SUPREME COURT OF QUEENSLAND

CITATION:	*Wardanski & Anor v Mawby & Anor (No 2)* [2023] QSC 237
PARTIES:	**AGNIESZKA WARDANSKI** (First Plaintiff) **PAWEL GRZEGORZ WARDANSKI** (Second Plaintiff) **v** **KAREN MARY MAWBY** (First Defendant) **SCOTT CAMERON MARKS** (Second Defendant)
FILE NO/S:	BS 4153 of 2020
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	27 October 2023
DELIVERED AT:	Brisbane
HEARING DATE:	Heard on the papers
JUDGE:	Crowley J
ORDER:	1. **The Defendants are to pay the Plaintiffs an amount of $5,225, together with interest on that amount in the sum of $852.16, for expenses incurred by the Plaintiffs in investigating the encroachment.** 2. **Pursuant to r 687(2)(c) of the *UCPR*, the Plaintiffs are to pay the Defendants' costs of the proceedings, fixed at $160,000.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – INTEREST ON JUDGMENTS – GENERALLY – where the plaintiffs brought a claim seeking relief under s 184 of the *Property Law Act 1974* (Qld) in respect of an encroachment upon their land by several of the Defendants' structures – where the Court declined to order the removal of the encroaching structures – where the Court instead ordered the defendants pay the plaintiffs compensation and take the necessary steps to transfer the land burdened by the encroachment to the defendants and to realign the property boundary – whether the defendants should be ordered to pay

interest on the compensation ordered

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – GENERAL PRINCIPLES AND EXERCISE OF DISCRETION – where each party submits the other should pay their costs – whether the plaintiffs were the successful party in the litigation – whether the defendants should pay the plaintiffs' costs

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INDEMNITY COSTS – RELEVANT CONSIDERATIONS GENERALLY – where the parties exchanged various offers and counter-offers prior to the trial – where each party seek for their costs to be paid, either wholly or in part, on the indemnity basis – whether r 360 displaces s 194 of the *Property Law Act 1974* (Qld) – whether costs should be ordered to be paid on the indemnity basis

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – REGULATED COSTS: GROSS OR FIXED COSTS, LUMP SUM ORDERS OR CAPPING ORDERS AND LIKE MATTERS – POWER TO ORDER – where the defendants seek an order that their costs be fixed in the amount of $160,000 – whether a fixed costs order should be made

Civil Proceedings Act 2001 (Qld), s 15, s 58
Property Law Act 1974 (Qld), s 184, s 194
Uniform Civil Procedure Rules 1999 (Qld), r 5, r 360, r 681, r 687

Australian Securities and Investments Commission v Atlantic 3-Financial (Aust) Pty Ltd (No 3) [2008] 2 Qd R 298; [2008] QSC 009, cited
Built Qld Pty Limited v Pro-Invest Australian Hospitality Opportunity (ST) Pty Ltd (No 2) [2023] QCA 140, cited
Calderbank v Calderbank [1975] 3 All ER 333, cited
De L v Director-General, Department of Community Services (NSW) (No 2) (1997) 190 CLR 207; [1997] HCA 14, cited
Hardie v Cuthbert (1988) 65 LGRA 5, cited
Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2) (2005) CR 435; [2005] VSCA 298, considered
Hofer v Howell Developments Limited (No 2) [2001] 113 LGERA 391; [2001] NSWLEC 42, cited
HS South Brisbane Pty Ltd v United Voice (2019) 2 QR 556; [2019] QSC 274, considered
Oshlack v Richmond River Council (1998) 193 CLR 72; [1998] HCA 11, cited
Perpetual Trustees Victoria Ltd v Suncorp-Metway Ltd (2010) NSWLEC 12, cited
Shadbolt v Wise [2006] 1 Qd R 553; [2005] QCA 443,

explained
Thiess v TCN Channel Nine Pty Ltd (No 5) [1994] 1 Qd R 156, cited
Wardanski v Mawby [2023] QSC 136, cited
West v Blackgrove [2012] QCA 321, cited

COUNSEL: B O'Brien for the Plaintiffs
D Ananian-Cooper for the Defendants

SOLICITORS: Cooper Grace Ward for the Plaintiffs
Plastiras Lawyers for the Defendants

[1] On 18 August 2023, I delivered my principal judgment on a claim brought by the Plaintiffs, seeking relief under s 184 of the *PLA* in respect of an encroachment upon their land by several of the Defendants' structures.[1]

[2] I declined to order the removal of the encroaching structures and instead ordered that the Defendants pay the Plaintiffs compensation and take the necessary steps to transfer the subject land burdened by the encroachment to the Defendants and to realign the property boundary.

