AUSTRALIA / JUDGMENT

Odlum v Friend [2024] NSWCA 159

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Court of Appeal

Supreme Court

New South Wales

Medium Neutral Citation: Odlum v Friend [2024] NSWCA 159

Hearing dates: 28 May 2024

Date of orders: 03 July 2024

Decision date: 03 July 2024

Before: Leeming JA at [1];

Mitchelmore JA at [2];

Harrison CJ at CL at [109]

Decision: (1) The appeal is dismissed.

(2) The appellant is to pay the respondents' costs of the appeal.

Catchwords: NEGLIGENCE — professional negligence — advice about settlement and cost consequences — breach — causation

Legislation Cited: Uniform Civil Procedure Rules 2005 (NSW), rr 42.15, 42.15A

Cases Cited: Bowling v Bowling [2010] NSWSC 916

Bowling v Bowling [2011] NSWSC 1168

Bowling v Bowling (No 3) [2012] NSWSC 1069

Lee v Lee (2019) 266 CLR 129; [2019] HCA 28

Odlum v Friend & Anor [2022] NSWSC 574

Category: Principal judgment

Parties: Judith Odlum (Appellant)

Stephen Friend t/as Friend and Co Lawyers (First Respondent)

Andrew Paterson (Second Respondent)

Representation: Counsel:

Appellant (Self-represented)

D A Lloyd SC / G Marsden (Respondents)

Solicitors:

Mullane & Lindsay Solicitors (First Respondent)

Carter Newell Lawyers (Second Respondent)

File Number(s): 2022/00180452

Publication restriction: Nil

Decision under appeal Court or tribunal: Supreme Court

Jurisdiction: Common Law

Citation: Odlum v Friend & Anor [2022] NSWSC 574

Date of Decision: 12 May 2022

Before: Cavanagh J

File Number(s): 2017/00378597

[Note: The Uniform Civil Procedure Rules 2005 provide (Rule 36.11) that unless the Court otherwise orders, a judgment or order is taken to be entered when it is recorded in the Court's computerised court record system. Setting aside and variation of judgments or orders is dealt with by Rules 36.15, 36.16, 36.17 and 36.18. Parties should in particular note the time limit of fourteen days in Rule 36.16.]

HEADNOTE

[This headnote is not to be read as part of the judgment]

The appellant, Judith Odlum, engaged the respondents, Stephen Friend and Andrew Paterson, to act, respectively, as her as her solicitor and barrister in a property adjustment dispute against her former partner, Darryl Bowling. The real property that was the focus of the dispute was a property in MacMasters Beach (the Property), which Ms Odlum and Mr Bowling owned as joint tenants.

On 7 December 2011, Associate Justice Macready delivered judgment in the property adjustment proceedings. Offers to settle the issue of costs were subsequently exchanged. On 9 December 2011, Mr Bowling made an offer that Ms Odlum pay an amount of $30,000 (the First Costs Offer). Ms Odlum was advised about potential costs risks following the offer and was advised not to accept the offer but to make a counteroffer. She informed Mr Friend that she did not want to pay any amount to Mr Bowling on account of costs and she instructed him to reject the offer.

On 14 December 2011, Mr Bowling made a further offer that Ms Odlum pay him the amount of $23,000 (the Second Costs Offer). The primary judge, Cavanagh J, found that Ms Odlum had a short conference with the respondents on the day of the costs hearing and was advised that she was at risk of an adverse costs offer if she did not accept. His Honour also found that she had received earlier advice about the risk of allowing the matter to proceed to judgment in the face of reasonable offers from Mr Bowling.

On 15 December 2011, Macready AsJ heard the parties on costs before ordering that Ms Odlum pay 75% of Mr Bowling's costs on an ordinary basis. This amounted to a sum of approximately $98,000.

On 14 December 2017, Ms Odlum filed a statement of claim against Mr Friend and Mr Paterson, alleging negligence and misleading and deceptive conduct in relation to the advice they provided to her about the offers on costs that Mr Bowling made before the hearing on 15 December 2011. The relief claimed by Ms Odlum included damages for the loss of the opportunity to purchase Mr Bowling's share in the Property.

On 12 May 2022, Cavanagh J gave judgment for the respondents. In respect of the First Costs Offer, his Honour found that the respondents' advice could not have caused loss because it enticed a lower offer. In respect of the Second Costs Offer, his Honour found that the respondents had exercised reasonable care by advising Ms Odlum about the costs consequences of not accepting the offer, and in any event, her entitlement to damages for any negligent advice would have been limited to the difference between the offer she could have accepted (either $30,000 or $23,000) and the amount she paid on costs ($98,000); the evidence did not establish that any advice caused Ms Odlum to lose the opportunity to purchase the Property.

Ms Odlum challenged Cavanagh J's decision on several grounds. The crux of her appeal was that his Honour erred by failing to hold that (1) the respondents' advice in relation to the costs offers was negligent; and (2) that the negligent advice had caused her to lose the opportunity to purchase the Property in December 2011 because she needed an increased amount to cover the adverse costs order, as well as the costs associated with potentially appealing.

The Court held (Mitchelmore JA, Leeming JA and Harrison CJ at CL agreeing), dismissing the appeal:

In respect of the First Costs Offer:

(1) The respondents' advice about the First Costs Offer was not negligent. Ms Odlum was appropriately advised to make a counteroffer: at [88]-[89].

(2) Even if Ms Odlum were correct that she was not advised about making a counteroffer to the First Costs Offer, there would be no causal connection between any such omission and the loss Ms Odlum advanced, in light of the Second Costs Offer: at [89]. In any case, the primary judge's conclusion that Ms Odlum would not have accepted advice that she pay Mr Bowling any amount on costs was correct: at [95].

In respect of the Second Costs Offer:

(3) In finding that the respondents advised Ms Odlum about the Second Costs Offer before the costs hearing, the primary judge relied upon his observations of Ms Odlum and Mr Friend. Thus, appellate restraint is required with respect to those findings unless they are "glaringly improbable" or "contrary to compelling inferences". Apart from asserting that his Honour was wrong, and reiterating her account, Ms Odlum has not sought to demonstrate why his Honour's findings satisfied that description: at [91].

Lee v Lee (2019) 266 CLR 129; [2019] HCA 28 applied.

As to the assessment of damages (if negligence were established):

(4) The question for the primary judge was what sum would be necessary to restore Ms Odlum to the position that she would have been in if the respondents had (on her case) not been negligent. His Honour correctly identified Ms Odlum's damages as the difference between the amount of Mr Bowling's costs that she could have accepted on the morning of 15 December 2011 ($23,000) and what she was ordered to pay by Macready AsJ on the same day ($98,000): at [86]-[87].

Judgment

1. LEEMING JA: I agree with Mitchelmore JA.

2. MITCHELMORE JA: These proceedings concern a claim by the appellant, Judith Odlum, for professional negligence against the respondents, Stephen Friend and Andrew Paterson, who acted, respectively, as her solicitor and barrister in a property adjustment dispute against her former partner, Darryl Bowling. The real property that was the focus of the dispute was a property in MacMasters Beach (the Property), which Ms Odlum and Mr Bowling owned as joint tenants.

3. On 7 December 2011, Associate Justice Macready delivered judgment in the property adjustment proceedings: Bowling v Bowling [2011] NSWSC 1168 (the adjustment decision). Offers to settle the issue of costs were subsequently exchanged, including an offer from Mr Bowling for Ms Odlum to pay him costs of $23,000, which was declined. On 15 December 2011, Macready AsJ heard the parties on costs before ordering that Ms Odlum pay 75% of Mr Bowling's costs on an ordinary basis (the costs decision). This amounted to a sum of

approximately $98,000.

4. On 14 December 2017, Ms Odlum filed a statement of claim against Mr Friend and Mr Paterson, alleging negligence and misleading and deceptive conduct in relation to the advice they provided to her about the offers on costs that Mr Bowling made before the hearing on 15 December 2011. On 12 May 2022, Cavanagh J gave judgment for the respondents: Odlum v Friend & Anor [2022] NSWSC 574.

5. At the commencement of the hearing in this Court on 28 May 2024, an extension of time was granted to Ms Odlum to file a notice of appeal from the decision of Cavanagh J. The respondents, who were represented by separate solicitors instructing the same counsel, did not oppose the extension, noting that Ms Odlum was representing herself and that she had attempted to file a notice of appeal within the period for which the rules provide. The notice of appeal has been supplemented by a number of sets of written submissions, including two sets of submissions in reply and an oral outline.

6. Ms Odlum challenged the primary judge's conclusion that the respondents' advice in relation to the costs offers was not negligent, and his Honour's further conclusion that in any event, the advice did not cause her to lose the opportunity to purchase Mr Bowling's share of the Property. Ms Odlum also took issue with the primary judge's assessment of the scope of her pleaded case, and sought to reagitate several issues that his Honour found did not fall within the allegations in the statement of claim and thus did not need to be resolved in the proceedings. For the reasons which follow, the appeal must be dismissed.

Background to the appeal

1. In her submissions, Ms Odlum took issue with the merits of the two decisions of Macready AsJ, and with Cavanagh J's findings regarding the conduct of the respondents before those two decisions. Ms Odlum also complained that Cavanagh J focused unduly on the respondents' conduct of the proceedings leading up to the costs offers and wrongly declined to look at what happened after the costs decision.

