. For the purposes of r 353, then, a proceeding was one started by a claim, a third party notice or a counterclaim. Rule 353 permitted an offer to settle more than one claim in the proceeding, but one offer could not be made to settle two separate proceedings. If r 353 were intended to permit settlement of both claim and counterclaim or third party notice, provision in the *Rules* for such an offer would be expected. Instead, r 353 should be construed as meaning that the claims in relation to which offers to settle could be made were causes of action or claims for relief within a proceeding such as a claim, a counterclaim or a third party proceeding.

[15] That a counterclaim should be regarded as a separate proceeding was supported by a number of rules – rr 164(1)(b), 175, 178, 181 and 183 – which referred to the "original proceeding", as distinct from the counterclaim. The following points were also made: a counterclaim could proceed after the original proceeding ended (r 183); a counterclaim constituted a different event from the original claim for the purposes of entry of judgment and awarding costs; and a counterclaim was an alternative to a separate proceeding (r 177). In addition, to treat a counterclaim otherwise than as a separate proceeding would lead to difficulties for comparison for the purposes of

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5 Then contained in sch 4, since re-numbered as sch 3.

6 At [16].

rr 360 and 361; those rules required that an offer to settle a counterclaim be assessed separately from an offer to settle a claim.

[16] Those considerations, apart from the last, led Digby J in the Victorian Supreme Court in *Panorama Investments Pty Ltd v Summit Tower Pty Ltd*[7] to conclude that a counterclaim was a separate proceeding for the purpose of considering whether it was caught by s 58(3) of the *Bankruptcy Act* 1966 (Cth), which requires leave to commence or take a fresh step in proceeding in respect of a provable debt. Similarly, in *Arogen v Leighton*,[8] McDougall J concluded that a cross-claim under the New South Wales *Uniform Civil Procedure Rules* was a proceeding in its own right for the purposes of s 440D of the *Corporations Act* 2001 (Cth), which places restrictions on the commencement of a proceeding against a company in administration.

[17] In similar vein, Civil Mining referred to a decision of Jackson J in *Gladstone Area Water Board & Anor v AJ Lucas Operations Pty Ltd*,[9] in which his Honour was considering what the relevant "event" was for the purposes of awarding costs after judgment in relation to a claim and a counterclaim. In that context, he noted that the *Rules* recognised

> "…[t]he separate nature of the proceeding on the claim on the one hand and on the counterclaim on the other".[10]

His Honour went on to observe that it was well-established that for the purposes of costs the judgment on the claim could be treated as one event and the judgment on the counterclaim as another event.[11]

[18] Civil Mining relied in particular on r 181(1) to argue that even if a counterclaim were not a separate proceeding, ch 9 pt 5 applied as if it were. That rule is as follows:

> "**181 Conduct of counterclaim**
>
> (1) These rules apply to the conduct of a counterclaim with necessary changes as if—
>
> (a) the plaintiff on the counterclaim were the plaintiff in an original proceeding; and
>
> (b) the defendant to the counterclaim were the defendant to an original proceeding."

That meant, Civil Mining contended, that pt 5 applied to the counterclaim as if it were an original proceeding; so that in r 353 the proceeding started by counterclaim was to be treated as an original proceeding.

[19] The construction of the word "claim" in r 353 as meaning a cause of action or claim for relief was (Civil Mining submitted) consistent with the use of the term in many of the *Rules*, and it was consistent with the application of r 364, in which "claim" was to be read as meaning, not the document initiating a counterclaim or third party notice, but a claim for particular relief (in that instance, contribution or indemnity). It had the advantage of enabling a party to offer to settle some, but not all, causes of

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7 [2017] VSC 390.
8 (2013) 278 FLR 245.
9 [2015] QSC 52.
10 At [9].
11 At [12].

action; that was consistent with New South Wales practice, as evidenced in *Whitehouse Properties v Bond Brewing (NSW) Ltd*.[12] In that case, the New South Wales Court of Appeal concluded that an offer of compromise was compliant with the *Supreme Court Rules* 1970 (NSW) in that State (which permitted "an offer to compromise any claim in the proceedings") in offering to settle a claim for compensation for loss of possession of premises, but not other claims for damages and mesne profits. (There was, however, no definition in the New South Wales legislation of "claim".)

[20] Wiggins, on the other hand, argued that a counterclaim fell within the definition of "proceeding" in the Dictionary to the *Supreme Court of Queensland Act*[13] 1991 as including

> "…an incidental proceeding in the course of, or in connection with, a proceeding…".

(Civil Mining countered that a counterclaim could not be regarded as "incidental"; it was a substantive proceeding in its own right, one which culminated in its own judgment and costs order.) In written submissions, Wiggins maintained the correctness of Fryberg J's conclusion in *Charter Pacific* that "claim" in r 353 should be read as defined in the Dictionary, so that the concept was restricted to being the entirety of a claim, counterclaim or third party claim. In oral submissions, however, its argument was that his Honour had *not* applied the Dictionary definition to r 353. Rather, while acknowledging the definition as the prima facie meaning of "claim", he had concluded that in r 353 it meant something different, and included counterclaims or claims against third or subsequent parties.

[21] To accept Civil Mining's reading of the word "claim", Wiggins contended, would permit offers to settle individual causes of action; which would produce the "problematical outcomes" to which Fryberg J had referred. It might not be possible to compare the outcome of the case against an offer to settle only one or some of the causes of action, and it would be difficult to apply rr 360 and 361 (as Civil Mining also argued, but to different effect), because they contemplated costs consequences in respect of the entirety of the costs of the proceeding. It would be necessary to make different cost orders for different issues, an undesirable result.

Conclusions on the construction of r 353

[22] Notwithstanding Wiggins' contrary oral submission, I think it is clear that Fryberg J in *Charter Pacific* did adopt the Dictionary definition of claim as "a document under chapter 2, part 3 starting a proceeding", or an application where a proceeding is ordered to be continued as a claim, for the purposes of r 353. His Honour's statement that applying that definition did not defeat pt 5's objects makes as much clear. But with respect to his Honour, I do not accept his apparent premise that the Dictionary definition extends to documents commencing counterclaims or third party proceedings. A counterclaim is a document commencing a proceeding under ch 6 pt 5 div 2,[14] while a third party notice starts a proceeding under ch 5 pt 6.[15] Self-evidently, neither is a document under ch 2 pt 3 starting a proceedings; nor is it an application where the necessary order to proceed as if by claim has been made.

