

SUPREME COURT OF QUEENSLAND

CITATION: *Mules v Ferguson* [2015] QCA 233

PARTIES: **NANCY LEANNE MULES**
(appellant)
v
KAYLENE JOY FERGUSON
(respondent)

FILE NO/S: Appeal No 3754 of 2014
SC No 339 of 2011

DIVISION: Court of Appeal

PROCEEDING: General Civil Appeal – Further Orders

ORIGINATING COURT: Supreme Court at Cairns – [2014] QSC 51

DELIVERED ON: 17 November 2015

DELIVERED AT: Brisbane

HEARING DATE: Heard on the papers

JUDGES: Margaret McMurdo P and Applegarth and Boddice JJ
Judgment of the Court

ORDERS: **1. The respondent/defendant pay the appellant/plaintiff's costs of the proceeding, to be assessed on an indemnity basis.**
2. The respondent pay the appellant's costs of the appeal, to be assessed on the standard basis.

CATCHWORDS: PROCEDURE – COSTS – DEPARTING FROM THE GENERAL RULE – ORDER FOR COSTS ON AN INDEMNITY BASIS – where the appellant was successful on appeal – where the appellant sought an order that the respondent pay the appellant's costs of the action on an indemnity basis, and the appellant's costs of the appeal on an indemnity basis – where the respondent did not make any submissions as to costs – where the plaintiff made a formal offer to settle under Chapter 9 Part 5 of the *Uniform Civil Procedure Rules* 1999 (Qld) for a sum significantly less than the judgment sum – whether the respondent ought to pay the appellant's costs of the action on an indemnity basis, and the appellant's costs of the appeal on an indemnity basis
Uniform Civil Procedure Rules 1999 (Qld), r 354, r 360

COUNSEL: No appearance by the appellant, the appellant's submissions were heard on the papers
No appearance by the respondent, the respondent's submissions were heard on the papers

SOLICITORS: Shine Lawyers for the appellant
K & L Gates for the respondent

- [1] **THE COURT:** On 6 February 2015, this Court ordered that the appellant’s appeal be allowed, that the judgment and orders entered below be set aside and that judgment be entered for the appellant in the amount of damages assessed by the trial judge together with interest thereon. The parties were given leave to make submissions as to costs.
- [2] On 12 February 2015, the appellant filed written submissions, contending that the appropriate costs orders were that the respondent/defendant pay the appellant/plaintiff’s costs of the action, to be assessed on an indemnity basis and the appellant’s costs of the appeal, to be assessed on the standard basis. On 17 February 2015, the respondent advised the Registrar that she would not be making any submissions as to costs.
- [3] As a consequence of the orders of this Court, the appellant succeeded both at trial and on appeal. As such, the appellant is entitled to her costs of the proceeding and of the appeal. The only issue is whether it is appropriate to order that the costs of the proceeding be assessed on an indemnity basis.
- [4] On 1 November 2013, the plaintiff made a formal offer to settle under Chapter 9 Part 5 of the *Uniform Civil Procedure Rules 1999 (Qld) (UCPR)* for a sum significantly less than the judgment sum. Whilst that offer to settle was made during the course of the trial, and towards the conclusion of the trial, that fact does not prevent the offer from being an offer which invokes the provisions of rule 360 of the UCPR.¹
- [5] Rule 360 of the UCPR provides:-
- “(1) If -
- (a) the plaintiff makes an offer that is not accepted by the defendant and the plaintiff obtains an order no less favourable than the offer; and
- (b) the court is satisfied that the plaintiff was at all material times willing and able to carry out what was proposed in the offer;
- the court must order the defendant to pay the plaintiff’s costs calculated on the indemnity basis unless the defendant shows another order for costs is appropriate in the circumstances.
- (2) If the plaintiff makes more than 1 offer satisfying subrule (1), the first of those offers is taken to be the only offer for this rule.”
- [6] The respondent did not accept the appellant’s formal offer on 1 November 2013, and the appellant obtained a judgment no less favourable than that offer to settle. There is no basis to conclude other than that the appellant was at all material times willing and able to carry out what was proposed in that offer.
- [7] The formal offer to settle satisfies the requirements of rule 360 of the UCPR. The Court is to order that the respondent pay the appellant’s costs on an indemnity basis

¹ UCPR r 354.

unless the respondent shows another order for costs is appropriate in the circumstances. The respondent has not shown another order for costs is appropriate.

[8] We would order:

1. The respondent/defendant pay the appellant/plaintiff's costs of the proceeding, to be assessed on an indemnity basis.
2. The respondent pay the appellant's costs of the appeal, to be assessed on the standard basis.