SUPREME COURT OF QUEENSLAND

CITATION:	*Nortask Pty Ltd ACN 077 690 852 v Areva Solar KCP Pty Ltd ACN 149 114 134 (No 2)* [2018] QSC 210
PARTIES:	**NORTASK PTY LTD ACN 077 690 852** (Plaintiff) **v** **AREVA SOLAR KCP PTY LTD ACN 149 114 134** (Defendant)
FILE NO/S:	BS No 1564 of 2015
DIVISION:	Trial Division
PROCEEDING:	Trial
ORIGINATING COURT:	Supreme Court at Brisbane
DELIVERED ON:	14 September 2018
DELIVERED AT:	Brisbane
HEARING DATE:	17 August 2018
JUDGE:	Lyons SJA
ORDER:	**The plaintiff is directed to bring in minutes of order to reflect these reasons within seven days.**
CATCHWORDS:	PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – CORRECTION UNDER SLIP RULE – GENERAL PRINCIPLES – where there is an alleged mistake in the payments that are to be set off against the award for damages – where there is correspondence from both parties regarding the issue –whether the amounts can be amended – whether there was a mistake requiring amendment PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – CORRECTION UNDER SLIP RULE – GENERAL PRINCIPLES – where the plaintiff alleges an issue was overlooked in the reasons delivered – where the plaintiff submits that the reasons can be amended to address this issue – where the defendant submits this is outside the scope of the court's power to correct mistakes and omissions – whether the matter should be addressed – whether the matter can be amended PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – TAXATION AND OTHER FORMS OF ASSESSMENT – GST

CONSIDERATIONS – where the plaintiffs claim GST on all amounts of its claim – where the defendant submits the plaintiff is not entitled to GST – where the defendant submits that amount recoverable is GST exclusive – whether the amounts awarded attract GST - whether the reasons delivered need to be amended to make an order for payment of GST

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – JUDGMENTS AND ORDERS – INTEREST ON JUDGMENTS – GENERALLY – where interest is claimed on the awards of damages – where the defendant submits interest is payable - whether the approach of the plaintiff should be adopted – whether the approach of the defendant should be adopted

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – GENERAL RULE: COSTS FOLLOW EVENT – GENERAL PRINCIPLES AND EXERCISE OF DISCRETION – where the defendant submits the court should vary the normal order that costs follow the event – where the defendant submits each party should bear their own costs, except for the reserved costs – where the plaintiff submits three costs orders are open to the court, including an order for indemnity costs of the whole proceeding – where there have been offers in the course of the proceedings - whether the normal order should be varied – whether indemnity costs should be awarded

PROCEDURE – CIVIL PROCEEDINGS IN STATE AND TERRITORY COURTS – COSTS – INTERLOCUTORY PROCEEDINGS – COSTS RESERVED – ALLOWANCE OF RESERVED COSTS AFTER JUDGMENT – where the defendant submits the plaintiff should pay the reserved costs of the interlocutory hearings – where the plaintiff submits the reserved costs should follow the event – whether the plaintiff should pay those costs – whether the defendant should pay those costs

A New System (Goods and Services Tax) Act 1999 (Cth)

Civil Proceedings Act 2011 (Qld)

Uniform Civil Procedure Rules 1999 (Qld) r 360, r 388, r 667, r 681, r 684, r 698, r 702

Andrews v Barnes (1887) 39 Ch D 133

Atlantic 3-Financial (Aust) P/L & Anor v Marler & Anor [2003] QCA 529

Bulsey & Anor v State of Queensland [2016] QCA 158

Chapman v Chapman [2001] QCA 465

Colgate-Palmolive Co v Cussons Pty Ltd (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

Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd [2001] VSCA 167

Grice v State of Qld [2005] QCA 298

Hayes v Surfers Paradise Rock and Roll Café P/L & Anor [2010] QCA 48

Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2) [2005] VSCA 298

Interchase Corporation Ltd v ACN 010 087 573 Pty Ltd [2000] QSC 13

J & D Rigging Pty Ltd v Agripower Australia Limited & Ors [2014] QCA 23

McBride v ASK Funding Ltd [2013] QCA 130

McDermott & Ors v Robinson Helicopter Company (No 2) [2014] QSC 213; [2015] 1 Qd R 295

McIntosh v Linke Nominees Pty Ltd [2010] 1 Qd R 152

Preston v Preston [1982] 1 All ER 41

Qld Pork Pty Ltd v Lott [2003] QCA 271

Secretary to the Department of Business and Innovation v Murdesk Investments Pty Ltd (No 2) [2012] VSC 586

Stewart v Atco Controls Pty Ltd (in liq) [No2] (2014) 252 CLR 331

West & Ors v Blackgrove & Anor [2012] QCA 321

COUNSEL: S J Armitage for the Plaintiff
M J Steele for the Defendant

SOLICITORS: Clifford Gouldson Lawyers for the Plaintiff
Norton Rose Fulbright for the Defendant

Background

[1] The trial of this proceeding was conducted over 5 days in April 2018.

[2] On 22 June 2018, my associate sent the following email to the parties:[1]

[1] Exhibit 116.

"Dear Mr Steele and Ms Armitage,

Paragraph 11 of the Further Amended Statement of Claim claims amounts were paid by the defendant as set out in that paragraph and whilst the payments weren't agreed to be rental, it is claimed that the payments so made could be offset in respect of any damages claim by the plaintiff against the defendant.

Can the parties confirm these were the only amounts paid by the Defendant after February 2014 and therefore the only payments that would be offset, should an order for damages be made."

[3] On 22 June 2018, the following response was received from counsel for the defendant:[2]

"Dear Ms Associate,

Paragraph 11 of the further amended statement of claim accurately sets out the amounts paid by the defendant to the plaintiff for the use of the land from time to time after **February 2015** (not 2014), which is the period referred to in paragraph 11 of the further amended statement of claim.

