JUDGMENT : HIS HONOUR HABERSBERGER J: Supreme Court of Victoria at Melbourne Commercial & Equity Div. Building Cases List. 21st December 2007

1 A number of issues, including disputes as to the appropriate orders for the costs of the claim and counterclaim in this proceeding, were argued before me on 23 November 2007, following the publication of my reasons for judgment on 12 October 2007.[1] After certain agreed corrections were made to the figures, as a result of some confusion on my part between pre and post GST figures, the amount found to be owing by the defendant to the plaintiff was $85,935.53 plus GST of $8,593.55, a total of $94,529.08 ("the principal debt").

2 The parties subsequently agreed that the amount of interest payable on the pre GST amount of $85,935.53 was $32,541.73 as at 23 November 2007 and that interest continued to accrue thereafter at the rate of $28.25 per day. Accordingly, the amount of interest included in the judgment to be entered today is $33,332.73.

3 A further step was to set off the amount of $1.44 for the nominal damages awarded to the defendant in respect of its counterclaim.[2] Thus, the amount for which judgment is to be entered in favour of the plaintiff against the defendant is $127,860.37.

The Costs of the Claim

4 The dispute about the appropriate order for the costs of the claim arose as a consequence of the fact that the plaintiff, Danidale Pty Ltd ("Danidale"), obtained a less favourable result than it was offered on five different occasions by the defendant, Abigroup Contractors Pty Ltd ("Abigroup"), both before and after the proceeding was issued on 14 October 2004.

5 First, a verbal offer was made by Mr Lowrie to Mr Cornfoot at a meeting on 25 February 2004 that Abigroup would pay Danidale $100,000. This was subsequently confirmed in a letter dated 27 February 2004.[3] Indeed, as was made clear by the Contract Value Agreement enclosed with a further letter from Mr Byth to Mr Cornfoot dated 28 February 2004, the offer also included payment of retention monies of $12,912.30. There was no entitlement to statutory interest at the date of that offer, so that it exceeded the principal debt by over $5,400, or over $18,300 if the retention monies are included in the calculation.

6 Secondly, a further verbal offer was made by Mr Lowrie to Mr Cornfoot at a later meeting that Abigroup would pay Danidale either $115,000 or $120,000.[4] Mr Lowrie was not certain about the date or the precise amount. Again, there was no entitlement to interest. This offer exceeded the principal debt by between approximately $20,000 and $38,000.

7 Thirdly, on 22 November 2004, Abigroup served an offer of compromise in which it offered to compromise the proceeding by paying Danidale $140,000. Interest on the principal debt from 12 October 2004, when the proceeding was commenced, to the date of the offer would not have exceeded $1,300, so that this offer would have been a more favourable result for Danidale by over $44,000.

8 Fourthly, on 18 March 2005, Abigroup served a second offer of compromise in which it offered "to compromise this proceeding (consisting of the plaintiff's claim and the defendant's counterclaim)" by paying Danidale $200,000. Interest on the principal debt by this date would not have been more than $5,000, so that the second offer of compromise would have been a more favourable result for Danidale by over $100,000.

9 Finally, on 15 December 2006, Abigroup served a third offer of compromise in which it offered "to compromise this proceeding (consisting of all of the plaintiff's claims and all of the defendant's counterclaims) for $350,000.00 (excluding GST)." In the letter enclosing the third offer of compromise, Abigroup's solicitors stated that:

If the Offer of Compromise is accepted and your client is required to pay GST on some or all of the amount, our client will pay your client any such GST upon receipt of an appropriate tax invoice.

By the date of this offer, interest on the principal debt would not have been more than $24,500, so that the third offer of compromise would have been a more favourable result for Danidale by over $230,000, or approximately $256,400 if GST was added to the whole of the amount offered.

