VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

DOMESTIC BUILDING LIST VCAT REFERENCE NO D43/2009

CATCHWORDS

DOMESTIC BUILDING DISPUTE – Costs – Whether offer complied with s 112 of the *Victorian Civil and Administrative Tribunal Act 1998*; whether enhanced costs order should be made; whether a *Bullock* or *Sanderson* order should be made - relevant principles.

APPLICANT	Architectural Building Project Management Pty Ltd (ACN 117 626 909) (Deregistered)
FIRST RESPONDENT	Monty Manufacturing Pty Ltd (ACN 050 464 536)
SECOND RESPONDENT	West Farmers General Insurance Ltd (ACN 000 036279) (struck out)
JOINED PARTY	NMBW Pty Ltd ACN 079 825 488)
WHERE HELD	Melbourne
BEFORE	Senior Member E. Riegler
HEARING	Costs Hearing
DATE OF HEARING	16 December 2013.
DATE OF ORDER	30 January 2014
CITATION	Architectural Building Project Management v Monty Manufacturing Pty Ltd (Domestic Building) [2014] VCAT 57

ORDERS

1. The proceeding is dismissed as against the Joined Party.
2. The First Respondent must pay the Joined Party's party and party costs pursuant to the *Supreme Court Scale of Costs* from 13 May 2010 to be agreed between the parties, failing which to be assessed by the Victorian Costs Court.

SENIOR MEMBER E. RIEGLER

APPEARANCES:

For the Applicant	No appearance
For the First Respondent	Mr J Forrest of counsel
For the Second Respondent	No appearance
For the Joined Party	Mr M Hooper of counsel

REASONS (D43/2009 AND D420/2009)

INTRODUCTION

1. These *Reasons* relate to two separate but related proceedings, being D43/2009 and D420/2009, in which the active parties are common to both proceedings. Given that the subject matter of both proceedings is inter-connected, it is appropriate that only one set of *Reasons* relating to both proceedings be published, notwithstanding that separate orders have been made in each proceeding.

2. The background surrounding both proceedings has previously been set out in my *Reasons* dated 10 December 2013. On that day, I made orders in proceeding D420/2009 that the First, Third and Fourth Respondents pay the Applicant (**'Monty'**) $1,651,261 (excluding interest). I further ordered that Monty's claim against the Fifth Respondent (**'the Architect'**) be dismissed. However, no orders were made finalising proceeding D43/2009, given that that proceeding had previously been stayed. Moreover, the question of costs and interest was left open with liberty given to the parties to apply. The present application concerns the parties' applications for costs and interest.

BACKGROUND

Proceeding D43/2009

3. Monty is (or was) the developer and registered owner of a four level residential apartment block located in Fitzroy. In 2008, a dispute arose between Monty and the builder of the residential apartment block, Architectural Building & Project Management Pty Ltd (**'the Builder'**), which culminated in Monty terminating the building contract on 21 January 2009. As a result, on 31 January 2009, the Builder issued proceeding D43/2009 against Monty. In that proceeding, the Builder initially alleged that Monty had failed to supply the Builder with all plans and specifications to enable the Builder carry out and complete the building works. *Amended Points of Claim* were subsequently filed by the Builder, which alleged that Monty had unlawfully sought to terminate the Contract, constituting a repudiation on its part. Monty defended the claim made against it on the ground that the termination of the Contract was lawful and resulted from the Builder failing to comply with its obligations under the Contract. Monty also counterclaimed against the Builder for loss and damage pursuant to the building contract between those parties (**'the Contract'**) or alternatively, damages at common law. In its defence to counterclaim, the Builder alleged that the drawings prepared by the Architect were deficient and not coordinated with engineering drawings. In addition, the Builder alleged that the Architect's conduct in its role as contract administrator was the direct cause of delays in the completion of the works and that the Architect:

> … did not provide the Respondent as the Owner nor the Applicant and the Builder the level of professional skill expected from a normal competent architect.[1]

4. On 14 December 2009, Monty filed an application to join the Architect to proceeding D43/2009. In its *Points of Claim by Respondent against Third Party*, Monty alleged that:

> 20. In the event that the Tribunal determines that Monty's termination of the Building Contract was a repudiation of the Building Contract, which the Applicant was entitled to and did elect to accept, then the Architect has acted in breach of the Architect's retainer and its duty of care to the extent alleged in the Applicant's Defence to Counterclaim.

