

SUPREME COURT OF QUEENSLAND

CITATION: *Trouton v Trouton & Another (No 2)* [2023] QSC 29

PARTIES: **PATRICIA ANN TROUTON**
(plaintiff)
v
NEIL SIMON TROUTON
(first defendant)
LEANNE TROUTON
(second defendant)

FILE NO/S: BS No 6965 of 2017

DIVISION: Trial Division

PROCEEDING: Application

ORIGINATING COURT: Supreme Court at Brisbane

DELIVERED ON: 24 February 2023

DELIVERED AT: Brisbane

HEARING DATE: 4 November 2022

JUDGE: Williams J

ORDER: **1. The plaintiff pay the defendants' costs calculated on the indemnity basis in respect of the plaintiff's claim, including reserved costs.**

2. Each party bear their own costs in respect of the counterclaim.

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 defendant made a formal offer to settle claim and counterclaim – where the defendant's offer was for an all-up sum that did not distinguish between the claim and counterclaim – where the parties agreed that each party should bear their own costs in respect of the counterclaim – whether rr 360 and 361 of the *Uniform Civil Procedure Rules* 1999 (UCPR) apply to the defendants' offer to settle – whether the offers could be compared with the net result of judgments on the claim and counterclaim

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND

TERRITORY COURTS – COSTS – GENERAL RULE:
 COSTS FOLLOW EVENT – where the plaintiff was totally unsuccessful on the claim – where the defendants were partly successful and partly unsuccessful on the counterclaim – whether the Court has discretion as to costs under r 681 UCPR – whether the Court should depart from the general rule as to costs

Land Title Act 1992 (Qld), s 127, s 187

Uniform Civil Procedure Rules 1999 (Qld), r 5, r 184, r 353, r 360, r 361, r 681

AKS Investment Pty Ltd v National Australia Bank (No 2) [2012] QSC 282

Balnaves v Smith & Anor [2012] QSC 408

Binaray Pty Ltd (ACN 119 724 211) as Trustee for the Allen Family Trust v RAMS Financial Group Pty Limited [2019] QSC 280

Brother Industries Ltd v Dynamics Supplies Pty Ltd [2008] FCA 126

Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd [2020] QSC 1

Colgate Palmolive Co v Cussons Pty Ltd [1993] FCA 536; (1993) 46 FCR 225

Emanuel Management Pty Ltd (in liquidation) & Ors v Foster's Brewing Group Ltd & Ors and Coopers & Lybrand & Ors [2003] QSC 299

Fairfield Services Pty Ltd (in liquidation) v Leggett [2020] QSC 183

Tremco Pty Ltd v Thomson [2018] QDC 109

Trouton v Trouton & Another [2022] QSC 210

Wiggins Island Coal Export Terminal Pty Ltd v Civil Mining & Construction Pty Ltd [2021] QCA 8

COUNSEL: A J H Morris KC, with I Erskine for the plaintiff
 G Allan for the first and second defendant

SOLICITORS: Creagh Weightman Lawyers for the plaintiff
 Walt Allan for the first and second defendant

- [1] On 30 September 2022, I published reasons in respect of the claim and counterclaim (**Reasons**).¹ The final orders and costs remained outstanding.
- [2] On 25 October 2022, the matter was listed for review and directions were made for the filing and serving of further material and submissions in respect of the final orders and costs. The defendants also indicated that they intended to bring an application for a costs order against a third party and directions were made to facilitate the application in parallel.
- [3] On 4 November 2022, I heard from the parties as to the appropriate orders in light of the Reasons to finalise the claim and counterclaim. On that day the judgment was pronounced as follows:
- “THE JUDGMENT OF THE COURT IS THAT:
1. The plaintiff’s claim is dismissed.
 2. Pursuant to s 127 of the *Land Title Act* 1992 (Qld) the following caveats over Lot 7 on Survey Plan 128612, Title Reference 50306461, located at 1 Harbut Street, Holland Part West be removed:
 - (a) caveat number 717953437; and
 - (b) caveat number 718136397.
 3. The defendants’ counterclaim be otherwise dismissed.”
- [4] Submissions were then made as to the appropriate costs order as between the plaintiff and the defendants. My decision in respect of costs was reserved.
- [5] The application for a costs order against the third party did not proceed on 4 November 2022 and was adjourned to allow for substituted service of the application on the third party, Christine Trouton.
- [6] Subsequently, various directions were made in respect of the application for costs against the third party, including for the filing of any further affidavit evidence and submissions.
- [7] On 1 December 2022, the plaintiff filed a notice of appeal in respect of the judgment dated 4 November 2022.
- [8] The third party brought an application on 15 December 2022 to adjourn the application for costs against the third party until after the appeal was heard and determined. The application was refused and the application for costs against the third party was ultimately set down for 14 February 2023.
- [9] On 9 February 2023, the hearing date for the application was vacated as the third party is suffering a health issue. The matter is currently listed for review on 3 March 2023.