[3] The only further matters to deal with were the question of costs and whether any other consequential orders should be made to give effect to my judgment. These reasons deal with those matters. They should be read together with my principal judgment.

[4] Neither party seeks any other consequential orders. The Plaintiffs do, however, seek an order that the Defendants pay interest on the amount of compensation I ordered.

[5] On the issue of costs, each of the parties says the other should pay their costs and that they should be paid, either wholly or partly, on the indemnity basis.

[6] The two remaining issues that I must therefore resolve are:

1. Should the Defendants be ordered to pay interest?
2. Who should pay the costs of the proceedings, and on what basis?

Should the Defendants be ordered to pay interest?

[7] Section 58 of the *Civil Proceedings Act 2011* (Qld) permits the Court, in the exercise of discretion, to order that interest be included in the amount for which judgment is given in relation to a proceeding for the payment of money.

[8] I ordered that the Defendants pay the Plaintiffs $21,087.50 in compensation, comprised of:

(a) $16,087.50 to compensate for the transfer of the subject land burdened by the encroachment; and

(b) $5,000 to compensate for the diminution in value of the Plaintiffs' land.

[9] I also indicated in my reasons that I would make an order for the Defendants to pay the Plaintiffs' costs of obtaining the Urbicus Advice and the Identification Survey, totalling $5,225.

[10] The Plaintiffs now seek an order that the Defendants pay interest on an amount of $21,312.50, representing the compensation payable for the transfer of the subject land and the $5,225 for the Urbicus Advice and Survey. They accept they are not

---

1 *Wardanski v Mawby* [2023] QSC 136.

entitled to interest on the $5,000 compensation payable for the diminution in value of their land that will result from the transfer of the subject land and realignment of the property boundary.

[11] The Plaintiffs say they ought to be entitled to interest on the other monetary sums awarded, and there is no good reason not to award interest, where they have been kept out of the use of their land and the use of their money.

[12] The Defendants accept that the Plaintiffs are entitled to an order for interest to be paid upon the $5,225 spent by the Plaintiffs for the Urbicus Advice and the Identification Survey. I will make an order to that effect. The Defendants otherwise oppose the Plaintiffs' claim for interest.

[13] In my opinion, the Plaintiffs are not entitled to interest in respect of the compensation amounts that are to be paid relating to their land.

[14] The Plaintiffs did not suffer any loss before judgment by reason of being 'kept out of their land'. The compensation is payable because of the order I have made for the transfer of the subject land. It compensates the Plaintiffs for the loss of their land as a result of the orders I have now made. The amount of compensation payable has been determined according to an agreed current unimproved capital value of the subject land of $650 per square metre. It is therefore not appropriate to also include an amount of interest payable to further compensate the Plaintiffs for the loss of their land.

Who should pay the costs of the proceedings, and on what basis?

[15] Section 15 of the *Civil Procedure Act 2011* (Qld) provides that a court may award costs in all proceedings unless otherwise provided.

[16] Under r 681(1) of the *UCPR,* the general rule is that costs are in the discretion of the court but 'follow the event, unless the court orders otherwise'. Rule 681(2) states that r 681(1) applies unless the *UCPR* provide otherwise.

[17] The successful party in litigation is ordinarily entitled to an award of costs in its favour. The primary purpose of an award of costs is to indemnify the successful party from the expense that it would not otherwise have incurred. Costs are not awarded to punish an unsuccessful party. The rationale for the general principle is grounded in reasons of fairness and policy. Fairness dictates that an unsuccessful party typically bears the liability for the costs of the unsuccessful litigation.[2]

[18] Nevertheless, the Court has a discretion to make another order, if that is required in the interests of justice.[3] Whilst the Court's discretion is unfettered, it must be exercised judicially, without caprice and having regard only to relevant considerations.[4]

[19] The general rule may also be subject to the specific rules that apply where an offer to settle the proceedings, made under Chapter 9, Part 5 of the *UCPR*, was not accepted by the other party.

[20] In this case, the Plaintiffs made such an offer. Accordingly, they say that they are entitled to an order that the Defendants pay their costs, on the indemnity basis, from the commencement of the proceedings until judgment, as they obtained a judgment

---

2 *Oshlack v Richmond River Council* (1998) 193 CLR 72, 97 [67] (McHugh J, Brennan CJ agreeing).