2. The negligence claim that Ms Odlum advanced against the respondents, and that Cavanagh J determined, was focused on the respondents' conduct in relation to the offers of costs that Mr Bowling made after the adjustment decision. The conduct of the respondents and Ms Odlum in the lead up to the adjustment decision was nonetheless relevant context for the negligence allegations, particularly having regard to Ms Odlum's contention that she did not understand, and was not properly informed about, what was happening when the costs offers were made. By contrast, the events after the costs decision that Ms Odlum sought to rely upon, whilst plainly of significance to her, were not relevant to the allegations of liability that Cavanagh J's considering.

3. As to Ms Odlum's challenges to the merits of what Macready AsJ decided, Ms Odlum did not ultimately pursue an appeal from either the adjustment decision or the costs decision, and this appeal, from Cavanagh J's decision, does not provide that opportunity. Nonetheless, it is necessary to give some attention to those two decisions in light of Ms Odlum's arguments.

4. Paragraph references below are to the reasons of Cavanagh J unless otherwise specified.

Background to the adjustment proceedings

1. In 1991 or 1992, Ms Odlum and Mr Bowling commenced living in a de facto relationship. In about mid-2002, they purchased the Property as joint tenants. The relationship ended in May 2007: at [22] (see also adjustment decision at [20]).

2. In May 2010, Ms Odlum engaged Mr Friend to act on her behalf in respect of property settlement matters with Mr Bowling. On 2 August 2010, Mr Paterson was briefed to advise and appear in the property adjustment proceedings.

3. On 11 August 2010, Ms Odlum commenced proceedings seeking orders for an adjustment of property pursuant to the Property (Relationships) Act 1984 (NSW). Ms Odlum sought a split of the real property of the relationship in the order of 80% to her and 20% to Mr Bowling, and an equal split of the personal property. She also sought an interim injunction restraining Mr Bowling from severing the joint tenancy of the Property, which Gzell J granted on 13 August 2010: Bowling v Bowling [2010] NSWSC 916.

4. On 21 September 2010, Mr Bowling filed a defence and cross-claim in the property adjustment proceedings. In his cross-claim, he sought orders that the Property be sold at such reserve price as the parties shall agree in writing or, absent agreement by three days before the auction date, a reserve price of $1.5 million; that a mortgage to RHG Mortgage Corporation Ltd be discharged; that a loan advanced by Ms Odlum's mother to purchase the Property be paid out; and that the balance of the proceeds be divided equally between him and Ms Odlum. Mr Bowling also sought to retain his pre-relationship personal property, with the rest to be split equally.

5. On the recommendation of Mr Friend, a valuer was engaged to prepare a valuation of the Property for the purposes of a mediation. On 20 December 2010, the valuer produced a valuation report assessing the market value of the Property at $1.125 million. Mr Bowling's solicitors obtained a competing valuation which assessed the market value of the Property at $1.35 million. On 22 December 2010, a mediation took place which was unsuccessful: at [81].

Offers to settle the adjustment proceedings

1. During 2011, Mr Bowling and Ms Odlum exchanged offers to settle the dispute. As Cavanagh J observed, one of the matters that featured in the contemporaneous documents and in the proceedings before him was the differing balance sheets of Mr Bowling and Ms Odlum: at [82]. Ms Odlum advanced a number of submissions on these offers, including that Mr Friend

had not made a Calderbank offer consistently with her instructions or the spreadsheet she had provided, whilst also submitting that the asset and liability position needed to be worked out before there could be any settlement of the adjustment proceedings or, subsequently, the costs of those proceedings.

The January Offer of Compromise

1. On 18 January 2011, Mr Bowling's solicitors served an offer of compromise to the effect that he would accept 40% of the net asset pool having regard to his version of the balance sheet (the January Offer of Compromise). On 19 January 2011, Mr Friend discussed the offer with Mr Paterson. Mr Paterson's file note of the discussion, dated 19 January 2011, recorded that he said the offer was "in ballpark" and Ms Odlum "should be advised of this + of cost consequences".

2. By letter to Ms Odlum dated 19 January 2011, Mr Friend referred to a telephone discussion with her on 18 January 2011 about the letter from Mr Bowling's solicitors. He explained in the letter that the offer had been made pursuant to the Uniform Civil Procedure Rules "which state in effect that should you not accept the offer you can be liable to pay the Defendants [sic] costs on an indemnity basis (that is a very high rate covering his entire costs) should the Court make a decision less favourable to you than the offer made". Mr Friend also noted Ms Odlum's instructions that she did not have the sum of $466,884 to purchase Mr Bowling's share of the Property, as sought by Mr Bowling in the offer. Mr Friend continued:

"As discussed with you extensively with counsel and myself at mediation it is the view of the writer and counsel that the offer made is within the range of the likely outcome of the Court.

Given the costs consequences I urge you to give serious and thoughtful consideration to the offer. Litigation is very expensive and time consuming business and should only be pursued if you are likely to obtain a commercial advantage. You should at the very least consider making a counter offer on the basis of Uniform Civil Procedure Rules of compromise. On the material available at the moment counsel is of the view that the offer is within range a Court may give you.

It seems to me that there is no realistic option of you buying out Darryl Bowling on the basis of either the valuation obtained by you or the valuation obtained by the Defendant it is quite clear that the Defendant is not going to accept anything like your proposal of 80% to you after the sale of the property and 20% to the Defendant and the Court will not in our view make an order on that basis."

1. In the letter, Mr Friend asked for Ms Odlum's instructions. He also noted that it was important that she establish with precision the assets she held at the commencement of the relationship, in order for him to advise further on the likelihood of her being awarded more than 60% (which is what Mr Bowling had offered). On 20 January 2011, Mr Friend received an email from Ms Odlum with an attached letter, in which she advised that she did not wish to accept the offer. The letter relevantly stated:

"Regarding their offer and possible costs to me from proceeding to hearing and losing – I wish to proceed as at the end of the day the money that is left is I hope to be left to our children. It does not make my life much different. He now has a valuable asset in wendy's house – 2 newly built homes which she built on vacant land in Glenbrook. My counter offer cannot change much; can i get a further opinion from another barrister who may see that I have a better chance – not regarding costs in the equation? What is likely to be total cost from proceeding to court?

...

I do not understand the percentages entirely but in any case I do not accept this offer and would like to know if having the centrelink documents will make any difference to your point of view. I need to know apart from costs why the barrister does not see that i have a strong case. I brought in the assets and I made the contributions largely. All deposits on investments were mine – the repayments were mine or tenants – there is proof that there was nothing left in 41 easter pde – I would be able to approach nab for clearer documents to prove this as my name was on loans. He is a dishonest and manipulative man. ..."

(Emphasis in original.)

1. Cavanagh J found that Ms Odlum was given appropriate advice about the January Offer of Compromise: at [93]. Mr Friend had spoken to Mr Paterson and provided oral and written advice to Ms Odlum in which he advised her to seriously consider the offer or to make a counteroffer, given the possible costs consequences: at [91]. His Honour considered that it was plain from Ms Odlum's own words that she did not wish to follow the advice: at [93].

The August Offer of Compromise

1. On 13 May 2011, Mr Friend sent an email to Ms Odlum stating that Mr Bowling's solicitor had contacted him to ask if she was going to make a counteroffer. The solicitors had also advised that Mr Bowling was "about halfway through [preparing] his affidavit and is concerned about cost (as we are or should be)". Mr Friend asked Ms Odlum for instructions "about making a sensible offer".

2. On 19 May 2011, Mr Friend sent Ms Odlum an email, referring to a telephone conversation earlier that day and confirming a number of matters including the following:

"1. Please read the Defendant's solicitor's letter of 16 may carefully and collate ALL the documents which are asked for and delivery them to ouir [sic] office by next week ASAP in the week. I note that any failure to produce may well result in costs orders being made against you.

2. I confirm your advice that you do not accept our advice for you to make a reasonable offer. You instruct that you do not wish to make an offer under any circumstances and want the litigation to run unto its end.

3. You have obtained under FOI Centrelink records pertaining to yourself but have not gone through them, nor sent them to me.

4. You do not now wish to instruct another counsel for an alternate opinion about the matter. My advice is that given the great volume of material such an alternate opinion will cost about $5000.00.

5. You can not afford to buy out Darryl Bowling's share of the Macmasters property no matter what valuations of the property are accepted.

5. My advice to you that it is counsel's opinion that going as best as you possibly can in the litigation you can not achieve more than 65% of the asset pool and most likely you will achieve significantly less.

6. You do not appear to accept our advice about your prospects in the matter but wish to continue instructing myself and Mr [Paterson] in any event ...".

1. On 27 May 2011, Ms Odlum replied stating, among other things, that she needed more time to collate the requested documents; she wished to obtain another opinion about the matter from a female barrister; she wanted to see Mr Bowling's affidavit, which was filed and served on 27 May 2011, before making an offer of 70% to her and 30% to Mr Bowling; and she had understood that the strength of her case would rely on what Mr Bowling said. On 30 May 2011, Mr Friend replied as follows (omitting the formalities):

"Your instructions are not good enough.

You must provide the documents sought. Otherwise you will get cost orders against you ordered by the Court.

Please advise how much money you would be prepared to spend on an opinion of a female barrister [forthwith] (I will then seek to [obtain] a second opinion).

Your suggestion that you put in an offer 70/30 is frankly unrealistic. In any event can I take it that they are your instructions if they are we should put that offer straight away (it is not going to be accepted in any event but it is a good idea if you want to put an [offer] to put it early or on [sic] rather than just before the hearing).

[There] is an urgency to this matter because this matter will be set down for hearing as soon as the Defendants evidence has been filed. Mr Paterson has advised me that his opinion is that he should put an offer of 65/35. You should also clarify your position about whether you are in any way able to pay out Mr Darryl Bowlings share of MacMaster Beach property or not.