Please let us know if you wish to obtain confirmation of the amounts paid to the plaintiff from February 2014, rather than February 2015. In that regard, paragraph 11(c) (to which no denial is made in the reply) confirms that between **February 2013** and **April 2016** the defendant paid the sum of **$469,095.47** to the plaintiff for storage of the defendant's chattels on the plaintiff's property.

However, those amounts **do not reflect the further sums** paid to the plaintiff for other work performed by the plaintiff from time to time.

Subject to that qualification, the defendant confirms that the amounts identified in paragraph 11 of the FASOC are those which should be offset against any damages awarded to the plaintiff in relation to the use of the land."

[4] On 27 June 2018 the following response was received from the solicitors for the plaintiff:[3]

"Dear Madam Associate

The payments set out in paragraphs 11.a. ($16,221.70), 11.b. ($11,748.00) and 11.c. ($164,858.28) of the Further Amended Statement of Claim cover the period between February 2015 and 18 April 2016. These amounts total $192,827.98.

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2 Exhibit 116.
3 Exhibit 116.

Between February 2014 and January 2015 the following amounts were received by the Plaintiff from the Defendant in respect of either of the Retainers pleaded in the Further Amended Statement of Claim:

AMOUNT	DATE PAID	PERIOD
11,748.00	31-03-14	February 2014
11,748.00	30-04-14	March 2014
11,748.00	30-05-14	April 2014
11,748.00	30-06-14	May 2014
11,748.00	30-07-14	June 2014
11,748.00	29-08-14	July 2014
11,748.00	30-09-14	August 2014
11,748.00	30-10-14	September 2014
11,748.00	28-11-14	October 2014
11,748.00	02-01-15	November 2014
11,748.00	19-01-15	December 2014
6,063.49	30-01-15	January 2015
135,291.49	TOTAL	

Accordingly, by adding this $135,291.49 to the $192,827.98 above, the total amount the Plaintiff received from the Defendant in respect of land use between February 2014 and 18 April 2018 is $328,119.47 including GST.

Any amounts received for other services provided, and nothing to do with storage or use of land, have been excluded from the calculations to arrive at the above figure.

Should her Honour have any additional questions please do not hesitate to contact us."

[5] On 28 June 2018 I delivered my reasons for judgment and sought submissions from the parties as to the final form of the orders and as to costs. As neither trial Counsel was available on 28 June 2018, the matter was set down for 17 August for further hearing as to the form of the orders and as to costs.

[6] Following the delivery of my reasons, on 29 June 2018, the below email was received from the solicitors for the defendant:

> "Paragraph 158 of her Honour's reasons deals with the issue of set off. In light of her Honour's email seeking clarification about that issue, we consider it appropriate to respectfully indicate that her Honour appears to have unintentionally overlooked some amounts that ought to have been included in her consideration of set-off and to indicate that the defendant will make submissions in that regard when the matter is next heard on 17 August 2018.
>
> We will between now and 17 August 2018 articulate the matters to the plaintiff's solicitor in the hope that the parties can reach agreement on the matter before 17 August 2018."

[7] I received written submissions from the defendant on 15 August 2018 which essentially agreed with the plaintiff's email of 29 June 2018 and confirmed that there had been technical errors in the judgment in relation to the calculation of damages and that the amount of set off should have been increased in accordance with the plaintiff's email of 27 June 2018 from $192,827.98 to $328,119.47. Other submissions were also made as to costs and in relation to the calculation of GST and interest.

Plaintiff's Submissions in relation to damages for trespass

[8] The plaintiff provided written submissions on the day of the hearing, 17 August 2018.

[9] Unlike the defendant, the plaintiff submits that there were no errors in the reasons published regarding the set off payments. The plaintiff submits that the period of 26 months referred to in the calculation of loss at paragraph 14A of their Further Amended Statement of Claim relates to February 2014 to April 2016. The proceedings began February 2015 and the plaintiff submits that the parties agreed that the defendant would continue to pay the plaintiff for their ongoing use and occupation of the land and that such payments could be set off against any claim for use and occupation of the land that the plaintiff may have against the defendant.

[10] Nortask argues that the reasons for judgment delivered on 28 June 2018 indicate that damages were awarded (exclusive of GST) to Nortask as follows:

(a) Damages for loss of profit associated with the loading works (at [141] of the reasons)	$341,928.00
(b) Damages for trespass in respect of the first agreement original 45 acres at the rate of $10,680.00 per month for 26 months (at [146] of the reasons)	$277,680.00
(c) Damages for trespass in respect of the additional area at the rate of $5,285.00 per month for 26 months (at [146] of the reasons)	$137,410.00
(d) Damages remediation costs (at [154]	$49,302.00

of the reasons)	
(e) Total damages (exclusive of GST)	$806,320.00

[11] The relevant pleadings and evidence on this point is as follows:

(a) “On 20 February 2015, Nortask and Areva by their respective Counsel executed an agreement in the following relevant terms (Ex. 106):

"It is otherwise agreed that in addition to the orders of the Supreme Court:

(a) …

(b) Without prejudice to any parties rights or the claim which the Plaintiff may have, AREVA, pay the sum of $14,747.00 plus GST to the trust account of Clifford Gouldson by 4.00 pm on Friday, 27 February 2015 in exchange for a tax invoice from Nortask;

(c) The payment in (b) shall be on account of any claim which the plaintiff may have in respect of the use and occupation of the said property and would be set off as against any such claim."

(b) On 22 September 2015, Justice Dalton made an order in this proceeding which included a document titled "Annexure A - Terms of the parties' undertakings: (Court Doc 62). Paragraph [5] of .Annexure A provided:

> "That until removal of the chattels and upon the presentation of a tax invoice by the Plaintiff each month, the Defendant will, within 14 days of the receipt of the tax invoice, pay the sum of $10,680.00, plus Goods and Services Tax, on the basis that the payment may be offset on account of any claim for use and occupation against the Defendant by the Plaintiff."