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12 (1992) 28 NSWLR 17.
13 Schedule 5.
14 In particular, rr 177 – 179.
15 Rules 191, 193, 200, and 206.

Thus, while a counterclaim or third party procedure may meet the more general definition of "proceeding", it is not started by "claim" as that term is defined in the Dictionary. And although in respect of each, provision is made for certain rules to be applicable as if the proceeding were commenced by claim,[16] they do not deem the initiating document to be a claim.

[23] Section 32A of the *Acts Interpretation Act* 1954 provides that definitions in an Act apply

> "…except so far as the context or subject matter otherwise indicates or requires".

Nothing in the context of r 352 suggests that the use of the Dictionary definition of "claim" is not apposite in that rule; it is concerned with the way the proceeding is commenced, and the definition is readily inserted. If that view is correct, "proceeding" in r 353 should be read accordingly, as referring to a proceeding commenced by claim (or application, as the case may be).

[24] For some purposes a counterclaim may be regarded as separate, as was the case in *Panorama Investments* and *Arogen*, and it is distinct from the principal proceeding in that it can result in a separate judgment and separate costs orders. But although, as counsel for Civil Mining submitted, the *Rules* tend in different ways on this issue, their weight and sense as a whole is against regarding counterclaims and third party notices as independent proceedings for the purposes of rr 352 and 353. Rule 177 permits a counterclaim in a proceeding "instead of bringing a separate proceeding"; thus a counterclaim is an alternative to, not a form of, a separate proceeding. Rule 181(1), on which Civil Mining relied, does not give the document initiating a counterclaim the status of a claim in an independent proceeding. It simply makes the rules applicable to the defendant's conduct of the counterclaim the same as those for the plaintiff in the principal claim, while the plaintiff in its defence of the counterclaim must do what a defendant does. The following rule, r 182, provides that a counterclaim can be excluded "from the proceeding" at any time; which confirms that it is part of the larger proceeding, albeit as a distinct claim in its own right which can survive after the rest of the proceeding has been ended.

[25] As to third party proceedings, r 191(1) specifies that ch 6 pt 6

> "…provides for a third party procedure in a proceeding started by claim",

making it clear that the third party procedure is not a separate proceeding. Rule 196 makes the third party "a party to the proceeding", which can only be the principal proceeding, with the same rights in defending the third party notice claim as if it had been sued by the defendant. As a party to the proceeding, it would be entitled to serve an offer to settle under r 353.

[26] The definitions of "plaintiff" and "defendant" in the Dictionary to the *Rules* as including, respectively, a person filing a counterclaim or third party notice and the person served with a counterclaim or third party notice, would enable the application of rr 360 and 361 where offers are made to settle those parts of the litigation. Civil Mining's contention that the difficulty of applying rr 360 and 361 to an offer to settle both claim and counterclaim tells in favour of their treatment as separate proceedings for the purposes of r 353 involves the argument yet to be addressed on the appeal. It is an argument made entirely on the basis of the

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16 Rules 178(4), 181, 191(3), 197, 200, 207.

circumstances of this case. But circumstances might have been different: if the trial judge had exercised his discretion under r 184 to give judgment for the balance in favour of the plaintiff, rather than separate amounts for claim and counterclaim, the process of comparison between the amount Wiggins offered and the judgment amount would have been relatively straightforward. For present purposes, the fact that there may be the difficulties of comparison for which Civil Mining argues in relation to the offer made here as against the judgment actually given does not seem to me a compelling one in favour of the reading of r 353 for which it contends.

[27] A counterclaim does not meet the definition of "proceeding" in r 352 because, for the reasons I have already given, the reference in that rule to "a proceeding" is to the proceeding as a whole as commenced by the plaintiff's claim or application. Correspondingly, r 353 does not contemplate a counterclaim or third party notice as constituting proceedings of themselves for the purposes of that rule. In my view, a counterclaim or third party proceeding meets the *Supreme Court of Queensland Act* definition of proceeding as extending to "an incidental proceeding in the course of …a proceeding". It is an incident of the principal proceeding as commenced by the plaintiff's claim, in that it flows from it. But the "proceeding" in the expression "claims in the proceeding" is the principal proceeding as commenced by the plaintiff's claim (or application).

[28] What are the relevant "claims" in that proceeding? Neither party now contends that the definition of "claim" in the Dictionary, which refers to the document starting a claim, is applicable to r 353. There are a number of instances in the *Uniform Civil Procedure Rules* in which the context indicates that the Dictionary definition of "claim" is not applicable. So, for example, in the rules concerning pleadings (such as r 150(4) and r 154), the term is plainly used in reference to a cause of action or claim for relief. Rule 353 is also an instance in which the context indicates that the Dictionary definition is inapposite. With respect to Fryberg J, it would be odd to speak of offering to settle a document or documents. In any case, on my construction, the Dictionary definition of "claim" refers solely to the plaintiff's claim, and it is improbable that the capacity to make an offer would be correspondingly limited to that claim.

[29] The more obvious reading of the expression "claims in the proceeding" in r 353 is, as Civil Mining contends, that it refers to causes of action or claims for relief, rather than a plaintiff's claim, a counterclaim or claim against a third party. The problem Wiggins raised, that there may be difficulty in comparing the result with an offer to settle only some causes of action, constitutes a risk which a party seeking to make an offer which does not encompass all causes of action must confront: that the result will not neatly fit with the offer. If a party chooses to settle only some of the claims for relief brought by a plaintiff, its offer may not meet a judgment given for the entirety of the plaintiff's claim. And it does not follow that an offer to settle particular issues will result in separate costs orders where there is success on only one or some of those issues. The onus remains on the offeror to show that the judgment achieved is as good as or better than the offer, which requires some proper basis for comparison. A party having succeeded on only some issues may also face a conclusion that "another [costs] order" is appropriate. Those drawbacks are not surprising; the imperative, within the bounds of the *Rules*, is to seek to settle more, rather than less.

[30] An even broader construction of "claims in the proceeding" than that for which Civil Mining contended may be warranted. In *Davies v Fay*,[17] Mackenzie J considered that "claims in a cause or matter" in O 26 r 10 of the *Supreme Court Rules*, which allowed a party to serve on another party

> "…an offer to settle any one or more of the claims in a cause or matter",

extended to a claim that the plaintiff was guilty of contributory negligence, thus permitting an offer to admit contributory negligence in a particular percentage. It is unnecessary, however, to reach any final view of the width of "claims in the proceeding"; the offer in this case was made to settle "all claims in this proceeding", which was reasonably to be read as all the claims made in the plaintiff's claim and all the claims the defendant made by counterclaim.

