WARREN CJ, EAMES and NEAVE JJA : Supreme Court of Victoria : Court of Appeal. Melbourne. 22nd March 2007

JUDGEMENT : WARREN CJ:

1 I have had the benefit of reading the judgment on a costs submission prepared by Eames JA. The appeal raised a significant legal issue under the *Domestic Building Contracts Act* 1995. As stated by Eames JA the issue raised was not without difficulty or frivolous. For the reasons stated by his Honour with respect to the statutory construction issue I consider costs should be awarded on a party-party basis.

2 There were additional aspects of the costs application that revolved around the certainty or otherwise of the offer of compromise made in the appeal. I consider it unnecessary to determine the costs application on that basis. However, I would add that when such offers are made on appeals it behoves the offeror to apply sufficient specificity and certainty in the offer such that the offeree fully comprehends the offer and also, the risk as to costs if the offer is not accepted and the appeal fails.

JUDGMENT : EAMES JA:

3 This appeal arose out of a contract of sale of an apartment, off the plan, in a residential development in the Docklands area. The appellant, as purchaser, contended that his contract with the developer constituted a "major domestic building contract" under the *Domestic Building Contracts Act* 1995 and that the developer could not therefore demand final payment until all work had been completed in accordance with the plans and specifications. The appellant contended that there were items of work not completed or which were defective, relating to such items as a toilet exhaust, an inadequately opening window, and the composition of a balcony handrail. The respondents had rescinded the contract upon the appellant's failure to pay the balance owing and had retained the deposit, contending that they were entitled to do so as the contract was not a major domestic building contract. A judge in the trial division agreed with the respondents' interpretation of the legislation and the Court of Appeal, by majority, on 15 December 2006 dismissed the appeal from that decision.

4 The respondents, having been successful on the appeal to this Court, now apply pursuant to R.26.12 for an order that the appellant pay their costs on a party-party basis up to and including 25 May 2006 and thereafter on an indemnity basis, or alternatively on a solicitor-client basis. The appellant resists the making of any special order for costs, contending that it ought pay only the respondents party-party costs of the appeal, that being the usual order of costs against an unsuccessful party.

5 In support of their application for a special order as to costs the respondents rely on material disclosed in an affidavit of Alexander William King, dated 14 December 2006, which exhibits a written offer to compromise, dated 11 May 2006,[1] in which the respondents offered to compromise the appeal on the following terms:

"THE RESPONDENTS offer to compromise your appeal on the following terms:
1 The appeal is dismissed.
2 One-third of the deposit monies (being $22,183.33) to be repaid by the respondents to the appellant.
3 The appellant will pay 65% of the respondents' costs of the appeal to be taxed, failing agreement, on a party/party basis.

THIS OFFER TO COMPROMISE is served in accordance with rule 26(1) of the Supreme Court (General Civil Procedure) Rules 2005.

This offer to compromise is open to be accepted by the appellant for a period of 14 days after service of the offer.

This offer to compromise is made at this stage of the appeal in an endeavour to finally compromise the matters in dispute in this proceeding.

***FURTHER TAKE NOTICE:** The respondents foreshadow that if this offer is not accepted and thereafter the respondents obtain an order on the appeal which is no less favourable than that contained in this offer to compromise, they will make application for an order that the appellant pay their costs of this appeal from the date of expiry of this offer to be taxed on an indemnity basis, alternatively, on a solicitor and client basis."*

6 The offer was held open for 14 days. It is not contended that that was an unreasonably short time to allow the appellant to consider the terms of the offer. The appellant did not accept the offer.

7 The offer to compromise represents payment by the respondents of one third of the deposit monies forfeited upon what the Court held to have been a lawful rescission of the contract by the respondents. There is no dispute that the payment of $22,183, being one third of the deposit, would represent a better outcome for the appellant than dismissal of the appeal, but whether the end result of the respondent's offer to accept only 65% of its costs of the appeal would have been a saving as to costs for the appellant is not conceded, it being contended that the terms of the offer made that difficult to assess.

8 Counsel made comprehensive written submissions as to costs and were content for the Court to determine the question on the papers.

