SUPREME COURT OF VICTORIA

COURT OF APPEAL

S APCI 2012 0239

VICTORIAN EDUCATION FOUNDATION LTD (ACN 126 965 044) — Applicant

v

AC HALL AIRCONDITIONING CONTRACTING PTY LTD (ACN 091 308 637) — Respondent

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APPLICATION ON SUMMONS

JUDGES	NEAVE and PRIEST JJA
WHERE HELD	MELBOURNE
DATE OF HEARING	14 February 2013
DATE OF JUDGMENT	22 February 2013
MEDIUM NEUTRAL CITATION	[2013] VSCA 32
JUDGMENT APPEALED FROM	*AC Hall Airconditioning Contracting Pty Ltd v Victorian Education Foundation Ltd* [2012] VCC 1810, Judge Ginnane

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PRACTICE AND PROCEDURE – Applications for stays of execution of judgment and costs order – Application for leave to appeal against cost order – Whether 'in full and final settlement' constitutes an 'all in' offer – Order 26 *County Court Civil Procedure Rules 2008* – Application for leave to appeal dismissed – Stay of execution refused.

Appearances:	Counsel	Solicitors
For the Applicant	Mr S K Wilson QC with Mr D H Colman	Lachlan Partners Legal
For the Respondent	Mr M R Scott SC with Mr C Young	Moores Legal

NEAVE JA:

1 I agree.

PRIEST JA:

Introduction

2 Before the Court is an application for leave to appeal against a costs order made by a judge of the County Court on 23 November 2012; and applications for stays of execution both with respect to the judgment of 20 August 2012 to which the costs order relates, and the costs order itself.

3 For reasons that I will shortly state, each application should be refused.

Orders of the County Court

4 On 20 August 2012, consent orders were made in County Court to the following effect:

1. judgment for the appellant/defendant ('VEF') in favour of the respondent/plaintiff ('A.C. Hall') in the sum of $131,430.22;
2. interest on the judgment sum to be determined;
3. costs to be determined; and
4. the operation of the first order be stayed until the determination of the issues of interest and costs provided for in the second and third orders.

5 Following further submissions by the parties on 10 and 15 September 2012, on 23 November 2012 the judge in substance made the following orders:

1. VEF pay interest of $34,254.68 on the judgment sum;
2. save for the costs referred to in order 3, the VEF pay A.C. Hall's the costs of the proceeding on a party-party basis until the 12 October 2011 and thereafter on a solicitor-client;
3. there be no order as to costs of A.C. Hall's application for summary

judgment decided on 20 October 2010;[1] and

4. orders 1 and 2, and order 1 of the orders of 20 August 2012,[2] be stayed for 14 days.

Background

6 I need say a little about the background to these orders. The proceedings in the County Court arose out of a contract entered into by the parties under which AC Hall agreed to carry out air conditioning works for VEF at premises situated at 347 Flinders Street, Melbourne. A dispute arose over payment for the work done.

7 AC Hall brought a claim pursuant to s 16(2)(a)(i) of the *Building and Construction Industry Security of Payment Act 2002*. In its amended Statement of Claim, AC Hall claimed the sum of $280,500 for work done pursuant to the contract, and in the alternative, damages for breach of contract.

8 VEF admitted that AC Hall had carried out air conditioning works under the contract made on 10 December 2009 and was entitled to be paid on a *quantum meruit* for the work done, but also claimed a set off against AC Hall for breaches of the contract.

9 On 8 July 2010, VEF made a purported offer of compromise for $165,000 (including GST) in 'full and final settlement of its claim', such sum to be paid on nominated dates by three instalments. The offer of compromise purported to be made pursuant to Order 26 of the *County Court Civil Procedure Rules 2008* ('*County Court Rules*').

10 The same day that the offer of compromise was made by VEF, 8 July 2010, AC Hall applied for summary judgment. Judge Shelton heard and dismissed the application on 8 September 2010. There is a dispute between the parties as to the

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1 The judge noted that VEF had successfully resisted an application for summary judgment by AC Hall, and considered that in those circumstances it was appropriate that those costs be excluded from the costs that AC Hall was otherwise entitled to. This order is not the subject of challenge and thus need not be further considered.

2 The order referred was that giving judgment to AC Hall for $131,430.22.

reasons for that dismissal.