10 In these circumstances, Abigroup sought an order that Danidale pay the costs of the entire claim on an indemnity basis, whereas Danidale submitted that it was entitled to its costs of the claim up until the date of the first offer of compromise and that, by virtue of r.26.08(3) of the Supreme Court (General Civil Procedure) Rules 2005 ("the Rules"), it could not oppose an order that thereafter it should pay Abigroup's costs of the claim, with costs taxable in both cases on a party and party basis. There are, therefore, two issues in respect of the costs of the claim:

(a) what order should be made in respect of the costs of the claim up to and including 22 November 2004, the date of the first offer of compromise, and

(b) whether Danidale should be ordered to pay Abigroup's costs from 23 November 2004 on an indemnity basis.

11 Section 24 of the Supreme Court Act 1986 states that, unless otherwise expressly provided by Act or the Rules, orders for costs are "in the discretion of the Court and the Court has full power to determine by whom and to what extent the costs are to be paid." Rule 63.02 of the Rules states that the power and discretion of the Court

[1] [2007] VSC 391.
[2] [2007] VSC 391 at [154]. The amount of $1.44 was fixed in an attempt to round off the judgment sum. This attempt failed when the figures had to be corrected.
[3] [2007] VSC 391 at [90].
[4] [2007] VSC 391 at [90].

under s.24 of the Act shall be exercised subject to and in accordance with Order 63. Rule 63.16 states that r.26.08 determines liability for costs in the situation where an offer of compromise has been served but not accepted at the time of judgment.

12 Rule 26.08(3) provides as follows:

26.08 Costs consequences of failure to accept

(3) Where an offer of compromise is made by a defendant and not accepted by the plaintiff, and the plaintiff obtains a judgment on the claim to which the offer relates not more favourable to the plaintiff than the terms of the offer, then, unless the Court otherwise orders—

(a) the plaintiff shall be entitled to an order against the defendant for the plaintiff's costs in respect of the claim up to and including the day the offer was served taxed on a party and party basis; and

(b) the defendant shall be entitled to an order against the plaintiff for the defendant's costs in respect of the claim thereafter taxed on a party and party basis.

13 Before considering each of the above issues, I need to deal with an argument concerning the **construction** of r.26.08(3). Mr Twigg of counsel, who appeared on behalf of Danidale, submitted that the power to make an order "otherwise" than what was set out in r.26.08(3)(b) only extended to enabling the Court to decline making an order in favour of the offeror/defendant and did not include a power to order that the costs of the offeror/defendant be paid by the offeree/plaintiff on a higher basis than party and party, such as on an indemnity basis. Logically, this argument would apply equally to the power contained in r.26.08(3)(a).

14 I do not agree that the power to "*otherwise order*" in r.26.08(3) is limited in the way contended by Danidale. There is nothing in the wording of the rule to suggest any such limitation. The discretion of the Court under s.24 is preserved by the ability to "*otherwise order*". That discretion must be exercised judicially, that is not acting "*arbitrarily*" or "*capriciously*"[5] but "taking into account all relevant matters and making a decision which does justice between the parties."[6] In my opinion, in an appropriate case, the rule gives the Court power to make a costs order which departs in any way at all from the normal consequences provided for in the rule. That departure could be by declining to order costs in favour of the plaintiff in terms of r.26.08(3)(a) or costs in favour of the defendant in terms of r.26.08(3)(b), or by ordering costs on a higher basis in respect of either limb in r.26.08(3).

15 In respect of the first issue, Mr Hopkins of counsel, who appeared for Abigroup, submitted that the Court was entitled to, and should, take the two informal offers of settlement into account in exercising its discretion. He submitted that the fact that they were not expressed in the Calderbank[7] form was both understandable, because no proceeding had been issued, and irrelevant. Mr Hopkins further submitted that because these two offers were genuine offers designed to compromise the dispute, which were made before the proceeding was issued, and Danidale received a worse outcome from the litigation, Danidale should not be awarded any costs of its claim in the proceeding and that Abigroup should have all of its costs of the claim incurred in the period before the first offer of compromise, and that such costs should be assessed on an indemnity basis.

16 Mr Twigg submitted, on behalf of Danidale, that the rejection of pre-proceeding offers was not unreasonable. He emphasised that these offers were not in the form of a Calderbank offer, in particular they did not include any foreshadowing of an application for indemnity costs (or indeed any costs) in the event that the offeree rejected the offer, commenced a proceeding and then failed to obtain a more favourable result than that offered.