(c) In accordance with Ex.106 and [5] of Annexure A to the order of Justice Dalton made on 22 September 2015, Nortask pleaded at [11] of the FASOC that Areva had paid to it “since the commencement of these proceedings” and from 2 March 2015 to 11 May 2016 sums totalling $192,827.98 including GST ($175,298.16 exclusive of GST) "for which the plaintiff must account in respect of any damages or mesne profits awarded to the plaintiff." The existence of the agreement as to payments made and the right to set off those payments were also pleaded at [2e.], [2f.], [2j.], [2k.], [2n.], [2p.] and [4c.] of the Second Amended Further Reply to the Defence ("the SAFR").

(d) At [9(b)] of the Second Further Amended Defence ("the SFAD"), Areva pleaded that it had "agreed to continue to pay the monthly rent to the plaintiff ' and particularised that agreement as a "Written agreement between the parties dated 5 March 2015".

(e) At [ll(c)] of the SFAD (and purportedly by way of response to [11] of the FASOC), Areva alleged that "between February 2013 and April 2016 the defendant paid to the plaintiff the sum of $469,095.47 (inclusive of GST) storage of the defendant's chattels on the property, pursuant to the agreement referred to in paragraph 9(b) of the further amended defence".

(f) At [5] of the SAFR, Nortask joined issue generally with the SFAD on the basis that the true position was that pleaded in the amended statement of claim to which the defence allegations and contentions respond."[4]

[12] Accordingly, Nortask argues that the difficulty for Areva is four-fold:

(i) [11] of the FASOC pleaded payments made between 2 March 2015 and 11 May 2016;

(ii) [11(c)] of the SFAD relates to a different period, namely February 2013 to April 2016;

(iii) The method of calculation of the $469,095.47 at [11(c)] is not pleaded or particularised;

(iv) The amount of $469,095.47 includes amounts pre-dating the agreement between the parties dated 5 March 2015.

[13] Nortask therefore argues that by the FASOC and the SAFR it accepted that the sum of $192,827.98 including GST ($175,298.16 exclusive of GST) ought to be set off from any damages or mesne profits awarded to it. For the reasons given above, Nortask argues that Areva has failed to establish any entitlement to any set off in excess of $192,827.98 including GST ($175,298. 16 exclusive of GST), being the amount pleaded and admitted by Nortask. Nortask argued that if Areva wished to challenge the amount of the set off as pleaded and admitted by Nortask, it ought to have done so at trial.

Defendant's submission on trespass

[14] The defendant submits that the following matters should be corrected in relation to the calculation for damages:

a) In paragraph 158, the amount set off against the payable amount for trespass should be changed to $328,119.47 from $192,827.98 to account for payments made by the defendant to the plaintiff from February 2014 to January 2015;

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4 Outline of Submissions on Behalf of the Plaintiff: Filed by Leave on 17 August 2018, pg 2.

b) As a result of (a), the total amount for trespass plus remediation should be changed from $271,564 to $136,372 of which $49,302, in the defendant's submission, is to be attributed to remediation. Accordingly, the amount for trespass should be $87,070.

[15] The defendant relies on *Fletcher Construction Australia Ltd v Lines MacFarlane & Marshall Pty Ltd*[5] and in the alternative, r 388 of the *Uniform Civil Procedure Rules* 1999 (Qld) ("UCPR") for their submission that those two above matters may be corrected before final orders are made.

[16] The defendants submits that *Fletcher Construction Australia Ltd v Lines Macfarlane & Marshall Pty Ltd* is authority for the principle that the court has the inherent power to correct its reasons to ensure justice is achieved. In that case, it was held that where 'draft' reasons for judgment had been delivered, the court had the power to make the necessary corrections to the reasons and orders. Chernov JA stated:

> "The extent to which judges of a superior court may properly alter reasons for judgment subsequent to their being given may depend not only on whether the changes are sought to be made before or after judgment has been entered, but also on the nature and extent of the alterations. A litigant is entitled to a decision that is based on reasons that have led the judge to that conclusion. It would obviously impede the proper administration of justice and work unfairness to the parties if the judge could, at a later time, give different reasons for the decision which were crafted after judgment had been pronounced. Thus, the courts limit the rights of a judge to change the reasons, but they do so consistently with the practical requirements of justice. In the case of a superior court of record, judgment is not relevantly finalised until it is entered in the records of the court. Hence, until that occurs, the judge can recall the order and the reasons and make a different order and give different reasons."[6]

[17] His Honour also noted:

> "It seems, however, that ordinarily, even after judgment has been entered, it is permissible to change the given reasons provided that in substance they do not become different reasons as a result of the changes and provided the alterations are made within a period that is not unduly long in all the circumstances…There is no reason in principle why a like position should not apply to written judgments that have been published."[7]

[18] The defendant does not submit that the reasons given on 28 June 2018 should be altered in substance. Rather, the defendant submits that the amounts to be set off against damages for trespass should be altered, in accordance with the email from the plaintiff on 27 June 2018 (as set out above) and that the amount for GST should be considered nil.

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5 [2001] VSCA 167.
6 Ibid at [49].
7 Ibid at [51].

Consideration

[19] The reasons for decision leave no doubt that the calculation of the loss suffered by the plaintiff for the trespass to the land from February 2014 was $10,680 per month for 26 months for the original 45 acres which was a total of $277,680. For the additional 20 acres for 26 months it was calculated at $5285 per month for 26 months which was $137,410. The total for the loss of rent of all of the land was $415,090.