3 *West v Blackgrove* [2012] QCA 321, [49] (Muir JA, Holmes JA and Daubney J agreeing).

4 *Thiess v TCN Channel Nine Pty Ltd (No 5)* [1994] 1 Qd R 156, 207 (McPherson SPJ, Moynihan and Byrne JJ).

that was no less favourable than their offer. The Plaintiffs rely on r 360 of the *UCPR* as in force at the time.

[21] The Defendants say that r 360 does not apply, as it is inconsistent with s 194 of the *PLA* and, irrespective, r 360 is not satisfied in this case. They further say that the Plaintiffs are not entitled to an order for costs in their favour at all, as they were not the successful party in the litigation. Rather, they argue they were the successful party and the appropriate order to be made in the circumstances is that the Plaintiffs pay their costs, including that they be paid on the indemnity basis after 9 December 2020, because the Plaintiffs unreasonably rejected a settlement offer made by the Defendants and did not better that offer in the judgment following trial.

Is r 360 of the UCPR inconsistent with s 194 of the PLA?

[22] If the Defendants' argument about inconsistency is correct the question of costs will be determined according to s 194 of the *PLA*.

[23] Rule 360 of the *UCPR* provides:

> **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.

[24] Rule 360 is rule that 'provides otherwise' within the meaning of r 681(2). Where it is engaged and its requirements are satisfied, it displaces the general rule in r 681(1).[5]

[25] Section 194 of the *PLA* provides:

> **194** Costs
>
> In any application under this division the court may make such order as to payment of costs (to be taxed as between solicitor and client or otherwise), charges, and expenses as it may deem just in the circumstances and may take into consideration any offer of settlement made by either party.

[26] In my opinion, there is evident inconsistency between the scope and terms of these two statutory provisions. Rule 360 applies generally to any proceeding started by claim. Section 194 applies specifically to applications under Part 11, Division 1 of

---

5 *Built Qld Pty Limited v Pro-Invest Australian Hospitality Opportunity (ST) Pty Ltd (No 2)* [2023] QCA 140 [18].

the *PLA* in respect of 'encroachment of buildings'. Where it is engaged, r 360 mandates that the court 'must' order the defendant to pay the plaintiff's costs calculated on the indemnity basis, unless the defendant shows that another order for costs is appropriate. There is thus a restriction on the court's discretion with respect to an order for costs and an onus is placed upon the defendant to persuade the court that it should depart from the otherwise mandatory order. In contrast, s 194 confers a broad, unfettered discretion to make such an order for costs 'as it may deem just in the circumstances'. Further, r 360 is confined to a consideration of the first offer made by the plaintiff that satisfies r 360(1), whereas s 194 allows the court to take into consideration 'any offer of settlement made by either party'.

[27] In considering this issue, it is relevant to emphasise the purpose and historical context of s 194. Bowskill J (as her Honour then was) detailed the history of Part 11, Division 1 of the *PLA* in *HS South Brisbane Pty Ltd v United Voice*.[6] As her Honour noted, prior to the enactment of the *PLA,* almost identical provisions to those now contained in Part 11, Division 1 appeared in the former *Encroachment of Buildings Act 1955* (Qld). That Act had itself largely replicated provisions of the analogous *Encroachment of Buildings Act 1922* (NSW).

[28] As to the purpose of the New South Wales Act, her Honour noted:

> [33] The purpose of the 1922 New South Wales Act was referred to by Young J in *Hardie v Cuthbert* (1988) 65 LGRA 5 at 6:
>
> > "The *Encroachment of Buildings Act* 1922 (NSW) was passed in New South Wales as remedial legislation to overcome a problem where innocent and in some cases not so innocent people were being held to blackmail by neighbours as a result of faulty surveys that were carried out earlier this century and by other surveying errors or building errors which were not their fault. I have been referred to the second reading speech and committee debate on the Act pursuant to s 34 of the *Interpretation Act* 1987 (NSW) and it would seem that there were quite a few cases in the early part of this century where children had moved surveyor's pegs or builders' pegs or otherwise monuments were in the wrong place without any real fault on anyone where the legal owner was exacting unconscionable compensation or alternatively refusing to accept compensation and insisting on demolition. The Act was passed to enable the Court to adjust rights in that situation…
> >
> > The Act was remedial legislation and in the light of s 33 of the *Interpretation Act* one must bear in mind its purpose and give it the effect to secure the purpose rather than to defeat the purpose of the legislature.
> >
> > The Act has not been before the courts for consideration on very many occasions. This, it would appear, in fact fulfils what the legislature intended because the ministers when introducing the Act made it clear that the government thought that 99 per cent of cases would be settled because neighbours would know that the court had an overriding

---

6 (2019) 2 QR 556, 568–73 [20]–[34].