¹ *Trouton v Trouton & Another* [2022] QSC 210.

- [10] I had previously indicated that I proposed to deliver judgment on costs between the plaintiff and the defendants at the same time as judgment on the application for costs against the third party. Initially this was to avoid the potential for inconsistent findings given the third party indicated that the plaintiff would be called to give evidence.
- [11] Subsequently, the third party indicated that the plaintiff would not be required to give evidence. At the time that the application to adjourn was refused I indicated that on balance I considered it preferable to deal with all issues on costs together and then if the costs judgments were appealed, they could be dealt with expeditiously and efficiently.
- [12] As the application for costs against the third party has now been adjourned and there may be some delay before the application is heard, I consider that the various factors now favour judgment on the issue of costs between the plaintiff and the defendants being dealt with separately from the application for costs against the third party.²
- [13] Accordingly, these reasons consider the application in respect of costs between the plaintiff and the defendants.
- [14] These reasons use the defined terms set out in the Reasons, unless indicated otherwise.

Final orders

- [15] In considering the submissions on costs it is helpful to understand the basis of the judgment. Both parties provided proposed draft final orders to reflect the findings in the Reasons and a brief statement explaining the basis of the proposed orders.
- [16] The plaintiff proposed orders that the Plaintiff's Caveat and the Registrar's Caveat be removed pursuant to s 127 of the Land Title Act, the plaintiff's claim be dismissed and the defendants' counterclaim be otherwise dismissed.
- [17] The plaintiff submitted that the appropriate order was that the defendants' counterclaim be otherwise dismissed as the Reasons revealed no entitlement to other relief.
- [18] The defendants contended for similar orders but with three additional orders. The defendants originally contended for additional orders as follows:

“The order of the Court is that:

...

4. When the RAMS loan facilities (loan number 005215067390A) (account number 1367390) and loan number

² On 22 February 2023 the parties signed and submitted a Memorandum of Agreement dismissing the appeal by consent. These reasons were prepared prior to that development, and are not affected by the discontinuance of the appeal.

002833022533A (account number 1922533) ('RAMS facilities') are fully repaid, the plaintiff (or her attorneys, executors or assignees) must do all acts, and sign all documents presented to her, to enable the discharge of all mortgages (of which she is a mortgagor) registered over Lot 7 on Survey Plan 128612, Title Reference 50306461, situated at 1 Harbut Street, Holland Part West ('1 Harbut Street').

5. If the plaintiff (or her attorneys, executors or assignees) refuses or fails to comply with order 4 above, the defendants are hereby appointed the plaintiff's attorneys for the purposes of doing all said acts and signing all said documents to enable the discharge of all mortgages (of which the plaintiff is the mortgagor) registered over 1 Harbut Street.
6. The plaintiff (and her attorneys, executors or assignees) is restrained from:
 - (a) otherwise altering the terms or conditions of the RAMS facilities; and
 - (b) withdrawing any funds from, or pursuant to the RAMS facilities."

[19] The defendants submitted that support for orders 4 and 5 were contained in [86] of the 2ADCC and [3(c)] of the prayer for relief.

[20] In [86] of the 2ADCC, the defendants sought a declaration that the plaintiff is liable for repayment of the RAMS Facilities, an order that the plaintiff repay the RAMS Facilities in discharge of the mortgages against the Harbut Street Property and an order that the plaintiff pay interest. Further, in [3(c)] of the prayer for relief the defendants sought an order that the plaintiff repay the RAMS Facilities and discharge the mortgages against the Harbut Street Property.

[21] The proposed order 4 and 5 were significantly different from the relief originally sought in the 2ADCC. The plaintiff contended that the relief sought in the defendants' proposed order was not sought in the 2ADCC and were not orders that reflected the Reasons.

[22] The defendants in their submissions stated:

"Once the RAMS facilities are fully repaid, since the defendants hold indefeasible title to 1 Harbut Street, clearly they would want to 'clear the title' by having the mortgages discharged, it makes sense (for finality purposes) to provide a mechanism by which that can be done in these final orders rather than requiring the defendants to bring a separate proceeding at that time seeking the orders in paragraphs 4 and 5 of the proposed orders."