11 On 29 November 2010, AC Hall made a purported offer of compromise for $165,000 (inclusive of GST) in 'full and final settlement' of its claim. It made a second offer on 12 October 2011 for $145,000 (inclusive of any GST and interest), plus the costs of the proceedings. AC Hall then made a third purported offer on 22 November 2011.

12 Ultimately the proceedings settled. It was agreed between the parties that VEF would pay AC Hall the sum of $131,430.22; and, as I have already observed, on 20 August 2012 consent orders were made to give effect to the settlement.

13 Later, as I have said, on 23 November 2012 the judge made orders concerning interest and costs. The order for interest is the subject of a separate appeal which does not require this Court's leave. By contrast, an appeal concerning orders relating to costs by reason of s 74(2E) of the *County Court Act 1958* may only be brought by leave of this Court. It is thus necessary to discuss briefly the judge's reasons touching the question of costs.

14 The County Court judge found as follows:

- VEF's offer of 8 July 2010 was an 'all in' offer and not an offer of compromise in accordance with the rules.
- Nor was the offer a *Calderbank* offer, because it was impossible to determine whether the respondent had achieved a more favourable outcome than was offered.
- A.C. Hall's second offer, made on 12 October 2011, was 'more favourable to [VEF] than the judgment sum' and A.C. Hall was 'therefore entitled to costs in accordance with the rules that govern the offers of compromise'.

15 The judge made no order as to the costs for AC Hall's application for summary judgment, noting that although the party who succeeds in litigation ordinarily obtains costs, in this case an exception should be made.

Application for leave to appeal

16 By Notice of Appeal dated 7 December 2012, VEF has sought to appeal against the order for payment of interest.[3] One of the applications presently before the Court is for a stay of that order pending determination of that appeal.

17 In the draft Notice of Appeal filed with the summons dated 7 December 2012 asking for leave to appeal, VEF seeks to appeal against the costs order, including that part of the order denying it the costs of the application for summary judgment. As I understand it, in substance VEF seeks to substitute for the orders made by the County Court alternative orders that it pay AC Hall's costs on a party-party basis up to 8 July 2010 (when VEF made its offer of compromise) and thereafter AC Hall pay VEF's costs on a party-party basis. VEF argues that if the appeal is successful, it will create a position where AC Hall will owe it a sum.[4]

18 There are eight proposed grounds of appeal, which in summary claim that the trial judge erred:

1. in finding that VEF's offer of compromise of 8 July 2010 was not a valid offer in accordance with Order 26 of the *County Court Rules*;

2. in that he did not have proper regard to the provision of Order 26.03(8);

3. in that he did not find that VEF's offer was served in accordance with Order 26.03(7);

4. in finding that *Aquatec-Maxon Pty Ltd v Barwon Region Water Authority (No 8)* was authority for the proposition that an 'all in' offer is not an offer of compromise in accordance with Order 26;

5. in not finding that A.C. Hall was under no misapprehension as to what VEF's offer meant;

6. in finding that there be no order as to costs of the A.C. Hall's application for summary judgment;

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3 An appeal against that order may be brought without leave of the Court.

4 At the outset of the hearing of the application for leave to appeal, senior counsel for the applicant, Mr Wilson QC, handed to the Court two documents entitled respectively *Chronology* and *Statement of Costs*. The latter document was said to be an estimate of what the costs may be if the judgment on costs from the County Court is not disturbed, and also illustrative of the costs implications if the appeal was successful. Counsel for respondent did not accept the estimates contained in the document, and it was, in any event, of dubious relevance to any issue that the Court had to determine.

7. in finding that if VEF had accepted the A.C. Hall's offer:

   (i) VEF would have been obliged to pay the A.C. Hall's costs including the costs of the summary judgment application;

   (ii) VEF would have been obliged to pay more of A.C. Hall's costs than the judge in fact found that it was liable to pay; and

8. in finding that the judgment was no less favourable to A.C. Hall than the terms of its offer and that Order 26.08(2)(b) should apply.

19 For leave to appeal to be granted under s 74(2E) of the *County Court Act 1958*, an applicant must establish both that the original decision is attended with sufficient doubt to warrant it being reconsidered on appeal, and that a substantial injustice would be caused were the decision allowed to stand.[5] Neither criterion has, in my opinion, been established in this case.

Proposed grounds 1 to 4

20 Proposed grounds 1 to 4 might conveniently be considered together, since each concerns the validity of the purported offer ('offer') made by VEF on 8 July 2010.

