SUPREME COURT OF QUEENSLAND

CITATION:	*Campbell v Turner & Ors (No. 2)* [2007] QSC 362
PARTIES:	**WAYNE ALEXANDER CAMPBELL and MARY-ANNE MONICA CAMPBELL** (plaintiffs) **v** **LIONEL JOSEPH JAMES TURNER and ELSIE EDITH TURNER** (first defendants) **BOHLE GRAZING PTY LTD (ACN 010 552 762)** (second defendant) **HERBERT SAMUEL TURNER** (third defendant) **LYNDEL ISABEL OWENS** (fourth defendant)
FILE NO:	No 97 of 2004 (Cairns)
DIVISION:	Trial Division
PROCEEDING:	Application for costs (following trial)
DELIVERED ON:	5 December 2007
DELIVERED AT:	Supreme Court, Brisbane
HEARING DATES:	Heard on the papers
JUDGE:	Wilson J
ORDER:	**1. That the first defendants pay the plaintiffs $30,000 plus interest at 9 per cent per annum from 21 March 1990 to judgment** **2. That the claim against the second, third and fourth defendants be dismissed** **3. That the first defendants pay the plaintiffs' costs of and incidental to the proceeding up to and including 12 February 2007 to be assessed on the standard basis on the applicable Magistrates Courts scale** **4. That the plaintiffs pay the first defendants' costs of and incidental to the proceeding after 12 February 2007 to be assessed on the standard basis on the Supreme Court scale** **5. That the plaintiffs pay the second, third and fourth defendants' costs of and incidental to the proceeding to be assessed on the standard basis**

on the Supreme Court scale (each of those defendants being entitled to one-quarter of the whole costs of defending the proceeding on that scale)

6. That upon the first defendants' paying the judgment debt (being $30,000 plus interest to today) into court, enforcement of the judgment debt be stayed pending assessment and payment of the costs ordered to be paid by the plaintiffs to the first, second, third and fourth defendants, including costs ordered to be paid by Cullinane J on 14 December 2005, or earlier agreement of the parties

CATCHWORDS: PROCEDURE – COSTS – SCALES OF COSTS – SCALE APPLICABLE – the plaintiffs were awarded $30,000 pursuant to the *Land Sales Act*, plus interest in the amount of approximately $48,000 – whether the proceeding could have been heard in a Magistrates Court – whether to award costs on the Magistrates Courts scale

PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – CONDUCT OF PARTIES – DEMAND, OFFER AND CONSENT – the defendants made an offer to settle pursuant to the *Uniform Civil Procedure Rules* – the defendants delivered an amended defence contemporaneously with the offer – the plaintiffs obtained judgment for an amount less than the offer – whether to award the defendants costs from the date of the offer

PROCEDURE – COSTS – GENERAL RULE – COSTS FOLLOW THE EVENT – CO-DEFENDANTS – each defendant had the same legal representation – the plaintiffs obtained judgment against the first defendants – the plaintiffs' claim was dismissed as against the other defendants – whether to award the successful defendants their costs

PROCEDURE – COSTS – SET-OFF – the costs estimated to be payable by the plaintiffs to the defendants exceeds the judgment sum – whether to order that the judgment debt be set off against the costs

PROCEDURE – SUPREME COURT PROCEDURE – QUEENSLAND – PROCEDURE UNDER RULES OF COURT – JUDGMENTS AND ORDERS – OTHER MATTERS – the defendants seek a stay of the judgment pending the assessment of or agreement as to the amount of their costs recoverable against the plaintiffs – that amount is likely to exceed the judgment sum – whether to grant the stay

Magistrates Courts Act 1921 (Qld) s 4
Uniform Civil Procedure Rules 1999 (Qld) r 361, r 362, r 668, r 800