> duty to do what was fair, people would accept themselves what was fair and not try and blackmail their neighbours. Those half a dozen or so cases which have come before the courts have, almost without exception, shown that the court is construing this legislation in a purposive and beneficial way."

[29] Of particular relevance to the present issue, I note the final form of the relevant costs provision contained in the New South Wales Act as passed was the product of an amendment that was agreed to when the Bill was before the Legislative Council for consideration. The amendment added the concluding words, '…in the circumstances, and may take into consideration any offer of settlement made by either party'. Those same words continue to appear in s 194 of the *PLA.* At the time, the stated rationale for the amendment and inclusion of the additional words was: [7]

> …to emphasise the discretion of the court in regard to costs. It is an extremely important part of the bill. It should be made as plain as possible that the court has control over any kind of application that comes before it by having full discretion as to costs…I want to make it quite plain that the Equity Court has complete control in the matter of costs.

[30] It is no doubt because of the remedial nature and purpose of the provisions of Part 11, Division 1 of the *PLA* that the Court is given the broad and unfettered discretion in respect of costs and expenses conferred by s 194.

[31] As was observed in respect of the New South Wales Act when it was first introduced more than a century ago, it was expected that most encroachment disputes would be resolved by neighbours.[8] In my view, that remains the expectation today. However, where disputes are not resolved, the provisions of Part 11, Division 1 of the *PLA* are available and intended to provide an efficient and fair mechanism for the Court to decide the dispute and grant appropriate relief. It is obvious that the broad discretion conferred by s 194 is intended to give effect to that purpose by, amongst other things, enabling the Court to have regard to any efforts that were made by the parties to resolve their dispute, including what settlement offers may have been made, whether before or after the commencement of the proceedings. No distinction is made between the types of offers that the Court may consider. The existence of the broad discretion conferred by s 194 thus acts as an incentive to encourage parties to resolve their dispute themselves, even before the commencement of proceedings.

[32] The rationale and purpose of r 360 is different. The costs implications of the provisions relating to settlement offers made under the *UCPR* are designed to encourage the early resolution of proceedings once they have begun. This is achieved by enabling settlement offers to be made, which introduces a risk element to the litigation in respect of a potential adverse costs order. That is in keeping with the philosophy and purpose of the *UCPR,* as expressed in r 5.

[33] The nature of the two statutory provisions is also quite different. The *UCPR,* of which r 360 is a part, are statutory rules, made by the Governor in Council pursuant to s 85(1) of the *Supreme Court of Queensland Act 1991* (Qld). The *UCPR* are thus a species of subordinate legislation, regulating court processes and procedures in

---

7 New South Wales, *Parliamentary Debates*, Legislative Council, 26 July 1922, 602 (JB Peden MLC).

8 *Hardie v Cuthbert* (1988) 65 LGRA 5, 6 (Young J).

respect of all civil proceedings. In contrast, s 194 is a substantive provision of an Act of Parliament, which applies to a particular type of proceeding. These contrasting features are not simply a matter of form or of cursory significance. They are differences of substance which matter.

[34] Section 194 was enacted in 1974. It confers a plenary power and an unfettered discretion with respect to awards of costs in encroachment applications under the *PLA*. Rule 360 is part of later promulgated subordinate legislation. Nothing within r 360 or Chapter 9, Part 5 of the *UCPR* expressly states that r 360 excludes the operation of s 194 or restricts the exercise of the Court's discretion to award costs under that provision. Consequently, acceptance of the Plaintiffs' argument that r 360 displaces s 194 would entail acceptance of a proposition that r 360 necessarily impliedly amends s 194.

[35] In my opinion, such a proposition cannot be correct. Subordinate legislation cannot impliedly repeal or amend an earlier Act of Parliament. It must be expressly authorised to do so.[9] There is no such authorisation here.

[36] Having regard to these matters it is plain, in my view, that r 360 does not displace s 194. The inconsistency between the provisions is to be resolved by recognizing that s 194 is intended to be the sole source of the Court's power and discretion to order costs in respect of an encroachment application made under s 184 of the *PLA*.

[37] That is not to say that an offer made under the *UCPR* and the terms of r 360 are completely redundant considerations. They remain relevant considerations as to what is 'just in the circumstances' under s 194.

What costs order is just in the circumstances?