[31] The trial judge's conclusion that Wiggins' offer was within the language of r 353(1), so that the pt 5 regime was engaged, was correct, although not precisely for the reasons his Honour gave.

The trial judge's conclusion that the "all-up" offer did not engage rr 360 and 361

[32] The trial judge's reasoning for concluding that rr 360 and 361 could not be applied in this case was to the following effect. Rules 360 and 361 required a comparison between the offer and the order which the plaintiff obtained: whether for the purposes of r 360 it was less favourable, or, for r 361, more favourable, than the order obtained by the party in the position of plaintiff in respect of the relevant claim. The onus lay on the offeror to demonstrate what was necessary. For that comparison it was necessary to compare the part of the offer relating to the claim under consideration with the orders obtained on the claim, a comparison which was not possible in the present case.

[33] An offer to settle both claim and counterclaim could trigger both rr 360 and 361, provided it distinguished between the two, with separate amounts for each. A plaintiff making an offer would be the plaintiff under r 360 but the defendant under r 361 in respect of the counterclaim, while a defendant making the offer would be the plaintiff in respect of the counterclaim under r 360 and the defendant for the purposes of r 361. But the different costs consequences as prescribed by those rules could only work if the distinction between the claim and the counterclaim were observed. His Honour rejected the submission that the net outcome of a trial could be regarded as an "order", noting that in *Australia & New Zealand Banking Group Ltd v Alirezai (No 2)*,[18] Mullins J had not adopted the approach of considering the net outcome of the claim and counterclaim.

[34] In this case, because the offer stipulated a single amount in settlement of both the claim and counterclaim, it was not possible to undertake the necessary comparison of the offered amount with the order made on the relevant claim. The result was that Wiggins could not demonstrate that the orders Civil Mining obtained on its claim were less favourable to it than the offer or that the outcome of its counterclaim was more favourable to itself than its offer. Consequently, rr 360 and 361 had no application. The result would have been no different had there been a single judgment for the net outcome of the claim and counterclaim, because in that

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17 [1995] 1 Qd R 509.

18 [2002] QSC 205.

event it would still be necessary for the purposes of comparison under r 361 to compare the order which the plaintiff obtained and the part of the defendant's offer that related to the plaintiff's claim. It would, however, be possible to make an offer to settle both claim and counterclaim under pt 5, provided it offered individual amounts for each claim rather than a single amount for all.

Wiggins' submissions on the applicability of rr 360 and 361 to its offer

[35] Wiggins argued here that it was significant that rr 360 and 361 had been amended in 2014[19] to replace the word "judgment" with the term "order", which bore the more expansive definition in the sch 3 Dictionary. The change, as the trial judge had observed,[20] was probably the result of the decision of Chesterman J in *Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd*[21] that a costs order could not be made under r 361, as it then stood, where a plaintiff had obtained no judgment at all. That definition of "order", Wiggins contended, was sufficiently wide to include the net outcome of a proceeding; the court's decision as comprised by the reason and order or orders. There was no warrant for reading the term as being confined to an individual order or subset of orders.

[36] Civil Mining had argued that an offer made by a defendant to settle the claim fell to be assessed under r 361, while an offer by the same party to settle the counterclaim was to be considered under r 360, but that was an unduly narrow construction of the rules. In fact, an offer could be made in a dual capacity by a party as defendant and plaintiff by counterclaim. Rules 360 and 361 were designed to assess success or failure by reference to the offer to settle, and that could only be done by reference to the outcome of the case as a whole.

[37] The trial judge's construction, Wiggins contended, did not accord with the purpose of pt 5, to promote the early settlement of litigation, or with r 5, which made it clear that the *Rules*' purpose was to facilitate expeditious resolution of civil proceedings at minimum expense. Settlement was driven by an overall assessment of risk and likely result. To require separate sums to be stipulated for each claim was impractical and could lead to unjust outcomes; for example, it could not be intended that costs would depend on whether the party making the offer was able to predict the result of each award, as opposed to the overall result. Where a proceeding involved a number of different claims, it would be impracticable to make an early exchange of offers nominating precise separate amounts for each claim. Wiggins provided examples of the different results which could be produced from different apportionments, as between claim and counterclaim, of the same net amount offered, as an illustration of the arbitrariness which it contended would result from a requirement to stipulate the settlement amount for each claim.

[38] The trial judge's view that the comparison had to be made between the part of the offer which related to the particular claim under consideration and the orders obtained on that claim was not warranted by any wording in rr 353, 360 or 361. If such a rigorous regime had been contemplated, specific language to that effect would have been expected. It was artificial to have regard to the claim and counterclaim separately in determining the costs order where acceptance required an agreement to settle both claim and counterclaim. The only rational comparison was between the net result of the claims and the "all-up" offer made in respect of them. The question

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19 *Uniform Civil Procedure and Another Rule Amendment Rule (No. 1)* 2014.

20 *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* [2020] QSC 1 at [39].

21 [2003] QSC 299 at [36].

was whether the offer bettered the orders achieved, which required a holistic comparison; an undertaking which was relatively simple where monetary orders were involved.

Conclusions on the applicability of rr 360 and 361

[39] The starting point is Wiggins' submission that the expanded definition of "order" can extend to the outcome of the case. According to the relevant Explanatory Note,[22] the changes to replace the word "judgment" in rr 360 and 361 were made to

> "…ensure the rules better reflect current practice".

Wiggins is probably correct in its submission that the result in *Emanuel* had some bearing on the change, but the far more significant change in 2014 likely to have been prompted by that case was to alter r 361 so that the basis for comparison was no longer whether the plaintiff had obtained

> "…a judgment… not more favourable…than the offer to settle",

but whether the plaintiff had *failed* to obtain a more favourable order, the comparison now required by the rule.

[40] While accepting that the broader term, "order", is likely to have been intended to widen the application of rr 360 and 361, that wider application cannot extend to reading those rules as though "order" can embrace the net result of different orders. In this case, there was unquestionably more than one relevant order. His Honour gave two judgments, one on the claim, the other on the counterclaim. There was no warrant for treating them as though they were a single judgment, or as though there were only one decision or determination, or as if they could somehow be regarded as a single order. That conclusion is reinforced by consideration of what rr 360 and 361 respectively require by way of comparison.