17 I agree that the fact that these offers were not made in the Calderbank form is one reason why Danidale should not be ordered to pay Abigroup's costs of the claim in the period before 22 November 2004, especially costs on an indemnity basis. Failing to warn the offeree that indemnity costs would be sought if it went ahead and sued and obtained a less favourable result is one matter to take into account in deciding whether the rejection of the offers was unreasonable. Further, as I will discuss below when considering the various offers of compromise, the limited extent of the compromise offered by Abigroup was such that Danidale's refusal of these offers could not be categorised as unreasonable. In my opinion, the offeree could have reasonably considered, at the date of the offer, that there was some prospect of it being found to be entitled to be paid more than $94,529.08, if it sued Abigroup.[8]

18 This does not necessarily mean, however, that Danidale should be awarded its costs of the claim up until the date of the first offer of compromise, although usually a successful party is awarded its costs.[9] In my opinion, it is appropriate to recognise that Abigroup did attempt to resolve this dispute without forcing Danidale to litigate and that, as events have transpired, its offers of settlement before the proceeding was commenced would have resulted in a more favourable outcome for Danidale than it subsequently obtained. In these circumstances, I consider that it would not be a just result to order that Abigroup pay Danidale's costs of the claim up until the date of the first offer of compromise when, instead of incurring those costs, Danidale could have accepted one or other of Abigroup's pre-proceeding offers of settlement and both parties would have been better off financially.

[5] ***Oshlack v Richmond River Council*** *[1998] HCA 11;* (1998) 193 CLR 72 at 81 [22] per Gaudron and Gummow JJ, at 96 [65] per McHugh J and at 121 [134] per Kirby J.

[6] ***MT Associates Pty Ltd v Aqua-Max Pty Ltd (No. 3)*** [2000] VSC 163 at [32] per Gillard J.

[7] *Calderbank v Calderbank* [1976] Fam 93.

[8] ***Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (No. 2)*** [2005] VSCA 298; (2005) 13 VR 435 at 442 [25] per Warren CJ, Maxwell P and Harper AJA.

[9] ***Oversea-Chinese Banking Corporation v Richfield Investments Pty Ltd*** [2004] VSC 351 at [8] per Redlich J.

I therefore propose to order "otherwise" within the meaning of r.26.08(3) by making an order that there be no order as to the costs of the claim up to and including 22 November 2004.

19 In respect of the second issue, Mr Hopkins submitted, on behalf of Abigroup, that at least the costs of the claim from the date of the first offer of compromise, 23 November 2004, should be paid on an indemnity basis because of Danidale's imprudent refusal to accept any of the offers of compromise and because of what was said to be Mr Cornfoot's untruthful evidence concerning the rock excavation which formed the basis of Danidale's unsuccessful claim for a substantially larger payment. It was further submitted that Mr Cornfoot could only have rejected the offers by Abigroup if he had taken the view that there were good prospects that the untruthful evidence led on behalf of Danidale would be believed and that, accordingly, Danidale would be awarded the "windfall" sum it had been seeking from the outset. In support of his first proposition, Mr Hopkins relied on the statement by Sheppard J in his "seminal" judgment[10] in ***Colgate Palmolive Co v Cussons Pty Ltd***,[11] that one of the circumstances that might warrant the exercise of the discretion to award indemnity costs was: "... *an imprudent refusal of an offer to compromise*."

In support of his second proposition, Mr Hopkins submitted that a "high-handed" pursuit of a claim, particularly one based on false evidence, was another situation which would justify the exercise of the discretion to award indemnity costs.[12]

20 On the other hand, Mr Twigg, on behalf of Danidale, submitted that, as each of the offers of compromise was made in accordance with the Rules, the costs consequences set out in r.26.08(3) should be applied. As previously stated, he submitted there was no power for the Court in this situation to order costs on a higher basis. I rejected that submission. Alternatively, Mr Twigg submitted that if the power to "otherwise order" did extend to ordering costs on a higher basis, then this was not a case for such an order because none of the rejections were unreasonable as, at the times the offers of compromise were made, Danidale had genuine and bona fide grounds for believing in the success of its case.