21 The offer was claimed to have been made in accordance with Order 26 of the *County Court Rules*, and was in the following terms:

> TAKE NOTICE that [VEF] offers to compromise this proceeding by paying to [A.C. Hall] the sum of $165,000.00 inclusive of Goods and Services Tax in full and final settlement of its claim to be paid in three monthly instalments of $55,000.00 commencing on the 15th day of each month following the date of acceptance of this Offer.

22 In reliance on *Aquatec-Maxon Pty Ltd v Barwon Region Water Authority (No 8)*[6] ('*Aquatec*'), the judge found that the offer was an 'all in' offer and, as such, was not an offer of compromise contemplated by Order 26.

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5 *Darrell Lea (Vic) Pty Ltd v Union Assurance Society of Aust Ltd* [1969] VR 401, 408; *Niemann v Electronics Industries Ltd* [1978] VR 431, 433; *Australian Dairy Corporation v Murray Goulburn Cooperative Co Ltd* [1990] VR 355; *Priceline Pty Ltd v JHY Nominees Pty Ltd* (2010) 27 VR 513, 518 [22].

6 [2007] VSC 363 (Byrne J).

23 Order 26.08(2) of the *County Court Rules* generally dictates that the failure of a defendant to accept an offer of compromise will result in the plaintiff being awarded costs on a party-party basis, so long as 'the plaintiff obtains a judgment on the claim to which the offer relates no less favourable to the plaintiff than the terms of the offer.' (It will be remembered that the offer of 8 July 2010 was for $165,000, whereas judgment was entered for $131,430.22.) It is necessary to set out relevant parts of Order 26.03:

> 26.03 Time for making, accepting etc. offer
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> …
>
> (4) A party on whom an offer of compromise is served may accept the offer by serving notice of acceptance in writing on the party who made the offer before –
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> (a) the expiration of the time specified in accordance with paragraph (3) or, if no time is specified, the expiration of 14 days after service of the offer; or
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> (b) verdict or judgment in respect of the claim to which the offer relates –
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> whichever event is the sooner.
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> …
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> (7) Upon the acceptance of an offer of compromise in accordance with paragraph (4), unless the Court otherwise orders, the defendant shall pay the costs of the plaintiff in respect of the claim up to and including the day the offer was served.
>
> (8) If an offer of compromise contains a *term* which purports to negative or limit the operation of paragraph (7), that *term* shall be of no effect for any purpose under this Part.[7]

24 Since the offer was expressed as being in 'full and final settlement' of AC Hall's claim, the County Court judge interpreted it as being an 'all in' offer, in the sense that it should be understood as inclusive of costs. That being so, it was in a form proscribed by Order 26.03(8), rendering it 'of no effect for any purpose' under Order 26.

25 In my view, the judge was correct to reach the conclusion that he did.

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[7] My emphasis.

Properly construed, in my opinion the offer is an 'all in' offer, and thus falls foul of Order 26.03(7) and (8).[8]

26 VEF submits that the words 'in full and final settlement' do not convey that the offer was inclusive of costs; that the offers were 'sufficiently clear'; and that AC Hall should be taken to have understood that the offer did not include costs. The applicant relies on cases in which it was found that the words 'plus costs' did not render the offers in those cases unclear or invalid. In *Enerka Apex Belting Pty Ltd v Vickers Systems Pty Ltd (No. 2)*,[9] Habersberger J was prepared to treat an offer as being in compliance with the rules despite referring to 'the sum of $300,000 plus costs'. And in *Simonovski v Bendigo Bank (No 2)*,[10] Ashley J considered an offer of compromise that made reference to costs, and held that such a reference was of a 'more benign intended effect'.

27 In my view, however, the expression 'in full and final settlement' – as used in the offer under consideration – imports a different meaning to the expression 'plus costs' considered in the two cases relied upon, since the latter expression sets the costs outside of, or in addition to, the amount offered on the claim. Thus, I think neither of the cases relied upon provides an answer to the judge's reasons for holding that the offer did not comply with Order 26.

28 I am fortified in my opinion by the conclusions reached by Giles J in *Associated Confectionery (Aust) Ltd v Mineral and Chemical Traders Pty Ltd*.[11] In that case, Giles J had under consideration a purported offer of compromise 'in the sum of $135,000 inclusive of costs', which fell to be considered against the backdrop of a rule of court expressed in almost precisely the same terms as Order 26.03(8) (including the use of the word 'term' within the body of the rule). He considered that the

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8 *Nolan v Nolan* [2003] VSC 136, [47] (Dodds-Streeton J).