[41] The focus, for each rule, is on the order obtained by the plaintiff. In the present case, judgments were given in favour of two different plaintiffs: the judgment relevant for r 360 purposes was that given for Wiggins on its counterclaim and, for r 361, for Civil Mining on its claim. What had to be considered for the purposes of the two rules was different: in the case of Wiggins' success on its counterclaim, whether, for r 360, that result was no less favourable than its offer; and, for the purposes of r 361, whether the judgment obtained by Civil Mining was more favourable to it than Wiggins' offer. The costs orders which Wiggins sought required a conclusion that its offer had equalled or bettered the result it achieved for the purposes of each rule; those were conclusions which could not be reached because, as the trial judge said, the necessary comparisons for the purposes of those rules individually could not be made.

[42] Recourse to the purpose of pt 5, or the rules more generally, in promoting early resolution cannot avail to overcome the problems inherent in the attempt to apply rr 360 and 361 where there is a single offer to settle both claim and counterclaim and separate judgments are given on each. I depart, with respect, from the trial judge's reasoning to this extent: I am inclined to think that a defendant can properly serve an offer under r 353 to settle the entire proceeding without quantifying claim and counterclaim separately, and that if judgment is given for a net amount under

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22 Explanatory note to the *Uniform Civil Procedure and Another Rule Amendment Rule (No. 1)* 2014 at 2.

r 184, nothing prevents assessment under r 361(1) of the offer against the order. The judgment in that event is given in favour of a party to the proceedings as a whole, plaintiff or defendant, rather than in their separate capacities as plaintiff on the claim and defendant on the counterclaim and vice versa. However, my view in that regard is not critical to the issues to be decided in this case.

[43] The trial judge was right to conclude that the offer was not one to which rr 360 and 361 could be applied and that, in consequence, it was unnecessary to consider whether the offer was sufficiently certain for the purposes of those rules.

The relevance of Wiggins' offer to the exercise of the r 681 costs discretion

[44] Since neither r 360 nor r 361 applied, costs were, by virtue of r 681, in the discretion of the court, but would follow the event, absent different order. In this case, the trial judge observed, there were two separate events in the form of the separate judgments entered on the claim and counterclaim; hence his order that each party receive the costs of the event in which it had succeeded. Wiggins submitted that even if its offer did not engage rr 360 and 361, it was still properly to be taken into account in the exercise of the costs discretion.

[45] The trial judge referred to the decision of the New South Wales Court of Appeal in *Whitney v Dream Developments Pty Ltd*,[23] which had been applied by the Victorian Court of Appeal in *Marriner v Australian Super Developments Pty Ltd*,[24] as establishing that an offer expressed to be made pursuant to the *Rules* could not be relied on as a *Calderbank* offer unless there was something to indicate that it was to be relied on as the basis for a special order as to costs. There was nothing in the offer or covering letter in the present case, his Honour said, to indicate that Wiggins proposed, as well as invoking pt 5, to rely on the offer to ask for a special order as to costs. The fact that the letter which accompanied the offer bore the notation "Without prejudice except as to costs" of itself did not suffice to make it a *Calderbank* offer.

[46] Wiggins' argument, at first instance and in this court, was that the cases to which his Honour referred were concerned with whether an offer not compliant with the rules could be relied upon as a *Calderbank* offer to support the making of an indemnity costs order, as opposed to a costs order which departed from the usual rule. It had sought the latter, not the former. Other decisions of the New South Wales Court of Appeal in *Ziliotto v Hakim*[25] and *Singapore Airlines Cargo PTE Limited v Principle International Pty Ltd (No 2)*[26] supported the view that a non-compliant offer, whether or not it constituted a *Calderbank* offer, could be considered generally in the exercise of the court's costs discretion. Even if *Whitney* and *Marriner* were read to different effect, they should not be followed. The court's costs discretion was unconfined, as the High Court had made clear in, for example, *Oshlack v Richmond River Council*;[27] and it would be an error to conclude that the court was prevented in its exercise from considering offers to settle, properly a matter to which it should have regard.

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23 (2013) 84 NSWLR 311.
24 [2016] VSCA 141.
25 [2013] NSWCA 359.
26 [2017] NSWCA 340.
27 (1998) 193 CLR 72.

[47] Secondly, Wiggins said, notwithstanding those decisions, the words "Without prejudice except as to costs" in the letter which accompanied its offer amounted to an express reservation of its right to rely on the offer generally to costs so as to constitute a *Calderbank* offer. In fact, *Whitney* was distinguishable because there was no such reservation made in the accompanying letter in that case.

Calderbank and beyond

[48] A *Calderbank* offer is made "without prejudice"; that is, its maker effectively stipulates that it is not to be admitted as evidence on the substantive issues in the case, while reserving the right to rely on it on the issue of costs.[28] The cases referred to in connection with whether an offer purportedly but ineffectively made under rules of court can constitute a *Calderbank* offer and whether it may enter into the exercise of the costs discretion outside the rules regime arose, in the most part, because the New South Wales and Victorian rules relating to offers, as enacted,[29] required that any offer be exclusive of costs. That meant that genuine attempts at settlement were frustrated in circumstances where the offer, had it been accepted, would have given its recipient a better outcome; the courts then had occasion to consider whether the non-compliant offers could otherwise be recognised. That led to the question of whether such an offer constituted a *Calderbank* offer, and if it did not, whether it could have any relevance to the exercise of the costs discretion. The result is a rich vein of authority from the New South Wales Court of Appeal, unfortunately not always flowing in the same direction.