[38] The Plaintiffs submit that where the assistance of the Court is necessary to overcome problems which arise because of an encroachment, the encroaching party will usually be required to pay the costs of the party whose land has been encroached upon. In support of that submission, they cite *Shadbolt v Wise,* where Keane JA made a statement to that effect.[10]

[39] I do not think that by making that particular statement, Keane JA sought to establish or identify any presumption or principle to be applied in respect of the exercise of the discretion to award costs under s 194 of the *PLA*. In my view, Keane JA's observation was no more than a recognition of the usual way in which the discretion would be exercised. That is borne out by considering the full passage from his Honour's judgment:[11]

> [14] His Honour made no order as to the costs of the application before him. Section 194 of the Property Law Act empowered his Honour to "make such order as to payment of costs … as [the court] may deem just in the circumstances". Where the assistance of the court is necessary to overcome problems which arise because of an encroachment, the encroaching party will usually be required to pay the costs of the party whose land has been encroached upon **because it will usually be the case that it is the conduct of the encroaching party that has necessitated the**

---

9 *De L v Director-General, Department of Community Services (NSW) (No 2)* (1997) 190 CLR 207, 212

10 [2006] 1 Qd R 553, 556–7 [14].

11 Ibid (emphasis added).

> **resort to litigation**. His Honour chose not to adopt that course in this case, apparently because of his disapproval of the conduct of the Wise parties.

[40] It is pertinent to note that the section which I have emphasised in bold above was omitted from the Plaintiffs' excerpt of his Honour's statement.

[41] Although the discretion with respect to costs under s 194 is unfettered, I do consider that the general rule that costs follow the event should apply. That is the position under r 681(1) of the *UCPR* and it is also the practice in New South Wales in respect of encroachment matters determined under the *Encroachment of Buildings Act*.[12] The proper exercise of the discretion will, of course, be determined by the facts and circumstances of the particular case in question. In any given case, there may well be reasons why it is just to depart from the general rule.

[42] In this case, the Plaintiffs say they were the successful party in the litigation and they ought therefore to be entitled to their costs. Whilst the Plaintiffs did not achieve the primary relief they sought, being removal of the Defendants' encroaching structures, they nevertheless contend that they obtained the alternative relief they claimed and therefore they were the successful party.

[43] I do not accept that submission.

[44] The mere fact that the Plaintiffs achieved the primary relief they sought by their claim does not *prima facie* make them the successful party, let alone entitle them to an order for costs as the successful party in the litigation. Where an application is made under s 184 of the *PLA,* the Court may make such an order as it may deem just with respect to any of the forms of relief set out in ss 185(1)(a)–(c), irrespective of which party made the application to the Court and regardless of the particular relief sought by the moving party. The jurisdiction of the Court is invoked to resolve the dispute. Accordingly, simply because the Court made orders granting a form of alternative relief sought by a moving party does not mean they were successful and should have their costs.

[45] In my view, it is necessary to consider the conduct of the parties, the issues that were litigated and whether it was necessary to resort to litigation at all to achieve the orders for the alternative relief that were ultimately made following the trial. Such an approach is in accordance with the broad, unfettered discretion conferred by s 194. It is no doubt because of the subject matter and purpose of applications made to the court under s 184, and the nature and extent of the relief that may be granted by the Court, that s 194 gives the Court such a wide discretion with respect to orders for costs, charges and expenses.

[46] I extensively covered the genesis of the encroachment dispute and the subsequent conduct of the parties leading up to the litigation in my principal judgment. Whilst I concluded that each of the parties had at times acted unreasonably in certain respects, I accepted that from 29 November 2018 onwards, the Defendants had acted reasonably in attempting to resolve the encroachment dispute by way of a boundary realignment and an offer to pay the Plaintiffs reasonable compensation for the necessary transfer of their subject land.[13] In contrast, I concluded that from 26 February 2019 onwards, the Plaintiffs were no longer open to a boundary realignment and they unreasonably insisted upon reclaiming their land, regardless of

---

12 *Hofer v Howell Developments Limited [No 2]* [2001] 113 LGERA 391, 395–6 [14]–[15]; *Perpetual Trustees Victoria Ltd v Suncorp-Metway Ltd* [2010] NSWLEC 12, [19].

13 *Wardanski v Mawby* [2023] QSC 136 [380].

the cost and inconvenience to the Defendants. I considered the Plaintiffs' approach to the open pre-proceeding offers that had been exchanged by the parties to be a continuation of that unreasonable conduct.[14]

[47] This litigation was unnecessary. The encroachment dispute could and should have been resolved without the parties resorting to the Court for intervention.