21 Whilst I did conclude that some of Mr Cornfoot's evidence,[13] particularly his evidence about the circumstances in which the letter of 15 October 2003 came to be signed by Mr Hahn and dated 14 November 2003,[14] was false, I do not consider that it was the rejection of this unsatisfactory evidence which caused Danidale to obtain a less favourable result than the offers from Abigroup. Rather, the critical issue, in my opinion, was whether excavation of rock was included in the lump sum price. That was a question of **construction** of the Subcontract Agreement, not a credit issue. Moreover, it was, in my opinion, a finely balanced issue and difficult for the parties to conclude with any confidence how it would be determined. Once this issue was decided against Danidale, it was always going to struggle to beat at least the third offer of compromise. But if that issue had been decided the other way, then the costs recoverable by Danidale for excavation of rock would clearly have brought a result more favourable for it than the pre-proceeding offers or the first offer of compromise, because I concluded that I would have held that Danidale was entitled to recover another $83,816.35, plus GST, if the cost of excavating the rock was not included in the Subcontract Agreement lump sum.[15] By my calculations the amount recovered by Danidale would then have been over $185,000 plus interest, which would have been just short of the amount of the second offer of compromise.

22 It is important to note that this result would not have been dependent on the acceptance of any unsatisfactory aspects of Mr Cornfoot's evidence about the agreements allegedly reached about the excavation of rock rate. Rather, I found that, apart from the agreement with respect to sedimentation basin 4, there had been no agreement on $85 per bcm, or on hourly rates as asserted by Abigroup,[16] with respect to sedimentation basins 1, 7 and 8. Thus, the question became what was a reasonable rate for that work. This was the type of issue on which reasonable minds can differ. I accepted Mr Simonsen's evidence that a reasonable rate was $17.75 per bcm.[17] However, acceptance of Mr Simonsen's alternate figure of $26.30 per bcm would have meant that the second offer of compromise would also have been exceeded.

23 In all the circumstances, therefore, I have concluded that it could not be said that the rejection of the first and second offers of compromise was so unreasonable that I should order that Abigroup's costs thereafter be paid on an indemnity basis.

24 I turn then to consider the situation with respect to the third offer of compromise. In order for Danidale to have obtained a more favourable result than the third offer of compromise, the overall reasonable rate for rock excavation would have had to have been found to be about $46 per bcm for sedimentation basins 1, 7 and 8. The plaintiff's expert, Mr Tozer, prepared a report in which he concluded that $85 per bcm was a reasonable rate for rock excavation, particularly in respect of sedimentation basins 1 and 7, but that $50 per bcm was a reasonable rate for rock excavation in the considerably larger sedimentation basin 8, if full details of the extent

10 See ***Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority (No. 2)*** [2005] VSCA 298; (2005) 13 VR 435 at 440 [18].
11 (1993) 46 FCR 225 at 233.
12 ***Australian Guarantee Corporation Ltd v De Jager*** [1984] VR 483 at 502 per Tadgell J; *Degnam Pty Ltd v Wright (No. 2)* [1983] 2 NSWLR 354 at 358 per Holland J.
13 [2007] VSC 391 at [102]- [112].
14 [2007] VSC 391 at [108]- [112].
15 [2007] VSC 391 at [126]- [129].
16 [2007] VSC 391 at [107].
17 [2007] VSC 391 at [98] and [128].

of rock excavation had been known prior to commencement.[18] If that evidence had been accepted, Danidale would have beaten the third offer of compromise. Mr Hopkins correctly pointed out that this information was not available to Danidale at the time it rejected the third offer of compromise because Mr Tozer was not instructed to prepare his report until 26 March 2007. Nevertheless, Mr Tozer's later calculations and the overall required rate of about $46 per bcm do show, in my opinion, how it was possible for Danidale to take the view that it might obtain more than the amount of the third offer, if the cost of rock excavation was held not to be included in the lump sum price of the Subcontract Agreement. As stated above, such a result was not dependent on acceptance of the unsatisfactory aspects of Mr Cornfoot's evidence.