9 [2002] VSC 409, [2]–[7].

10 [2003] VSC 139, [6].

11 (1991) 25 NSWLR 349.

making of the offer 'inclusive of costs' took it outside the operation of the rules.[12]

29 For the sake of completeness, I should add that, even if Order 26.03(8) permits an invalid 'term' notionally to be excised from an offer (thus preserving its validity), in my view it would be impossible in the context of this case to sever the term 'in full and final settlement' and leave any part of the offer salvageable.

Proposed ground 5

30 By this ground, VEF contends that the judge should have found that AC Hall was under no misapprehension as to what the offer meant, particularly where AC Hall made a later offer in similar terms. In my view, however, the terms of the later offer cannot illuminate the terms of the offer made by VEF on 8 July 2010. This ground is without substance.

31 I agree with the judge's assessment which was, in effect, that it was not possible to determine what the offer actually meant.

32 Moreover, in determining whether the offer complies with order 26, it falls to be construed objectively according to its terms, and not according to a subjective belief that a party might have harboured as to its terms.[13] For this reason, the fact that AC Hall itself made a later offer in much the same terms does not avail VEF.

Proposed ground 6

33 This proposed ground also lacks merit.

34 VEF contends that the costs of the failed application for summary judgment should have followed the event. As I understood the way it was put, VEF submitted

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12 See also *Warkworth Mining Company Limited v O'Connor* [1996] NSWCA 546, where Priestley JA briefly discusses the significance of the use of the word 'term' in the equivalent rule to Order 26.03(8).

13 After oral argument concluded, senior counsel for the applicant (with the consent of the respondent's counsel), provided the Court with reasons for judgment in *Theiss Contractors Pty Ltd v SCI Operations Pty Ltd* (Unreported, 21 September 1990, Sup Crt NSW, Rogers CJ Comm D). In my opinion, the reasoning in that case supports the view I have expressed.

that the costs of the failed application having been incurred after the date of VEF's offer, costs should have been awarded in its favour. In so far as part of the submission on this ground is predicated upon the validity of the offer, given my conclusions concerning proposed grounds 1 to 4, it cannot be upheld.

35 More generally, Judge Shelton had made costs of the failed application costs in the cause. When the judge whose costs orders are sought to be impugned considered the costs of the failed application, whilst acknowledging that usually the party succeeding in the litigation should obtain those costs, he considered that an exception should be made and that there ought be no order as to those costs.

36 Having considered the judge's reasons for so concluding, I can see no error. The award of costs was discretionary. I cannot see that the exercise of discretion miscarried. It does not appear to me that he acted on a wrong principle, or that he failed to take into account relevant considerations or took into account irrelevant considerations.[14]

Proposed grounds 7 and 8

37 I would not uphold proposed grounds 7 and 8.

38 Argument on ground 7 revolved, I think, around findings of fact that the judge made relative to the manner in which the costs discretion would, in all probability, have been exercised had the offer been valid. It was a finding that was open to the judge, and did not lead his discretion to miscarry.

39 Ground 8 proceeds on a false basis.

40 The proposed ground assumes, I think, that the judgment would have been 'less favourable' if the costs of the failed application for summary judgment had been awarded to VEF. As a matter of construction, this is not so. It will be remembered that Order 26.08(2) of the *County Court Rules* generally provides that

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14 *Victorian Workcover Authority v Kagan Bros Consolidated Pty Ltd* (2011) 31 VR 386, 389 [11].

the failure of a defendant to accept an offer of compromise results in the plaintiff being awarded costs on a party-party basis, so long as 'the plaintiff obtains a judgment *on the claim* to which the offer relates no less favourable to the plaintiff than the terms of the offer.'

41 In my opinion, it is not reasonably arguable that a more favourable order with respect to the costs of the failed application for summary judgment is a judgment 'on the claim'.

Conclusions on the application for leave to appeal

42 For the reasons that I have advanced, in my opinion none of the proposed grounds of appeal is reasonably arguable. Thus it cannot be said that the original decision is attended with sufficient doubt to warrant it being reconsidered on appeal, or that a substantial injustice would be caused were the decision allowed to stand.

Application to stay judgment

43 By a summons dated 7 December 2012, VEF seeks:

1. Stay of execution on the judgment until the costs of the proceeding are agreed by the parties, taxed in default of agreement, or further order.