5. After considerable delay and several adjournments, proceeding D43/2009 was listed to be heard on 13 February 2012. However, the proceeding was not heard on that day and was eventually stayed after the Builder was placed into administration and ultimately de-registered. By order dated 23 July 2012, I ordered:

> 1. Save and except to the extent that the subject matter of this proceeding is comprised in proceedings D420/09 and D848/11, this proceeding is otherwise stayed.

6. The Architect now seeks an order that proceeding D43/2009 be dismissed and that Monty pay its costs of that proceeding.

Proceeding D420/09

7. Proceeding D420/2009 was issued by Monty on 12 June 2009, approximately four months after D43/2009 had been filed by the Builder. Proceeding D420/2209 was initially issued against the First, Second, Third and Fourth Respondents, who were former directors of the Builder and who guaranteed the performance and payment of all monies payable by the Builder (**'the Guarantors'**). That guarantee was given pursuant to a contract of guarantee executed by the parties on or around 29 July 2007 (**'the Guarantee'**). The First and Second Respondents originally defended the claim on the basis that Monty had to first prove primary liability of the Builder before secondary liability could be attributed to the Guarantors. In essence, that entailed either proving that a *Progress Certificate* certifying a payment to Monty of $1,606,490.94 had been properly issued by the Architect or alternatively, proving that the losses claimed by Monty arose as a consequence of the Builder breaching the Contract. In answer to that claim, the First and Second Respondents argued, by way of defence, that the Contract had been unlawfully terminated by Monty. They further argued that Monty had been in breach of the Contract because it had failed to provide adequate architectural and structural drawings, despite having made certain representations to the contrary, prior to executing the Guarantee. Not

[1] Paragraph 5 (d) of the Builder's *Defence to Counterclaim* dated 16 November 2009.

surprisingly, the defence raised by the First and Second Respondents prompted Monty to join the Architect as the Fifth Respondent in the proceeding.

8. The nature of the proceeding was fundamentally altered in October 2012, after the First and Second Respondents retained legal representation; having defended the action for a period of time as self-represented litigants. In particular, the First and Second Respondents sought leave to amend their defence to a solitary ground; namely, that their obligations under the Guarantee granted in favour of Monty had been discharged by reason of a change to the primary obligation of the Builder effected by the conduct of Monty, thereby invoking the principle enunciated by the High Court in *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd.* [2]

9. Subject to that defence, the First and Second Respondents otherwise admitted the quantum of Monty's common law claim. In relation to the Third or Fourth Respondents, neither entered a defence, nor did they appear at any of the hearings or take any steps in the proceeding.

10. On 10 December 2013, I made orders in proceeding D420/2009 that the First, Third and Fourth Respondents pay the Applicant (**'Monty'**) $1,651,261 (excluding interest). Monty's claim against the Architect was dismissed.

11. The question of costs and interest was reserved with liberty given to the parties to make an application for costs and with further liberty given to Monty to make an application for interest on the judgment sum. Monty now seeks orders that:

    (a) the First Respondent pay its costs on an indemnity basis from the commencement of the proceeding; or alternatively from 4 November 2009 (with costs prior to 4 November 2009 being paid on a party and party basis on the *Supreme Court Scale of Costs*); and

    (b) the Third and Fourth Respondents pay all of its costs on an indemnity basis.

    (c) the First, Third and Fourth Respondents pay interest on the judgment sum at the rate set under the *Penalty Interests Rate Act 1983*.

12. Monty makes no claim for costs against the Architect. Rather, it contends that it would be fair to make an order that the First Respondent pay the Architect's costs of this proceeding.

13. The Architect opposes the making of an order that the First Respondent pay its costs of proceeding D420/09. It seeks an order that Monty pay its costs in successfully defending both proceedings.

[2] (1987) 162 CLR 549.

MONTY'S COSTS IN PROCEEDING D420/2009

14. As indicated above, Monty seeks an order that its costs are paid by the First, Third and Fourth Respondents either:

    (a) on an indemnity basis from the commencement of the proceedings in June 2009; or alternatively

    (b) on a party and party basis on the *Supreme Court Scale of Costs* from June 2009 to 4 November 2010 and thereafter, on an indemnity basis.