[49] The cases on the issue illustrate two distinct ways of viewing an offer which purports to be made under, but does not meet the requirements of, the rules, and which, had it been accepted, would have produced a better result for its recipient. The first approach is that a genuine offer of compromise unreasonably refused, while not leading to the imposition of indemnity costs as a rules-compliant offer would, may still be relevant in the exercise of determining whether a costs order other than the usual is appropriate. The second way of looking at a non-compliant rules offer which contains nothing to indicate that it is to operate as a *Calderbank* offer is to say that the party receiving it is entitled to treat it as it represents itself to be: an offer made for the purposes of the rules, and as having no other consequence.[30]

[50] A useful starting point is a decision of the New South Wales Court of Appeal, *Old v McInnes and Hodgkinson*,[31] given prior to the decision in *Whitney v Dream Developments Pty Ltd*. In that case, a party had made offers to settle (expressed to be *Calderbank* offers) in broad terms followed by offers purportedly under the *Uniform Civil Procedure Rules* 2005 (NSW) ("the *Rules* (NSW)"). However, the purported *Rules* offers did not conform to the *Rules* (NSW), because their terms included payment of costs. Those offers do not appear to have been accompanied by any relevant correspondence. The majority expressed the view that whether an offer which did not comply with the *Rules* (NSW) could operate as a *Calderbank* offer depended on the offeror's intention, as revealed by the terms of the offer. Since the offers expressed to be made pursuant to the relevant rule did not contain

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28 *Calderbank v Calderbank* [1975] 3 All ER 333 per Cairns LJ at 342.

29 In the *Uniform Civil Procedure Rules* 2005 (NSW); *Supreme Court (General Civil Procedure) Rules* 2005 (Vic).

30 At 324.

31 [2011] NSWCA 410.

any statement that they were to operate as a *Calderbank* offer, they could not be "relied upon on that basis".[32] The earlier offers were not *Calderbank* offers because they contained no sufficiently certain offer and were properly not taken into account. The primary judge had made no error in not taking any of the offers into account in the exercise of his costs discretion.

[51] Beazley JA (as she was when *Old v McInnes* was decided) dissented: the court was entitled to look at the conduct of the parties throughout the proceedings, including attempts to settle and the terms of a failed offer under the *Rules*, even if they were not *Calderbank* offers. That was appropriate in light of the court's discretionary powers as to costs and the public policy considerations and litigants' interests in settling litigation. The correspondence sent with the earlier offers in that case evinced an intent to settle, and the failed *Rules* offer would have achieved as good as a result for the plaintiff as the judgment. The court should "act pragmatically and justly"[33] by making an order for indemnity costs in favour of the offeror. That approach contrasts with the view of the majority, that attempts at settlement by way of purported *Rules* (NSW) offers which were neither effective under the rules nor as *Calderbank* offers, but which might indicate a general disposition to resolution, were of no avail to the party making them.

[52] *Whitney v Dream Developments Pty Ltd*, to which the trial judge referred, was a decision of a five-member Court of Appeal in New South Wales. The leading judgment was given by Bathurst CJ, with whom the other members of court agreed. Two of them, Barrett JA and Emmett JA, delivered their own reasons; the two judges, Beazley P and McColl JA, who had not given separate reasons also agreed with Barrett JA's reasons, giving them majority status also. In that case, the plaintiff had made two offers of settlement purportedly under the *Rules* (NSW). The first was for an amount less than was received by judgment; the second was for the amount of the judgment, although less than the net amount the plaintiff would receive, the defendant having obtained judgment for a small sum on a cross-claim. In setting out the facts, Bathurst CJ, interestingly, focused on the net amount received, which was more than the amount of the first, but not the second, offer. However, that was not the issue in the case; the question was whether the first offer, which included a proposal that the defendant pay costs, was within the *Rules* (NSW) and, if not, whether it was effective as a *Calderbank* offer.

[53] The first question was answered in the negative. As to the second question, the offer in that case was expressed to be made in accordance with the relevant rule and set out the terms of the offer and the time for acceptance, without more. The covering letter said nothing about it except that it was the final offer of compromise. The Court concluded that an offer of compromise expressly made under the relevant rule would not take effect as a *Calderbank* offer unless there was something in it or the surrounding circumstances to indicate that it was to be relied on in relation to the question of costs, regardless of its effectiveness as an offer under the *Rules* (NSW).

[54] Bathurst CJ noted that in *Old v McInnes*, the majority held that an offer in similar terms could not take effect as a *Calderbank* offer and could not be taken into account on the question of the appropriate costs order to be made. He noted

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32 At [106].
33 At [36].

Beazley JA's dissent and her conclusion, having regard to the court's discretionary power as to costs and the desirability of encouraging settlement, that the court was not precluded by the fact that a failed offer did not conform with a *Calderbank* offer from considering its exercise of a discretion to make a costs order outside the usual; as her Honour had proposed in that case. But all there were in the case before him were the offers of compromise, which bore nothing to indicate that they were intended to have effect other than as offers under the *Rules* (NSW) or that they would be relied on in the event of a more favourable verdict than the offer; such an indication being the essence of a *Calderbank* offer.

[55] The Chief Justice continued:

> "That is not to say that the conduct of the parties during litigation, including the making of open offers, may not in certain circumstances be relevant to the appropriate manner in which a court's discretion as to costs should be exercised. However, an offer made expressly pursuant to [the relevant rule] will not of itself take effect as a *Calderbank* offer unless there is something in it or in the surrounding circumstances to indicate that it is proposed to be relied upon on the question of costs, irrespective of its effectiveness as an offer under [the relevant rule]".[34]

Wiggins relied in particular on the first sentence in that passage.

[56] Barrett JA similarly made an observation to the effect that rejection of a non-compliant offer might be

> "…relevant to the exercise of the court's jurisdiction with respect to costs";

whether it was would

> "…depend in part on whether [the offer] has the characteristics associated with *Calderbank*…"[35]

A *Calderbank* offer could come into effect only if its maker were shown to intend that non-acceptance would be relied on as a basis "for seeking a special costs order".[36] Because the offer did not manifest any intention to rely on it on costs if it were ineffective under the *Rules* (NSW), it could not operate as a *Calderbank* offer. (Wiggins submitted that his Honour in speaking of a "special costs order" was contemplating an indemnity costs order, that being the type of order sought in that case. However, his Honour's reference to the relevance of non-compliant offers with *Calderbank* characteristics to the court's exercise of the costs jurisdiction, without any limitation as to types of order, suggests he was using the term more generally.)

[57] Barrett JA went on to say,

> "Faced with an offer that purported to have significance under [the offer rule] (and not otherwise) but which, on its face, exhibited a feature

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34 At [43].
35 At [55].
36 At [57].

> inconsistent with that rule, the correct course for the defendant to adopt was to regard the purported offer as having no force at all".[37]

It was not incumbent on the defendant to speculate about whether the plaintiff had some alternative intention. Emmett JA also observed that the party receiving such an offer was entitled to assume that it had no significance beyond any effect it had under the *Rules* (NSW).