- [23] While arguably there was some logic to the orders of the nature sought, no such relief was sought in the 2ADCC. Further, the defendants' proposed orders did go beyond the findings in the Reasons. There was also an issue as to the utility of the orders sought.
- [24] The defendants submitted that the support for the proposed order 6 could be found in various findings in the Reasons but recognised that no such specific relief was claimed in the 2ADCC.
- [25] The defendants pointed to the findings that the defendants held indefeasible title, the plaintiff was and remains primarily responsible for payment of the amounts owing under the RAMS Facilities and the defendants found themselves in the position of effectively being guarantors of the RAMS Facilities. In those circumstances, the defendants submitted that it was appropriate for the Court to protect the defendants' equity in 1 Harbut Street and make the orders to avoid the costs of a further proceeding.
- [26] The plaintiff opposed order 6 as sought by the defendants.
- [27] Ultimately at the hearing on 4 November 2022 the defendants did not press for the orders in 4, 5 and 6 of the proposed draft orders.
- [28] In the SOC, the plaintiffs sought an order pursuant to s 187 of the Land Title Act cancelling the registration of the Form 1 Transfer lodged for registration on 19 June 2007 over and on the Harbut Street Property. Further, the plaintiff sought an order for recovery of possession of the Harbut Street Property. The plaintiff was wholly unsuccessful in relation to that relief and the matters pleaded in the SOC.
- [29] In respect of the 2ADCC, the defendants sought relief including the removal of the Plaintiff's Caveat and the Registrar's Caveat pursuant to s 127(1) of the Land Title Act. The Reasons state that the removal of the Plaintiff's Caveat and the Registrar's Caveat are appropriate orders given the findings in the Reasons.³
- [30] The defendants also sought relief by way of damages for deceit, damages for breach of contract, a declaration that the plaintiff was liable for repayment of the RAMS Facilities, an order that the plaintiff repay the RAMS Facilities and discharge the mortgages, a declaration that the plaintiff is estopped from seeking an order under s 187 of the Land Title Act cancelling registration and estopped from seeking any consequential order for recovery of possession of the Harbut Street Property. The defendants also sought relief in the alternative if the Court found that the Harbut Street Property was to be transferred to the plaintiff. In respect of these claims, the defendants were unsuccessful or it was unnecessary to decide given the primary finding in respect of the plaintiff's claim.
- [31] The defendants ultimately were successful in defending the plaintiff's claim and obtained an order for the removal of the Plaintiff's Caveat and the Registrar's Caveat. No other orders were appropriate given the findings in the Reasons, other than the dismissal of the balance of the counterclaim and the claim.

³ Reasons at [400].

- [32] Ultimately an agreed position was reached in respect of the orders for the dismissal of the claim, the removal of the two caveats and otherwise dismissing the counterclaim, except for some different wording in respect of removal of the caveats. I preferred the form of order proposed by the plaintiff and judgment was pronounced in the form of the plaintiff's draft.
- [33] The judgment can be characterized as reflecting that:
- (a) The plaintiff was totally unsuccessful on the claim.
 - (b) The defendants had a mixed result on the counterclaim: partly successful, partly unsuccessful.

Appropriate costs order between the plaintiff and the defendants

- [34] In respect of costs between the plaintiff and the defendants, both parties started from the position that the defendants were successful in defending the plaintiff's claim and were successful in part on the counterclaim.
- [35] The application proceeded on the basis that the parties agreed that each party should bear their own costs in respect of the counterclaim given the mixed result.
- [36] The issue requiring determination is what is the appropriate costs order in respect of the plaintiff's claim. Initially, the parties contended for different outcomes:
- (a) The plaintiff contended that costs should follow the event and the plaintiff should pay the defendants' costs of the proceeding, including reserved costs, to be assessed on the standard basis.
 - (b) The defendants contended that the plaintiff should pay the defendants' costs of the plaintiff's claim, including reserved costs, on the indemnity basis.
- [37] The basis for these outcomes changed during the course of the hearing on costs. Initially, the key difference between the two positions was:
- (a) The plaintiff submitted that costs were in the discretion of the Court pursuant to r 681 UCPR.
 - (b) The defendants submitted that costs were mandated by operation of r 360 UCPR and not in the general discretion of the Court (r 681(2)).
- [38] During the hearing, the position of the parties was clarified to be as follows:
- (a) The defendants:
 - (i) Principally relied upon r 360 UCPR as mandating an order for the plaintiff to pay the defendants' costs on an indemnity basis.
 - (ii) In the alternative, submitted that pursuant to r 361(2) UCPR the mandated costs consequences were not appropriate and the appropriate costs order was that the plaintiff pay the defendants' costs on an indemnity basis.
 - (iii) Further in the alternative, submitted that costs should be dealt with under the general discretion under r 681 UCPR and the appropriate

order was for the plaintiff to pay the defendants' costs on an indemnity basis.