Please reply by immediate return and please advise when you shall get the documents together. The matter is next in Court on the 7th of June 2011 for directions and I am of the view that cost orders will be made against you."

1. On 2 and 3 June 2011, Mr Friend and Ms Odlum exchanged emails in which Mr Friend requested clear instructions in relation to whether Ms Odlum was proposing to purchase Mr Bowling's share of the Property or wished to make an offer to settle. In an email to Ms Odlum dated 3 June 2011, Mr Friend asked if she was coming to a conference with him and Mr Paterson on the following Monday and cautioned, "If not and you keep refusing to accept our advice I see real problems in you continuing to instruct us".

2. On 22 June 2011, Mr Friend emailed Ms Odlum informing her that the matter had been listed for hearing on 28 and 29 September 2011, and further stating:

"If you can not afford to pay out D [B]owling you should advise us now as this will save expert fees as the property will need to be sold any way."

1. On 24 July 2011, Ms Odlum emailed Mr Friend requesting advice as to whether an offer could be made on the basis of a valuation of $1.2 million for the Property. Ms Odlum wrote that "[w]ith difficulty to [her] mother and siblings", on a valuation of $1.1 million she could raise $275,000 through a bank loan but she understood "that this is not even worth discussion, so it seems better to say let the court determine a sale price". By way of comparison, she stated that if the valuation were $1.275 million, she could not raise $450,000 (being 40% of the value less half of the mortgage). She then wrote:

"I do not know the implications of what you are asking me to do as I am not informed of the various possibilities. However, based on what I think I know

- I am not seeking an order to buy out the defendants interest in the property.
- I therefore am not relying on the valuation unless there are costs implications. So what are the consequences of not proceeding with this conference. Will the court order they confer anyway?
- My email of 14/7/11 said that even on a midway valuation, at 60/40 I cannot raise this money.
- I am not informed about possibility of costs orders against me. Does this have anything to do with a valuation? Surely it is easier to better my offer %-wise if it does not relate to a value as I don't have to be able to borrow the money, but will get it from sale.
- I do not wish for the property to go to auction, but for both parties to nominate a real estate agent as this is less likely to result in further wasted money. ..."

1. On 25 July 2011, Mr Friend sent a detailed letter to Ms Odlum in response to her email, including her query about making an offer on the basis of a valuation of $1.2 million. Mr Friend stated that there was little sense in doing so because Mr Bowling did not accept that as the value, and continued:

"... If the valuers confer and agree on that valuation then there would be a great deal of sense in doing so. You can, however, put an offer on any terms to the Defendant at any stage and at anytime. The earlier an offer is put the better for you both in terms of any issue as to legal costs at the end of the matter and also as to resolving the matter with certainty.

The Defendant has asked that if you are not in a position to buy out the Defendant then the property be sold now. There is no Court order that the property be sold now it is a matter for you if you wish to agree to do this or not. If the property is sold the process [scil proceeds] of sale could be invested until the end of the Court case.

As previously advised the Centrelink and real estate agents valuation have little evidentiary bearing when expert valuers have been engaged.

I cannot determine the percentages for you as the Court does that. Mr Paterson and I have advised you that the Defendant's offer to you is reasonable and that you should put an offer to the Defendant of no more than 65% of the asset pool to yourself and 35% to the Defendant. This may result in the Defendant increasing their offer slightly on his present position. It is likely that you will get a big costs order against you if the Defendants offer is more than the Court determines at trial. The Defendants costs at the end of the hearing will probably be in the region of $50,000.00 to $60,000.00.

I note on the second page of you[r] letter that you are now stating that you are not seeking an order to buy out the Defendant's interest in the properties. ...

...

The possibility of having a costs order against [you] is strong as the Defendant has put on a reasonable offer which you have failed to accept. Further you have not even put in a counter offer to the defendant which we have continuously advised you to do. There is a strong likelihood that there will be a costs order made against you in these proceedings."

1. On 26 July 2011, Ms Odlum emailed Mr Friend stating that she did not agree to a proposal by Mr Bowling to sell the Property before the hearing. On 28 July 2011, she sent Mr Friend a further email in which she noted that he had advised her to make an offer "but without percentages and/or valuation agreed I have not done so as I do not know the final amount in money terms". Ms Odlum also proposed in that email that the parties agree on an agent to sell the Property even if it were not sold before the hearing; and that an agent had affirmed to her that they would list the Property at $1.1 million to $1.2 million. The primary judge concluded from this correspondence, in particular Ms Odlum rejecting the valuation evidence and seeking an agent who would list the Property at a lower price, that she was intent on pursuing her own strategy — namely, buying Mr Bowling's share for the lowest

price — rather than following Mr Friend's advice: at [103].

2. On 2 August 2011, Mr Friend made an offer on Ms Odlum's instructions that the Property be sold and, after payment of the necessary expenses and the loan from Ms Odlum's mother, the net sale proceeds be divided 75% to Ms Odlum and 25% to Mr Bowling. The offer was recorded by Mr Bowling's solicitors in a further offer that they served in response, dated 9 August 2011 (the August Offer of Compromise). Mr Bowling's solicitors rejected that offer, but reduced the January Offer of Compromise so that he would receive 35% of the net proceeds of sale (with a reserve of $1.3 million), on the understanding that Ms Odlum was not in a position to retain the Property and that it must be sold. As was the case with the January Offer of Compromise, Mr Bowling's solicitors provided a balance sheet along with a document setting out the effect of the offer of compromise.

3. Mr Friend sent a copy of the August Offer of Compromise to Ms Odlum and Mr Paterson. Mr Paterson replied by email to Mr Friend, stating that "If our client is not minded to accept the offer, at a minimum she should put a 70:30 offer". On 11 August 2011, Mr Friend sent Ms Odlum a letter, referring to a telephone call between them earlier that day and relevantly stating:

"Counsel and I both advise that the defendant's offer should be accepted and I note you reject that advice. I further note that you advise that you do not care if you are significantly worse off financially but you want to go to hearing even though you will be worse off.

I confirm [you] will attend our office tomorrow at 12 noon and provide written instructions in relation to the offer set out in in the defendant's solicitor's letter of 9 August 2011.

In the circumstances we are of the view that you should seriously consider obtaining different legal representation as you are unwilling to accept our advices.

I note that it is a condition of our acting for you that we may terminate acting for you if you fail to accept our advice about accepting a reasonable offer of settlement.

I suggest you seriously consider your position."

1. On 15 August 2011, Ms Odlum emailed Mr Friend suggesting a counteroffer where she would purchase Mr Bowling's interest in the Property by an immediate payment of $200,000 "and the remainder as an interest in the property for five years". Mr Friend replied that he did not understand the offer she proposed and stated that was why if she wished to reject the August Offer of Compromise she should provide complete written instructions of her rejection and provide instructions on the offer she wished to put.

2. On 17 August 2011, Ms Odlum and the respondents had a lengthy conference. An email from Mr Friend to Ms Odlum sent on the day of the conference referred to it commencing at 11:00am and finishing at 5:00pm, with one 15 minute break. Mr Friend wrote in the email that he did not accept Ms Odlum's suggestion that she did not understand Mr Bowling's offer, given they had conferred for six hours and he had spent a significant period discussing the

figures with her. He advised her of his view that she should accept Mr Bowling's offer and noted that she refused to sign a written acknowledgment of this advice.

3. On 18 August 2011, Ms Odlum emailed Mr Friend suggesting a counteroffer of $200,000 payable immediately and approximately $165,000 in five years' time, but that she could not provide instructions in relation to a counteroffer until she investigated the possibility of her mother "being on title" or Mr Bowling signing a re-draw for the existing mortgage. Mr Friend replied, again requesting clear instructions as to whether Ms Odlum wished to reject the August Offer of Compromise. He also noted that he could not advise Ms Odlum's mother as there would be a conflict of interest.

4. On 19 August 2011, Ms Odlum replied stating that she found Mr Friend's email distressing and requested that he talk to her about the strengths of her situation rather than talking it down. In his response, Mr Friend made the point that he was advising her about the negative consequences if she did not accept the offer because that was his job: "Unfortunately it is not my job to tell you what you want to hear."

5. On 21 August 2011, Ms Odlum provided instructions to draft an offer on the basis that she pay Mr Bowling $200,000 within 28 days and $150,000 within five years and retain the Property. Mr Friend sent the draft offer to Ms Odlum for her consideration the following day. On 25 August 2011, Ms Odlum responded acknowledging the draft offer and sought further clarification about the proposed outcome in terms of final percentages. Mr Friend advised that her proposed offer amounted to a 29% final split to Mr Bowling but that this depended on the values attributed to the assets.

6. On 7 September 2011, Ms Odlum emailed Mr Friend an amended spreadsheet and instructions to make an offer to Mr Bowling on the basis that she pay him $200,000 immediately and $100,000 in five years. Ms Odlum advised that she was "still trying to get a private mortgage arrangement for $200,000 as I cannot borrow from banks even though there is so much equity". On 8 September 2011, Mr Friend replied asking her to clarify her proposed offer. On 12 September 2011, Mr Friend had a conference with Ms Odlum in which he received final instructions to make her proposed counteroffer, which he sent to Mr Bowling's solicitors on that date. On 14 September 2011, Mr Bowling's solicitors replied rejecting the offer and advising that Mr Bowling could not consider the effect of the offer as the balance sheet was not agreed.

7. On 14 September 2011, Mr Friend advised Ms Odlum that her offer had not been accepted. The hearing occurred on 28 and 29 September 2011: at [122].