Anderson v AON Risk Services Australia Ltd [2004] QSC 180, cited
Astway P/L v Council of the City of the Gold Coast [2007] QSC 224, cited
Castro v Hillery [2003] 1 Qd R 651; [2002] QCA 359, considered
Colgate Palmolive Co Pty Ltd v Cussons Pty Ltd (1993) 46 FCR 225, cited
Commissioner of State Taxation v Mark Chew Holdings Pty Ltd (1987) SR (WA) 129, cited
Contor v Commercial Union Assurance Company of Australia Limited [1996] 1 Qd R 604, cited
Cripps v State of Queensland (1994) 16 Qld Lawyer Reps 25, cited
Di Carlo v Dubois [2002] QCA 225, cited
Elphick v MMI General Insurance Ltd [2002] QCA 347, cited
Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd [2003] QSC 299, cited
Johns v Johns [1988] 1 Qd R 138, considered
Keen v Towler (1924) 41 TLR 86, cited
Leydon v Trigil Insurance Broker Pty Ltd Unreported, Queensland District Court, Wylie DCJ, 3 June 1986, cited
Pringle v Gloag (1879) 10 Ch D 676, cited
Rathie v ING Life Ltd [2004] QSC 146, cited
Turley v Saffin (1975) 10 SASR 463, followed

COUNSEL: M P Amerena and M A Jonsson for the plaintiffs
J C Bell QC and S Cooper for the defendants

SOLICITORS: MacDonnells for the plaintiffs
Ruddy Tomlins & Baxter for the defendants

[1] **Wilson J**: On 13 November 2007 I delivered reasons for judgment in this proceeding.[1] The parties asked for time to make written submissions on costs. I determined to postpone making the orders for judgment I had foreshadowed until I was in a position to make orders as to costs. Having received the parties' written submissions on costs, I am now in a position to do that.

Orders as foreshadowed

[2] The orders for substantive relief will be as foreshadowed, namely –

(a) that the first defendants pay the plaintiffs $30,000 plus interest at 9 per cent per annum from 21 March 1990 to judgment;

(b) that the claim against the second, third and fourth defendants be dismissed.

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1 *Campbell v Turner & Ors* [2007] QSC 331.

Offer to settle

[3] On 12 February 2007 the defendants made an offer to settle in the following terms –

> "1. The Defendants pay to the Plaintiffs the sum of ONE HUNDRED THOUSAND DOLLARS ($100,000.00) plus costs on the District Court scale to be assessed.
>
> 2. This offer may only be accepted by the Plaintiffs serving a written notice of acceptance on the Defendants['] Solicitors at any time within fourteen (14) days of service of this offer pursuant to rule 358 of the *Uniform Civil Procedure Rules 1999* (Qld) ("the Rules").
>
> 3. This offer is made pursuant to Chapter 9 Part 5 of the Rules."

[4] The plaintiffs did not accept the offer.

Costs orders proposed by the parties

[5] The plaintiffs submit that costs should be resolved as follows –

(a) that the plaintiffs should have their costs on the standard basis on the Supreme Court scale to the service of the offer, and that there should be no order as to costs thereafter;

(b) alternatively, that the plaintiffs should have their costs on the standard basis on the Supreme Court scale to the service of the offer, and the defendants should have their costs on the standard basis thereafter.

[6] The defendants submit that the following orders should be made –

(a) that the plaintiffs should have costs against the first defendants limited to the costs of initiating a proceeding in a Magistrates Court for the recovery of $30,000;

(b) alternatively to (a) that the plaintiffs should have their costs against the first defendants on the standard basis on the Magistrates Court scale up to the service of the offer;

(c) that the plaintiffs should pay the first defendants' costs thereafter on the indemnity basis on the Supreme Court scale;

(d) that the plaintiffs should pay the second, third and fourth defendants' costs of and incidental to the proceeding on the indemnity basis;

(e) that the judgment amount of $77,682.74 [sic][2] "be deducted from" the costs payable by the plaintiffs to the defendants;

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[2] $30,000 plus interest to 13 November 2007.

(f) alternatively to (e), that [enforcement of] the judgment be stayed pending the assessment of or agreement as to the costs payable by the plaintiffs to the defendants.