[58] Those views were consistent with those of an earlier Court of Appeal in *Dean v Stockland Property Management Pty Ltd & Anor (No 2)*,[38] in which the court observed of an offer of compromise explicitly made under the *Rules* (NSW), without an indication that it would be relied on otherwise to claim costs,

> "The intention must be made clear. It would be unfair for a party to be subject to the consequences of a *Calderbank* offer if it was not made clear that the offer should be treated as such. A party receiving an offer of compromise apparently made under the rules should be entitled to decide whether or not to accept it according to the offer of compromise regime in the rules, including deciding whether or not it is an effective offer of compromise".[39]

That statement was also endorsed by the majority in *Old v McInnes*.[40]

[59] *Whitney* was delivered in June 2013. In October that year, the Court of Appeal, this time comprising only three members (Basten and Macfarlan JJA, Tobias AJA), delivered, in *Ziliotto v Hakim*,[41] another judgment which concerned costs in relation to an offer to compromise. In *Ziliotto*, an offer which was non-compliant with the *Rules* (NSW) because it referred to costs was accompanied by a covering letter which bore the notation "without prejudice except as to costs"; which, it was contended, was sufficient to manifest an intention that it be relied on as a *Calderbank* offer. That contention was rejected. Tobias AJA, with whom Macfarlan JA agreed, observed that this was a standard notation for *Calderbank* offers, but it was not sufficient to indicate that an offer was to be relied on as a *Calderbank* offer. *Whitney* made it clear that something more was required, manifesting an intention to rely on the offer with respect to costs regardless of its effectiveness under the *Rules* (NSW).

[60] However, Tobias AJA referred to the passage from Bathurst CJ's judgment in *Whitney* which I have set out, as to whether the parties' conduct might be relevant to the costs discretion, and also to Barrett JA's observation that a non-compliant offer could be relevant in that regard, depending "in part" on whether it had the *Calderbank* characteristics. In the view of Tobias AJA, those observations, taken together with what Beazley JA had said in *Old v McInnes*, demonstrated that the conclusion that the offer could not operate as a *Calderbank* offer did not prevent the court from taking into account the parties' conduct, including attempts at settlement, in exercising the general costs discretion to decide whether to depart from the usual order as to costs. The refusal of the offer was unreasonable: the proper outcome was that there be no orders as to costs after the date of the offer.

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37 At [59].
38 [2010] NSWCA 141.
39 At [34].
40 At [107].
41 [2013] NSWCA 359.

[61] Basten JA reasoned along similar lines, but reached a different conclusion as to the result. Like Tobias AJA, his Honour considered that the fact that the offer was stated to be "without prejudice" and was intended to have costs consequences was not sufficient, in light of the decision in *Whitney*, to allow it to be treated as a *Calderbank* offer; an express intimation that it was to have some operation beyond the rules was necessary. He described as "obscure" Barrett JA's observation in *Whitney* that the "correct course" for a defendant was to regard an offer which did not comply with the *Rules* (NSW) as having no force. The parties had a duty under the New South Wales legislation to further legislative objects, including seriously considering any offer of compromise, whether or not it was rules-compliant. It was doubtful that the court in *Whitney* could have meant

> "…to sanction deliberate disregard of informal offers".[42]

It was unreasonable not to accept the offer, which was genuine. Those were circumstances which allowed a departure from the ordinary rule; the appropriate order was that the plaintiff who had refused the offer should pay the defendant's costs (but not indemnity costs) from the date of the offer.

[62] In this context, I should mention, for completeness, the decision of two members of the New South Wales Court of Appeal given in *Marshall v Megna*; *Megna v Tory*; *Tory v Megna (No 2)*[43] in relation to costs, about seven weeks after the decision in *Ziliotto*. (The third member of the court which had decided the substantive appeal, Allsop P, as he then was, had, in the interim, departed for the Federal Court.) The remaining judges, Beazley P and Hoeben JA, were considering two offers which the plaintiff had made in almost identical terms, purportedly under the *Rules* (NSW), in each case accompanied by a letter headed "Without prejudice as to costs". They were non-compliant with the *Rules* (NSW) because they offered costs, but both were for amounts lower than the award achieved. The members of the court reasoned that the heading "Without prejudice save as to costs" was required in *Calderbank* offers, but was not necessary in relation to *Rules* (NSW) offers. Reference was made to Beazley JA's decision in *Old v McInnes* that the offer ought in that case to be taken into account because it had been apparent in the course of the litigation that the respondent had indicated a wish to settle, and it was observed that that view had not been rejected by the court in *Whitney*. The offers in *Marshall v Megna* had, Beazley P and Hoeben JA considered, the appearance of *Calderbank* offers and clearly indicated an intention to settle, warranting an order for indemnity costs.

[63] In *Marriner v Australian Super Developments Pty Ltd*, the Victorian Court of Appeal applied the New South Wales Court of Appeal's decision in *Whitney*. In *Marriner*, one of the parties served an offer of compromise purporting to be made under the relevant rule of the *Supreme Court (General Civil Procedure) Rules* 2005 (Vic) ("the *Rules* (Vic)") accompanied by proposed minutes of consent orders and a covering letter. The letter was marked "Without Prejudice Save as to Costs", and said that the consent orders and offer of compromise were to operate together. It went on to explain that if the offer were accepted and the consent order signed, the offeror would not seek costs, but if the opposing party did not accept the offer and did not do better at trial it would seek its costs on an indemnity basis thereafter and reserve the right to rely on the offer, consent orders and letter as evidence on that

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42 At [16].

43 [2013] NSWCA 456.

issue. The offer was deficient for the purposes of the *Rules* (Vic), as they stood at the relevant time, because it encompassed costs.

[64] However, the court noted, an ineffective offer of that kind could take effect as a *Calderbank* offer; the question was that posed in *Whitney*, whether there was something in it or in the surrounding circumstances to indicate expressly or by implication that it was to be relied upon on the costs question, regardless of its effectiveness as an offer under the *Rules* (Vic). Viewed in conjunction with the covering letter and minutes of consent orders, the offer contained the necessary features for a *Calderbank* offer: it set out an offer to settle the proceeding which was clear and capable of being accepted; it was expressed to be made without prejudice save as to costs, with the reservation that it could be used in evidence on that question; it was open for acceptance for a reasonable time; and it put the other party on notice that if it were not accepted in that time, indemnity costs would be sought.