[20] From that loss was to be deducted any amounts actually received by Nortask from Areva during that period for the use of the land. The amount admitted by Nortask in the pleadings was $192,827.98 or $175,298.16 ex GST. The pleadings made no reference to amounts that had already been paid before the litigation began. The email to the parties of 22 June 2018 endeavoured to clarify the amounts actually paid. The email of 27 June 2018 made it clear that Nortask accepts that it received an additional amount of $135,291.49 during the period from February 2014 and January 2015 and the correct amount to be deducted is $328,119.47. As Areva submits, that is consistent with Nortask's pleading and the evidence of Mr Hermes Speziali.

[21] In *Atlantic 3-Financial (Aust) Pty Ltd v Marler & Anor,*[8] Helman J held:

> "To succeed in their application filed on 3 June 2003 the respondents must show that there was a clerical mistake in an order, or an error in a record of an order, resulting from an accidental slip or omission so that the clear intention of the judgment was not expressed (rule 388(1); *Rose v. Terry Hewat Commercial Diving Pty Ltd*, SC (Qd), Demack J., no. 115 of 1995, 17 August 1999, unreported, at para. 6) or that the orders made should be set aside because they do not reflect the court's intention at the time they were was made."[9]

[22] Rule 388 of the UCPR states:

> (1) This rule applies if—
>
> (a) there is a clerical mistake in an order or certificate of the court or an error in a record of an order or a certificate of the court; and
>
> (b) the mistake or error resulted from an accidental slip or omission.
>
> (2) The court, on application by a party or on its own initiative, may at any time correct the mistake or error.
>
> (3) The other rules in this part do not apply to a correction made under this rule.

[23] No formal orders were made on 28 June 2018. There was, rather, a direction that there were to be submissions as to the form of orders and as to costs. Rule 388 of the UCPR provides that the Court may correct technical errors or slips. Despite the current submission from Nortask, the exchange of emails clearly indicates that Areva paid additional amounts for the use of the land between February 2014 and January 2015

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8 [2003] QSC 197.
9 Ibid at [15].

and set out the amounts received which it stated were inclusive of GST. Irrespective of whether GST was paid by Nortask, the actual amount it received from Areva was $328,119.47 and accordingly that full amount must be deducted from the calculation of damages.

[24] Accordingly, I am satisfied that there has been a clerical error in my calculation of the correct figure for damages in paragraph 158 of my reasons delivered on 28 June 2018. Accordingly, the total in paragraph 158, namely the amount set off against the payable amount for trespass should be changed to $328,119.47 from $192,827.98 to account for payments made by the defendant to the plaintiff from February 2014 to January 2015.

[25] Furthermore, the total amount for trespass plus remediation should be changed from $271,564 to $136,372 of which $49,302 is to be attributed to remediation and accordingly, the amount for loss of rent should be $87,070.

[26] I consider therefore that the total amount of damages for trespass as assessed in paragraph 158 should be corrected pursuant to r 388 and the figure of $271,564 should be corrected to $136,372 which would be plus GST if GST is in fact payable. That is a contentious issue which I shall address later in these reasons.

The Notice of Cross Appeal and the reasons for judgment

[27] Despite the fact that no orders had been made, Areva filed a Notice of Appeal on 26 July 2018. Nortask also filed a Notice of Cross Appeal on 9 August 2018. A ground of appeal at paragraph three is:

> "If the learned trial judge was correct to find that Mr Gary Robertson lacked authority to enter into the second agreement with the respondent in June or July 2013, the learned trial judge erred:
>
> (a) in failing to find that the appellant ratified the second agreement Mr Gary Robertson made with the respondent in June or July 2013;
>
> (b) by reason of Her Honour's failure to give reasons in respect of the failure identified in the above sub-paragraph."

[28] The plaintiff refers to paragraph 4B of their Further Amended Statement of Claim where they pleaded the formulation of the second agreement in about June to July 2013. In the defendant's Second Further Amended Defence (at paragraph 4B), the defendant pleaded that they did not enter into the second agreement; that Mr Robertson did not have authority to enter into an agreement with the plaintiff on behalf of the defendant in the terms alleged by the plaintiff; and that Mr Robertson did not have authority to act on behalf of the defendant in the manner alleged.

[29] In this regard Nortask argues that this issue of ratification may have been overlooked and on the authority of *Chapman v Chapman*[10], *Qld Pork Pty Ltd v Lott*[11] and *Hayes v*

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[10] [2001] QCA 465 at [9] – [10].
[11] [2003] QCA 271 at [2], [17]-[20].

Surfers Paradise Rock and Roll Café P/L & Anor[12] seeks to have this error corrected pursuant to the "slip rule".

[30] I agree with Areva's submission that such an amendment would go well beyond correcting an uncontroversial slip or technical error and would in fact amount to a wholesale revisitation of the reasons and findings.

[31] I do not consider that a failure to consider whether there had been a ratification in the circumstances alleged is an appropriate subject for the application of r 388 as such a failure would not necessarily be a "mistake or error [which] resulted from an accidental slip or omission."[13] Neither do I consider that this is a matter which would fall within the inherent power of the Court or r 667 of the UCPR.

Is GST payable?

[32] I accept that the plaintiff claimed GST on all amounts of their claim as specifically outlined in paragraphs 14A, 15 and the prayer for relief in the Further Amended Statement of Claim.

[33] The plaintiff also claims that there is evidence to support the proposition that GST was included in invoices issued by the plaintiff to the defendant for the use and occupation of the land between February 2015 and April 2016.[14] In this regard I note that the amount deducted from the calculation of the amount of damages for trespass was an amount that was inclusive of GST.

[34] There is no positive allegation in the Second Further Amended Defence that the plaintiff was not entitled to claim and recover GST regarding their claims. Further, there was no submission made by the defendant at trial regarding whether the amount potentially recoverable was GST exclusive or inclusive. The first time this was mentioned, in the plaintiff's submission, was following the reasons for judgment.