Judgment for amount recoverable in a Magistrates Court

[7] The plaintiffs succeeded in recovering $30,000 pursuant to s 8 of the *Land Sales Act 1984* together with interest at 9 per cent per annum from 21 March 1990 pursuant to s 47 of the *Supreme Court Act 1995*. By s 8 of the *Land Sales Act* the $30,000 was recovered "as for a debt due and owing".

[8] Interest from 21 March 1990 to today amounts to approximately $48,000.[3]

[9] The plaintiffs properly conceded that the substantive relief they have obtained has at all material times been within the jurisdiction of the Magistrates Courts. The Magistrates Courts have jurisdiction to decide "every personal action in which the amount claimed is not more than $50,000".[4] The amount of interest awarded should be disregarded when assessing whether a particular monetary limit on jurisdiction has been reached. In *Turley v Saffin*[5] it was held that, if interest were to be included when assessing jurisdiction to award damages, it would render the court's jurisdiction uncertain, and would "lower the ceiling on the Court's jurisdiction" whenever a plaintiff is entitled to interest; that could not have been Parliament's intent.[6] In *Johns v Johns*[7] Williams J adopted that reasoning, albeit in a different context.[8] In each case the language of the jurisdictional limit was important: "the sum sued for"[9] and "the sum claimed"[10] did not include the amount of interest awarded. Similar language is used in s 4 of the *Magistrates Courts Act 1921*. See also *Contor v Commercial Union Assurance Company of Australia Limited*[11] and *Leydon v Trigil Insurance Broker Pty Ltd.*[12] Inferior courts have considered the matter settled.[13]

[10] Rule 698 of the *Uniform Civil Procedure Rules* ("*UCPR*") provides –

"**698 Costs of proceeding in wrong court**

(1) Subrules (2) and (3) apply unless the court otherwise orders.

(2) If the relief obtained by a plaintiff in a proceeding in the Supreme Court or District Court is a judgment that, when the

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3 Affidavit of S M Lindsay, sworn 27 November 2007, filed 30 November 2007, [15].

4 *Magistrates Courts Act 1921* (Qld), s 4.

5 (1975) 10 SASR 463.

6 (1975) 10 SASR 463, 474 (Bray CJ).

7 [1988] 1 Qd R 138.

8 [1988] 1 Qd R 138, 141. In that case the Court was considering s 92 of the *District Courts Act 1967* (Qld), which provided for appeal as of right against a judgment of a District Court "in an action or matter in which the sum sued for exceeds $5,000.00".

9 Johns v Johns [1988] 1 Qd R 138, 140.

10 *Turley v Saffin* (1975) 10 SASR 463, 475 (Wells J)

11 [1996] 1 Qd R 604, 606

12 Unreported, Queensland District Court, Wylie DCJ, 3 June 1986.

13 *Cripps v State of Queensland* (1994) 16 Qld Lawyer Reps 25; *Commissioner of State Taxation v Mark Chew Holdings Pty Ltd* (1987) SR (WA) 129. See also 'District Court Practice and Procedure' (1996) 17 *Queensland Lawyer* 56.

proceeding began, could have been given in a Magistrates Court, the costs the plaintiff may recover must be assessed as if the proceeding had been started in the Magistrates Court.

(3) If the only relief obtained by a plaintiff in a proceeding in the Supreme Court is relief that, when the proceeding began, could have been given by the District Court, but not a Magistrates Court, the costs the plaintiff may recover must be assessed as if the proceeding had been started in the District Court."

[11] The plaintiffs failed in their equitable claims. But for those claims, the proceeding would not have been complex or procedurally complicated. The relief they obtained was at all material times within the jurisdiction of the Magistrates Courts. I am unpersuaded that any costs awarded in their favour should be assessed on other than the Magistrates Courts scale.