- (b) The plaintiff's position was that:
- (i) Rule 360 UCPR was not applicable.
 - (ii) Rule 361 UCPR was engaged, therefore the mandated costs orders should be made and there was no basis to be satisfied that another order was appropriate in the circumstances. Accordingly, the Court should order:
 - (A) The defendant pay the plaintiff's costs on the standard basis up to and including the date of the offer;
 - (B) The plaintiff pay the defendants' costs on the standard basis after the date of the offer.
 - (iii) Alternatively, costs be dealt with under the general discretion under r 681 UCPR.

UCPR provisions

[39] Under the UCPR, the starting point in respect of costs is r 681 UCPR which provides:

- “(1) Costs of a proceeding, including an application in a proceeding, are in the discretion of the court but follow the event, unless the court orders otherwise.
- (2) Subrule (1) applies unless these rules provide otherwise.”

[40] Rules 360 and 361 UCPR are rules which “provide otherwise”.

[41] Rule 360 UCPR relevantly states as follows:

- “(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.

...”

[42] Rule 361 UCPR relevantly states as follows:

- “(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.

...”

[43] As a result of the operation of these rules, costs are in the Court’s discretion unless the Court must make the order required by the UCPR (or another order is shown to be appropriate). The Court may exercise its discretion if neither r 360 nor r 361 UCPR apply.⁴

UCPR Offer

[44] The defendants rely on a formal offer made under r 353, Chapter 9, Part 5 of the UCPR on 31 October 2018 to “settle the plaintiff’s claim and the defendants’ counterclaim in matter No 6965 of 2017” (**UCPR Offer**).

[45] The UCPR Offer was made by the defendants to the plaintiff to settle both the claim and counterclaim on the following terms:

- “1. The defendants will assume responsibility for the plaintiff’s liabilities in respect of the following finance facilities and securities:
- (1) RAMS home loan account number 001367390, in the name of Mrs P A Trouton and Mr C W Trouton;
 - (2) RAMS home loan account number 001922533, in the name of Mrs P A Trouton and Mr C W Trouton;
 - (3) Transfer of Mortgage 703207827 to RAMS Mortgage Corporation Ltd (‘RAMS’) registered on 29 April 2003;

⁴ *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd* [2020] QSC 1 at [6] (Flanagan J).

- (4) Transfer of Mortgage 704475302 to RAMS registered on 29 April 2003;
- (5) Transfer of Mortgage 705392165 to RAMS registered on 29 April 2003;
- (6) Mortgage 706560466 to RAMS registered on 29 April 2003,

(‘the RAMS Facilities’) which liabilities as at 30 June 2018 are in the amount of \$350,709.67.

- 2. The defendants indemnify and forever hold harmless Patricia from all liabilities owing under the RAMS Facilities.
- 3. The defendants pay the plaintiff the sum of \$150,000 (Settlement Sum) in full and final settlement of the proceedings.
- 4. The plaintiff:
 - (1) shall remove Caveat 717953437 registered over the title in respect of the Harbut Street Property (Patricia’s Caveat); and
 - (2) shall take all steps required to request the Registrar of Titles to remove Caveat 718136397 registered over the title in respect of the Harbut Street Property and to remove the Caveat 718136397.
- 5. The defendants pay the plaintiff’s costs of the proceedings assessed on the standard basis.
- 6. Upon payment of the Settlement Sum the plaintiff shall discontinue the proceedings and the defendants shall consent to such discontinuance.
- 7. The parties will provide mutual releases and sign a formal deed of settlement and release.

This offer remains open for acceptance for a period of 21 days from the date of this letter.”

Does r 360 apply in respect of the UCPR Offer?

[46] The defendants submit that r 360 UCPR applies in respect of the UCPR Offer and accordingly the Court must order that the plaintiff pay the defendants’ costs on the indemnity basis (on the basis that the defendants here are in a position of plaintiffs as a result of the counterclaim).

[47] The difficulty with the defendants’ submission is that given the agreed position in respect of costs of the counterclaim, the only claim being considered for costs purposes is the plaintiff’s claim and in respect of that claim the defendants are only

in the role of defendants. The submission made appears to be that the defendants were defendants initially in respect of the claim but when the counterclaim was filed they switched to being plaintiffs and stayed in that role for all purposes. That cannot be the correct analysis.

[48] The defendants' submissions on r 360 proceed on a wrong understanding of the operation of r 360 and r 361. In respect of the plaintiff's claim, the defendants are in the position of a defendant. Rule 361 would be the applicable rule in considering the effect of the UCPR Offer as it applies where a "defendant makes an offer".

[49] This is consistent with the reasoning of Flanagan J in *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd*⁵ and the Court of Appeal in *Wiggins Island Coal Export Terminal Pty Ltd v Civil Mining & Construction Pty Ltd*.⁶

Does r 361 UCPR apply in respect of costs of the plaintiff's claim?