9 Counsel were in agreement that the principles governing the question whether a special order as to costs should be made are those set down in ***Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority***.[2] The issue is whether in all the circumstances the offeree's refusal to accept the offer warrants departure from the ordinary

[1] The appeal was heard on 29 August 2006.
[2] (2005) 13 VR 435.

rule that costs be awarded on a party-party basis, that, in turn, requiring assessment whether the offer made was in all the circumstances a reasonable one and whether its rejection was unreasonable.[3]

10 Rule 26.12(3) reads:

"*(3) Where on an appeal –*

(a) a party has made an offer in writing to the other party (whether or not expressed to be without prejudice) to compromise the appeal on the terms specified in the offer;

(b) the offer was open to be accepted for a reasonable time, but was not accepted; and

(c) the party making the offer obtains an order on the appeal no less favourable to that party than the terms of the offer –

the Court of Appeal shall take those matters, and also the stage of the appeal at which the offer was made, into account in determining what order for costs to make in respect of the appeal."

11 By R.26.12(4) the Court of Appeal is empowered to order costs on a solicitor-client basis from the date of service of the offer, or such other time as the Court deems fit.

12 In exercising its discretion as to such an application the Court does not approach the question with any preconceptions as to what factors constitute an unreasonable refusal to accept an offer of compromise, although in ***Hazeldene's*** the Court identified a range of matters which might be among those constituting relevant considerations.[4]

13 The appellant contends that there were two primary factors which rendered it reasonable for him to have refused to accept the offer. In the first place, it is submitted that the offer was uncertain as to its terms. The offer did not disclose whether the respondents were or were not offering to pay the appellant's costs of the appeal up to the date of offer, or whether the offer contemplated that should he accept the offer then the appellant would have to bear his own costs, in addition to paying 65% of the respondent's costs of the appeal.

14 The second contention for the appellant, is that given the uncertainty of the law concerning what constituted a "major domestic building contract" the appeal was not without merit, and an appellant with reasonable prospects of success ought not be denied the pursuit of his rights of appeal by being, in effect, pressured to accept what amounted to a very modest offer of compromise at risk of an additional costs penalty if the appeal failed.

15 In my opinion, both contentions on behalf of the appellant have merit, and the refusal to accept the offer has not been shown to have been unreasonable in all the circumstances.

16 As to the first issue, had the offer been made under R.26.03(7) – which relates to offers at trial level – then upon acceptance of the offer the plaintiff must (unless the Court ordered otherwise), be paid his or her costs up to and including the date of service of the offer. There is no such provision for offers of compromise to which R.26.12 applies, which relates to appeals. That rule only comes into effect after the appeal has concluded and the result is known. The Court of Appeal is then given a very broad discretion, not confined by R.26.12, as to the matters it might take into account in assessing the reasonableness of refusal of the offer. There being no rule that specifies what happen as to costs if the appellant accepts an offer of compromise of an appeal, the appellant submits the onus was on the respondents to spell out precisely what was being offered with respect to the appellant's own costs of the appeal, up to the date the offer was made.

17 The respondents, however, contended in response that their offer: *"... did not deny a right in the appellant to payment of his own costs up to the date of service of that Offer. Costs are always in the Court's discretion. The offer said nothing as to the appellant's right to costs."*

18 It is notable that that response does not assert that the offer was, in fact, intended to include an offer to pay the appellant's costs up to the date the offer was made. Instead, counsel for the respondents referred to the opinion of the Court in ***Hazeldene's***[5] in which their Honours observed that artificial distinctions between the trial and appellate situations ought no longer apply. From that discussion counsel for the respondents concluded that the appellant ought to have anticipated that, "the prima facie position on appeal should be that, unless the Court otherwise orders, the respondent should pay the appellant's costs up to the date an offer was served."

19 Observations made by the Court in ***Hazeldene's*** were concerned with the distinction made in the rules between indemnity costs, as the penalty in the trial context, and solicitor-client costs, being the penalty in the appeal jurisdiction.[6] Their Honours observed that in both the trial and appellate contexts the Court had jurisdiction to award costs on either basis, so there was no reason for the distinction in the rules to continue to apply.