[48] For the reasons I expressed in my principal judgment, it is abundantly clear that the Plaintiffs largely failed in their claim at trial. The primary encroaching structures that were the subject of the dispute were the Retaining Wall and the Defendants' Garage. The Plaintiffs wanted those encroaching structures entirely removed. That would have required the Defendants, at very considerable expense, to demolish the structures and rebuild them within the limits of the true property boundary. Having regard to the circumstances of the case as a whole, I did not consider the primary relief sought by the Plaintiffs was just or fair. The alternative relief was the just and fair resolution of the dispute between the parties. The Defendants had long been agreeable to resolving the matter on that basis and did not contest the granting of that relief generally at trial. Furthermore, aside from an ongoing disagreement as to costs, the Plaintiffs were also agreeable to resolving the matter on a similar basis.

[49] Further, much of the trial was consumed by issues agitated by the Plaintiffs with respect to their claim for alternative relief, upon which they failed. In particular, the Plaintiffs sought substantial compensation for supposed loss and damage they would suffer due to a need to redesign their proposed garage in the event that the Defendants' Garage was not removed. I rejected that claim.

[50] In those circumstances, I consider it was the Defendants who were, on the whole, the successful party.[15] Consequently, I consider the Plaintiffs should pay the Defendants' costs.

[51] It remains then to consider whether costs should be ordered to be paid on the indemnity basis.

[52] The parties have provided further evidence of other without prejudice offers that were made by them to resolve the proceedings. It is not necessary to chronicle every offer and counter-offer made. It is sufficient to simply identify the principal offers and the general course of the settlement negotiations.

[53] The Defendants rely on a *Calderbank*[16]offer they made on 9 December 2020, to submit that the Plaintiffs should pay their costs on the indemnity basis from that date. The terms of the Defendants' offer included:

(a) the boundary between the properties be realigned in accordance with the Plaintiffs' Identification Survey;

(b) the Defendants pay for the costs of realignment;

(c) the parties co-operate and use their best endeavours to facilitate the boundary re-alignment;

(d) the Defendants pay the Plaintiffs $45,000 within 30 days of the date of acceptance of their offer; and

(e) the Plaintiffs discontinue the proceedings with no order as to costs.

---

14 Ibid [381]–[385].

15 *Thiess v TCN Channel Nine Pty Ltd (No 5)* [1994] 1 Qd R 156, 207-208 (McPherson SPJ, Moynihan and Byrne JJ).

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

[54] The offer explained the $45,000 payment comprised $7,357 for the unimproved land value (of 17m^2), $12,473.76 for costs associated with the encroachment, including $7,248.76 for legal fees prior to the commencement of the proceedings, and $25,169.24 for other loss and damages.

[55] The Defendants' offer was open for acceptance for 14 days. In making that offer, the Defendants pointed out that s 194 of the *PLA* modified the usual rule with respect to costs and permitted the Court to make such an order as to costs as it may deem just in all the circumstances.

[56] On 18 December 2020, the Plaintiffs rejected the Defendants' offer and proposed two alternative counter-offers. The first required removal of the encroachment and payment of $45,000 in compensation to the Plaintiffs. The second proposed realignment of the property boundary, as previously suggested by the Defendants, but also required the Defendants pay $30,000 in compensation and $35,000 for the Plaintiffs' legal costs and disbursements.

[57] The Defendants rejected both counter-offers.

[58] On 19 February 2021, the Plaintiffs made their formal offer under the *UCPR*. The terms of that offer were:

(a) the Defendants arrange for the boundary to be aligned, at their cost, so as to obtain 17m^2 of the Plaintiffs' property;

(b) the Defendants pay compensation of $17,000 to the Plaintiffs, being for the land and costs reasonably incurred in investigating the encroachment;

(c) the Defendants pay interest on the sum of $17,000, from the date the proceedings were commenced (i.e. 16 April 2020) to 19 February 2021; and

(d) the Defendants pay the Plaintiffs' standard costs to be agreed or, failing agreement, to be assessed.

[59] The Plaintiffs' formal offer was open for acceptance for 14 days. It was said to be their 'final offer' to compromise the proceedings and gave notice that r 360 would be relied upon and the Plaintiffs would seek an order for indemnity costs in the event they succeeded at trial.

[60] The Defendants rejected the Plaintiffs' offer. In particular, the Defendants advised that they did not accept the term that they pay the Plaintiffs' standard costs to be agreed or assessed.