[50] The next issue to be considered is therefore whether r 361 UCPR is engaged in respect of the UCPR Offer.

[51] An offer which purports to settle all claims in a proceeding is within r 353(1) UCPR. The reference to 1 or more claims in a proceeding is a reference to causes of action or claims for relief, rather than a claim and counterclaim.⁷ Here the UCPR Offer is expressly stated to settle the claim and counterclaim, which would include all claims: that is, all causes of action raised in the claim and counterclaim.

[52] The inclusion of a non-monetary term of "mutual releases" and a "formal deed of settlement" do not necessarily result in the UCPR offer being non-compliant with r 353 UCPR.⁸

[53] In this case the issue arises as to whether the "all up" offer triggers or engages the operation of r 361 UCPR. Where there are separate judgments on a claim and counterclaim, an "all up" offer which does not distinguish between the various claims will not trigger r 361 UCPR.⁹

[54] It is not necessary in this case to consider whether r 361 may be triggered by an "all up" offer where there is a single judgment.¹⁰

[55] Here, the plaintiff and the defendants submit that:

⁵ [2020] QSC 1 at [39]-[41].

⁶ [2021] QCA 8 per Holmes CJ at [41]-[43].

⁷ *Wiggins Island Coal Export Terminal Pty Ltd v Civil Mining & Construction Pty Ltd* [2021] QCA 8 per Holmes CJ at [27]-[29].

⁸ *Balnaves v Smith* [2012] QSC 408 and *Binaray Pty Ltd (ACN 119 724 211) as Trustee for the Allen Family Trust v RAMS Financial Group Pty Limited* [2019] QSC 280.

⁹ *Wiggins Island Coal Export Terminal Pty Ltd v Civil Mining & Construction Pty Ltd* [2021] QCA 8 at [40]-[41] and [43].

¹⁰ See discussion per Holmes CJ in *Wiggins Island Coal Export Terminal Pty Ltd v Civil Mining & Construction Pty Ltd* [2021] QCA 8 at [42].

- (a) It is open that r 361 UCPR is triggered by the UCPR Offer where the plaintiff's claim is wholly dismissed.
- (b) Here, only the costs order in respect of the plaintiff's claim is being considered and the order dismissing the plaintiff's claim can be compared against the UCPR Offer.
- (c) The current circumstances are distinguishable from the situation considered by Flanagan J in *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd*¹¹ and the Court of Appeal in *Wiggins Island Coal Export Terminal Pty Ltd v Civil Mining & Construction Pty Ltd*,¹² where there were separate monetary judgments on the claim and counterclaim and an "all up" offer.

[56] I have some difficulties with this contention. The UCPR Offer is an "all up" offer to settle the claim and counterclaim. It does not distinguish between the claim and counterclaim. In *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd*, Flanagan J concluded that it could not be discerned from the terms of the offer the components that were referable to the claim and counterclaim. The comparison analysis requires consideration of the part of the offer that relates to the claim under consideration with the orders obtained on the claim.¹³

[57] A similar problem arises here. The Court would have to speculate as to the division of the terms of the UCPR Offer between the claim and counterclaim. The judgment here is in effect two judgments: dismissal of the plaintiff's claim and a mixed result on the counterclaim.

[58] In the Court of Appeal, Holmes CJ observed that an offer to settle the entire proceedings "without quantifying claim and counterclaim separately" could be compared to a single judgment for a "net amount" for the purposes of r 361(1) UCPR.¹⁴ However, it was not for the Court to construe or interpret two judgments as though they were only one single judgment to undertake the comparison.¹⁵

[59] The parties did not articulate with precision the basis that the reasoning of the Court of Appeal or Flanagan J could be distinguished. It seems that it was accepted that the plaintiff "[did] not obtain an order more favourable to the plaintiff than the offer". This position was reached without the parties grappling with the practical aspects of the comparison exercise: that is, what is the order dismissing the plaintiff's claim to be compared to in undertaking the comparison exercise? Is the entirety of the UCPR Offer or part only of it to be used for the comparison exercise?

[60] These issues tend to support a conclusion that r 361 is not engaged in these circumstances and the current circumstances are not distinguishable from the

¹¹ [2020] QSC 1.

¹² [2021] QCA 8.

¹³ [2020] QSC 1 at [46] and upheld on appeal in *Wiggins Island Coal Export Terminal Pty Ltd v Civil Mining & Construction Pty Ltd* [2021] QCA 8 at [42] and [43].

¹⁴ [2021] QCA 8 at [42].