15. Orders for costs in the Tribunal are regulated by Division 8 of Part 4 of *Victorian Civil and Administrative Tribunal Act 1998* (**'the Act'**). The relevant provisions are to be found in s 109 and s 112 which provide as follows:

109. Power to award costs

(1) Subject to this Division, each party is to bear their own costs in the proceeding.

(2) At any time, the Tribunal may order that a party pay all or a specified part of the costs of another party in a proceeding.

(3) The Tribunal may make an order under sub-section (2) only if satisfied that it is fair to do so, having regard to-

(a) whether a party has conducted the proceeding in a way that unnecessarily disadvantaged another party to the proceeding by conduct such as –

(i) failing to comply with an order or direction of the Tribunal without reasonable excuse;

(ii) failing to comply with this Act, the regulations, the rules or an enabling enactment;

(iii) asking for an adjournment as a result of (i) or (ii);

(iv) causing an adjournment;

(v) attempting to deceive another party or the Tribunal;

(vi) vexatiously conducting the proceeding;

(b) whether a party has been responsible for prolonging unreasonably the time taken to complete the proceeding;

(c) the relative strengths of the claims made by each of the parties, including whether a party has made a claim that has no tenable basis in fact or law;

(d) the nature and complexity of the proceeding;

(e) any other matter the Tribunal considers relevant.

112. Presumption of order for costs if settlement offer is rejected

(1) This section applies if –

(a) a party to a proceeding (other than a proceeding for review of a decision) gives another party an offer in writing to settle the proceeding; and

(b) the other party does not accept the offer within the time the offer is open; and

(c) the offer complies with sections 113 and 114; and

(d) in the opinion of the Tribunal, the orders made by the Tribunal in the proceeding are not more favourable to the other party than the offer.

(2) If this section applies and unless the Tribunal orders otherwise, a party who made an offer referred to in sub-section (1)(a) is entitled to an order that the party who did not accept the offer pay all costs incurred by the offering party after the offer was made.

(3) In determining whether its orders are or are not more favourable to a party than an offer, the Tribunal –

(a) must take into account any costs it would have ordered on the date the offer was made;

…

16. Mr Forrest, counsel for Monty, submitted that it was fair to order that the First, Third and Fourth Respondents pay the costs incurred by Monty. He argued that the complexity and length of the proceedings, coupled with the strength of Monty's claim were factors that justified an order for costs in favour of Monty.

17. I accept that the proceeding was complex. It raised difficult technical and legal issues. This is exemplified by the fact that the First and Second Respondents engaged senior counsel to argue their defence. It is also exemplified by the comprehensive and voluminous written submissions filed by each of the parties. Moreover the hearing, although confined to an argument as to whether the *Anker* principle operated to discharge the liability of the Guarantors, occupied seven hearing days, with many lay and expert witnesses called.

18. In addition, I find that the First Respondent conducted the proceeding in a manner that has significantly disadvantaged Monty and the Architect. In particular, the claim made against the Guarantors was initially defended on the ground that Monty had to first prove primary liability on the part of the Builder before secondary liability fell upon the Guarantors. That prompted Monty to prepare for a hearing which comprised all the hallmarks of a typical building case. Consequently, comprehensive and voluminous witness statements and expert reports were relied upon. However, that defence was belatedly discarded in lieu of a defence relying solely on the *Anker* principle. In my view, that change in position resulted in preparatory work being rendered unnecessary and costs thereby being thrown away.

19. Consequently, I find that given the nature and complexity of the proceeding, coupled with the conduct of the First Respondent, it is fair that the First Respondent pay the costs incurred by Monty in proceeding D420/2009.

20. In relation to the Third and Fourth Respondents, no defence has ever been filed, nor were any steps taken by them in the proceeding. In those circumstances, I fail to understand how it can be said that the Third and Fourth Respondents have conducted the proceeding in a manner that has unnecessarily disadvantaged Monty. In my view, it was open for Monty to have sought summary judgment against the Third and Fourth Respondents after they failed to enter any defence to the claim made against them. That was not pursued and for all intents and purposes, the proceeding continued unaffected by the non-appearance or participation of the Third and Fourth Respondents. In those circumstances, I do not consider that it would be fair to order that the Third and Fourth Respondents pay Monty's costs, especially where those costs were incurred as a result of Monty prosecuting a claim against a defence raised and relied upon by only the First and Second Respondents.