[61] On 12 March 2021, the Defendants made a further offer to settle the proceedings. Their offer effectively agreed with the terms of the Plaintiffs' formal offer, save that in respect of costs they proposed the Court could determine the question of costs under r 685 of the *UCPR,* unless the parties agreed otherwise to bear their own costs. The Defendants noted that, if accepted, their further offer would resolve the substantive dispute in the proceedings on an objectively reasonable basis and the remaining question concerning costs would be a much narrower dispute. The further offer was open for acceptance for 21 days.

[62] The Plaintiffs did not accept the Defendants' further offer.

[63] Despite the fact that the time for acceptance of each of their previous offers had expired, on 12 April 2021 the Defendants informed the Plaintiffs that each of their offers of 9 December 2020 and 12 March 2021 were re-opened for acceptance for a period of 14 days.

[64] The Plaintiffs did not accept either of the re-opened offers.

[65] On 29 April 2021, the Defendants made a further attempt to resolve the matter by making a further *Calderbank* offer in largely the same terms as their 12 March 2021 offer and the Plaintiffs' 19 February 2021 offer, save that in respect of costs, the Defendants this time offered to pay $35,000 towards the Plaintiffs' costs.

[66] The Plaintiffs did not accept that offer.

[67] On 14 May 2021, the Defendants made one last attempt to resolve the matter by a further *Calderbank* offer in the same terms as their 29 April 2021 offer, save that on this occasion, they offered to pay $37,500 towards the Plaintiffs' costs.

[68] On 21 May 2021, the Plaintiffs advised that they were prepared to accept the terms of the Defendants' final offer, however they required further terms to be agreed to and for the agreement to be set out in a settlement deed. The further terms sought included the Defendants' giving undertakings to be of good behaviour towards the Plaintiffs and their family for a period of 25 years. On 25 May 2021, the Plaintiffs' solicitors emailed a draft settlement deed to this effect to the Defendants' solicitors.

[69] The Defendants did not accept the proposed additional terms. They rejected the proposed undertaking as to 'respectful dealings', considering it to be 'grossly offensive' and a conflation of the proceedings with unrelated disputes between the parties.

[70] By this stage, the parties had not yet filed any lay or expert witness evidence in the proceedings.

[71] Two further *Calderbank* offers were made by the Plaintiffs, on 12 and 28 April 2022. Whilst each of those offers proposed the transfer of the subject land (differing in area between the two offers), realignment of the property boundary and the payment of compensation for the value of the land and costs reasonably incurred for investigating the encroachment, the sticking point remained the issue of the Plaintiffs' costs. Each of these further offers contained a term that the Defendants would pay the Plaintiffs' legal costs on the standard basis, to be assessed if not agreed. The Plaintiffs did not accept either of these offers.

[72] The parties were ultimately unable to reach an agreement to settle the proceedings.

[73] The Plaintiffs object to the Court receiving evidence of their 21 May 2021 letter and their 25 May 2021 email, as they are said to have been made on a 'without prejudice' basis and they have not waived privilege in respect of their disclosure. Each of those communications is exhibited to an affidavit sworn by the Defendants' solicitor which the Defendants rely upon in respect of the question of costs.

[74] Without more, I do not consider the 'without prejudice' endorsement on the 21 May 2021 letter renders either that communication or the subsequent 25 May 2021 email privileged from disclosure or otherwise inadmissible on the question of costs. Each of those communications was a response to the Defendants' offer made on 14 May 2021, which was made on a 'without prejudice save as to costs' basis. Although the Plaintiffs' 21 May 2021 letter was headed 'without prejudice', the email, attaching the draft settlement deed, was not. Further, neither communication made plain the position that is now taken.

[75] The fact that an offer to settle, either made under the rules or styled as a *Calderbank* offer, was made by the successful party and rejected by the unsuccessful party does not automatically lead to an order for indemnity costs. The ordinary rule is that

costs are payable on the standard basis. The ordinary rule should not be departed from unless there are circumstances that justify some other order. One such circumstance that may justify departure from the ordinary rule is where an unsuccessful party acted unreasonably or imprudently in rejecting a *Calderbank* offer.

[76] In *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority,*[17] the following matters were identified as relevant considerations for determining whether a *Calderbank* offer had been unreasonably rejected:

(a) the stage of the proceeding at which the offer was received;

(b) the time allowed to the offeree to consider the offer;

(c) the extent of the compromise offered;

(d) the offeree's prospects of success, assessed as at the date of the offer;

(e) the clarity with which the terms of the offer were expressed; and

(f) whether the offer foreshadowed an application for indemnity costs in the event of the offeree's rejecting it.