¹⁵ [2021] QCA 8 at [40].

situation considered by Flanagan J in *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd*¹⁶ and the Court of Appeal in *Wiggins Island Coal Export Terminal Pty Ltd v Civil Mining & Construction Pty Ltd*.¹⁷

[61] However, for the purposes of argument and without accepting the correctness of this contention, I am prepared to proceed on a preliminary basis that r 361 UCPR applies and attempt to undertake the required analysis.

[62] The requirements in r 361(1) UCPR are:

- (a) The defendant(s) made an offer to the plaintiff that was not accepted.
- (b) The plaintiff does not obtain an order that is more favourable to the plaintiff than the offer.
- (c) The defendant(s) establishes that the defendant(s) was at all material times willing and able to carry out the offer.

[63] Applying this to the current facts, the requirements in (a) and (c) are met:

- (a) The defendants made a complying offer by way of the defendants' UCPR Offer.
- (b) The defendants' UCPR Offer was not accepted.
- (c) The affidavits of the first and second defendants address the defendants' being willing and able to carry out the offer.

[64] The issue then arises whether the plaintiff does not obtain "an order that is more favourable to the plaintiff than the offer". This is the "comparison exercise" required by r 361 UCPR.

[65] The judgment pronounced on 4 November 2022 was that the plaintiff's claim be dismissed, the two caveats be removed and the counterclaim be otherwise dismissed.

[66] The defendants' UCPR Offer was in summary:

- (a) The defendants assume responsibility for the RAMS Facilities and the four mortgages to be transferred to the defendants. As at 30 June 2018 these liabilities amounted to \$350,709.67.
- (b) The defendants indemnify the plaintiff in respect of (a).
- (c) The defendants pay the plaintiff \$150,000 in full and final settlement of the proceedings.
- (d) The plaintiff remove the Plaintiff's Caveat and take all steps required to request the removal of the Registrar's Caveat.
- (e) The defendants pay the plaintiff's costs of the proceeding on a standard basis.

¹⁶ [2020] QSC 1.

¹⁷ [2021] QCA 8.

- (f) Upon payment of the \$150,000 the plaintiff discontinue the proceedings, with the defendants' consent.
- (g) The parties "will provide mutual releases and sign a formal deed of settlement".

[67] The task is to be approached on the following basis:

"The offer must permit fairly ready comparison between the nature and extent of the advantages (and any disadvantages) arising from the judgment with the situation that would have been obtained had the offer been accepted."¹⁸

[68] The comparison task requires consideration of the overall effect of the judgment and the offer. Consideration of non-monetary terms does not require precise correlation between all elements of the offer and judgment but rather a pragmatic consideration of the effect and impact of the terms in their totality.¹⁹ This is particularly so when the judgment was substantially more favourable than the offer and none of the non-monetary terms were capable of impacting on that conclusion.²⁰

[69] Rule 5(2) UCPR expressly incorporates the r 5 objective into the construction and application of the UCPR. Accordingly, this applies to the comparison exercise to be undertaken under r 361 UCPR.

[70] Here:

- (a) The term that the defendants took over responsibility for the RAMS Facilities and the mortgages for which the plaintiff currently remains liable²¹ was at the time of the UCPR Offer a significant benefit to the plaintiff and remains so at the current time.
- (b) The terms that the defendants would indemnify the plaintiff in respect of the RAMS Facilities and mortgages was also a benefit in favour of the plaintiff.
- (c) The terms for a discontinuance by consent was accompanied with a term for payment of the plaintiff's costs on the standard basis. There was no disadvantage to the plaintiff.
- (d) The term "[t]he parties will provide mutual releases and sign a formal deed of settlement" is not in the form of open-ended conditions "on terms to be agreed".²² Taking a non-technical approach as required by r 5(2), the term can be construed as mutual releases in respect of both the claim and counterclaim which are the claims being settled and a settlement deed reflecting the terms of the offer. The objective of the mutual releases and deed of settlement is finality of the litigation. That is an advantage to both parties, not a disadvantage to the plaintiff.

¹⁸ *Balnaves v Smith & Anor* [2012] QSC 408 at [20] per Byrne SJA.

¹⁹ *Brother Industries Ltd v Dynamics Supplies Pty Ltd* [2008] FCA 126 at [6] per Tamberlin J.

²⁰ *Tremco Pty Ltd v Thomson* [2018] QDC 109 at [13].

²¹ Reasons at [405].

²² This was not contentious between the parties.

- [71] Overall, the UCPR Offer contained terms that provided significant benefits to the plaintiff when compared to the final judgment. The UCPR Offer clearly had positive benefits to the plaintiff.
- [72] This highlights the problem identified above. Is this the correct comparison analysis? How is the comparison to be undertaken with respect to the plaintiff's claim component when that is not identified in the UCPR Offer?
- [73] I consider the current circumstances are not distinguishable from the situation considered by Flanagan J in *Civil Mining & Construction Pty Ltd v Wiggins Island Coal Export Terminal Pty Ltd*²³ and the Court of Appeal in *Wiggins Island Coal Export Terminal Pty Ltd v Civil Mining & Construction Pty Ltd*.²⁴
- [74] Accordingly, I find that r 361 UCPR is not engaged and does not apply.

