VICTORIAN CIVIL AND ADMINISTRATIVE TRIBUNAL

CIVIL DIVISION

VCAT REFERENCE NO. D179/1999

DOMESTIC BUILDING LIST

CATCHWORDS

Order for payment of costs "in relation to" claim against a party – meaning of – nexus required – relevant considerations - assessment of costs where multiple respondents – whether common costs should be apportioned – 'rule of thumb' – not applicable where inconsistent with costs order – costs order following acceptance of offer of compromise

APPLICANT	Bilbarin Nominees Pty Ltd
SECOND APPLICANT	Cross-Applicant 1:- Riverwild Pty Ltd
SECOND APPLICANT	Mistiglen Pty Ltd
THIRD APPLICANT	Cross-Applicant 2: John Carlyle Kenley and Catherine Elizabeth Halliday
FOURTH APPLICANT	Cross Applicant 3: Kenneth Noel Johnson and Bruce Michael Stillman
FIFTH APPLICANT	Cross Applicant 4: Coolumbooka Holdings Pty Ltd (ACN 005 783 933)
SIXTH APPLICANT	Cross-Applicant 5: Plumpton Place Pty Ltd (ACN 005 644 226)
SEVENTH APPLICANT	Cross-Applicant 6: Headington Investments Pty Ltd (ACN 006 747 682)
EIGHTH APPLICANT	Cross-Applicant 7: Jasper Nominees Pty Ltd (ACN 008 518 269)
NINTH APPLICANT	Cross-Applicant 8: Grantali Pty Ltd (ACN 005 524 854)
FIRST RESPONDENT	Di Mella Constructions Pty Ltd (in liquidation
SECOND RESPONDENT	Michael Morris
THIRD RESPONDENT	Alan Lorenzini
FOURTH RESPONDENT	Finmay Pty Ltd,
FIFTH RESPONDENT	Mr Trevor Huggard
SIXTH RESPONDENT	Joined Party 1: G H A Engineers Pty Ltd (A.C.N. 059 220 745)
SEVENTH RESPONDENT	Joined Party 2: Geoffrey Richard Holland

EIGHTH RESPONDENT	AMP General Insurance Limited
WHERE HELD	Melbourne
BEFORE	Senior Member R. Walker
HEARING TYPE	Referral of question of law by Registrar
DATE OF HEARING	19 December 2006
DATE OF ORDER	17 February 2007
CITATION	Bilbarin v Di Mella Constructions (Domestic Building) [2007] VCAT 663

ORDER

1. The question referred by the Registrar, namely:

   > "On the taxation of the Applicant's bills as against the Architect pursuant to the order of Senior Member Walker made 13 September 2004 as amended on 20 September 2004, should items of costs be reduced by any (and if so to what) amount or proportion of the amount otherwise properly allowable?"

   is answered "No".

2. The Second Respondent's applications for injunctive and other relief are dismissed.

3. Costs reserved.

SENIOR MEMBER R. WALKER

APPEARANCES:

For the Applicant	Mr P.B. Murdoch QC with Mr R. Antill of counsel
For the Second Respondent	Mr P.J. Riordan SC with Mr D.A. Klempfner of counsel

REASONS

The question

1. In this matter, the following question of law has been referred to me by the Registrar in relation to an assessment of costs:

> "On the taxation of the Applicant's bills as against the Architect pursuant to the order of Senior Member Walker made 13 September 2004 as amended on 20 September 2004, should items of costs be reduced by any (and if so to what) amount or proportion of the amount otherwise properly allowable?"

The additional application of the Second respondent

2. The Second Respondent ("the Architect") also seeks the following orders by application issued 7 December 2006, namely:

    1. To the extent that items of the Applicants' taxed costs are referrable to costs incurred in pursuing the Applicants' claim against the Second Respondent and one or more of the other Respondents; the Applicants be restrained from recovering in excess of a pro rata share of such items from the Second Respondent.

    2. To the extent that items of the Cross Applicants' taxed costs are referrable to costs incurred in pursuing the Cross Applicants' claim against the Second Respondent and one or more of the other Respondents; the Cross Applicants be restrained from recovering in excess of a pro rata share of such items from the Second Respondent.

    3. Pursuant to s.95 of the *Victorian Civil and Administrative Tribunal Act* 1998, the question of which items of the Applicants' and Cross Applicants' taxed costs are referrable to costs incurred in pursuing their claims against the Respondent and one or more of the Respondents (stating how many) be referred to the Taxing Registrar to decide the question, or to give his opinion on it.

3. The Architect also seeks an order for the costs of the application and such further or other orders as the Tribunal may think appropriate.

Hearing

4. The matter was listed for hearing before me on 19 December 2006 to receive submissions from counsel for the Applicants and the Architect as to the manner in which the question should be answered and to consider the further application of the Architect. At the hearing I heard submissions from Mr Riordan, Senior Counsel, and Mr Klempfner of counsel for the Architect and from Mr Murdoch of Her Majesty's Counsel and Mr Antil of counsel for the Applicants and Cross-Applicants. For ease of reference in these reasons I shall refer to the Applicants and the Cross Applicants jointly as "the Applicants".