[65] Wiggins submitted that *Marriner* considered the issue whether a failed rules offer could be relied on as a *Calderbank* offer only from the perspective of whether it could be relied on to support an indemnity costs order. It is true that the case was only concerned with whether indemnity costs should be ordered, in light of the content of the offer and the accompanying documents, but the court expressed itself more broadly, saying that a failed offer under the *Rules* (Vic) could be effective as a *Calderbank* offer if there were something to indicate that it was

> "…proposed to be relied upon on the question of costs irrespective of its effectiveness as an offer under the relevant rules";[44]

referring to *Whitney* for that proposition. The reference to an intimation of reliance in relation to the "question of costs" again suggests that the court was not confining itself to what was needed to justify an indemnity costs order, but was considering what was required for the purposes of the costs discretion generally.

[66] As already mentioned, Wiggins relied on a further decision of the New South Wales Court of Appeal, *Singapore Airlines*, on the issue of whether a costs order not accordance with the *Rules* (NSW) could be relied on generally in the court's exercise of its costs discretion. There were four offers in that case, of which only the last was made under the *Rules* (NSW), and it had not bettered the result so it was irrelevant. None of the earlier offers indicated that if proceedings did ensue it would be relied on in relation to costs. They were not *Calderbank* offers, because none conveyed the message, as Barrett JA had put it in *Whitney*, that it was to be used as a basis for claiming a special costs order. However, the court went on to observe, it could make a special costs order in the exercise of its discretion. In *Old v McInnes*, Beazley JA had considered what was described as a "non-compliant rules offer" in the context of an earlier offer made a month before, which had been sent with correspondence saying that it was made in accordance with *Calderbank*.[45] Her approach had not been disavowed in *Whitney*. Instead, whether the court would exercise its discretion depended on the factual circumstances, including the terms in which offers were made and the message conveyed by them.

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44 At 231.

45 In fact, there may, in this part of the reasoning in *Singapore Airlines*, have been some confusion of the facts in *Old v McInnes*, because it appears from the history of offers set out in that case that the *Calderbank* correspondence related to earlier informal offers, not the non-compliant *Rules* (NSW) offer: *Old v McInnes* [2011] NSWCA 410 at [15]-[16], [101].

[67] Wiggins again contended that the reference to *Singapore Airlines* to a "special costs order" contemplated an order for indemnity costs. However, in dealing with one of the offers made in that case by telephone, the court observed that it lacked the formalities which would be expected to convey

> "…the intention…to provide a basis for seeking an advantageous costs order";[46]

but, in saying so, it emphasised, it did not mean to indicate that

> "…a *Calderbank* offer or an offer which is intended to provide a basis for a special costs order…"

had to be in a particular form. It seems from that passage that the court regarded a "special costs order" as synonymous with an "advantageous costs order".

[68] Having reviewed the cases, I do not accept Wiggins' argument that they prescribe, in effect, a particular set of requirements where indemnity costs are to be sought by virtue of a failed rules offer. They seem to me to stand for a broader proposition, that an intention to seek something other than the usual costs order – and in that sense a "special costs order" – must be intimated.

Was Wiggins' offer a Calderbank offer?

[69] The absence of any "without prejudice" notation in the letter which accompanied the offer in *Whitney* is not a helpful point of distinction for Wiggins. The point of the enquiry is to establish whether there is some reasonable basis for regarding the offer as intended to have an effect independent of its operation under the *Rules*. The words "without prejudice except as to costs" (or similar formulations using different prepositions) are typical of a *Calderbank* offer. However, they may also be properly appended to an offer under the *Rules*, although the deeming effect of r 356 makes them descriptive, rather than necessary. I agree with the conclusion of the majority in *Ziliotto v Hakim*: a mere use of the "without prejudice" formula is not sufficient to indicate that an offer is to be relied upon as a *Calderbank* offer. In the present case, the words were used in the covering letter in conjunction with the advice that the offer was made pursuant to ch 9 pt 5, with no suggestion that it was made pursuant to anything else.

[70] The trial judge was correct in rejecting the proposition that the offer could take effect as a *Calderbank* offer. It is unnecessary, in consequence, to consider the argument that his Honour gave insufficient reasons for his conclusion that if it were to be treated as a *Calderbank* offer, it would not warrant a departure from the general rule that costs should follow the event.

Could Wiggins' offer be taken into account in the exercise of the costs discretion?

[71] The conclusion I draw from my review of the cases is that a majority in *Whitney* agreed with Barrett JA's view that a party receiving an offer purporting to be made under the *Rules* (NSW), and not otherwise, was entitled to regard it "as having no force at all". That is to say, it was without effect for any purpose, including reliance on it as supporting an application for a favourable exercise of discretion, whether by way of an order for indemnity costs or any other costs order departing from the

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46 [2017] NSWCA 340 at [40].

usual rule. The passage relied on from Bathurst CJ's judgment falls far short of endorsement of a proposition to the contrary. His Honour said no more than that the parties' general conduct during litigation, including as to offers, might be relevant in the exercise of the costs discretion. He did not propose that failed offers made purely for the purposes of the *Rules* (NSW), such as the two offers in *Whitney*, were available for consideration in that way.

[72] The result in *Ziliotto* is difficult to reconcile with that in *Whitney*. Tobias AJA's observation that the authorities showed that a finding that an offer was not effective as a *Calderbank* offer did not

> "…preclude the Court from taking into account the conduct of the parties, including attempts at settlement"[47]

in the exercise of its costs discretion is unexceptionable. What is puzzling, in the light of what was said in *Whitney*, is the conclusion that the court should take into account the only offer made in that case, one made solely for the purposes of the *Rules* (NSW) but not compliant with them. If, as the majority in *Whitney* appeared to accept, the recipient of such an offer is entitled to disregard it, it would be an odd result if it were later to be taken into account to his disadvantage in the formulation of a costs order.

[73] *Singapore Airlines* adds little, because in that case the court was considering, in the end, informal offers, not offers expressed to be made under the *Rules* (NSW), in reaching the conclusion that offers which did not amount to *Calderbank* offers could nonetheless be taken into account in the exercise of the costs discretion.