What costs order is appropriate under the general discretion r 681 UCPR in respect of the plaintiff's claim?

- [75] The Court has a wide general discretion as to costs under r 681. Costs would follow the event in the usual course. Here, the plaintiff has been wholly unsuccessful in respect of the plaintiff's claim.
- [76] The Court also has a wide power to award indemnity costs in accordance with the principles identified in the authorities. What is required is something in the circumstances of the case to warrant a departure from "the usual course". It requires something more than the "demerit of a party's case".²⁵
- [77] While the categories are not closed, the authorities do recognise some circumstances that warrant the exercise of the discretion. For example:
- (a) The making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud.
 - (b) Evidence of particular misconduct that causes loss of time to the Court and to other parties.
 - (c) The fact that the proceedings were commenced or continued for some ulterior motive.
 - (d) The fact that the proceedings were commenced or continued in wilful disregard of known facts or clearly established law.
 - (e) The making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions.

²³ [2020] QSC 1.

²⁴ [2021] QCA 8.

²⁵ *Colgate Palmolive Co v Cussons Pty Ltd* [1993] FCA 536; (1993) 46 FCR 225; *AKS Investment Pty Ltd v National Australia Bank (No 2)* [2012] QSC 282, Applegarth J; *Fairfield Services Pty Ltd (in liquidation) v Leggett* [2020] QSC 183, Bond J (as his Honour then was); *Emanuel Management Pty Ltd (in liquidation) & Ors v Foster's Brewing Group Ltd & Ors and Coopers & Lybrand & Ors* [2003] QSC 299, Chesterman J (as his Honour then was).

(f) An imprudent refusal of an offer to compromise.²⁶

[78] Even in respect of these categories of cases the question remains whether the particular facts and circumstances of the case warrant the making of an order for payment of costs other than on a standard basis. Further, it remains in the discretion of the judge.²⁷

[79] In the Reasons the plaintiff's evidence was found not to be reliable or credible. Further, extensive findings were made that were contrary to the plaintiff's evidence and the plaintiff's claim.

[80] At the hearing on costs, Senior Counsel for the plaintiff submitted that the findings in the Reasons did not go as far as finding deliberate dishonesty on the part of the plaintiff. For example, it was possible that the plaintiff had the relevant knowledge at the time the transfer was executed but had subsequently forgotten. It was submitted that in the absence of a finding of deliberate dishonesty it was not open to the Court to find a sufficient basis to order indemnity costs.

[81] Counsel for the defendants submitted that it was open on the findings in the Reasons to conclude that the allegations of fraud in the plaintiff's claim were made by the plaintiff knowing them to be false. Further, it was open for the Court to make additional findings at this stage.

[82] The contention that the plaintiff simply "forgot" at some later time cannot be sustained, particularly given the extensive analysis of contemporaneous documents undertaken in the Reasons.

[83] Further, while these proceedings were commenced in 2017, being 10 years after the Form 1 Transfer was signed, the plaintiff arranged her personal affairs over a period of time in a way consistent with her being aware that the Harbut Street Property had been transferred to the defendants.

[84] In the circumstances, I consider it is necessary and appropriate for me to make additional findings in respect of the plaintiff's evidence, which are supplementary to the findings in the Reasons. I make the following supplementary findings:

(a) At all material times, the plaintiff:

(i) Knew and understood the legal effect of the Form 1 Transfer.

(ii) Knew that she had knowingly and voluntarily signed the Form 1 Transfer in both her personal capacity and purportedly as an attorney on behalf of Colin Trouton.

(iii) Knew that she had intended to transfer the Harbut Street property to the defendants.

²⁶ *Colgate Palmolive Co v Cussons Pty Ltd* [1993] FCA 536; (1993) 46 FCR 225 per Sheppard J at 233 point 5.

²⁷ *Colgate Palmolive Co v Cussons Pty Ltd* [1993] FCA 536; (1993) 46 FCR 225 per Sheppard J at 234 point 5 and 6.

- (b) The plaintiff commenced and continued the proceedings making allegations of fraud knowing them to be false and in wilful disregard of known facts.