Should an enhanced costs order be made?

Costs prior to 4 November 2009

21. Monty submits that its costs in relation to proceeding D420/2009 should be paid on an indemnity basis either from the commencement of proceeding on 12 June 2009 or from 4 November 2010, being the date that Monty served a offer to settle both proceedings.

22. Dealing first with the period preceding 4 November 2010, I see no reason why the Tribunal should make an enhanced costs order for this period. No argument was advanced why indemnity costs should be awarded over this period as opposed to costs on a party and party basis. For example, it was not submitted that the First Respondent had acted vexatiously during this period.

23. That being the case, I find that costs should be determined on a party and party basis for the period prior to 4 November 2009. However, given the quantum of Monty's claim, I accept Mr Forrest's submission that the appropriate scale is the *Supreme Court Scale of Costs*.

Costs after 4 November 2009

24. By letter dated 4 November 2010, Monty made an offer to the Builder and the First, Second and Third Respondents to settle both proceedings. The offer was expressed to be in a form commonly known as a *Calderbank* offer. The relevant terms of the offer were:

    (a) The Builder and the Guarantors were jointly and severally liable to pay Monty $1,029,290.58 within 30 days of acceptance of the offer.

(b) The Builder and the Guarantors were jointly and severally liable to pay Monty's costs calculated on a scale 'D' of the *County Court Scale of Costs*.

(c) The Builder was liable to pay the Architect's legal costs of proceeding D43/2009 and indemnify Monty in respect of any liability that it may have in respect of those costs, such costs to be calculated on a scale 'D' of the *County Court Scale of Costs*.

(d) The parties otherwise mutually released each other in relation to both proceedings.

25. In my view, the terms of the offer are less favourable than the outcome of the proceedings. In that regard, I note that the determination of the Tribunal in proceeding D420/2009 exceeds the settlement amount of $1,029,290.58 by more than $600,000 (without taking interest into consideration). I hold this view even if the combined party and party legal costs of Monty and the Architect, incurred prior to 4 November 2009, were added to the settlement sum. In particular, given that both proceedings were still relatively young when the offer was made, I find it unlikely that the combined legal costs of Monty and the Architect prior to 4 November 2009 would have increased the settlement sum by more than $600,000. In that regard, I note that there were minimal interlocutory steps completed by the parties in both proceedings leading up to 4 November 2009. In proceeding D43/2009, which was commenced 8 months prior to 4 November 2010, very little had occurred to progress the litigation. For example, appearances comprised three directions hearings. Pleadings had not been completed and the only party which had filed expert reports was Monty. Similarly, in proceeding D420/2009, which was commenced only five months prior to the offer being served, the interlocutory processes were limited to one compulsory conference and two directions hearings, albeit that one directions hearing comprised a strikeout application. Moreover, the only party which had filed expert reports was Monty.

26. Further, there is no evidence before me to even remotely suggest that the offer is not more favourable than the final determination of the Tribunal. Had the offer been accepted, the litigation would have ended at that time and the Builder and Guarantors' position would certainly have been better than it is now.[3] In *Peet v Richmond (No.2)*,[4] Hollingworth J stated:

> [121] As a matter of principle, if one party has drawn the futility of the case to the attention of the losing litigant, and the losing litigant has wilfully ignored that, those may be circumstances supporting a special costs order. But it does not follow that a special costs order can only be made if the successful party has drawn the futility to the other sides attention.

[3] The reference to Guarantors in this context excludes a reference to the Second Respondent, given that the claim made against him was stayed as a result of him having passed away during the course of litigation.
[4] [2009] VSC 585.

27. Later in her Honour's judgment, she expressed the following:

> [170] However, an imprudent refusal of an offer of compromise may be sufficient to justify an award of costs on a special basis. The question must always be whether the particular facts and circumstances of the case, as they existed at the time the offer was refused, justify an award other than on a party-party basis.