[35] The matter was not the subject of evidence before me and has not been fully argued before me and I only have Counsel's submissions to rely on. However, Areva is correct in its submission that in relation each head of damage there is no reason in principle to cause Areva to pay an additional amount to Nortask in relation to GST. There is nothing before me that establishes that Nortask would have any GST liability in respect of an award of damages. In this regard I consider that there is considerable force in Areva's submission that the amount of GST payable is nil and the orders should reflect this. The defendant relies on *A New System (Goods and Services Tax) Act* 1999 (Cth) *("*GST Act*")* and submits that there is no taxable supply within the meaning of the GST Act.

[36] The defendant's submissions set out in great detail the basis for this proposition including the decision of White J (as her Honour then was) in *Interchase Corporation Ltd v ACN 010 087 573 Pty Ltd.*[15] Areva argues that there is no reason to suppose that

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12 [2010] QCA 48.
13 *Uniform Civil Procedure Rules* 1999 (Qld) r 388.
14 In their submissions filed by leave on 17 August 2018, the plaintiff refers to Exhibit 2 and Exhibit 24 of the trial exhibits.
15 [2000] QSC 13.

any award to the plaintiff for damages for breach of contract in relation to the first retainer, damages for trespass or compensation for remediation would attract GST.

[37] The defendant also argues that the plaintiff did not plead the basis for or provide evidence of any GST liability. In the defendant's submission, unless the plaintiff can show that it owes a GST liability in relation to any of the amounts, and that liability arises from the defendant's breach, they are not entitled to any additional sum regarding GST.

[38] In order to be entitled to an amount referable to GST, Nortask would have to show that it was in fact subject to a GST liability. As the defendant notes, damages are compensatory, not punitive and they are not intended to provide a windfall. Nortask therefore needs to show that they in fact had a GST liability before one could be awarded and no such evidence is before me that such a liability exists here.

[39] Even if a GST liability was established by the plaintiff, they would need to demonstrate that the liability arises because of a compensable breach by the defendant. The defendant sets out in their submissions the heads of compensation found by this court: breach of contract (regarding the first retainer); damages for trespass and compensation for remediation.

[40] In the defendant's submission, for each head of damage, the plaintiff has not provided a pleaded basis, evidence or reason in principle that would result in the defendant having to pay an additional amount in GST. The defendant submits that there is nothing in the pleadings (other than a mere assertion) that the plaintiff has any GST liability for an award of damages from this Court.

[41] The defendant also refers to s 7.1(1) of the GST Act which states that GST is payable on "taxable supplies and taxable importations." Section 9.5 of the GST Act provides the definition of "taxable supply" and s 9.10 provides some examples of types of supply. Section 9.5 states:

> "You make a taxable supply if:
>
> (a) you make the supply for *consideration; and
>
> (b) the supply is made in the course or furtherance of an *enterprise that you *carry on; and
>
> (c) the supply is *connected with the indirect tax zone; and
>
> (d) you are *registered, or *required to be registered.
>
> However, the supply is not a *taxable supply to the extent that it is *GST-free or *input taxed."

[42] The defendant attached to their submissions a ruling from the Australian Taxation Office ("ATO"), GSTR 2001/4 which relates to the GST consequences of court orders and out of court settlements. The ruling was recently updated on 4 April 2018. At paragraph 17, the ruling states:

> "The GST consequences of a court order…will depend on a number of matters, including whether a payment made under the order…constitutes consideration for a supply and, if so, whether the supply is in the nature of a taxable, input taxed, or GST-free supply."

[43] At paragraph 22, the ruling states that "a supply is [essentially] something which passes from one entity to another. The supply may be of particular goods, services or something else." The ruling also refers to the decision of White J in *Interchase Corporation Ltd v ACN 010 087 573 Pty Ltd*[16] where her Honour said:

> "It is not easy to see how a court giving judgment or the payment of a judgment sum or the granting of a stay of execution could constitute a 'supply' within the meaning of those expressions [s.9-10]."[17]

[44] The ruling then states that "The Commissioner shares the view expressed by their Honours that a court, in giving judgment, does not make a supply for GST purposes"[18] and notes that:

> "The most common form of remedy is a claim for damages arising out of the termination or breach of a contract or for some wrong or injury suffered. This damage, loss or injury, being the substance of the dispute, cannot in itself be characterised as a supply made by the aggrieved party. This is because the damage, loss, or injury, in itself does not constitute a supply under section 9- 10 of the GST Act."[19]

[45] I am therefore satisfied that Nortask has not established that any of the amounts claimed are a taxable supply within the meaning of the GST Act. As a result, GST should not be awarded. As the defendant submits, it would seem to me to be the case that damages for breach of contract do not incur GST liability and the damages relating to trespass and remediation are amounts awarded for compensation, not the provision of goods or services.

[46] In relation to GST, as Areva submits that as the amount payable is nil, there is not a slip or an error, because no amount was calculated in the reasons. The defendant submits that the Court has the power to make the order that the relevant amount payable for GST is nil.

[47] Accordingly, I am not satisfied that any order should include a component for GST.

The calculation of interest

[48] The plaintiff's submissions contained two annexures that detail their calculations of interest, both GST inclusive and exclusive. Interest is claimed pursuant to s 58 of the *Civil Proceedings Act* 2011 (Qld) and the Supreme Court Practice Direction No 7 of 2013.

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16 [2000] QSC 13.
17 Ibid at [53] and at [41] of GSTR 2001/4.
18 At [60] of the ruling.
19 At [73] of the ruling.

[49] I accept the defendant's submission that the interest for the breach of the first retainer should be calculated from 1 August 2014 so six months is allowed for the work to have been undertaken by the plaintiff and for the defendant's liability to pay to have arisen.