Effect of offer to settle

[12] Rules 361 and 362 of the *UCPR* provide –

"**361 Costs if offer to settle by defendant**

(1) This rule applies if—

(a) the defendant makes an offer to settle that is not accepted by the plaintiff and the plaintiff obtains a judgment that is not more favourable to the plaintiff than the offer to settle; 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 to settle; and

(b) order the plaintiff to pay the defendant's costs, calculated on the standard basis, after the day of service of the offer to settle.

(3) However, if the defendant's offer to settle 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; and

(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.

362 Interest after service of offer to settle

(1) This rule applies if the court gives judgment for the plaintiff for the recovery of a debt or damages and—

(a) the judgment includes interest or damages in the nature of interest; or

(b) under an Act the court awards the plaintiff interest or damages in the nature of interest.

(2) For giving judgment for costs under rule 360 or 361, the court must disregard the interest or damages in the nature of interest relating to the period after the day of service of the offer to settle."

[13] Interest from 21 March 1990 to 12 February 2007 amounts to $45,611.50.[14]

[14] The plaintiffs submit –

"8. In the exercise of the discretion conferred under r.361(2) of the *Uniform Civil Procedure Rules*, the usual rule should nevertheless be applied by the Court here because:

(a) The Defendants' formal offer to settle was served contemporaneously with substantial amendments to the Defendants' pleading;

(b) The Defendants only offered to compensate the Plaintiffs for costs calculated by reference to the District Court scale."[15]

[15] The defendants did not dispute the plaintiffs' entitlement to be repaid the $30,000. While the fourth defendant offered to repay it as early as November 2002, it was never tendered. Interest was not offered until the formal offer to settle in February 2007.

[16] But for the offer to settle, I would have ordered the first defendants to pay the plaintiffs' costs of and incidental to the proceeding to be assessed on the Magistrates Court scale, and I would have ordered the plaintiffs to pay the second, third and fourth defendants' costs of and incidental to the proceeding to be assessed

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14 Plaintiffs' written submissions, [7(b)].

15 Plaintiffs' written submissions.

on the Supreme Court scale (each of those defendants being entitled to one-quarter of the whole costs of defending the proceeding on the Supreme Court scale).[16]

[17] The offer was to pay costs on the District Court scale, but in my view the costs recoverable by the plaintiffs should be on the Magistrates Courts scale. Those costs are recoverable against the first defendants only.

[18] The amount the plaintiffs have recovered against the first defendants, including costs on the Magistrates Court scale, is less favourable to them than the offer made by the defendants. The same solicitors and counsel acted for all the defendants, and the offer to settle was made on behalf of all the defendants. The plaintiffs succeeded only against the first defendants; their claim against the other defendants was dismissed. In other words, while it is applicable to the claim against the first defendants, r 361 is not applicable to the claim against the second, third and fourth defendants because the plaintiffs did not obtain any judgment against them.[17]

[19] The defendants amended their defence contemporaneously with the service of the offer to settle. They maintained their earlier plea that the deed executed on 21 March 1990 was void pursuant to the *Land Sales Act*. The quite substantial amendments related to the plaintiffs' equitable claims, and apparently were prompted by the insertion of paragraph 3A into the statement of claim, by which the plaintiffs alleged that they had effected improvements to the land upon the faith of expectations arising from a combination of oral representations and the deed. The plaintiffs rely on what Williams JA said in *Castro v Hillery*[18] –

> "The Offer to Settle procedure is designed to focus attention on early resolution of the dispute. The sanction is with respect to costs. In those circumstances it is not unreasonable to say that the Offer to Settle must be evaluated in the light of circumstances disclosed in the proceedings. If the plaintiff's case changes substantially after an Offer to Settle is made and declined, the defendant ought not be penalised for rejecting the offer."

But this case is different. Here the amended pleading was served at the same time as the offer. The plaintiffs had 14 days in which to consider the offer. The amendments were in response to a claim on which the plaintiffs ultimately failed. In all of these circumstances I do not consider that the amendment of the defence is pertinent to the resolution of the costs questions.