25 Again, the question I have to determine is whether the rejection of the third offer of compromise was so unreasonable that I should "otherwise order" by awarding Abigroup its costs on an indemnity basis after the date of that offer. The matters relevant to assessing the reasonableness of Calderbank offers are set out in ***Hazeldene.***[19] I consider that they should apply equally to the question of whether indemnity costs should be "otherwise ordered" under r.26.08(3).

26 The extent of the compromise offered is relevant because the amount of the offer was not insignificant. The total pre GST amount finally claimed by Danidale was $497,537.10 [20] plus over two years' interest of, at least, $100,000. In final submissions Abigroup effectively acknowledged that it owed Danidale $53,546.43 pre GST.[21] Its third offer of compromise increased that amount by nearly $300,000. Thus, the compromise was just over half of the difference between best and worst results for Danidale.

27 Another relevant matter was the offeree's prospects of success. I have already discussed the competing views about what was a reasonable rate for rock excavation. In my opinion, Danidale should have realised that it ran a serious risk of not beating the third offer of compromise. Apart from the uncertainty about what might be held to be a reasonable rate for rock excavation, there was also the difficult legal question of whether, on its proper **construction**, the Subcontract Agreement included rock excavation. One might have thought that, in those circumstances, a reasonable and prudent plaintiff would have been satisfied with the offer of $350,000 plus GST, rather than seeking more.

28 The final relevant matter was that the third offer of compromise was not accompanied by any warning that, if Danidale was unsuccessful, Abigroup would be making an application for indemnity costs and not simply relying on the normal result that followed a plaintiff falling below an offer of compromise. This is significant because, in my opinion, the absence of such a warning tips the scales slightly in favour of the conclusion that it would not be appropriate to order Danidale to pay Abigroup's costs on an indemnity basis after the date of the third offer of compromise. I have to say, however, that I have only reached this conclusion after much hesitation as the argument that Danidale's rejection of the third offer of compromise was unreasonable was quite strong.

29 I therefore reject Abigroup's argument that I should "*otherwise order*" under r.26.08(3) by ordering Danidale to pay any of Abigroup's costs of the claim on an indemnity basis.

The Costs of the Counterclaim

30 The dispute about the appropriate order for the costs of the counterclaim arose from the following circumstances. Initially, Abigroup's counterclaim included a "*topsoil stripping breach*" claim which was said to have caused Abigroup loss of about $700,000. By its third further amended defence and counterclaim, dated 9 February 2007, Abigroup discontinued or withdrew that part of its counterclaim based on the "topsoil stripping breach" claim. This left Abigroup counterclaiming for damages of $6,576 as a result of a number of alleged breaches by Danidale of certain terms of the Subcontract Agreement. During the hearing, Abigroup indicated that it would not be leading evidence concerning the quantum of damages and sought only nominal damages, which I awarded in the sum of $1.44. [22]

31 Whilst Abigroup accepted that it must pay Danidale's costs of the withdrawn "topsoil stripping breach" claim, it nevertheless sought an order for the remaining costs of its successful counterclaim. On the other hand, Danidale sought a special order for the costs of the withdrawn claim, either on an indemnity basis or a solicitor and client basis, and not a party and party basis, and opposed the making of any order in favour of Abigroup for the costs of the remainder of the counterclaim.

32 There are, therefore, two issues in respect of the costs of the counterclaim:

(a) whether Abigroup should be ordered to pay Danidale's costs of that part of the counterclaim which it withdrew on a solicitor and client or indemnity basis, and

(b) what order should be made in respect of the costs of the remainder of the counterclaim.