[50] For the reasons outlined above, I consider that interest should be calculated exclusive of GST. Accordingly, the interest awarded will be in the following amounts, to be calculated by the parties:

a) On the award for the breach of the first retainer ($341,928), the relevant time period will be: 1 August 2014 – 13 September 2018;

b) On the award for trespass, including remediation ($136,372), the relevant time period will be: 19 April 2016 – 13 September 2018);

[51] This means that the final order should be that judgment is given for the plaintiff in the sum of $478,300 plus interest.

Costs

[52] Rule 681 of the UCPR provides that whilst costs of a proceeding are at the discretion of the court, they generally follow the event unless ordered otherwise and are also generally on the standard basis.

[53] Nortask has been successful in its action against Areva and has been awarded damages of $478,300 plus interest which means that the total award would be almost $600,000. Nortask seeks its costs on an indemnity basis. Areva argues that, apart from the reserved costs, each party should pay their own costs.

[54] Areva submits that the usual order should be departed from and argues that the order that would normally be made should be varied as it is in the interests of justice to do so. The defendants rely on *West v Blackgrove*[20] as authority for this submission, noting that where "the successful party...unnecessarily protracts the proceedings… or obtains relief which the unsuccessful party had already offered in settlement of the dispute"[21] then the usual order should be departed from.

[55] Areva submits that the appropriate costs order is that the parties bear their own costs of the proceeding (aside from the reserved costs). This is for several reasons:

(1) the plaintiff's claim that was ultimately prosecuted at trial was markedly different than the claim originally pleaded in 2015. This claim in 2015 primarily sought an injunction for the removal of the chattels as well as nearly $2 million in damages for trespass. The amount awarded by this Court for trespass and remediation was less than $150,000;

(2) for three years the claim proceeded on different basis, until amended at request of the defendant in 2018;

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[20] *West & Ors v Blackgrove & Anor* [2012] QCA 321.
[21] Ibid at [49].

(3) the plaintiff did not otherwise take the appropriate steps required to prosecute the claim for breach of contract, including because the matter was deemed resolved in 2017;

(4) the plaintiff was only successful at trial regarding the first retainer and small sums were awarded in relation to remediation and trespass;

(5) the plaintiff was unsuccessful regarding the second retainer; and

(6) two offers by the defendant were made to and rejected by the plaintiff (23 March 2015 and 22 April 2015) and it is argued they would have resolved a substantial part of the trial on a more favourable basis for the plaintiff than ultimately achieved. The defendant submits that if either offer had been accepted, the proceeding could have resolved much sooner.

[56] In the alternative, Areva submits that they should only be ordered to pay part of the plaintiff's costs (apart from the reserved costs). Under r 684 of the UCPR, the court may make an order for costs in relation to only part of a matter, and is able to declare what percentage of costs is attributable to that particular part. The defendants are required to identify the particular part of the proceeding if they seek such an order and demonstrate why the court should depart from the general rule as to costs.

[57] In relation to the issue of the second retainer and costs of arguing that aspect of the case, Areva submits that they should not pay the costs of the plaintiff regarding the second retainer because the plaintiff was wholly unsuccessful on this point at trial and based on Mr Robertson's evidence, the plaintiff was never going to be successful. The defendants rely on two cases to support this argument: *Emanuel Management Pty Ltd (in liquidation) v Foster's Brewing Group Ltd*[22] and *McDermott v Robinson Helicopter Co (No 2)*.[23] Particularly, in *Emanuel Management* where Chesterman J stated:

> "The rule is, I suspect, more likely to find application where a plaintiff has been partially successful. The defendant who has restricted the plaintiff's success may have an argument, the strength of which will depend on the circumstances, that it should pay only part of the costs or indeed be paid part of the costs."[24]

[58] The defendant submits that there is authority to support their submission that the disproportionate amount of time consumed on the trial by unmeritorious issues may justify a departure from the general rule in r 681.23.[25]

[59] Accordingly, Areva submits that the court should attribute half the costs of the trial as relating to the second retainer and order that they pay half the plaintiff's costs. Whilst Nortask were not successful in relation to this aspect of the claim, I do not consider that

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

[23] *McDermott & Ors v Robinson Helicopter Company (No 2)* [2014] QSC 213; [2015] 1 Qd R 295.

[24] *Emanuel Management Pty Ltd (in liquidation) & Ors v Foster's Brewing Group Ltd & Ors and Coopers & Lybrand & Ors* [2003] QSC 299 at [85].

[25] *McIntosh v Linke Nominees Pty Ltd* [2010] 1 Qd R 152 at [14].

the time consumed at trial in relation to the second retainer was significant and certainly could not be said to be disproportionate.

[60] I do not accept Areva's submission that its offer to settle in March 2015 would have resolved a significant part of the proceeding on a more favourable basis as it would have removed the chattels and remediated the property. That offer did nothing to resolve the real dispute as it involved contractors other than Nortask "processing" the reflectors on site which was the real area of contention. Areva also argues that in April 2015 the offer was that Areva would pay Nortask $1,000,000 to remove the chattels. That submission ignores the reality in paragraph 2, 4 and 5 of the offer of April 2015 which was for Nortask to arrange and pay for the removal and disposal, or recycling of, all the remaining equipment, to remediate to the satisfaction of Council and to have full liability for all of those actions. It is also clear that Areva ultimately had to pay the cost of removing the chattels which was well in excess of the figure offered to settle.