28. In *Hazeldene's Chicken Farm Ltd v Victorian Workcover Authority (No.2)*,[5] the joint judgment of Warren CJ, Maxwell P and Harper AJA discussed the circumstances that might lead a court to determine whether the rejection of an offer was unreasonable:

> [25] The discretion with respect to costs must, like every other discretion, be exercised taking into account all relevant considerations and ignoring all irrelevant considerations. It is neither possible nor desirable to give an exhaustive list of relevant circumstances. At the same time, a court considering a submission that the rejection of a Calderbank offer was unreasonable should ordinarily have regard at least to the following matters:
>
> (a) the stage of the proceeding at which the offer was received;
>
> (b) the time allowed to the offeree to consider the offer;
>
> (c) the extent of the compromise offered;
>
> (d) the offeree's prospects of success, assessed as at the date of the offer;
>
> (e) the clarity with which the terms of the offer were expressed;
>
> (f) whether the offer foreshadowed an application for indemnity costs in the event of the offeree's rejecting it.

29. In my view, it was unreasonable for the Builder and the First and Third Respondents not to have accepted the offer. This is because the offers were made relatively early in the proceeding and went into considerable detail highlighting weaknesses in the position taken by the Builder and the Guarantors. Moreover, the offer foreshadowed that either indemnity or solicitor and client costs would be sought if the offer was rejected. Therefore, I find that it is fair that an enhanced costs order is made in respect of Monty's costs incurred in proceeding D420/2009 after 4 November 2009.

30. However, given that the offer foreshadowed that either indemnity or solicitor and own client costs would be sought, I do not consider it fair that costs should be awarded on a full indemnity basis. In my view, costs should be enhanced to the extent that Monty's solicitor and own client costs incurred after 4 November 2009 be paid pursuant to the *Supreme Court Scale of Costs*.

[5] [2005] VSCA 298.

THE ARCHITECT'S COSTS IN PROCEEDINGS D43/2009 AND D420/2009

31. As indicated above, the Architect is the Fifth Respondent in proceeding D420/2009 and the Joined Party in proceeding D43/2009. The Architect was joined to both proceedings by Monty. The claim made against the Architect in proceeding D43/2009 is a third party claim. Its success was contingent upon the Builder succeeding with its claim against Monty. As the Builder was de-registered on 12 May 2012, that proceeding was stayed by order dated 23 July 2012. The Architect now seeks an order that the third-party claim brought against it by Monty in proceeding D43/2009 be dismissed. That order was not opposed by Monty and I see no reason why such an order should not be made. Consequently, I will order that proceeding D43/2009 be dismissed.

32. As indicated above, the claim made against the Architect in proceeding D420/2009 is tied to allegations made by the First and Second Respondents in their defence. Consequently, the allegations made by Monty against the Architect in proceeding D420/2009 would have only gained momentum if the First and Second Respondents were able to successfully defend the claim made against them (on the ground that the conduct of the Architect resulted in their liability under the Guarantee being discharged). Having found that the conduct complained of was within the terms of the building Contract (and therefore did not invoke the *Anker* principle), I dismissed Monty's claim against the Architect in proceeding D420/2009.

33. The Architect now seeks that its costs of both proceedings, including reserved costs, be paid by Monty from 13 May 2010, in the case of D43/2009; and 12 September 2012, in the case of D420/2009.

Costs in D43/2009

34. Mr Hooper, counsel for the Architect, submitted that if the claim against the Architect in proceeding D43/2009 is dismissed, then costs should follow the event. He drew my attention to a settlement offer dated 13 May 2010, wherein the Architect agreed to settle that proceeding on the basis that each party walk away and bear their own costs. Mr Hooper contended that the offer was made in accordance with s 112 of *Victorian Civil and Administrative Tribunal Act 1998*. He argued that in the event that the claim made by Monty against the Architect is dismissed, then the outcome of that proceeding was not more favourable than the offer made.

35. It is not disputed that the outcome of the proceeding is not more favourable than the offer made. However, Mr Forrest argued that it was reasonable for Monty not to have accepted the offer. Relying upon comments made by the joint judgment in *Hazeldene's Chicken Farm*, he submitted that the offer did little to compromise the proceeding. In that respect, I accept that the offer, if accepted, would have done little to end the litigation, given the Builder's claim and Monty's counterclaim were unaffected by the terms of the offer.

36. In my view, that factor is relevant when considering the validity of the offer, at least insofar as it purports to be an offer made under s 112 of the Act.