33 Rule 63.15 relevantly provides that, "*unless the Court otherwise orders*", the plaintiff's costs of a discontinued or withdrawn part of a counterclaim to the time of discontinuance or withdrawal shall be paid by the defendant. Rule 63.17 provides that, "*unless the Court otherwise orders*", a party who amends a pleading shall pay the costs "*of and occasioned by the amendment*". Although an order for the payment of a party's costs of a withdrawn claim would normally include the costs of any amendments to that claim, Danidale was concerned to ensure that the

[18] [2007]VSC 391 at [95].
[19] [2005] VSCA 298; (2005) 13 VR 435 at 442 [25].
[20] [2007] VSC 391 at [3].
[21] [2007] VSC 391 at [4].
[22] [2007] VSC 391 at [154].

costs of the various amendments of the "*topsoil stripping breach*" claim were not overlooked. Abigroup did not dispute that the costs it was ordered to pay in respect of that claim would include the costs of all relevant amendments.

34 The main ground of Danidale's submission that the Court should "otherwise order" by ordering the costs of the withdrawn claim to be paid on a higher basis was that the claim was fundamentally flawed and that Abigroup should have known that it had no chance of success.[23] In support of that contention, Danidale filed an affidavit of Thomas Jim Tsirogiannis, a solicitor employed by the firm of solicitors acting for Danidale, which exhibited a large number of documents extracted from Abigroup's discovery in respect of the "topsoil stripping breach" claim. Mr Twigg submitted that, on the basis of this evidence, the Court could safely infer that Abigroup did not possess evidence with respect to the material facts essential to the proof of its claim.

35 Mr Hopkins submitted that, for a number of reasons, it was not appropriate for the Court to try to determine, at this late stage, the relative merits of the "*topsoil stripping breach*" claim, simply to resolve a dispute over costs. He emphasised that the only evidence in admissible form about this issue was that given by Mr Hahn during the hearing, which had gone unchallenged.

36 In my opinion, the Court is not in the position of being able to decide whether it should "*otherwise*" order by ordering the costs of the withdrawn claim to be paid on a higher basis. On the material presently before the Court, I could not be satisfied that the "topsoil stripping beach" claim had no chance of success and that it should never have been pleaded. That conclusion could only be reached after a hearing of that claim on the merits. Without such a hearing, there are real difficulties in dealing with arguments about costs. No doubt, r.63.15 was introduced to overcome this very problem.

37 As McHugh J pointed out in ***Re The Minister for Immigration and Ethnic Affairs of the Commonwealth of Australia: Ex parte Lai Qin***:[24]

In most jurisdictions today, the power to order costs is a discretionary power. Ordinarily, the power is exercised after a hearing on the merits and as a general rule the successful party is entitled to his or her costs. Success in the action or on particular issues is the fact that usually controls the exercise of the discretion. A successful party is prima facie entitled to a costs order. When there has been no hearing on the merits, however, a court is necessarily deprived of the factor that usually determines whether or how it will make a costs order."

38 In ***Australian Securities Commission v Aust-Home Investments Limited***,[25] Hill J outlined the following five propositions concerning the exercise of a court's discretion to order costs where the parties to a proceeding no longer wish to continue:

(1) Where neither party desires to proceed with litigation the Court should be ready to facilitate the conclusion of the proceedings by making a cost order. ...

(2) It will rarely, if ever, be appropriate, where there has been no trial on the merits, for a Court determining how the costs of the proceeding should be borne to endeavour to determine for itself the case on the merits or, as it might be put, to determine the outcome of a hypothetical trial. ...

(3) In determining the question of costs it would be appropriate, however, for the Court to determine whether the applicant acted reasonably in commencing the proceedings and whether the respondent acted reasonably in defending them. ...

(4) In a particular case it might be appropriate for the Court in its discretion to consider the conduct of a respondent prior to the commencement of the proceedings where such conduct may have precipitated the litigation. ...

(5) Where the proceedings terminate after interlocutory relief has been granted, the Court may take into account the fact that interlocutory relief has been granted ...[26] (References omitted.)

39 In ***Lai Qin***,[27] McHugh J approved of this approach:

In an appropriate case, a court will make an order for costs even when there has been no hearing on the merits and the moving party no longer wishes to proceed with the action. The court cannot try a hypothetical action between the parties ... In some cases, however, the court may be able to conclude that one of the parties has acted so unreasonably that the other party should obtain the costs of the action. ...