8. In relation to the pre-hearing conduct, Cavanagh J accepted the following matters at [127]:

"(1) The plaintiff was urged to seriously consider settlement on a number of occasions in 2011 prior to the hearing;

(2) The plaintiff was advised that there could be costs consequences for her should she not do better than the January Offer of Compromise;

(3) She was given more direct advice that she should accept the August Offer of Compromise, including advice about the costs consequences of not accepting the offer;

(4) The plaintiff declined to accept the advice of the defendants in respect of settlement of the proceedings and declined to sign a document confirming that she would not accept the advice to accept the August Offer of Compromise, even though it was clear that she was not accepting the advice; and

(5) Whilst the plaintiff had indicated that her intention and desire was to keep the property, she gave inconsistent instructions to the first defendant about that and, in particular, about her capacity to raise the finance to keep the property."

1. His Honour further found that Ms Odlum "plainly understood" the effect of advice given by Mr Friend and in part by Mr Paterson, about the offers Mr Bowling made and the kind of counteroffer she should be making. However, "she continued to challenge it because she did not agree as to the calculations and conditions and did not wish to settle in the range suggested": at [128].

The adjustment decision

1. On 7 December 2011, Macready AsJ delivered the adjustment decision. His Honour found that the parties' net property that was available for adjustment as at the date of the hearing was as follows (adjustment decision at [64]):

Asset/liability Value

Damien Drive, MacMasters Beach - agreed value 1,250,000

Art works (valued by Darryl) 5,000

Tools and equipment 3,000

4.5 tonne Kobalco excavator (only estimate is an auction estimate) 15,000 - 16,000

Furniture and contents MacMasters Beach 15,000

GST refund on excavator 2,910

Insurance payout for Pajero 17,000

Mortgage on MacMasters Beach property - $40

Liability to Judith's mother - $125,000

Net value of assets: $1,183,370

1. Macready AsJ noted that, in her submissions, Ms Odlum sought (adjustment decision at [115]):

"The costs of the sale, the liabilities to RHG Mortgage Corporation and the plaintiff's mother, Norma Odlum, should be paid from the proceeds of sale before any distribution to the parties.

The plaintiff should then receive the following sums:

$599,000 to reflect her initial contribution,

$15,000 to reflect the fact that the defendant would retain the excavator

$46,000 to reflect the money already received by the defendant

Any balance should be divided 60:40 in the plaintiff's favour

The proposed orders are just and equitable having regard to contributions. If the proposed orders were made, the defendant would receive the following:

$179,348 as a cash payment

$15,000 to reflect the fact that the defendant would retain the excavator

$46,000 to reflect the money already received by the defendant".

1. Mr Bowling agreed that all liabilities should be met first, sought his personal belongings that preceded the relationship, and contended that the balance of the assets be split equally: adjustment decision at [117].
2. His Honour adopted a global approach to the assessment of the parties' respective financial and non-financial contributions, as ascertaining in detail the respective contributions to particular assets was difficult, due to the passage of time and the fact that there was no property that stood apart from their joint endeavours: adjustment decision at [113]. Macready AsJ made the following findings:

1. The parties' respective contributions from income "(comprising Centrelink payments, salary, superannuation, gifts from Judith's mother or employer payouts)" were roughly equal: at [135].
2. The parties contributed to the capital gains on the properties owned by one or both of them in close to equal proportion, apart from a property that Ms Odlum introduced, where his Honour found the capital gains were attributable in a proportion that largely favoured Ms Odlum: at [136].
3. The non-financial contributions favoured Ms Odlum "by a large proportion": at [137].

4. The parties should repay Ms Odlum's mother and any other liabilities they have, including costs associated with the sale of the Property "if that occurs". Mr Bowling was to have the personal effects he had sought save for the tools, which his Honour considered should be sold and the net proceeds shared in a proportion of 65:35 favouring Ms Odlum: at [138], [140].

5. As to the balance of the assets, his Honour considered that an appropriate adjustment was 65 per cent of the remaining assets to go to Judith: at [138].

6. Mr Bowling had already retained $19,910, being the GST refund on the excavator and the insurance payout for the Pajero, and he should also retain the excavator, which was valued at $15,500. His Honour considered that these amounts should be shared in a proportion of 65:35 favouring Ms Odlum, meaning that an allowance needed to be made to her of $23,016: at [139].

7. Save for Mr Bowling's retaining his pre-relationship artworks and personal belongings, each party should retain furniture and contents of equal value: at [140]-[141], [143(2)-(3)].

1. Macready AsJ concluded:

"[141] The assets, including what has already been taken by the parties but excluding superannuation, total $1,183,370 after repayment of the known liabilities. After retention by Darryl of his art work and allowing for my order in relation to the furniture and the tools, there is $1,160,370 available for distribution. Subject to the sale of the MacMasters beach property at the agreed value of $1,250,000, Judith would be entitled to $754,240 and Darryl would be entitled to $406,130.

[142] Taking into account what Darryl has already retained, and the orders I make in relation to the excavator, the furniture and the tools, there remains $370,720 to be paid to Darryl and $125,000 to Norma Odlum. The plaintiff wishes to purchase Darryl's share of the property and I will, in my orders, allow her 21 days in which to come to an agreement to purchase the defendant's share in the MacMasters beach property and discharge the liability to Norma Odlum. Failing that, the property will be sold."

1. His Honour's orders included the following in relation to the Property:

"(5) Within 21 days from the date of this judgment the parties do all acts and things and sign all necessary documents so as to list the property at Damien Drive, MacMasters Beach for sale by private treaty and for that purpose they shall:

(a) Appoint Raine and Horne, Avoca as the real estate agent for the sale of the Macmasters Beach property, the costs of and incidental to such appointment to be borne equally by the parties as and when they fall due.

(b) Instruct Catherine Davies, conveyancer at the Entrance, to prepare a contract for the sale of the MacMasters Beach property, the costs of and incidental to such appointment to be borne equally by the parties upon completion of the sale.

(c) List the reserve price for the MacMasters Beach property at such price as the parties shall agree in writing or, where no agreement is reached, at $1,250,000.

(d) Execute all documents requested by the real estate agent and the conveyancer for the sale of the MacMasters Beach property.

(e) Execute all documents necessary to complete the sale of the MacMasters Beach property.

(f) The parties shall cooperate with the real estate agent ...:

(6) If the property is not sold within 3 months, reserve liberty to apply for orders for the auction of the property.

(7) On settlement of the MacMasters Beach property the proceeds of sale shall be paid in the following manner and priority:

(a) All costs and expenses incurred on sale that may be outstanding, including but not limited to legal costs and disbursements, agents' commission and expenses, including the reimbursement to either party of such expenses paid by them prior to the sale;

(b) Payment of the amount required to discharge mortgage registered number 8681424 to RHG Mortgage Corporation Limited registered on the title to the Macmasters Beach property;

(c) The sum of $125,000 to Ms Norma Odlum;

(d) The sum of $23,016 to the plaintiff;

(e) The balance then remaining is to be paid in the following proportions:

(i) 65 per cent to the plaintiff;

(ii) 35 per cent to the defendant."

1. Ultimately, in August 2012, Rein J amended order 7 under the slip rule in relation to order 7(d), finding that Macready AsJ did not intend the $23,016 allowance he made for Ms Odlum (see [43(6)] above) to reduce her share in the proceeds of the Property but, rather, to reduce Mr Bowling's share. His Honour also made orders appointing trustees pursuant to s 38(1)(g) of the Property (Relationships) Act and ss 70(1)-(2) of the Trustee Act 1925 (NSW) on the application of Mr Bowling to manage the sale of the Property, which had not yet been put on market: Bowling v Bowling (No 3) [2012] NSWSC 1069.

The costs offers

1. At the conclusion of the adjustment decision, Macready AsJ stated that he would hear the parties on costs. In an email to Mr Friend dated 8 December 2011, Mr Paterson said that he would compare the August Offer of Compromise with the judgment. He also informed Mr Friend that he had held a preliminary chat with Mr Bowling's counsel and suggested that each party pay their own costs.

2. By letter to Mr Friend dated 9 December 2011, Mr Bowling's solicitors foreshadowed making an application under r 42.15A of the Uniform Civil Procedure Rules 2005 (NSW) (UCPR), on the basis that Mr Bowling had obtained a judgment that was as favourable as the August Offer of Compromise, and indicated that Mr Bowling would be seeking indemnity costs from 10 August 2011. After setting out their total costs on that basis ($123,000), the solicitors made an offer that Ms Odlum pay Mr Bowling an amount of $30,000 in the way of costs, simultaneously with the payment under the orders if she chose to retain the Property, and otherwise from her entitlement to the proceeds of sale (the First Costs Offer). Mr Friend forwarded the offer to Mr Paterson to seek his advice, and informed Ms Odlum that he had received the offer and was consulting Mr Paterson.

3. On 11 December 2011, Ms Odlum emailed Mr Friend giving instructions that since her mother was in hospital, it was inappropriate to approach her mother to explore the possibility of assisting her to purchase Mr Bowling's interest in the Property. Ms Odlum also indicated that she had approval for finance with ANZ Bank on the basis that her mother would be registered as an owner but that her mother was not entirely comfortable with that arrangement and she had not been able to discuss it further with her mother since approval.

4. On 12 December 2011, Mr Paterson provided a draft of a response to Mr Friend to the First Costs Offer, rejecting the offer and proposing that each party pay their own costs. Mr Friend forwarded this draft to Ms Odlum the same day, and gave evidence that he also called her to discuss the draft. Mr Friend recalled Ms Odlum instructing him that she was not prepared to pay any amount to Mr Bowling for costs and wanted the Court to determine the matter. Later that evening, Ms Odlum sent Mr Friend an email, relevantly stating:

"Thank you for the attached letter re costs asking that each party pay their own costs – is it remotely possible that the judge can award a more favourable outcome?