37. Relevantly, s 112 states that:

> **112. Presumption of order for costs if settlement offer is rejected**
>
> (1) This section applies if –
>
> (a) a party to a proceeding (other than a proceeding for review of a decision) gives another party an offer in writing to settle the proceeding; and

[emphasis added]

38. In my view, the reference to 'proceeding' in s 112 means the whole of the proceeding, the subject of the litigation and not just a part of it. That interpretation is consistent with the comments of Morris J in *Re Schneider and Boroondara City Council,*[6] where his Honour stated:

> The word 'proceeding' is not defined in the VCAT Act. Clearly it is a term that would cover all acts that are taken from the commencement of the matter before the Tribunal to its completion by the Tribunal.

39. Therefore, it seems that a valid offer under s 112 of the Act is an offer to settle the whole proceeding and not merely a separate claim between two of the parties, and which only constitutes a part of the litigation comprising the proceeding.

40. Nevertheless, the offer is still relevant to the exercise of my discretion under s 109(3)(e) of the Act, as it constitutes a form of *Calderbank* offer. In that respect, I refer to my comments above and in particular, to what the Court of Appeal stated in *Hazeldene's Chicken Farm.*

41. By the time the offer was made, further expert reports had been filed, which included an expert report prepared by the Architect's consulting architect, Peter Quigley, who opined that the Architect had performed its services as a design architect and contract administrator to a high standard, notwithstanding a few minor errors and discrepancies. Importantly, however, Mr Quigley disagreed with the allegations raised by the Builder that there were design discrepancies or inadequate detail in the drawings prepared by the Architect.

42. In my view, the decision to reject the offer and keep the Architect in the proceedings was a strategy adopted by Monty to protect its interests, in the event the Builder was successful in prosecuting its claim and defending the counterclaim against it. It was a deliberate choice taken by Monty to insure against being unsuccessful in the claims as between it and the Builder.

43. Consequently, I find that it is fair to order that costs should follow the event in this proceeding from the date of the offer, being 13 May 2010. However,

[6] [2004] VCAT 642 at [12], sitting as the President of the Tribunal. See also *Morphett v Skabaw Pty Ltd* [2011] VCAT 1091 at [28].

I note that after the commencement of proceeding D420/2009, both proceedings were essentially conducted as one until proceeding D43/2009 was stayed following the Builder becoming de-registered. Accordingly, only those costs which relate solely to proceeding D43/2009 and do not otherwise constitute costs in proceeding D420/2009 should be payable.[7]

44. As to the measure of those costs, I do not consider that it would be fair that an enhanced costs order be made. In my view, costs should be assessed on a party and party basis, given that the offer, if accepted, would have done little to limit the scope of the proceeding and further, provided very little incentive for acceptance.

Costs in D420/2009

45. By letter dated 12 September 2012, the Architect made a second offer to settle the claim against it in proceeding D420/2009. The terms of that offer were that the Architect was to pay Monty $25,000 within 30 days of the terms of settlement being executed, inclusive of costs. Like the earlier offer made by the Architect in proceeding D43/2009, the offer did not foreshadow a settlement of the proceeding as a whole. It focused only on the claim as between Monty and the Architect.

46. For the reasons given in relation to proceeding D43/2009, I do not consider that the offer complied with s 112 of the Act. Properly categorised, the offer was a hybrid form of *Calderbank* offer. Nevertheless, the offer is still relevant to the exercise of my discretion under s 109(3)(e) of the Act.

47. As was the case in D43/2009, Mr Forrest submitted that it was reasonable for Monty to reject the offer. As I have already indicated, I regard the rejection of the offer as a strategic decision made by Monty in the course of litigation. It wanted to hedge its bets, given the allegations raised in the First and Second Respondents' defence. It may have been entirely appropriate for Monty to have adopted that course and I make no criticism against it in that regard. Nevertheless, like all litigation, there are risks which litigants accept as being par for the course. To issue a proceeding against the party and then to reject an offer of compromise carries with it the risk that if the determination of the Tribunal is not more favourable than the offer, costs may be awarded against the offeree.

48. In my view, it is fair that costs be awarded in favour of the Architect from the date of the offer, being 12 September 2012. However, for the same reason as articulated in relation to proceeding D43/2009, I do not consider that it would be fair to make an enhanced costs order in favour of the Architect. As I have already commented, the offer, although more generous than the offer made in proceeding D43/2009, would not have settled the whole proceeding and in all likelihood, would have done little to reduce its scope. Therefore, I consider that it is fair that the Architect's costs after 12

[7] Subject to any costs ordered in proceeding D420/2009.