Moreover, in some cases a judge may feel confident that, although both parties have acted reasonably, one party was almost certain to have succeeded if the matter had been fully tried ...

If it appears that both parties have acted reasonably in commencing and defending the proceedings and the conduct of the parties continued to be reasonable until the litigation was settled or its further prosecution became futile, the proper exercise of the cost discretion will usually mean that the court will make no order as to the cost of the proceedings. This approach has been adopted in a large number of cases.

40 As I have said, I am not persuaded that I should depart from the normal order for the costs of a discontinued or withdrawn part of a claim as set out in r.63.15 of the Rules.

23 ***Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd*** (1988) 81 ALR 397 at 400-401 per Woodward J; ***Murdaca v Maisano*** [2004] VSCA 123 at [40] per Nettle JA.

24 [1997] HCA 6; (1997) 186 CLR 622 at 624.

25 [1993] FCA 585; (1993) 44 FCR 194 at 201.

26 [1993] FCA 585; (1993) 44 FCR 194 at 201.

27 [1997] HCA 6; (1997) 186 CLR 622 at 624-5.

41 In respect of the second issue, Mr Twigg submitted that a party who recovers only nominal damages may be deprived of all or part of its costs.[28] He submitted that Abigroup should not be awarded its costs of the remainder of the counterclaim when, in the end, it was apparent that it had only been pursued in an attempt to recover costs.

42 Mr Hopkins submitted that Abigroup was entitled to its costs of the remainder of the counterclaim because it was successful in proving that Danidale had breached the Subcontract Agreement and had sensibly sought only nominal damages, thus not forcing the parties to incur yet further costs. He also referred to the fact that, by its second and third offers of compromise, Abigroup had shown that it was prepared to give up pursuing its counterclaim if Danidale accepted the proposed settlement.

43 In **Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd**,[29] Devlin J said:

No doubt, the ordinary rule is that, where a plaintiff has been successful, he ought not to be deprived of his costs, or, at any rate, made to pay the costs of the other side, unless he has been guilty of some sort of misconduct. In applying that rule, however, it is necessary to decide whether the plaintiff really has been successful and I do not think that a plaintiff who recovers nominal damages ought necessarily to be regarded in the ordinary sense of the word as a "successful" plaintiff. In certain cases he may be, e.g., where part of the object of the action is to establish a legal right, wholly irrespective of whether any substantial remedy is obtained. To that extent a plaintiff who recovers nominal damages may properly be regarded as a successful plaintiff, but it is necessary to examine the facts of each particular case.

44 I consider that in respect of the remainder of the counterclaim, Abigroup was a successful party. True it is that the damages initially sought for these breaches were not very large. But Abigroup was entitled to seek to establish that Danidale had breached the Subcontract Agreement in respect of the important issue of safety and it should not, in my opinion, be penalised on the question of costs simply because it sensibly sought to save time by not leading evidence about the quantum of loss and contented itself with an award of nominal damages. I also consider that it would be unjust not to award Abigroup its costs of the remainder of the counterclaim when it had made several genuine attempts to resolve the litigation prior to the hearing, by in fact abandoning the whole of its counterclaim.

Set-Off or Stay

45 The final issue was a submission by Abigroup that the Court should order that the net amount of costs payable by Danidale to Abigroup be set off against the judgment sum in favour of Danidale. It was submitted that the costs payable to Abigroup, even after a set-off by the Taxing Master, pursuant to r.63.55(1)(a), of the costs payable to Danidale, were likely to exceed the amount of Danidale's judgment and that, in those circumstances, it was appropriate and convenient that a set-off order be made. Mr Hopkins referred me to the decision of Dutney J in ***Elphick v Elliott***[30] in which his Honour held that where there was a close connection between the claims such as here,[31] the Court had the power in equity to set off an unascertained amount of costs against an ascertained judgment sum because it was "*possible for equity to require that the cost of ascertaining the amount payable by way of damages be met from the damages themselves by way of set-off*."[32]

46 Mr Twigg sought to distinguish Elphick on the basis that, in that case, there was an award of damages for personal injury arising out of a motor vehicle accident whereas here, the entitlement to payment arose under contract. He submitted in these circumstances that the award of costs did not impeach the judgment debt.