[20] The Plaintiff's submissions continued –

> "A distinctive feature of this case is this case is the Court's finding that the Plaintiffs have been treated shabbily and unconscionably as a result of the First Defendants' retention of $30,000 plus interest from 16 September, 1991. The relevant findings, however, do not make it

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16 *Keen v Towler* (1924) 41 TLR 86; Lawbook Co, *Quick on Costs*, vol 2 (at update 35) [4.3260]-[4.3290].

17 *Emanuel Management Pty Ltd (in liq) v Foster's Brewing Group Ltd* [2003] QSC 299, [36] (Chesterman J); *Rathie v ING Life Ltd* [2004] QSC 146, [46]-[57] (Wilson J); *Anderson v AON Risk Services Australia Ltd* [2004] QSC 180, [10] (P D McMurdo J); *Astway P/L v Council of the City of the Gold Coast* [2007] QSC 224, [15] (Wilson J).

18 [2003] 1 Qd R 651, 665.

> clear whether enforcement of the identified equity would require payment to the Plaintiffs of simple or, alternatively, compound interest on the principal amount to be refunded."[19]

They go on to discuss the recovery of compound interest amounting to $79,274.48 over 15 years, concluding this discussion with –

> "In effect, the Defendants' formal Offer to Settle ignored the equitable obligation which fell upon the Defendants to restore the Plaintiffs to the position they ought to have been in at the date of service of the Offer by allowing statutory simple interest."[20]

[21] I do not consider this relevant to the costs questions I have to decide. The plaintiffs relied on non-fulfilment of expectations alleged to have arisen from a combination of oral representations and the contents of the deed. They failed because the deed was void and incapable of giving rise to valid expectations. What I said in relation to any expectation that might have arisen independently of the deed was accordingly obiter dicta.

[22] Because of the offer to settle, I consider that orders should be made for –

(a) the first defendants to pay the plaintiffs' costs up to and including 12 February 2007 on the Magistrates Courts scale;

(b) the plaintiffs to pay the first defendants' costs after 12 February 2007 on the Supreme Court scale;

(c) the plaintiffs to pay the second, third and fourth defendants' costs of and incidental to the proceeding on the Supreme Court scale (each of those defendants being entitled to one-quarter of the whole costs of defending the proceeding on that scale).

[23] The defendants have asked for costs on the indemnity basis. As they have acknowledged, the usual order is for costs on the standard basis, and some special feature warranting a more generous award needs to be established before the Court will award indemnity costs.[21] They have submitted –

> "9. … Circumstances which might justify the exercise of the discretion to award indemnity costs were reviewed in *Colgate Palmolive Co v Cussons Pty Ltd,* and include:
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> (a) the fact that proceedings were commenced in wilful disregard of known facts or clearly established law;
>
> (b) the making of allegations that ought never to have been made or the undue prolongation of a case by groundless contentions;

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19 Plaintiffs' written submissions, [10] (footnotes removed).

20 Plaintiffs' written submissions, [13].

21 *Di Carlo v Dubois* [2002] QCA 225; *Colgate Palmolive Co Pty Ltd v Cussons Pty Ltd* (1993) 46 FCR 225.

(c) an imprudent refusal of an offer to settle the proceedings.

10. It is submitted that the plaintiffs' conduct of these proceedings warrants an order that the costs of the second, third and fourth defendants be paid on an indemnity basis where:

(a) it was alleged that the parties were bound by the discussions between Mr Campbell and Herbert Turner prior to the execution of the deed were not intended to create legal relations and bind the parties [sic]. The Court found that by reducing their agreement to writing, the parties are presumed to have intended that the deed represent their entire agreement: Reasons for Judgment at [103]. The parol evidence rule is long established. It is submitted that such an allegation should never have been made.