2. Stay of execution on the orders on the judgment for interest and costs until the costs of the proceeding are agreed by the parties, taxed in default of agreement, or further order.

3. Alternatively to the order sought in 2, the stay granted by the County Court on 23 November 2012 in relation to interest and costs be extended until the costs of the proceeding are agreed by the parties, taxed in default of agreement, or further order.

None of these orders should be granted.

44 Except so far as this court otherwise orders, 'an appeal shall not operate as a stay of execution or of proceedings under the decision appealed from'.[15]

45 The grant of a stay is discretionary. An applicant for a stay bears the onus of

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15 *Supreme Court (General Civil Procedure) Rules 2005*, r 64.25(a).

satisfying the Court that the discretion should be exercised in its favour.[16] The applicant (in this case, VEF) must demonstrate that there are special or exceptional circumstances that justify departing from the position that a successful party is entitled to the fruits of litigation pending determination of the appeal.[17] It has been held that an applicant must show special or exceptional circumstances justifying the grant of a stay.[18] Factors commonly accepted as relevant to the determination of whether special circumstances have been established include the prospect of success on appeal, which is to be assessed 'in a fairly rough and ready way';[19] and the risk of an appeal being rendered nugatory.[20]

46 As I understood his submissions, senior counsel for VEF, Mr Wilson QC, accepted that a stay could not follow if VEF failed in its application for leave to appeal the costs orders. Given the conclusions I have reached with respect to that application, it is thus not strictly necessary that I say more about the application for a stay.

47 Notwithstanding counsel's apparent and practical concession to the inevitable, however, I should say that in any event, VEF has in my opinion failed to demonstrate that any appeal against the interest or costs orders enjoys reasonable prospects of success,[21] or that any appeal will be rendered nugatory unless a stay is granted.

48 I have already discussed the prospects of success of the proposed grounds relating to the costs orders. They are without substance, and could not lead to the

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16 *David Neate & Tara Farm Pty Ltd v Thoroughbred International Marketing Pty Ltd* ('*David Neate*') [2012] VSCA 65, [5].

17 *David Neate,* ibid [6]–[8]; *Maher v Commonwealth Bank of Australia* [2008] VSCA 122, [20]; *Cellante v G Kallis Industries Pty Ltd* [1991] 2 VR 653, 657; *Scarborough v Lew's Junction Stores Pty Ltd* [1963] VR 129.

18 *Seifert v Chaudhary* [2012] VSCA 17, [15]; *Gangemi v Osborne* [2008] VSCA 221, [12]; *Cellante v G Kallis Industries Pty Ltd* [1991] 2 VR 653, 657.

19 *Jackamarra v Krakouer* (1998) 195 CLR 516, 522; *1-5 Grantham Street Pty Ltd v Glenrich Builders Pty Ltd* [2008] VSCA 228, [14]; *Interactive Network Services Pty Ltd v NPV WA Securities Pty Ltd* [2006] VSCA 225, [14]; *Drapac & Anor v Wain & Anor* [2013] VSCA 19, [20].

20 *Drapac & Anor v Wain & Anor*, ibid [20]–[22].

21 *David Neate*, [8]; *Seifert v Chaudhary*, [14].

grant of a stay.

49 As to the yet to be heard appeal concerning interest, I fail to see that it enjoys reasonable prospects of success.

50 VEF applies for the stay on the basis that there is a more than remote risk that AC Hall will fail to repay the relevant sums if VEF is successful on its appeal. AC Hall opposes the stay and submits that there are concerns that VEF is unable to pay the judgment and costs which have been ordered in its favour. Claim and counterclaim are made by the parties to the appeal concerning AC Hall's financial position and its capacity to repay.

51 It is enough to say, I think, that in my opinion VEF has failed to establish that AC Hall will not be in a position to repay the relevant sum if the appeal is allowed. There are, therefore, no special or exceptional circumstances extant which would justify depriving AC Hall of the fruits of litigation pending appeal.[22]

52 I would refuse the applications for stay of the judgment, and for stay of the orders for interest and costs.

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22 On the hearing of the application, the Court was informed that the solicitor for the applicant was prepared to give an undertaking to deposit a bank cheque for the disputed sum into an appropriate trust account until the outcome of the appeal. Such a course cannot be regarded as special or exceptional so as to justify the requested stay.