47 I am not persuaded that this is a valid ground of distinction, but rather than becoming embroiled in the complicated issue of equitable set-offs,[33] I consider that it would be sufficient for present purposes to accede to Mr Hopkins' alternative submission that execution of the judgment be stayed, pursuant to r.66.16, pending the taxation of the various orders for costs and the ascertainment of the net amount owed by Danidale to Abigroup for costs. Such a stay would, of course, be conditional on Abigroup undertaking to promptly take the necessary steps for a taxation of the costs orders in its favour, which it agreed to do.

48 Whilst a party is normally entitled to receive the fruits of its victory by being paid the judgment sum without any stay, in the special circumstances of this case I consider that Danidale is, in reality, an unsuccessful party and that it would not be just to expose Abigroup to the risk, however remote, that having paid the judgment sum to Danidale it could find itself unable to recover what will undoubtedly be the large amount of costs awarded to it. Further, in my opinion, Danidale will not be prejudiced by an order staying execution of the judgment because interest will accrue on the judgment at the penalty rate, pursuant to s.101 of the Supreme Court Act 1986, during the period in which the taxation of the costs is taking place.

The Costs of this Application

49 Each party has won the argument about some of the above issues and lost the argument about other issues. It therefore seems to me that the just outcome is to make no order with respect to the costs of this application.

[28] ***Gannon v White*** (1886) 12 VLR 589; ***Connelly v Sunday Times Publishing Co Ltd*** *[1908] HCA 69;* (1908) 7 CLR 263; *Anglo-Cyprian Trade Agencies Ltd v Paphos Wine Industries Ltd* [1951] 1 All ER 873; *Alltrans Express Ltd v CVA Holdings Ltd* [1984] 1 WLR 394; *Oshlack v Richmond River Council [1998] HCA 11;* (1998) 193 CLR 72 at 96 [65] per McHugh J.

[29] [1951] 1 All ER 873 at 874.

[30] [2002] QSC 285; [2003] 1 Qd R 362.

[31] ***Lockley v National Blood Transfusion Service*** [1992] 1 WLR 492.

[32] [2002] QSC 285; [2003] 1 Qd R 362 at 365.

[33] See, for example, the discussion by Gummow J in ***James v Commonwealth Bank of Australia*** (1992) 37 FCR 445 at 457-462.

Orders

50 Subject to Abigroup giving the undertaking referred to above, the orders which I therefore propose to make are as follows:

1. That, after setting off the amount of $1.44 awarded to the defendant on its counterclaim, there be judgment for the plaintiff on its claim in the sum of $127,860.37, including interest pursuant to statute in the sum of $33,332.73 to 21 December 2007.
2. That the plaintiff pay the defendant's costs of the claim from 23 November 2004, such costs to be taxed on a party and party basis, and that otherwise, there be no order as to the costs of the claim.
3. That, apart from the costs referred to in the following paragraphs of this order, the plaintiff pay the defendant's costs of the counterclaim, such costs to be taxed on a party and party basis.
4. That the defendant pay the plaintiff's costs of defending that part of the counterclaim which related to the "topsoil stripping breach" claim and which was discontinued or withdrawn by the filing of the defendant's third further amended defence and counterclaim dated 9 February 2007, including all costs thrown away by the plaintiff as a result of the defendant from time to time amending the way in which it pleaded or particularised the "topsoil stripping breach" claim, such costs to be taxed on a party and party basis.
5. That there be no order as to the costs of either party of and incidental to the applications for costs.
6. That execution of the judgment be stayed pending finalisation of the quantum of the above orders for costs, either by agreement or taxation, or until further order.

Mr JAF Twigg instructed by Giannakopoulos Solicitors
Mr ND Hopkins instructed by Maddocks