(b) it was alleged that the Deed gave rise to an express or constructive trust. The Court found that the Deed was invalid in its entirety by virtue of section 8(2) of the *Land Sales Act*: Reasons for Judgment at [107], [108]. The application of section 8(2) of the *Land Sales Act* has been well settled for some time. It is submitted that the claims for breach of an express or constructive trust, as formulated in the plaintiff's pleading, should never have been made.

(c) the plaintiffs sought relief for expenses incurred by companies in which the plaintiffs held an interest. The plaintiffs submitted that the proper object of the Court's inquiry should be the extent of the detriment occasioned by the defendants' conduct and that the fact that some of the expenditure was undertaken by companies associated with them did not detract from the detriment sustained. The Court rejected this submission: Reasons for Judgment at [129](d). It is submitted that costs incurred by the associated companies should never have been claimed by the plaintiffs.

(d) the plaintiffs claimed in excess of $1 million by way of disgorgement of the profit made by the defendants on the sale to Stockland. The Court found that this figure was grossly disproportionate to the minimum equity that would be necessary to do justice in circumstances where the expectation of the plaintiffs was confined to repayment of the $30,000 if the industrial subdivision could not be achieved: Reasons for Judgment at [133](h). It is submitted that the claim for disgorgement of profits should never have been made.

(e) the defendants made an offer to settle (discussed below) that exceeded the minimum equity that the Court found was required to do justice between the parties in this case.

> It was imprudent of the plaintiffs to reject this offer to compromise the proceedings."[22]

They have estimated their costs from 12 February 2007 at $370,000 on the indemnity basis and $270,000 on the standard basis.[23]

[24] Defeat in litigation results from the vanquished party's version of the facts being rejected and/or from its submissions on matters of law being rejected as wrong or inapplicable. Such was the plaintiffs' fate on the issues on which they lost in this proceeding. I am unpersuaded that the grounds relied on by the defendants, whether taken separately or in combination, are sufficient to warrant indemnity costs.

Set-off

[25] The plaintiffs have obtained a judgment against the first defendants for approximately $78,000 (being $30,000 plus interest), and I intend awarding them costs on the Magistrates Courts scale up to 12 February 2007. I intend ordering them to pay the first defendants' costs on the Supreme Court scale thereafter, which have been estimated at $270,000 on the standard basis.

[26] The Court has inherent power to set off the judgment debt against the costs.[24]

[27] Because such a set-off could be ordered only as between the first defendants and the plaintiffs, I reject the defendants' application for an order that the amount of the judgment (the total of the $30,000 plus interest) be deducted from the costs payable by the plaintiffs to the defendants.[25]

Stay

[28] In the alternative the defendants seek a stay of the judgment pending the assessment of or agreement as to the amount of their costs recoverable from the plaintiffs.[26]

[29] In so far as the defendants rely on r 668 of the *UCPR*, their application is misconceived. That rule provides –

> "**668 Matters arising after order**
>
> (1) This rule applies if—
>
> (a) facts arise after an order is made entitling the person against whom the order is made to be relieved from it; or
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> (b) facts are discovered after an order is made that, if discovered in time, would have entitled the person against whom the order is made to an order or decision in the person's favour or to a different order.

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22 Footnote removed.

23 Affidavit of S M Lindsay, sworn 27 November 2007, filed 30 November 2007, [13]-[14].

24 *Elphick v MMI General Insurance Ltd* [2002] QCA 347, [7]; *Pringle v Gloag* (1879) 10 Ch D 676; G E Dal Pont, *Law of Costs* (2003) [8.15].

25 Defendants' written submissions, [25].

26 Defendants' written submissions, [26], [31].

> (2) On application by the person mentioned in subrule (1), the court may stay enforcement of the order against the person or give other appropriate relief.
>
> (3) Without limiting subrule (2), the court may do one or more of the following—
>
> (a) direct the proceedings to be taken, and the questions or issue of fact to be tried or decided, and the inquiries to be made, as the court considers just;
>
> (b) set aside or vary the order;
>
> (c) make an order directing entry of satisfaction of the judgment to be made."