[77] Having regard to these factors and the circumstances of the present case, I consider the Plaintiffs acted unreasonably and imprudently in rejecting the Defendants' 9 December 2020 offer.

[78] The Defendants' offer was made at an early stage in the proceedings, however at a time when the issues in dispute and the parties' positions were generally well known to both sides. A reasonable time of 14 days for acceptance of the offer was given. The terms of the offer were clear. Notice was given that it was a *Calderbank* offer that would be relied upon on the question of costs. The extent of the compromise was reasonably significant. In addition to agreeing to the realignment of the property boundary and paying the associated costs, the Defendants offered to pay a total amount of $45,000, which was much greater than the compensation and costs orders the Plaintiffs subsequently secured following trial.

[79] At the time the Defendants' offer was made, the Plaintiffs' prospects of succeeding in obtaining the primary relief sought were limited at best. An order for transfer of the subject land together with payment of compensation was always the most likely outcome. Further, it was unlikely that they would have obtained the additional claimed compensation for the loss and damage associated with their redesign of their garage.

[80] That the Plaintiffs acted unreasonably in rejecting the Defendants' offer is in my view also borne out by the fact that the second of their alternative 18 December 2020 counter-offers proposed terms that essentially agreed with the fundamental terms of the Defendants' offer. Had they accepted it, the parties would have resolved the substantive dispute and borne their own costs. However, they continued to press for their costs to be paid. They then subsequently refused to accept several reasonable offers in that regard made by the Defendants. They also declined to settle the proceedings, even though the principal terms were largely agreed, unless the Defendants' agreed to give an undertaking to be of good behaviour. This was entirely collateral to the central encroachment dispute. The Plaintiffs then proceeded to trial and advanced a case in respect of their claim for compensation due to prospective loss and damage they would suffer if the

---

17 (2005) 13 VR 435, 442 [25].

Defendants' Garage was not removed, which I considered was not supported by the evidence adduced at trial. Although they obtained a judgment in which orders were made in respect of the alternative relief they sought, they did not obtain a judgment more favourable than the Defendants' offer.

[81] As is obvious from the foregoing, had it been necessary for me to consider whether the Plaintiffs achieved a judgment no less favourable than the formal offer they made under the *UCPR,* I would have concluded that they did not.

[82] In all the circumstances, I consider it would be just to order the Plaintiffs to pay the Defendants costs on the standard basis until 9 December 2020 and thereafter on the indemnity basis.

[83] However, the Defendants further submit that I should make an order for their costs to be fixed in the amount of $160,000. This is a rounded down figure, said to represent 60% of their legal costs until 9 December 2020 and 90% of their costs thereafter. It also includes 100% of their expert witness fees. The Defendants rely on an affidavit sworn by their solicitor, who deposes to the costs and expenses they have incurred.

[84] The Plaintiffs oppose an order for fixed costs. They submit that it would be inappropriate to make such an order on the basis of a general affidavit that does not properly particularise individual attendances.

[85] I am mindful that the power to award fixed costs under r 687(2)(c) of the *UCPR* should only be exercised where the Court has sufficient evidence to determine an appropriate sum that is logical, fair and reasonable in the circumstances. I am also mindful that when considering whether the power should be exercised the Court is not undertaking a process of taxation or assessment of costs.[18]

[86] I am satisfied that the material before me is sufficient to enable an order for fixed costs to be made. I am further satisfied that it is highly desirable that I exercise the power to make such an order in this case, as that will save the parties further delay, trouble and aggravation, which I think the parties would continue to encounter if costs were left to be assessed.

[87] I have reviewed the affidavit of the Defendants' solicitor. I am satisfied that the contents of the affidavit and the exhibited tax invoices justify making an order fixing the costs payable at $160,000 and that such a sum represents a fair and reasonable amount for the Defendants' costs.

Orders

[88] I make the following orders:

1. The Defendants are to pay the Plaintiffs an amount of $5,225, together with interest on that amount in the sum of $852.16, for expenses incurred by the Plaintiffs in investigating the encroachment.
2. Pursuant to r 687(2)(c) of the *UCPR*, the Plaintiffs are to pay the Defendants' costs of the proceedings, fixed at $160,000.

---

18 *Australian Securities and Investments Commission v Atlantic 3-Financial (Aust) Pty Ltd (No 3)* [2008] 2 Qd R 298, 306–7 [32]; 308–9 [36]–[39] (Mullins J).