I trust the advice from Mr [Paterson] and therefore will not accept the offer of compromise from Paltos."

1. Ms Odlum also raised some queries in the email regarding the figure that would need to be paid to Mr Bowling consistently with the adjustment decision. In his response to her on 13 December 2011, Mr Friend advised that if she proposed buying out Mr Bowling's share, the buyout figure would be $385,694, based on the property valuation of $1.25 million. He also requested immediate instructions in respect of costs and whether to put Mr Paterson's suggested offer and reject Mr Bowling's offer. The draft letter that Mr Paterson prepared was

sent to Mr Bowling's solicitors on 13 December 2011.

2. There was some uncertainty before Cavanagh J as to who provided advice to Ms Odlum in relation to the First Costs Offer. Mr Friend's evidence was that he sought Mr Paterson's advice and referred to the draft correspondence as advice. Mr Paterson gave evidence that he was not asked to provide any advice on the reasonableness of Mr Bowling's initial costs offer and that he used the words "subject to instructions" in his email to Mr Friend because he was intending not to give advice but only to provide a draft response on the assumption that Ms Odlum would not accept the First Costs Offer. Mr Paterson recalled that he had been told that Ms Odlum was not prepared to pay any amount to Mr Bowling for costs but he was not privy to any conversations or correspondence between Mr Friend and Ms Odlum about the First Costs Offer. His evidence was that he received a copy of the letter sent to Mr Bowling's solicitors rejecting the First Costs Offer and understood that Ms Odlum had given instructions to this effect.

3. Under cross-examination, Ms Odlum disputed that there was any conversation between her and Mr Friend about the First Costs Offer on 12 December 2011. Ms Odlum also disputed that she had told Mr Friend that she was not prepared to pay any amount to Mr Bowling for his costs:

"Q. --you told Mr Friend that you were not prepared to pay any amount to Darryl for his costs, and you wanted the matter to be determined by the judge?

A. No. That's his version.

HIS HONOUR: I'll just interrupt there, in the interests of unrepresented.

Q. What's your version?

A. As I just said, I couldn't understand the whole costs process, and said, "I will trust your judgment in all of this." I--

Q. You deny telling Mr Friend that you didn't want to pay any amount to--

A. For costs.

Q. --Darryl, and--

A. Can I--

Q. Hold on a minute. I'm just trying to help you out here, Ms Odlum--

A. Yeah.

Q. I want to give you an opportunity to say your version, as you're not legally represented. Mr Lloyd is putting to you, you told Mr Friend you didn't want to pay any amount towards Darryl's costs. You said, "That's his version"?

A. Yep.

Q. I asked you what your version is. You said your version is you told him you'd trust his judgment. Is that what you're saying?

A. I trust Mr [Paterson]'s judgment. No, I didn't trust--

Q. Did you say those words to him?

A. Yes, it's written in an email. It's filed ..(not transcribable).. actually. It's part of the statement of claim. Because I said - navely, [sic] not being able to understand it - I mean, I see it all differently now, now that I understand what's in that. I see the situation very clearly, and it's no wonder I couldn't understand it at the time.

Q. You told him in response to his advice, "I trust your judgment"?

A. I trust Mr [Paterson]'s judgment, not Mr Friend's--

Q. Mr [Paterson]'s judgment, okay--

A. Yes."

1. On 14 December 2011, Mr Bowling, through his solicitors, made a counteroffer that Ms Odlum pay him the amount of $23,000 (the Second Costs Offer). In an email of that date from Mr Friend to Ms Odlum, sent at 5.33pm, Mr Friend set out the following (omitting formalities):

"The Defendant's solicitor advise If you pay the amount set out in paragraph 143 (of $370,720) to the Defendant and discharge the liability to Norma Odlum within the 21 days of the Judgement the defendant's solicitor says that is what the Defendant will accept by way of purchase of MacMasters Beach.

The Defendant's solicitor also says they will accept the sum of $23,000.00 in costs by way of settlement of the costs issue.

They say their costs of the Hearing alone (let alone the whole of the litigation) amount to $60,000.00."

1. As Cavanagh J noted, there was a dispute about whether any advice was given to Ms Odlum about the Second Costs Offer before the costs hearing on 15 December 2011: at [167]. Mr Friend gave evidence that he had a conference with Ms Odlum and Mr Paterson before the hearing, which he recorded in a file note. The file note recorded that Ms Odlum provided instructions that she would not accept Mr Bowling's offer and did not wish to make any offer on costs. It also recorded that Mr Paterson advised that costs were discretionary, and the August Offer of Compromise was very close to the judgment. This was consistent with Mr Paterson's recollection that he told Ms Odlum that there was a risk that she would be ordered to pay a greater amount of costs. Ms Odlum alleged that no conference occurred prior to the costs hearing and that the file note recorded what she was told after the hearing.

The costs decision

1. On 15 December 2011, Macready AsJ delivered the costs judgment, ordering Ms Odlum to pay 75% of Mr Bowling's costs on an ordinary basis. Cavanagh J stated that the amount was approximately $98,000: at [33]-[34].

2. In giving oral reasons for making the costs order, Macready AsJ referred to the two offers that Mr Bowling had made to settle the substantive proceedings. His Honour stated that it was "necessary to look fairly carefully" at the August Offer of Compromise, in order to see "the differences between what was achieved and the terms of the offer". His Honour noted that the offer in substantial terms was that there should be a 65:35 split, with Ms Odlum having 65%. When compared to what was achieved, his Honour observed that "[s]o far as the actual realty is concerned, the offer was almost identical to the result achieved, which was that there should be paid out of the sale proceeds $125,000 to Norma Odlum and the balance split 35% to the defendant and 65% to the plaintiff". His Honour considered that the differences between the actual orders and the terms of the offer were minor (although the effect of his Honour allowing the sum of $23,016 to be retained by Ms Odlum before the 65:35 split was that r 42.15 of the UCPR did not apply).

3. Macready AsJ considered that the fact of the August Offer of Compromise was "a very substantial matter to be considered in the exercise of the Court's discretion". His Honour noted that there was "no evidence of any offers made by the plaintiff". Looking at what the parties claimed and how the matter was ultimately determined, his Honour stated:

"One therefore has at the start of the proceedings the plaintiff making claims which are a long way from what was ultimately achieved and the defendant making a claim that is also more than what was ultimately achieved but with not as great a disparity as that of the plaintiff's. The parties returned, after the attempted settlement, to positions of similar combativeness at the final hearing, with the final result.

But what the offers which were made by the defendant during the process of the matter illustrate is an attempt to compromise the claim. In particular, by the time the second offer was made, all the evidence was filed. It was plainly made with an attempt to obtain a saving of the costs which would be incurred at the hearing. They obviously would be substantial.

Although there is no engagement with the costs consequences of the offer of compromise, I think it is an important illustration of the defendant's attempt to make some real attempt to resolve the matter. In the circumstances, and weighing up all the factors that I have considered, I think it is appropriate that the defendant have some costs against the plaintiff in respect of the proceedings, given the attempt to try and resolve it in a way which was not very far from the result."

The proceedings below

1. In the statement of claim filed on 14 December 2017, Ms Odlum alleged that both defendants owed her a duty of care to discharge their respective responsibilities in a professional and diligent manner. The duty of care was pleaded as encompassing a duty to: provide advice which reflected a reasonable, sensible and correct interpretation of the law; obtain and act in accordance with her reasonable instructions; facilitate the implementation of her reasonable instructions; and preserve, as far as possible, her rights and optimise her prospects of being successful in her litigation (SOC [3]-[4]). Additionally, in relation to Mr Friend, Ms Odlum pleaded that there was an implied contractual term in the costs agreement he provided to her, which was to the same effect as the duty of care (SOC [3]).

2. Ms Odlum pleaded that her "consistent instructions" to the respondents were that she wished, "if at all possible", to acquire Mr Bowling's estate and interest in the Property (SOC [5]). She alleged that Macready AsJ's adjustment decision was "substantially consistent" with the August Offer of Compromise (SOC [6]) which "had not been accepted by either of the Defendants" on her behalf (SOC [7]). She further alleged that despite her consistent instructions, and despite the fact that the adjustment decision was "for all intents and purposes, no less favourable to [her] than the [August Offer of Compromise]", the defendants advised her to reject the First Costs Offer (SOC [11]). As a result of accepting the advice and rejecting the offer, she "lost the opportunity to acquire the sole legal and beneficial titles to the Property on the terms offered on behalf of Darryl Bowling and, pursuant to the [adjustment decision], to limit her liability to pay the costs of Darryl Bowling to $30,000" (SOC [13]).

3. The statement of claim alleged that the defendants' advice was negligent and also misleading and deceptive (SOC [14], [17]). By way of particulars to the misleading and deceptive conduct allegation, the pleading stated that the advice was given "to persuade her to believe that her position in relation to resisting an adverse Costs Decision on 15 December 2011, was substantially stronger than it could reasonably be assessed to have been". She further pleaded (SOC [18]):

"In the event, the Plaintiff was ordered to pay the costs of Darryl Bowling in respect of the Equity Proceedings for an amount which would prove to exceed $30,000 and she lost the opportunity to acquire Darryl Bowling's estate and interest in the Property on the terms offered in the said Darryl Bowling's solicitor's letter of 9 December 2011 [ie the First Costs Offer], or at all."

1. During the hearing before Cavanagh J, Ms Odlum also complained that the respondents negligently failed to provide her advice in respect of the Second Costs Offer before the costs hearing: at [41]. Although this allegation was not pleaded, the respondents accepted that it formed part of the issues for determination as it related to advice on the costs issue, and his Honour addressed it: at [42].