The defendants' submissions are premised on my having given judgment on 13 November 2007. I did not do so. I gave my reasons, but did not make any orders. A judgment of the Court is to be found in its order, not in its reasons for judgment.

[30] But I am satisfied that the Court has power to grant a stay in the circumstances, both an inherent power and a power on application pursuant to r 800 of the *UCPR*.

[31] In reality, when costs are taken into account, the defendants are the successful parties in this litigation. In addition to the disparity between the amount recovered by the plaintiffs and the quantum of the defendants' costs incurred after 12 February 2007 which has already been canvassed, the plaintiffs are liable to pay the defendants' costs pursuant to an interlocutory order made by Cullinane J on 14 December 2005. Those costs have not yet been assessed, but the defendants have estimated them at in excess of $60,000.

[32] On 23 November 2007 the defendants' solicitors wrote to the plaintiffs' solicitors in these terms –

> "We refer to the Order of Justice Wilson made on 13 November 2007.
>
> We note that the judgment is less favourable to your clients than the offer to settle made by our clients on 12 February 2007. Accordingly, we intend to apply for an Order that your clients pay our clients' costs from the date of service of the offer to settle until the date of judgment.
>
> If successful, our clients will be in a position to submit an itemised costs statement within seven (7) days. Our clients will also be submitting an itemised costs statement in relation to the costs incurred in accordance with the Order of Justice Cullinane dated 14 December 2005.
>
> It is evident that our costs will be well in excess of the amount of the judgment awarded to your client.

> Would you please advise whether your clients will consent to the judgment sum payable to your clients being subtracted from the amount of costs payable to our clients in the event that our clients are successful in obtaining an Order for costs.
>
> We also request that you confirm whether your clients will be in a position to attend to payment of our clients' costs if so ordered by the Court."[27]

As at 27 November 2007 they had received no reply.

[33] The defendants have provided itemised costs statements drawn on the standard basis relating to their costs since 12 February 2007 and to the costs payable pursuant to the interlocutory order.

[34] The first defendants are prepared to pay the judgment sum into Court pending the assessment of their costs. The defendants undertake to proceed with a costs assessment expeditiously if agreement cannot be reached.

[35] On 29 May 2007 the defendants' solicitors caused searches to be conducted through CITEC in order to ascertain whether the plaintiffs owned any property in Queensland. They were registered as proprietors of two properties as joint tenants; Mr Campbell was registered as proprietor of another property as joint tenant with one Sharyn Gaye Campbell; and Mrs Campbell was registered as proprietor of a fourth property.[28] Each of the properties was encumbered, and the extent of the plaintiffs' equity in them is not known.

[36] In these circumstances there is a real risk of loss to the defendants if the judgment sum is paid and expended before the costs are assessed and paid. I am prepared to grant a stay.

Orders for costs

[37] I make the following orders as to costs –

(a) that the first defendants pay the plaintiffs' costs of and incidental to the proceeding up to and including 12 February 2007 to be assessed on the standard basis on the applicable Magistrates Courts scale;

(b) that the plaintiffs pay the first defendants' costs of and incidental to the proceeding after 12 February 2007 to be assessed on the standard basis on the Supreme Court scale;

(c) that the plaintiffs pay the second, third and fourth defendants' costs of and incidental to the proceeding to be assessed on the standard basis on the Supreme Court scale (each of those defendants being entitled to one-quarter of the whole costs of defending the proceeding on that scale);

(d) that upon the first defendants' paying the judgment debt (being $30,000 plus interest to today) into Court, enforcement of the judgment debt be stayed pending assessment and payment of the costs ordered to be paid by the

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[27] Affidavit of S M Lindsay, sworn 27 November 2007, filed 30 November 2007, exhibit SML-7.

[28] Affidavit of S M Lindsay, sworn 27 November 2007, filed 30 November 2007, exhibit SML-6.

plaintiffs to the first, second, third and fourth defendants, including costs ordered to be paid by Cullinane J on 14 December 2005, or earlier agreement of the parties.