[85] Further, it appears from the Court file that:

- (a) The proceeding was commenced by originating application in July 2017, supported by an affidavit of the plaintiff. The first defendant filed and served a detailed affidavit in response in August 2017.²⁸
- (b) Subsequently, in August 2017 an order was made that the matter continue by way of claim. The SOC was filed in February 2018 and the defence and counterclaim was filed in April 2018.
- (c) Pursuant to orders of the Court the matter was to proceed to a mediation in parallel to the completion of the directed steps. There was a delay and the matter did not proceed to mediation until 30 October 2018.²⁹
- (d) The UCPR Offer was made on 31 October 2018 immediately following the unsuccessful conclusion of the mediation.
- (e) Following the unsuccessful mediation, various amendments were made to the reply, rejoinder and the defence and counterclaim.
- (f) At the time the UCPR Offer was made the SOC was in the same form as the trial was conducted on. The defence and counterclaim was subsequently amended and the trial proceeded on the 2ADCC. However, at the time of the UCPR Offer the key matters were raised by the defendants in the defence and counterclaim.

[86] The plaintiff contends that the UCPR Offer was made at too early a stage in the proceeding to give the plaintiff a reasonable opportunity to assess the merits of the offer. This contention is unsustainable in light of the findings in the Reasons and the supplementary findings.

[87] While there were some changes to the pleading and further disclosure occurred after the date of the expiry of the UCPR Offer, this was a case that ultimately turned on the plaintiff's knowledge at the relevant time and whether the Court accepted the plaintiff's evidence. The plaintiff was in the perfect position to be able to assess the merits of the UCPR Offer.

[88] Acceptance of the UCPR Offer would have avoided the related court proceedings in respect of the RAMS Facilities. Further, acceptance of the UCPR Offer would have relieved the plaintiff of liability under the RAMs Facilities and avoided the need for the trial. The UCPR Offer clearly was more favourable to the plaintiff than the practical net result of the orders in the judgment.

[89] These factors support a conclusion that the refusal of the UCPR Offer was imprudent and unreasonable, particularly given:

²⁸ The first defendant's affidavit was tendered by the defendants at trial and marked Exhibit 68.

²⁹ Mediator's Certificate filed 5 November 2018, document 17.

- (a) the findings in the Reasons and the supplementary findings as to the plaintiff's knowledge; and
 - (b) the findings in the Reasons as to the terms of the oral agreement, including a term that the plaintiff was responsible for paying out the RAMS Facilities secured by the mortgage registered over the Harbut Street Property.
- [90] Further, in all of the current circumstances there is no principled basis to distinguish between the period before the UCPR Offer and after the UCPR Offer.
- [91] The circumstances warranting a departure from the usual costs position in respect of the plaintiff's claim can be classified as at least falling in the categories of:
- (a) the making of allegations of fraud knowing them to be false;
 - (b) proceedings commenced or continued in wilful disregard of known facts; and
 - (c) an imprudent refusal of an offer to compromise.
- [92] The plaintiff contends that if the Court was minded to award costs on the indemnity basis there should be some offsetting of the plaintiff's costs of defending the counterclaim. In this regard the plaintiff points to the following matters:
- (a) The issues on the counterclaim were lengthy and complex.
 - (b) The defendants wholly failed in respect of their claim in deceit.
 - (c) The counterclaim required extensive disclosure.
 - (d) Not all relief sought in the counterclaim was in the alternative.³⁰
- [93] The agreed position of the parties is that there be no order for costs in relation to the counterclaim. This already factors in the "mixed" success of the defendants in respect of the counterclaim and no further adjustment is required. The concession by the defendants in respect of the costs of the counterclaim is significant.
- [94] In all of the current circumstances, in exercising the Court's general discretion under r 618 UCPR I am satisfied that:
- (a) the particular facts and circumstances of the case warrant the making of an order for payment of costs other than on a standard basis; and
 - (b) it is appropriate to order that the plaintiff pay the defendants' costs calculated on the indemnity basis in respect of the plaintiff's claim, including reserved costs.

If r 361 did apply?

- [95] If the conclusion could properly be reached that the order is not more favourable to the plaintiff than the UCPR Offer, the cost order must be as stated in r 361(2)(a) and (b) UCPR, unless a party shows another costs order is appropriate in the circumstances. It would then be necessary to consider whether an award of

³⁰ Plaintiff's costs submissions at [11] and [13].

indemnity costs is justified in considering whether “another order for costs is appropriate”.

- [96] If the UCPR Offer triggered r 361 UCPR in the current circumstances, I consider the same result is reached. That is, the appropriate order is that the plaintiff pay the defendants’ costs calculated on the indemnity basis in respect of the plaintiff’s claim, including reserved costs.

Costs Orders

- [97] Accordingly, the Court orders that:

1. The plaintiff pay the defendants’ costs calculated on the indemnity basis in respect of the plaintiff’s claim, including reserved costs.
2. Each party bear their own costs in respect of the counterclaim.