2. The primary judge summarised Ms Odlum's pleaded case as follows (at [53]):

"(1) If she had been properly advised about either one or both of the costs offers put by Mr Bowling subsequent to the principal judgment, that is, advised to accept the costs offers, she would have accepted that advice;

(2) Her costs liability to Mr Bowling would have been limited to $30,000 (or $23,000, I am not sure which) rather than $98,000;

(3) She would have been able to arrange finance, specifically through the contribution from her mother and a loan from the ANZ Bank, to buy out Mr Bowling and pay the costs;

(4) Having bought out Mr Bowling, she would have retained sole title to the Macmasters Beach property;

(5) She would have continued to live and raise her children there;

(6) She would have benefited from the increase in value of the property;

(7) She would not have incurred other expenses in living elsewhere;

(8) She would not have suffered health problems herself; and

(9) Her children would not have been impacted upon in the way that they were and they would have been able to find work and not suffer the loss of income which they have suffered."

1. The respondents did not dispute that they owed a duty of care to Ms Odlum, in respect of the advice that they provided to her, to exercise due care, skill and diligence, assessed as against the competence and skill that is usual among professional persons undertaking similar tasks: at [45]. Cavanagh J summarised their similar responsive positions as follows (at [54]):

"(1) The factual basis of the plaintiff's claim has not been established;

(2) They were not in breach of any duty of care owed to the plaintiff. They say that the plaintiff was provided with proper advice in respect of Mr Bowling's costs offers prior to the costs hearing;

(3) The plaintiff bears the onus of establishing causation under s 5E of the [Civil Liability Act 2002 (NSW)] and she has not done so. That is, she has not established that, even if the advice given in respect of the costs offers was not competent and proper, any loss was caused by such failures. That is because:

(a) She would not have accepted any advice given to pay any amount for Mr Bowling's costs;

(b) She would not have been able to raise the finance to pay Mr Bowling his share of the value of the Macmasters Beach property without selling the property. In fact, as set out in the judgment, she was afforded 21 days to buy out Mr Bowling before the property was listed for sale and she did not do so; and

(c) She has not suffered any loss in any event because:

(i) She received her share of the market value of the property through the sale of the property;

(ii) There is no evidence she suffered any additional losses as if the property had some 'special value'; and

(iii) The other alleged losses are not casually related, too remote and not the subject of necessary evidence."

1. His Honour observed that Ms Odlum advanced a wide range of other criticisms but did not apply to amend her statement of claim, "even though it was pointed out to her that these issues were not the subject of any allegations or mention in her pleadings": at [43]. Later in the reasons, Cavanagh J identified the following allegations that Ms Odlum raised but did not form part of the statement of claim (at [67]):

"(a) The defendants' alleged failure to become involved in the plaintiff's financing issues;

(b) The defendants' alleged failure to properly explain to the plaintiff matters relating to parenting;

(c) The defendants' alleged failure to properly advise on the potential contributions that the plaintiff and Mr Bowling might have to make in respect of [the Property];

(d) The defendants' alleged failure to properly advise on the offers made by Mr Bowling to settle the whole proceedings prior to the hearing of the principal proceedings;

(e) The defendants' alleged failure to provide advice in respect of the benefits of the plaintiff making offers or further offers as to contribution prior to the principal hearing;

(f) The way in which the first defendant and the second defendant conducted the hearing;

(g) The submissions made by the second defendant to the court on the principal hearing and then on the costs hearing on behalf of the plaintiff; and

(h) The further steps that allegedly should have been taken by the defendants to allow the plaintiff to purchase Mr Bowling's interest and prevent the sale of [the Property]."

1. Ms Odlum relied on a number of affidavits that she prepared between 2018 and 2021, as well as an affidavit of her mother dated 18 October 2016. Ms Odlum was cross-examined, while her mother was unable to attend court to give evidence. Mr Friend and Mr Paterson also relied on affidavit evidence and were cross-examined by Ms Odlum. However, Cavanagh J expressed the view that other than in respect of one matter, the case did not turn on assessments of credit, "because the plaintiff and the first defendant generally confirmed the advice and content of discussions in writing". It followed that "[t]he contemporaneous documentation is significant in considering the nature of any advice and instructions provided": at [62].

2. The "one matter" to which his Honour referred as an exception was whether Ms Odlum was given advice about the Second Costs Offer on the morning of the hearing on costs (as the defendants contended), or only after the hearing (as Ms Odlum contended): at [62]. That factual contest formed part of the critical issue on the pleaded case, namely, "what advice was given by the defendants about Mr Bowling's costs offers, and whether that advice was consistent with proper professional practice, that is, has the plaintiff established that in their communications (or lack of) with the plaintiff about Mr Bowling's costs offers the defendants failed to exercise the care and skill required of them": at [49].

3. His Honour noted that, in her written closing submissions, Ms Odlum continued to pursue arguments that were not available to her given her pleaded case, despite "it being made clear on a number of occasions during the hearing what this case was not about". Nonetheless, his Honour considered that it was clear from Ms Odlum's final submissions that she also understood the case that she had pleaded: at [70].

Cavanagh J's conclusions in relation to the costs offers

1. Cavanagh J considered that it was difficult to determine precisely what had been said by whom about the First Costs Offer. However, the evidence indicated that Ms Odlum was advised to reject the offer and to make a counteroffer: at [154], [156]-[157].

2. His Honour did not accept that Ms Odlum had the lack of understanding that she maintained. His Honour found, consistently with Mr Friend's evidence, that Ms Odlum had told Mr Friend that she did not want to pay any amount to Mr Bowling on account of costs: at [158]. His Honour also found that Ms Odlum instructed Mr Friend to reject the First Costs Offer and that she took the draft letter from Mr Paterson as advice to do so: at [157]. His Honour accepted that Mr Paterson provided that draft letter consistently with what he understood to be Ms Odlum's position, and that the letter achieved its aim (at least in part), as it led to Mr Bowling reducing the amount of costs he sought from Ms Odlum in the Second Costs Offer: at [196].

3. On the issue of whether Ms Odlum should have been given the advice not to accept the First Costs Offer, Cavanagh J described Ms Odlum's submissions as "confused". Her primary contention was that she disagreed with Mr Friend's statements about the similarity between the August Offer of Compromise and the judgment. She submitted that the August Offer of Compromise was based on Mr Bowling's share being valued at $475,825, whereas the judgment for his share was $449,879. Those figures were not used in Mr Paterson's submissions to the Court and were not disclosed to her to allow her to make an informed decision about costs: at [160].

4. Cavanagh J considered that these submissions did not help Ms Odlum since she did not pursue a case against either respondent based on any error in the submissions they made to the Court on the costs hearing. In any case, his Honour found it difficult to understand how Ms Odlum could maintain that the respondents were negligent in advising her to reject the

First Costs Offer if her real position was that Mr Bowling's offers of compromise were not better than what she achieved in the judgment: at [163]. His Honour also concluded that, in any case, rejecting the First Costs Offer had the desired effect of causing Mr Bowling to make the Second Costs Offer on 14 December 2011. It followed that whether the respondents should have provided more direct or specific advice about the risks of not accepting the First Costs Offer was somewhat academic: at [165].

5. As to the Second Costs Offer, Cavanagh J accepted Mr Friend's evidence that the conference took place before the costs hearing rather than after it. His Honour reached this conclusion for several reasons, including that Mr Friend's evidence was generally consistent with the contemporaneous records, whereas under cross-examination Ms Odlum was evasive and denied obvious things. Moreover, contemporaneous records indicated that Mr Friend was always prompt in advising Ms Odlum about offers: at [174]-[177].

6. His Honour rejected Ms Odlum's complaint that the respondents failed to exercise reasonable care by not providing any advice about the Second Costs Offer. His Honour found that they provided advice about the costs consequences of not accepting the offer, particularly given their earlier advice about the risks of allowing the matter to proceed to judgment in the face of reasonable offers from Mr Bowling: at [181]-[182].

7. Ms Odlum also complained that the respondents failed to disclose her 12 September 2011 offer to Macready AsJ during the costs hearing. The primary judge considered there was no point in a party attempting to resist a costs order by demonstrating that the only offer which had been made by the party was worse than what the other party had achieved at the hearing: at [184].

8. Cavanagh J concluded that the respondents acted with due care and skill, and consistently with the conduct of a competent professional solicitor and barrister in advising Ms Odlum about the risks of not accepting the costs offers prior to the costs hearing. His Honour summarised his findings at [186] as follows:

"(1) The plaintiff was advised about the first and second costs offers prior to the costs hearing;

(2) She was advised not to accept the first costs offer but to make a counter-offer. This is the effect of [Mr Paterson's] draft letter and although [Mr Friend] cannot recall the precise words used in his discussion with the plaintiff about the first costs offer, there is no suggestion that he gave contrary advice;

(3) She was advised about potential costs risks following the first costs offer but she informed [Mr Friend] that she did not want to pay any money to Mr Bowling on account of costs;

(4) The rejection of the first costs offer had the desired effect because it produced a lower offer from Mr Bowling;

(5) She was forwarded the second costs offer on the day it was received;

(6) On the day of the costs hearing she had a short conference or discussion with the defendants prior to the costs hearing about the second costs offer. She was advised that the costs were discretionary and that the August Offer of Compromise was close to what the Court had ordered. She instructed [Mr Friend] that she did not wish [to] pay the sum of $23,000 to Mr Bowling; and

(7) Costs were discretionary and the plaintiff was at risk of an adverse costs offer. It was not clear that Mr Bowling received more than his August Offer of Compromise and Associate Justice Macready did not so find. There was no certainty on the outcome of the costs hearing, albeit the plaintiff faced a risk of an adverse costs order. This is the effect of the advice the plaintiff received."