September 2012 are to be paid on a party and party basis in accordance with the *Supreme Court Scale Costs*.

SHOULD A BULLOCK OR SANDERSON ORDER BE MADE?

49. Monty opposes any order that it pay the Architect's costs. Nevertheless, it contends that it would be fair to make an order that the First Respondent pay the Architect's costs in proceeding D420/2009. In that respect, Mr Forrest submitted that the Tribunal has power to make a *Sanderson* order, with the effect that the First Respondent pays the costs of the Architect. The Architect opposes the making of a *Sanderson* order, although it does not oppose the making of a *Bullock* order. Such an order would require the First Respondent to indemnify Monty for its liability to pay the Architect's costs.

50. In *Civil Procedure: Victoria*,[8] the learned authors explain the difference between a *Bullock* and a *Sanderson* order as follows:

> If the plaintiff recovers judgment against one only of two defendants, under the usual order of costs the plaintiff gets costs from the losing defendant, and the winning defendant costs from the plaintiff…
>
> In some circumstances it may be appropriate to order that the losing defendant rather than the plaintiff bear the costs of the successful defendant. One way to relieve the plaintiff of liability is to require the losing defendant to pay to the plaintiff the costs which the plaintiff must pay the successful defendant. Another way is to order the losing defendant to pay the costs of the successful defendant direct to that defendant. An order in the first form is called a Bullock order, and one in the second form a Sanderson order.

51. Mr Forrest correctly submitted that *Bullock* or *Sanderson* orders should only be made where it was reasonable and proper to join the successful defendant;[9] and where it is shown that there was something in the conduct of the other unsuccessful defendant that makes it appropriate to exercise the discretion.[10] He referred me to the judgment of Einstein J in *Furber v Stacey*,[11] where his Honour said:

> It is sufficient to justify the making of such an order if:
>
> (a) the costs have been reasonably and properly incurred by the plaintiff as between it and the unsuccessful defendant: *Johnson Tyne Foundry v Maffra Corporation* [1948] HCA 46; (1948) 77 CLR 544 and 572-573 per Williams J and *Gould v Vaggelas* [1984] HCA 68; (1985) 157 CLR 215 at 229-230 per Gibbs CJ; and
>
> (b) the conduct of the unsuccessful defendant has been such as to make it fair to impose some liability on it for the costs of the successful defendant or the conduct of the unsuccessful defendant shows that the joinder of the successful defendant was reasonable and proper to

[8] Lexis Nexis Butterworths, *Civil Procedure Victoria,* Vol 1 (at Service 270 [9.02.10]).
[9] *Roads and Traffic Authority of NSW v Dederer* (2007) 234 CLR 330 at [176]-[193], [296]-[299].
[10] *Coombs v Road and Traffic Authority* [2007] NSWCA 70 at [9].
[11] [2005] NSWCA 242.

ensure the recovery of damages sought: *Fennell v Supervision and Engineering Services* (1988) 47 SASR 6 and 7-8, 15.

52. Mr Forrest submitted that the joinder of the Architect in proceeding D43/2009 and its inclusion as a respondent in proceeding D420/2009 only arose because of the defence raised by the First and Second Respondents. In particular, the allegations raised by the First and Second Respondents focused on the conduct of the Architect as being the basis upon which, in the case of proceeding D43/2009, there was no entitlement to payment from the Builder; and in the case of proceeding D420/2009, the liability of the Guarantors had been discharged. Therefore, he argued that it was entirely reasonable and proper for the Architect to be joined to those proceedings.

53. Mr Hooper, counsel for the Architect, submitted that it was not appropriate for a *Sanderson* order to made in respect of the Architect's costs incurred in proceeding D420/2009. He submitted that there were statements made in the affidavit of Mr Montaldo, the sole director of Monty, to the effect that the allegations made by the First and Second Respondents had no merit. Mr Hooper submitted that Monty had made an overly-cautious decision to unnecessarily join the Architect to the proceedings. He argued this put the Architect to significant expense, which ultimately proved to be for no useful purpose.