[74] Independently of the respect to be given to the decision of the five-member Court of Appeal in *Whitney*, it seems to me consistent with the policy of the *Rules* that the approach articulated by the New South Wales Court of Appeal in *Dean v Stockland* and by Barrett JA in *Whitney* should be preferred. The *Rules* prescribe a specific regime for offers to settle; it is not inconsistent with their spirit to require that parties wishing to take advantage of that regime comply with the relevant rules. There is a value to providing parties with certainty. A party who receives an offer expressed to be made under the *Rules*, and conveying no intent that it be used for any other purpose, should be entitled to rely on what it represents. If it fails to meet the requirements of the rules under which it purports to be made, it cannot be unreasonable for that party then not to act on it. It does not amount to any limitation on the costs discretion to say a costs order whose only identified purpose is as a *Rules* offer, but which does not comply with the *Rules*, will be ineffective.

[75] Since the offer was not effective for any purpose, there was no utility in the trial judge's dealing with the slip rule application, and it is unnecessary to consider the appeal grounds concerning the refusal of that application.

The trial judge's consideration of Civil Mining's approach to offers and his reasons

[76] Wiggins submitted to the trial judge that Civil Mining had failed to comply with its obligations under r 5, a matter which the court should take into account in the exercise of its discretion under r 681, with the appropriate result being that no order for costs was made. A number of allegations were made about Civil Mining's conduct

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47 At [134].

in relation to the claims it advanced and abandoned, a formal offer it had made without disclosure of salient information, amendments to its case and provision of inadequate written statements. Another of those complaints, which is the subject of appeal grounds here, was that Civil Mining's approach to an exchange of offers at the outset of proceedings minimised the changes of a commercial settlement's being achieved. Wiggins' written submissions to the trial judge detailed an offer made in July 2013, the day after the proceedings were commenced, to settle on the basis that the parties bear their own costs, to which Civil Mining made a counter-offer to settle on payment to it of $12,000,000. This was said to represent Civil Mining's misconceived view that it was entitled to an amount far in excess of its actual entitlement, when, after almost five years of litigation, it actually recovered about 4.3 per cent of the figure it claimed.

[77] The trial judge observed that the court should depart from the general rule, that costs follow the event, only in exceptional circumstances. His Honour reached the view, after a review of the results of the claim and counterclaim, that both parties had generally been successful in their claims. He considered the complaints Wiggins made of Civil Mining's conduct of the litigation as a whole, concluding that it did not warrant a departure from the general rule. Wiggins had, he observed, focused on Civil Mining's conduct of the litigation, but omitted to consider its own conduct. In particular, his Honour expressed the view that an examination of the offers exchanged between the parties showed that there was a

> "…realistic effort on the part of both parties to settle the litigation".[48]

He noted that Civil Mining had made a *Calderbank* offer in early 2016, in an amount which was not "unrealistically high". Even if one were to treat the failed *Rules* offer as a *Calderbank* offer, in the context of the lengthy and complex litigation, the costs order best achieving justice was to treat the claim and counterclaim as separate events and apply the general rule.

[78] In its written submissions on appeal, Wiggins contended that the trial judge had "failed to afford adequate weight" to the issue of the early exchange of offers. His Honour had made no substantive reference to those offers in his reasons, and had not considered their terms or content, or, as it was put in oral submissions, "engaged" with those offers. He had referred to the early 2016 exchange of offers as demonstrating a realistic effort to settle, but had not explained how that was true of Civil Mining's approach to settlement in 2013. The absence of an adequate explanation for his disregard of the parties' approach to the early exchange of offers was an absence of reasons constituting an error of law. The consequence should be that this court would either re-exercise the discretion as to costs or remit the issue to the trial judge for reconsideration according to law.

The exercise of the general costs discretion and the adequacy of reasons

[79] In my view, it was unnecessary for the trial judge to reprise the terms of the early 2013 exchanges of offers. He had footnoted in his judgment that part of Wiggins' submissions which set out the terms of those offers and Wiggins' contentions about them, so it can safely be assumed that he knew what those terms were and considered the submissions, but rejected them. His Honour's reference to the 2016 offers as revealing a realistic effort to settle did not carry an implication that the

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48 *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Expert Terminal Pty Ltd* [2020] QSC 1 at [74].

2013 position taken by Civil Mining was equally realistic. Wiggins' submission had been that Civil Mining "by maintaining exorbitant quantum claims" minimised the prospect of a commercial settlement. His Honour's point was that, though it may have started with an unrealistic proposition, that was not a position maintained by Civil Mining throughout the litigation.

[80] The complaint that the trial judge gave insufficient weight to Civil Mining's approach to the early offers does not fall within any of the terms of error identified in *House v The King*[49] as warranting appellate review. It is not said that his Honour mistook the facts, failed to take into account any relevant consideration, or disregarded any relevant one, and it is not contended that the result was unreasonable or plainly unjust. In fact, his Honour's approach, of considering what was only one of Wiggins' complaints in the context of the parties' conduct as a whole, was entirely appropriate.

[81] The extent to which it is necessary for a trial judge to set out reasons for the decision reached depends on

> "…the nature of the issues for determination and 'the function to be served by the giving of reasons'."[50]

It has long been recognised that decisions as to costs do not require the same degree of elaboration as other decisions, for example, on substantive issues in the trial. His Honour made clear in his reasons that he had reviewed the conduct of both parties in a variety of respects, including settlement attempts, as well as comparing their relative success, and had concluded that justice was best achieved by the application of the general rule. He made no error in the exercise of his discretion under r 681, and his reasons for not departing from the usual rule were adequate.

Orders

[82] I would extend to 10 August 2020 the time for Civil Mining to file and serve its Notice of Contention and would dismiss the appeal with costs. There remain some reserved costs; the parties should have leave to file any further submissions in relation to those costs within one week of delivery of this judgment.

[83] **PHILIPPIDES JA:** I have read the reasons of Holmes CJ and agree with those reasons and the orders her Honour proposes. I also agree with the caveats expressed by Brown J.

[84] **BROWN J:** I agree with the reasons for judgment of Holmes CJ, save for two minor caveats, and the orders proposed by her Honour. It is unnecessary to decide and I do not decide whether "claims in the proceeding" in r 353 of the UCPR should be given a broader construction as discussed by her Honour in [30] of her reasons. Nor do I decide whether an offer can be properly served by a defendant under r 353 to settle an entire proceeding without quantifying the claim and counterclaim separately, as discussed by her Honour in [42] of her Honour's reasons.

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49 (1936) 55 CLR 499 at 504-505.

50 *Drew v Makita (Australia) Pty Ltd* [2009] 2 Qd R 219 at 237.