[61] Whilst Areva argues that Nortask did not progress the matter expeditiously in 2017, it cannot be ignored that Nortask was trying to resolve the matter between the parties out of court. In this regard I note that Nortask's submission for indemnity costs is based on a formal Offer to Settle which was made under Chapter 9 Part 5 of the UCPR on 21 July 2017 in the following relevant terms:[26]

> "On a purely commercial basis and without admission of liability by either the Defendant as to the Plaintiff s claims or by the Plaintiff as to the Defendant's counterclaims, the Plaintiff offers to settle these Proceedings on the following basis:
>
> (1) Within 28 days of the Defendant's written acceptance of this offer being notified to the Plaintiff's solicitors, the Defendant pay to the Trust Account of the Plaintiff's solicitors the sum of AUD $836,497 ("Settlement Sum") comprising:
>
> (a) $836,497 as to the Plaintiff's Claim;
>
> (b) $0 as to interest;
>
> (c) $0 for the Plaintiff's costs in these Proceedings.
>
> (2) Upon acceptance of this offer:
>
> (a) the Defendant waive all entitlements to costs ordered in favour of the Defendant in the course of these Proceedings; and
>
> (b) there be no further orders as to costs, including reserved costs, of either Party in these Proceedings.

[62] Nortask submits that it is appropriate to order that Areva pay to Nortask costs of the proceedings on an indemnity basis pursuant to r 360 of the UCPR which provides:

> (1) If --
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> (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

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[26] Court File Document 188: Affidavit of B J Gouldson sworn 16 August 2018, at [6], Ex. BJG4.

(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.

[63] Accordingly, the question is should Nortask's offer to settle have been accepted by Areva? Nortask argues that prima facie if Areva would have been better off accepting Nortask's offer then Areva should pay costs on the indemnity basis. The substantive effect of the Formal Offer was that Areva could bring the litigation to an end by the payment of $836,497 including all liabilities in respect of claim, costs and interest.

[64] Nortask argues that as a result of the reasons for judgment, Areva is liable to pay to Nortask the sum of $613,492 by way of damages including interest (approximately $591,186.06 after set off) and is likely:

(i) to have a costs order made against it in a sum of not less than $667,930.69;[27]

(ii) is likely to bear its own costs of prosecuting the proceedings (with the exception of two interlocutory costs orders made in its favour).[28]

[65] Without necessarily accepting Nortask's submissions as to the quantum of a likely costs order, it would seem to me that Areva would have been better off accepting the Formal Offer. I consider therefore that Nortask obtained an order no less favourable than the offer taking into account costs. I am satisfied that Nortask was at all times willing and able to carry out what was proposed in the offer given that the offer did not require Nortask to do anything other than to accept receipt of the settlement sum.

[66] The fact that there has been a formal offer of settlement as outlined above is, however, just one factor which needs to be taken into account and I need to consider all of the background circumstances in order to determine the appropriate costs order. There is no doubt that the basis upon which a court may be justified in making orders for indemnity costs are not closed but must be such as to warrant a departure from award of costs on a standard basis.[29] The test for departure include "as and when the justice of the case might so require"[30] or "some special or unusual feature in the case to justify the court" [31] in departing from the ordinary practice.

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[27] Court File Document 188: Affidavit of B J Gouldson sworn 16 August 2018 at [10], using the lowest range of costs.

[28] Court File Document 84: Order of Atkinson J that Nortask pay Areva's costs of and incidental to the application to be assessed made on 11 November 2015 and Court File Document 117: Order of Douglas J that Nortask pay Areva's costs of and incidental to the application on 24 October 2016.

[29] *Colgate-Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225; *Grice v State of Qld* [2005] QCA 298 at [6] (in respect of the former r 704).

[30] *Andrews v Barnes* (1887) 39 Ch D 133, 141.

[31] *Preston v Preston* [1981] 3 WLR 619, 637.

[67] Nortask also argues that the Formal Offer also operates as a Calderbank offer and relies on *Secretary to the Department of Business and Innovation v Murdesk Investments Pty Ltd (No 2)*[32] where Emerton J held that it is necessary to have regard to the offeror's intention in determining whether an offer of settlement is effective as a Calderbank offer as follows:

> "it is not necessary for an offer of compromise to be accompanied by a letter expressing the intention that the offer operate as a *Calderbank* offer if it is incapable of operating under the Rules. In the absence of an express statement of intention in a covering letter, the intention of the offeror may be discerned by reference to the form and content of the offer itself to ascertain whether it is capable of operating as an offer more generally, and whether it was intended to be made "without prejudice save as to costs" and to be adduced in evidence on the question of costs if not accepted."[33]

[68] Whilst the rejection of a Calderbank offer does not lead to an entitlement to indemnity costs, the High Court in *Stewart v Atco Controls Pty Ltd (in liq)[No2]*[34] has held that it is an important factor which should be taken into account in the exercise of the discretion.[35] The principles that apply to a Calderbank offer were considered by the Court of Appeal in *J & D Rigging Pty Ltd v Agripower Australia Limited & Ors*[36] where the Court held that the failure to accept a Calderbank offer is a matter to which a court should have regard when considering whether to order indemnity costs. The refusal of an offer to compromise per se does not warrant the exercise of the discretion to award indemnity costs but rather the critical question is whether the rejection of the offer was unreasonable in the circumstances. The party seeking costs on an indemnity basis must show that the party acted "unreasonably or imprudently" in not accepting the Calderbank offer.[37]

[69] The Court then noted the factors that should be taken into account and referred to the Victorian Court of Appeal decision in *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No2)*[38] which held that "a court considering a submission that the rejection of a Calderbank offer was unreasonable should ordinarily have regard to at least the following matters:

> (a) the stage of the proceeding at which the offer was received;
>
> (b) the time allowed to the offeree to consider the offer;
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> (c) the extent of the compromise offered;
>
> (d) the offeree's prospects of success, assessed as at the date of the offer;

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32 [2012] VSC 586.
33 Ibid at [31].
34 (2014) 252 CLR 331.
35 Ibid at 334. See also *Bulsey & Anor v State of Queensland* [2016] QCA 158 at [73]-[74].
36 [2014] QCA 23.
37 Ibid at [5].
38 [2005] VSCA 298.