Cavanagh J's conclusions on causation and loss

1. Ms Odlum submitted that if she had received proper advice to accept the costs offers, she would have followed it. Cavanagh J rejected that submission as it was inconsistent with documentary evidence showing that she had not followed the respondents' advice. It was also inconsistent with her submission that she, in fact, did better out of the judgment than the August Offer of Compromise. In any event, the advice given on the First Costs Offer could not have caused loss because it enticed a lower offer: at [187]-[194].

2. His Honour further found that if Ms Odlum's negligence claim had succeeded, she would only have been entitled to the difference between the offer she could have accepted (either $30,000 or $23,000) and the amount she paid on costs ($98,000). His Honour did not accept that any negligent advice (if it had been found) caused her any other loss. In particular, his Honour rejected that any advice the respondents gave caused Ms Odlum to lose the opportunity to purchase the Property. In any case, his Honour noted that Ms Odlum did not lose her proportion of the value of the Property because she received it following its sale and it did not have a "special value" for her which may not have been reflected by the sale price: at [205].

Ms Odlum's appeal from the judgment of Cavanagh J

1. Ms Odlum has made detailed written submissions on her appeal. Her opening submissions comprised 89 pages and she prepared a reply of 48 pages, together with a 123-page chronology. In the early hours of 28 May 2024, being the date of the appeal hearing, Ms Odlum provided two further submissions documents. The first was titled "Reply Submission for Appeal Hearing 28 May 2024", which comprised 52 pages, and the second was titled "An Outline of my Reply Submission for Appeal Hearing 28 May 2024" and was nine pages. The respondents did not object to the Court having regard to this additional material, or to the further documents that Ms Odlum attached to her email which did not form part of the material before Cavanagh J, namely, a document that set out a procedure for acting on an offer of finance from a bank and a letter from Ms Odlum dated 15 July 2017 concerning the receipt of advice about her claim.

2. On 28 May 2024, after the hearing, Ms Odlum sent a further email to the Court attaching two emails she sent to an E Rusiti, dated 3 February 2012 and 6 February 2012, respectively, which were referred to in her submissions on appeal but not tendered before Cavanagh J. These emails concerned advice about the merits of an appeal or an application under the slip rule in relation to the costs judgment, which Ms Odlum suggested, in her covering email, would become relevant in the event that the appeal were allowed. The Court indicated to Ms Odlum that it would take these emails into account, and the respondents did not indicate any opposition to that course. The Court also reiterated that judgment was reserved, that there was nothing further to be done so far as Ms Odlum or the respondents were concerned (a point that had also been made to Ms Odlum at the conclusion of the hearing), and that it was not appropriate to contact the Court.

3. Between 31 May 2024 and 15 June 2024, Ms Odlum sent a number of additional emails to the Court which included various attachments. The Court has not considered those emails or the attachments to those emails in determining the appeal. As it set out in emails to Ms Odlum dated 3 June 2024 and 4 June 2024, judgment was reserved, it was not appropriate for Ms Odlum to contact the Court, and the Court had not granted leave for her to provide any further materials.

4. In her written and oral submissions, Ms Odlum advanced a number of criticisms of his Honour's conclusions regarding the respondents' conduct in relation to the costs offers. Ms Odlum's submissions repeated responses she had made to Cavanagh J regarding the respondents' submissions, which she contended were incorrect or misleading. Ms Odlum also addressed in detail the respondents' submissions on the applicable case law and the bases on which the cases they relied on were distinguishable, having regard to the view of the facts for which she contended.

5. Ms Odlum also advanced submissions referring to papers and articles on the subject of advocates' immunity and the limits of Commonwealth legislative and executive power. As Cavanagh J noted, Ms Odlum's case as set out in the statement of claim focused on the advice on costs offers that she alleged the respondents had given negligently, as opposed to anything that was said by either of them in court. The authorities on advocates' immunity were thus not relevant to the appeal, nor did the appeal call for any consideration of executive and legislative power.

6. In determining the appeal, I have focused on the issues that were relevant to the pleaded allegations that Cavanagh J determined adversely to Ms Odlum, without seeking to be exhaustive but rather to pick up the key themes. A central theme in Ms Odlum's grounds and submissions was that she had lost the opportunity to keep her home, being the Property, in December 2011. In her submission this was "the gist of the action", rather than "just a loss on costs". Ms Odlum submitted that Cavanagh J misunderstood that she had lost the opportunity to purchase the Property in December 2011 because she needed an increased amount to cover $123,000 (being the figure Mr Bowling's solicitors referred to in the First Costs Offer, as opposed to an amount that Ms Odlum was ordered to pay), as well as the costs

associated with potentially appealing. But for the actions of her lawyers in relation to costs, her finance would have been sufficient and she would have been able to keep her home. Ms Odlum took issue with his Honour's conclusion that she did not suffer any loss in this respect. She also challenged his Honour's conclusion that the Property did not have a special value.

7. It is appropriate to address the assessment of damages issue first as it was Ms Odlum's central complaint. However, as I have noted above, Cavanagh J assessed damages on the assumption that his conclusions — that the respondents had not given her negligent advice and that any such advice had not caused her loss — were wrong. In order to succeed on her appeal, Ms Odlum would need to overturn those conclusions as well as his Honour's assessment of damages.

8. On the principles to be applied to the assessment of damages in a negligence case, the question for his Honour was what sum would be necessary to restore Ms Odlum to the position that she would have been in if the respondents had (on her case) not been negligent. Cavanagh J identified that what Ms Odlum lost by reason of the allegedly negligent advice was the opportunity to settle costs by paying $23,000 to Mr Bowling: at [209]. Having declined that opportunity, Macready AsJ ordered that Ms Odlum pay 75% of Mr Bowling's costs on an ordinary basis, being $98,000. His Honour thus assessed Ms Odlum's damages as the difference between the amount of Mr Bowling's costs that she could have accepted on the morning of 15 December 2011 ($23,000) and what she was ordered to pay by Macready AsJ on the same day ($98,000): at [204]-[205].

9. His Honour's assessment was consistent with well-settled principles and was plainly correct. By contrast, Ms Odlum sought in her submissions to draw a much broader arc between the negligent advice she alleged she received about the costs offers and her inability to obtain finance to cover the amount of Mr Bowling's share of the Property and Mr Bowling's costs which, in turn, led to her being unable to secure finance to purchase the Property. Contrary to her submissions on the appeal, Cavanagh J understood this was the argument she was advancing, and at [206] did not accept it. Although she submitted to the contrary, Ms Odlum did not establish that there was a relevant causal nexus between the allegedly negligent advice given in respect of the costs offers and her inability to buy out Mr Bowling at any time between the costs decision and the sale of the Property.

10. Turning to Cavanagh J's conclusion that the respondents' advice on the costs offers was not negligent, Ms Odlum submitted that she was negligently advised about the First Costs Offer, including that she was not advised to make a counteroffer. This submission was difficult to reconcile with another part of her submissions in which she appeared to accept that she was advised that each party paying their own costs was appropriate. Thus, Ms Odlum stated in her reply: "If one is asked 'do you want to pay costs' the obvious answer would be NO. I had not been asked in a full context of the understanding of the implications, if at all".

11. The second part of that submission might suggest that Ms Odlum did not understand that an offer that each party pay their own costs was a counteroffer. However, irrespective of her understanding, Cavanagh J was correct to reject the contention that Ms Odlum was not advised to make a counteroffer, in circumstances where the offer that each party pay their own costs was made in the letter that Mr Friend sent in response to the First Costs Offer, on her written instructions (see [50]-[51] above). Further, in light of the Second Costs Offer, even if Ms Odlum were correct that she was not advised about making a counteroffer to the First Costs Offer, there would be no causal connection between any such omission and the loss Ms Odlum advanced, given the making of the Second Costs Offer. Any connection between the allegedly negligent advice on the First Costs Offer and her opportunity to purchase the Property was, contrary to her submission, severed. Cavanagh J was correct so to find.

12. In relation to the Second Costs Offer, Ms Odlum submitted that the respondents gave false evidence that she was advised about this offer before the hearing on 15 December 2011, when there was no conference before the costs hearing and she received no verbal or written advice. Ms Odlum emphasised that the file note of Mr Friend on which Cavanagh J relied was written in past tense, submitting that it must follow that it was made after the hearing, and that it included false alterations to suggest otherwise.

13. As I noted above at [67], the question of what occurred on 15 December 2011 was a matter in respect of which Cavanagh J relied on his observations of Ms Odlum and Mr Friend. Where factual findings "are likely to have been affected by impressions about the credibility and reliability of witnesses formed by the trial judge as a result of seeing and hearing them give their evidence", appellate restraint is required with respect to those findings "unless they are 'glaringly improbable' or 'contrary to compelling inferences'": Lee v Lee (2019) 266 CLR 129; [2019] HCA 28 at [55]. Apart from asserting that his Honour was wrong, and reiterating her account, Ms Odlum has not sought to demonstrate why his Honour's findings satisfied that description.

14. Ms Odlum submitted that the risks in relation to the costs offers were not obvious to her, nor were they competently communicated or explained. In circumstances where Ms Odlum had the stated intention to raise funds to keep the Property, she submitted that she should have received advice about how to avoid paying Mr Bowling's costs. She also contended that the respondents did not thoroughly read the whole of the adjustment decision and did not understand it, leading to Mr Friend over-emphasising the discretionary assessment of contributions in relation to costs at the expense of the underlying mathematical comparison. That the respondents did not understand the maths was a focus of Ms Odlum's submissions, particularly in relation to the [142] of the adjustment decision (in which Macready AsJ referred to Ms Odlum wishing to purchase Mr Bowling's share of the Property and giving her an opportunity to do so and to discharge the liability to her mother).

