SUPREME COURT OF QUEENSLAND

CITATION:	*Elias v Forsyth & Anor* [2004] QSC 369
PARTIES:	**STEPHEN ANTHONY ELIAS** (applicant) **v** **DONALD CAMERON FORSYTH** (first respondent) and **ELLA CHRISTINE FORSYTH** (second respondent)
FILE NO:	SC No 4889 of 2004
DIVISION:	Trial
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	22 October 2004
DELIVERED AT:	Brisbane
HEARING DATE:	28 September 2004
JUDGE:	Chesterman J
ORDER:	**1. That the order for costs made on 28 September 2004 be vacated.** **2. That the defendants pay the plaintiff's costs of and incidental to the action to be assessed on the indemnity basis.**
CATCHWORDS:	PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON INDEMNITY BASIS – where the plaintiff had made an offer to settle the dispute – where the offer was rejected by the defendants – where judgment was eventually awarded in favour of the plaintiff with an order that the defendants pay the plaintiff's costs on the standard basis – where judgment was no less favourable than the offer to settle – whether costs should have been awarded on an indemnity basis. *Uniform Civil Procedure Rules* 1999 (Qld), r 360
COUNSEL:	Mr S S W Couper QC Mr P J Dunning
SOLICITORS:	Hopgood Ganim for the applicant Varro Clarke & Co for the respondents

COSTS JUDGMENT

[1] On 28 September last I made a declaration in favour of the plaintiff's claim that he had exercised a contractual right to extend the time given to him by an agreement to exercise an option to purchase land from the defendants. I then made an order that the defendants should pay the plaintiff's costs of the action to be assessed on the standard basis. The plaintiff's solicitors asked for costs on the indemnity basis and tendered a letter dated 2 July 2004 which they had written to the defendants' solicitors pursuant to *UCPR* 360 offering to settle the dispute. The defendants' solicitor was unprepared for the application and I directed the parties to exchange written submissions which I have now received.

[2] The letter was written only a month after the action had commenced, though it must be said that it proceeded with commendable despatch and concluded with the delivery of judgment on 28 September 2004. The letter read:

> '… We received instructions … to put an offer to your clients pursuant to Part 5 of the *Uniform Civil Procedure Rules*.
>
> Our client's offer is that:
>
> 1. It is agreed that our client has validly extended the expiry date of the option exercise period to 31 July 2004;
>
> 2. The option agreement is rectified so that the correct title descriptions of the land are Lot 1 in RP 22225, Lot 2 in RP 22226, Lot 21 on CPS 151812, Lot 90 on CPM 311, Lot 94 on CPM 311, Lot 4 in RP 139920 and Lot 25 on CPS 15182;
>
> 3. Our client returns the cheque for $20,000 he is holding;
>
> 4. Each party bears their own costs of and incidental to the proceedings to date.
>
> This offer to settle is open for a period of 14 days. Acceptance of the offer may occur by serving a written notice of acceptance on us.'

[3] The judgment effectively gave the plaintiff what he sought by paragraph 1 of the offer. As well an order for costs was made in his favour. Nothing was said in relation to the subject matter of offers 2 and 3. They were not litigated. The parties expressly agreed that if the declaration were made in favour of the plaintiff then any contract which followed the exercise of the option would have to describe the land accurately so that there was no need to rectify the description of the land in the option agreement. There was no doubt or dispute about the proper description, or that the option agreement misdescribed the land. Nothing at all was said about the repayment of the option fee of $20,000 which the plaintiff had paid but the defendants had returned. The judgment made no reference to it at all.

[4] *UCPR* 360 provides that:

> '(1) If –

> (a) the plaintiff makes an offer to settle that is not accepted by the defendant and the plaintiff obtains a judgment no less favourable than the offer to settle; and
>
> (b) the court is satisfied that the plaintiff was at all material times willing and able to carry out what was proposed in the offer;
>
> the court must order the defendant to pay the plaintiff's costs calculated on the indemnity basis unless the defendant shows another order for costs is appropriate in the circumstances.'

[5] An order that a losing party pay costs on the indemnity basis is still an exception to the general rule that costs are assessed on the standard basis. *UCPR* 360 is therefore to be construed strictly. Unless judgment in favour of a plaintiff is 'no less favourable' than the offer to settle the pre-condition to an order for indemnity costs is not made out.

[6] The offer contained four terms. The judgment contained only two but they reflected the only issue that was truly in dispute and which was litigated. The second order, costs, followed the outcome of the first. The question is, therefore, whether the judgment can be described as no less favourable than the offer when it did not deal with two of the subject matters of the offer.

[7] Reluctantly I have concluded that the judgment is no less favourable than the offer. The question of rectification was not disputed because the defendants accepted, very properly and very candidly, that the land was misdescribed in the option agreement and that the plaintiff would be entitled to a contract, in the event that the option was exercised, which properly described the land. The defendants did not obtain an order that the plaintiff return to them the $20,000 option fee which he offered to do. To that extent they were worse off by not accepting the offer.

[8] The rule is mandatory in its terms. The court, if the pre-condition is satisfied, must order the defendant to pay costs on the indemnity basis unless the defendant shows to the court's satisfaction it should make some other order.

[9] The only basis urged by the defendants is that the offer was made very soon after proceedings were commenced, before any substantial costs had been incurred, and when the facts relevant to the dispute were in doubt. It was submitted that 'the letter of offer was not one proposing that each side forego something of significant value so that it might be said to offer a real compromise …'. The submission must be seen in the context of an action that turned upon one question of fact dependent upon an assessment of credibility and which took less than four months from commencement to the delivery of judgment. Moreover the subject matter of the action was not amenable to apportionment. The plaintiff either made out his case for a declaration or he failed. There was no real scope for compromise save on the question of costs. I do not understand that *UCPR* 360, much as I dislike its peremptory proscription of the discretion, not to apply to such cases.

[10] The rule applies to the facts of the case. The defendant has not shown any real ground for not making the order the rule mandates. I am influenced to make this

decision by the fact that the plaintiff and the defendants all knew the truth about the arrangements they made to alter the manner in which the plaintiff could extend the option period. The defendants chose to resist the plaintiff's claim by false testimony. The offer was in terms which the defendants knew reflected the agreement they had made. Accordingly I will vacate the order for costs made when judgment was delivered and instead order the defendants to pay the plaintiff's costs of and incidental to the action to be assessed on the indemnity basis.