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

(f) whether the offer foreshadowed an application for an indemnity costs in the event of the offeree's rejecting it."[39]

[70] Nortask argues that the formal offer also operates as a Calderbank offer. The progress of the proceedings was well advanced at the time the Formal Offer was made. In particular:

(a) the proceedings were filed on 13 February 2015;

(b) a review of the Queensland Courts File Summary indicates that, on or before 21 July 2017:

(i) approximately 14 Court appearances had taken place (including applications relating to the interlocutory injunctive relief and directions hearings);

(ii) the court file contained 139 documents including extensive affidavit material, amended pleadings and further and better particulars;

(iii) Nortask had filed a list of documents in December 2015;[40]

(iv) Areva had filed a list of documents in April 2017.[41]

[71] Furthermore it is argued that at the time the Formal Offer was made:

(a) the issue as to interlocutory and final injunctive relief had been resolved except in respect of the reserved costs orders made in the course of prosecution of the injunctive relief aspect of the claim;

(b) Nortask had been wholly successful in its prosecution of interlocutory and injunctive relief - Areva did in fact remove the chattels at its cost;

(c) Areva knew or ought to have known that Nortask's costs in securing that result were likely to be visited upon it;

(d) Areva was well placed to make an assessment as to the likely quantum of Nortask's costs to that date (including costs associated with the monetary claims advanced by Nortask);

(e) the only matters remaining in issue were those the subject of the trial;

(f) Areva had a good opportunity to realistically assess the merits of Nortask's claim.

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39 Ibid at [25].
40 Court File Document 86.
41 Court File Documents 88 and 120.

[72] I accept therefore that there is some force in Nortask's submission that its offer involved a true element of compromise and that Areva's refusal of the formal offer was unreasonable.[42]

[73] I accept that Nortask was forced to litigate given that Areva essentially abandoned the solar reflectors on its property and they remained there until they began to be removed in late 2015. Furthermore, as Nortask argues, it was necessary for Nortask to secure an award of damages in respect of the use and occupation of the land as the payments made by Areva were on account only. I also accept that Areva's counterclaim was wholly unsuccessful however this did not in fact occupy any time at trial.

[74] It must be accepted however that given the inactivity on the file, the matter was in fact deemed resolved in mid-2017 and that the claim proceeded for three years on a completely different basis and was only finally amended at trial to include the claims for breach of the retainers. I accept the force of the defendant's submissions that the plaintiff did not take the necessary step of applying to amend the originating processes until just before the trial.

[75] It also cannot be ignored that despite a claim for damages in the order of $2 million, Nortask has only succeeded in recovering about a quarter of that amount for trespass and remediation. Nortask has been wholly successful in relation to the first retainer but unsuccessful in relation to the second retainer.

[76] I consider therefore that those factors militate against an order for costs on the indemnity basis and that accordingly the defendant should pay the plaintiff's costs on the standard basis.

Reserved Costs

[77] Rule 698 of the UPCR deals with reserved costs and provides:

> "If the court reserves costs of an application in a proceeding, the costs reserved follow the event, unless the court orders otherwise."

[78] There have been several hearings of this matter since the proceedings were commenced in 2015. Following several interlocutory hearings, orders were made by Dalton J on 22 September 2015 regarding the removal of the chattels.[43]

[79] The chattels were removed by the defendant between late 2015 and April 2016.

[80] The defendant submits that despite the chattels being removed by April 2016, the plaintiff did not take timely steps to progress the matter. As a result, it was managed by Daubney J. The file reveals that on 7 March 2017, His Honour made orders that detailed a timetable for the exchanging of affidavit material between the parties. There was also an order that the parties sign a request for trial date by 12 May 2017 or the matter would be deemed resolved.[44] This request for trial date was not signed.

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[42] *McBride v ASK Funding Ltd* [2013] QCA 130 at [67].
[43] Court File Document 62.
[44] Whilst the defendant submits that these orders were made on 14 February 2017 with the request for trial date to be signed by 31 March 2017, the orders on the file do not reflect this. See Court File Document 119.

[81] On 15 June 2017, following the plaintiff's application to reactivate the proceeding, Daubney J made orders reactivating the matter and setting out another timetable for exchanging material.[45]

[82] The timetable was varied again by Daubney J on 21 July 2017.[46] In the defendant's submission, those applications were only necessary because of the plaintiff's conduct. This conduct also resulted in the matter being deemed resolved. That was of course against a background of Nortask's formal offer of settlement.

[83] However, in my view, the history of those matters is not sufficient to displace the normal rule that in relation to reserved costs the costs reserved follow the event.

[84] The defendant should pay the plaintiff's costs reserved on 14 February 2017, 15 June 2017 and 21 July 2017 to be assessed on the standard basis.

Reasonableness of Engagement of Queen's Counsel

[85] Nortask seeks an order pursuant to r 702 of the UCPR that the costs of engaging Queens Counsel for the limited purpose of dealing with the evidence of two witnesses was reasonable in the circumstances.

[86] Rule 702 provides:

> (1) Unless these rules or an order of the court provides otherwise, a costs assessor must assess costs on the standard basis.
>
> …
>
> (2) When assessing costs on the standard basis, a costs assessor must allow all costs necessary or proper for the attainment of justice or for enforcing or defending the rights of the party whose costs are being assessed.

[87] A determination of whether the costs of engaging Queens Counsel is in my view a matter for the Costs Assessor. There is insufficient evidence before me to make that determination.

Orders

[88] The orders of the court are:

(1) The plaintiff is directed to bring in minutes of order to reflect these reasons within seven days.

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[45] Court File Document 131.
[46] Court File Document 140.