15. Ms Odlum advanced two arguments in this context that were difficult, if not impossible, to reconcile. First, she submitted that the respondents "relied on their belief that a difference of, at the most $11,000, should have justified a WIN on costs", in circumstances where she

had made it clear, in her correspondence with Mr Friend, that she was seeking to understand the maths of the adjustment decision and needed assistance. On the other hand, in relation to causation, Ms Odlum submitted that she had done better than the August Offer of Compromise because of the lower value of the Property. She submitted that she did not want more money to be paid for her share, and that under the adjustment decision:

"I wanted and got a lesser amount to pay DB, to be able to keep my home, as Judge Macready had understood, and provided for me to pay DB; but not told to me by SF."

(Various emphases in original.)

1. Ms Odlum also quoted selectively in this respect from the reasons of Cavanagh J, emphasising his statement that "she did better out of the judgment than any offer made by Mr Bowling", and that "[i]t is unsurprising that she so readily accepted the advice to reject the first costs offer in these circumstances". While his Honour did make those statements at [191] and [192], his Honour did so by way of identifying the inconsistency in Ms Odlum's submissions:

"Her after-the-event opinion as to what she would have done is inconsistent with many of her other submissions, particularly her argument that she in fact did better than the August Offer of Compromise. That is, on the one hand it should have been recognised that she did better out of the judgment than any offer made by Mr Bowling but she also says that the defendants were negligent in advising her not to accept Mr Bowling's costs in accordance with his offers.

The proposition that she would have accepted advice to accept the first costs offer if it had been given to her is inconsistent with her conduct throughout the proceedings and with her view that she in fact did better than Mr Bowling had offered at any stage. It is unsurprising that she so readily accepted the advice to reject the first costs offer in these circumstances."

1. Ms Odlum advanced this same argument on the appeal, namely, that she would have accepted advice to accept the First Costs offer if that was the advice she had been given. She also submitted that she should not have to prove that she would have accepted different advice had it been given. However, the documentary record that I have summarised above supported Cavanagh J's finding that Ms Odlum generally did not accept advice she was given in relation to offers of compromise. The conclusion his Honour reached, that Ms Odlum would not have accepted advice that she pay Mr Bowling any amount on costs, was correct (if not inexorable).

2. Ms Odlum submitted responsively that the evidence that she refused to accept advice or make reasonable offers during the proceedings was wrong and lacked credibility. She made particular submissions about the August Offer of Compromise, contending that she was not competently advised about the maths of that offer and that in any event it was not a reasonable offer as it involved selling the Property, and at a higher market value than Mr Bowling advised Centrelink. Those submissions underline the force of the conclusion that his Honour reached.

3. Ms Odlum also disputed the honesty of Mr Friend's evidence that she had never given him clear and unequivocal instructions that she had finance or funds available to purchase the Property. Again, the documentary record shows that up until the point of the costs decision, Ms Odlum's instructions on that subject had not been consistent. It certainly could not be said that Mr Friend's description of her instructions was inapt.

4. Ms Odlum further alleged that Mr Paterson and/or Mr Friend failed to advise her to make "a conditional offer" on finance being forthcoming, or to reach agreement with Mr Bowling. She also submitted that the respondents were negligent in obtaining proper valuation evidence or in assisting Mr Odlum in obtaining an agreed value with Mr Bowling. These issues related to earlier points in the proceedings before Macready AsJ and did not form part of Ms Odlum's pleaded case before Cavanagh J.

5. Ms Odlum also sought to make much of the fact that Cavanagh J had not addressed the respondents' failure to provide a Calderbank offer on her behalf in September 2011, before the hearing. In her submissions on the appeal, Ms Odlum stated:

"Had my Calderbank offer of compromise spreadsheet been conveyed as a formal offer which could be relied upon, [Mr Bowling] would have had a chance to see that we agreed over percentages, and that the buyer should pay the amount to cover the debt (or otherwise I could keep it – it had reduced his share). We had a value both parties had to accept in September 2011 when Centrelink had corrected the assessable asset value. Transcript verifies that SF has now also come to that understanding."

(Various emphases in original.)

1. Ms Odlum did not make any allegation in her statement of claim that related to the making or otherwise of a Calderbank offer on her behalf in the course of the adjustment proceedings. This was one of the matters that Cavanagh J identified in his reasons as falling outside the scope of her pleaded case. Ms Odlum's submission that his Honour erred in finding that this was not relevant, given Macready AsJ relied on the absence of an offer from her in the costs decision, misunderstands the point. Even if Ms Odlum were correct that the respondents should have made a Calderbank offer on her behalf (a point his Honour did not need to decide and nor need this Court), it did not bear on the allegations that she made in her pleading, which related to the advice (or lack thereof) given in relation to offers made after the adjustment proceedings had been heard and determined.

2. That Ms Odlum advanced this submission, however, was consistent with Cavanagh J's conclusion that she was "unwilling to accept the advice of either the first or second defendant to make a reasonable offer of settlement prior to the hearing as that would have involved committing to a percentage contribution based on a higher total value than she was prepared to accept": at [179]. Ms Odlum's reliance on the Centrelink valuation of the Property as the value that the parties had to accept was not also consistent with the valuation evidence in the adjustment proceedings.

3. Ms Odlum also alleged that Mr Paterson was obliged, yet failed, to disclose to Macready AsJ the offer she had made on 12 September 2011, her intention to purchase Mr Bowling's share of the Property, and her ability to proceed on that intent. Ms Odlum contended that Cavanagh J erred in relying on advocates' immunity in response to this aspect of her claims. However, as his Honour endeavoured to explain to Ms Odlum in the course of the hearing, decisions as to what submissions to make to Macready AsJ fall within the scope of advocates' immunity, and in any event (and perhaps for this reason) what Mr Paterson said in the hearings was not the subject of Ms Odlum's negligence claim against him.

4. Ms Odlum submitted that the decision of Cavanagh J was "not without bias" because his Honour did not permit her to ask questions of the respondents about the events which post-dated December 2011 and did not refer to the evidence she gave about those events. She submitted that she saw no reason why she could not advance these matters, contending that they substantiated the loss that she sustained in December 2011. In the reply document that Ms Odlum emailed to the Court on 28 May 2024, she submitted that his Honour's comment that it was not necessary to consider what came after was "a paradox to the Judgement that I only lost of costs". Ms Odlum also submitted that Cavanagh J confused her when she was questioning "by not letting the defendant answer".

5. Ms Odlum sought to explain how Mr Friend's acts or omissions after the costs decision led to her being in the same position as she had been in back in 2010, save that Mr Bowling could appoint "less than impartial Trustees as the market had decreased" (a reference to the application that was heard before Rein J). However, the various events after the costs decision to which Ms Odlum referred and on which she sought to rely were simply not probative of the loss flowing from the negligence that she alleged. Again without being exhaustive, they included:

1. Mr Friend's failure to give Ms Odlum appropriate advice after the costs decision in relation to keeping the Property.

2. Mr Friend's refusal to act on the conveyance, from which Ms Odlum submitted it followed that her agreement with him was less than transparent.

3. Mr Friend did not assist her in relation to bank finance and how that tied in with the adjustment decision, nor did he speak to the bank to provide it with the assurance it required.

4. Mr Friend did not provide any assurances regarding appeal from the costs decision or how soon a costs assessment would be completed; other matters associated with repairs to the Property took time and Mr Friend would not provide an affidavit from the conveyancer to the Court in August 2012 to explain the delay.

5. The respondents did not assist her in an appeal. Mr Paterson prolonged the case instead of appealing in 2012.

1. Ms Odlum also asserted in her reply of 28 May 2024 that the proceeding could also be seen as unfair if she was correct that the solicitor for the respondents is related to Cavanagh J by marriage. There is no evidence for this assertion and it should be rejected.

2. Ms Odlum also alleges that Cavanagh J overlooked evidence that supported her wish to purchase Mr Bowling's interest in the Property. To the extent that such evidence was relevant to the propriety of the respondents' advice, the primary judge found that Ms Odlum had indicated that her intention and desire was to keep the property, but that she had given inconsistent instructions to Mr Friend on this point: at [127(5)].

3. Finally, Ms Odlum alleged that Cavanagh J erred in finding that there was "no application to amend the Statement of Claim to raise other issues" and that the issues in proceedings were limited to the advice of the respondents in response to Mr Bowling's costs offers: at [35], [43]. Ms Odlum referred to her affidavit dated 18 May 2019 tendered before Cavanagh J, which was framed as providing "further particulars to the Pleading in the statement of claim". Nonetheless, the affidavit is not in the form of an application to amend the pleadings and no such application was made. In her reply submissions, Ms Odlum sought to make such an application, submitting that that if Cavanagh J was correct that the issues she had raised in relation to the evidence post-December 2011 did not arise on the pleadings "then I have not received professional advice for the pleadings and seek to amend them". The time for any such application has long since passed.

Conclusion

1. The appeal must be dismissed. The respondents sought their costs. I do not see any basis on which the general rule, that costs follow the event, would not apply. Accordingly, I propose the following orders:

1. The appeal is dismissed.

2. The appellant is to pay the respondents' costs of the appeal.

1. HARRISON CJ at CL: I agree with Mitchelmore JA.

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Decision last updated: 03 July 2024

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Prepared on 30 October 2026 · Esheria