54. As I have already indicated, the decision to join the Architect to the proceedings was a strategic decision made in the course of litigation. It was prompted by allegations raised in both proceedings by the Builder and First and Second Respondents. In my view, it was a reasonable and proper course to adopt in order to ensure the recovery of Monty's damages. In particular, if the Architect had not been joined, it is arguable that if the Builder and the First and Second Respondents succeeded with their defences, Monty may have been prevented from resurrecting fresh proceedings against the Architect based on the allegations made in those defences. This point is made clear by Kaye J in *Altaura v Victorian Railways Commission*:[12]

> To avoid multiplicity of actions and risk of his subsequent claim being barred by the Statute of Limitations, it may be proper and reasonable for him to join in one action all parties who owed to him a duty of care and whose breach of duty could have been a cause of his injury.

55. Consequently, I am of the view that it was proper and reasonable for Monty to have joined the Architect to both proceedings. I, therefore, am of the opinion that this is a proper case for the making of an order that the costs of the Architect in proceeding D420/2009 should ultimately be paid by the First Respondent. However, that finding does not answer the question whether the appropriate order should be in the form of a *Bullock* order or a *Sanderson* order.

[12] [1974] VR 33 at 35.

56. In that respect, my task is to weigh up the comparative hardship that would be experienced by the parties from one or other form of the costs orders sought. Following the publication of my *Reasons* in proceeding D420/2009, the matter was returned before me in order to deal with the form of orders to be made in the substantive hearing. The First Respondent appeared without representation. During the course of that directions hearing, the First Respondent candidly admitted that he was impecunious. Mr Hooper submitted that this was a relevant consideration in the exercise of my discretion as to whether a *Bullock* or *Sanderson* order should be made. In *Law of Costs*, the learned author sets out the following commentary dealing with this issue:

> [11.14] The most common situation in which the court may choose a Bullock order in place of a Sanderson order is where the latter would cast upon the successful defendant the burden of the unsuccessful defendant's insolvency. A Sanderson order made where the unsuccessful defendant is insolvent would in effect deny the successful defendant an indemnity for its costs. As a general rule, the courts have cast the burden of an unsuccessful defendant's insolvency, so far as costs are concerned, upon the plaintiff, and a Bullock court order gives effect to this practice. The logic appears to be that a successful defendant has a stronger moral claim to an indemnity for costs than a plaintiff who, having initiated the litigation, has proved only partly successful.[13]

57. Having regard to the commentary set out in the extract of *Law of Costs* above, I find that in the present case, it is fairer to make orders in the form of a *Bullock* order, rather than a *Sanderson* order.

INTEREST ON THE JUDGMENT SUM

58. Pursuant to the liberty given to Monty, an application was made that interest on the judgment sum be paid by the First, Third and Fourth Respondents. As I have indicated, neither of the First, Third or Fourth Respondents appeared at the costs and interest hearing on 16 December 2013. No submissions were made by the Architect in respect of this element of the hearing. Consequently, the application for interest is unopposed.

59. Interest is claimed in accordance with s 53(2)(b)(ii) of the *Domestic Building Contracts Act 1995* from commencement of the proceeding, being 11 June 2009 to date of judgment, being 10 December 2013. Mr Forrest submitted that it is fair to order interest to Monty in all the circumstances. He argued that Monty had incurred costs and interest on borrowed money to rectify defects and complete the works in circumstances where the First Respondent has denied liability. He further noted that the interest payable under the building Contract between Monty and the Builder was fixed at the rate of 10% in respect of any payments due.

60. Having regard to the submissions made by Mr Forrest and in particular, the fact that the building Contract contemplated the payment of interest on

[13] G E Dal Pont, *Law of Costs*, (Lexis Nexis Butterworths, 2nd ed, 2009) at 317 (footnotes omitted).

outstanding monies, I consider it fair, in the circumstances, to award interest on the judgment sum. I assess interest in accordance with the *Penalty Interest Rates Act* 1983 to be $775,617.65, calculated as follows:

(a) 11/06/2009 to 31/01/2010 = $106,314.06 (235 days @ $452.40 per day @ 10% pa); and

(b) 01/02/2010 to 10/12/2013 = $669,303.59 (1,409 days @ $475.02 per day @ 10.50% pa).

SENIOR MEMBER E. RIEGLER