20 In my opinion, the discussion in ***Hazeldene's*** could not have told the appellant what the respondents meant by the terms of their offer. The appellant was left in the situation of not knowing from the terms of the offer whether any of his costs would be paid by the respondents if he accepted the offer. While that might have been resolved by further contact with the respondent's solicitors the issue before us is whether the offer was unreasonably refused. In my opinion, it was not unreasonable to refuse it in the terms in which it was offered. The respondent contended that the appellant had rejected many previous offers of compromise and this final rejection reflected a

[3] *Hazeldene's*, at [20].

[4] *Hazeldene's*, at [19], [25]-[29].

[5] At 438-9, [10]-[13].

[6] On 8 May 2006 the amended rule 26.12(4) came into effect, which replaced the words "taxed on a solicitor and client basis" with the words "taxed on a basis other than a party and party basis".

recalcitrant attitude which ought to justify a special costs order. It is not necessary to resolve whether the evidence as to previous settlement attempts ought be considered. Even if it was, that would not alter the fact that *this* offer was expressed in uncertain terms.

21 Even if that were not sufficient to dispose of the application for a special costs order, I would, in any event, have rejected the application on the alternative basis advanced by the appellant. In this case a significant legal issue was raised on the appeal concerning the interpretation of s 42 of the *Domestic Building Contracts Act* 1995. The issue had resulted in different interpretations being adopted by two judges of the Supreme Court and on appeal the Court, having to chose between those interpretations, was not unanimous. The issue, plainly, was not without uncertainty and the appellant was entitled to consider that his appeal was not without merit; certainly it was not a frivolous one, devoid of merit. As Redlich J held in ***Oversea-Chinese Banking Corporation v Richfield Investments Pty Ltd***,[7] in a passage approved by the Court in Hazeldene's:[8] *"Potential litigants should not be discouraged from bringing their dispute to the courts. It is such considerations which underlie the general rule that an order for special costs should only be made in special circumstances."*

22 A similar principle might relevantly be taken into account in the case of a party exercising a right of appeal where the appeal is not devoid of merit.

23 In my opinion, the application for a special order as to costs should be refused. The appeal should be dismissed, with costs on a party-party basis.

JUDGMENT : NEAVE JA:

24 I have read in draft the reasons for decision of Eames JA. I agree with his Honour that the application for a special order as to costs should be refused.

25 My main reason for taking this view is that the appeal required this court to determine the effect of s 42 of the *Domestic Buildings Contract Act* 1995, which had previously been interpreted differently by two judges of the Supreme Court. I therefore agree with the reasons expressed by his Honour in paragraphs [21]-[23].

26 If this had not been the case I might well have been prepared to exercise the broad discretion conferred on this court by Order 26.12 of the *Supreme Court (General Civil Procedure) Rules* to make a special order for costs. In doing so I would have given some weight to evidence about the respondents' previous attempts to resolve its dispute with the appellant.

27 In relation to the question of whether the offer was uncertain in its terms, it is at least arguable that the offer made by the respondents required the appellant to pay his own costs up to the date of the offer. I note however that the respondents did not contend that the failure of the offer to refer to the appellant's costs required him to pay his own costs.

28 Instead, as Eames JA points out at [17] and [18] of his judgment, it was submitted that the appellant should have understood that the prima facie position on appeal was the same as the position which applies to an offer of compromise at trial, so that the respondents would pay the appellant's costs up to the date the offer was served.

29 Like Eames JA I would reject the respondents' contention that this follows from the observations in ***Hazeldene's***[9] about the distinctions in the rules between offers of compromise at trial and offers to compromise an appeal.

30 I note that the submission made on behalf of the respondents does not clearly indicate the way in which it was contended the appellant's costs were to be dealt with under the agreement. This supports his Honour's view that it was not unreasonable for the appellant to reject the offer in the terms in which it was expressed.

31 I would therefore order that the appeal should be dismissed with costs on a party-party basis.

Mr J D Merralls, QC with Mr J A F Twigg instructed by Coadys
Mr A J Kelly, SC instructed by Arnold Bloch Leibler

[7] [2004] VSC 351, at [60].
[8] At 441 [22].
[9] (2005) 13 VR 435 at 439.