The costs order that was made

5. The order of costs was made following the acceptance by the Applicants of an offer of settlement made by the Architect. The costs order followed the form of the offer and was as follows:

> "1. Order the Second Respondent to pay the party-party costs of the Applicants and the Cross Applicants of this proceeding in relation to their claims against the Second Respondent, up to and including 26 August 2004, such costs:
>
> (a) to be assessed by the Registrar, if not agreed, by reference to the Supreme Court's Scale of Costs;
>
> (b) to be paid within 30 days of the date of such assessment or, in the case of agreement as to amount, the date of such agreement".

6. By a later amending order, the date "26 August 2004" was corrected to "26 July 2004".

The costs sought

7. Pursuant to the order Bills of Costs have been filed on behalf of the Applicants for assessment by the Registrar. Because of the very substantial sums involved the proper interpretation of the order and the manner in which the costs should be assessed are matters of great significance to the parties.

The construction of the order

8. Mr Riordan said that the costs set out in the Bills of Costs filed with the Tribunal and sought by the Applicants did not take into account that there were other Respondents to the proceeding apart from the Architect. The costs incurred by the Applicants in the conduct of the proceeding were partly incurred by them in pursuing their claims against each individual Respondent but the majority of costs were incurred with respect to several or all Respondents. The essence of Mr Riordan's submission as to the manner in which the Registrar's question ought to be answered is that these "common costs" that is, those incurred with respect to more than one Respondent and not solely attributable to a particular Respondent, ought to be divided pro rata amongst the Respondents and all that should be recoverable from the Architect is his due proportion of those costs, plus any costs incurred that are solely attributable to the claim against him.

9. Mr Riordan further submitted that, on its proper construction, the costs order was for costs that relate to the claim against the Architect and so costs that would not have been incurred but for the addition of claims against the other Respondents should not be allowed on the taxation of costs against the Architect. He pointed out that the totality of costs has been increased considerably by the number of Respondents to the claim in regard to pleadings, evidence, the Tribunal book, interlocutory proceedings and other matters. As I understand his argument, a large proportion of the common

costs would not have been incurred but for the addition of claims against the other Respondents. Accordingly, to the extent that the costs have been so increased, they should not be allowed.

10. Mr Riordan said that because of this the costs should be assessed as though the matter proceeded solely as a claim against the Architect and that the Registrar should reduce the items allowed to an amount that would be appropriate if the claim had been brought against the Architect himself.

11. I accept that, if the only Respondent had been the Architect, the costs incurred by the Applicants would have been considerably less but the Applicants would still have been required to incur the costs necessary to establish their case against the Architect.

12. Mr Murdoch submitted that the sole question in regard to the answer to be given to the Registrar's question was the proper construction to give to the order as made. He said that the words "in relation to" were very wide and referred to a number of authorities. I agree that the expression has a very wide meaning.

13. Mr Murdoch referred me to the following quotation from Cheshire and Fifoot's law of contract, 7th Australian edition at p.369, to the effect that the meaning of a limiting term:

> "… is to be determined by construing the clause according to its natural and ordinary meaning read in the light of the contract as a whole thereby giving due way to the context in which the clause appears including the nature and object of the contract and, where appropriate, construing the clause contra proferentem in the case of ambiguity".

14. Mr Murdoch argued that, to the extent that there is any ambiguity in the order, it should be read "contra proferentem" because it followed the offer of settlement and, as the author of the offer, the Architect is the proferens. I am not satisfied that is right. I am not construing a contractual term here. The contract is gone, having merged in the order. The order stands on its own and takes effect according to its tenor. Whatever its history, no one can be said to be the proferens of it. In any case it does not seem to me that there is any ambiguity in the words used. It is just that they are very wide.

How should the order be construed?

15. I have previously ruled that I cannot revisit the order and even if I could, I would not do so because it simply reflected the offer of settlement that the Architect made and the Applicants accepted. It would have been inappropriate to make an order for costs in anything other than the agreed terms. It is for the Registrar to determine in regard to each item of costs appearing in the bill whether that is "in relation to" the claims brought by the Applicants against the Architect.

16. Obviously, costs with respect to work done solely in regard to claims against one or more of the other Respondents could not be said to be related to the claim against the Architect.

17. Costs incurred with respect to pursuing the claim against some or all of the respondents including the Architect could not, I think, sensibly be said to be not "related to" the claim against the Architect simply because it also related to one or more of the other respondents. In order to fall within the order, an item of costs must have been necessarily and properly incurred for the purpose of prosecuting the claim against the Architect. It is immaterial that it was also incurred for the purpose of pursuing any of the other respondents. (For a similar approach see *Moage Ltd (In liq) v Jagelman & ors* [2001] NSWSC 557 at para. 37).

18. In order to fall within the order, an item of costs must have been necessarily and properly incurred substantially for the purpose of prosecuting the claim against the Architect. Items directed to establishing claims against other parties, such as engineering reports, experts reports in regard to the building surveyor and so forth are not within the order. The term "in relation to" is designed to have a limiting effect and means more than having some tenuous connection with the claim against the Architect. The connection must be of substance rather than ephemeral. For instance, the mere fact that it might be argued that the Architect ought to have supervised the engineer does not mean that all costs incurred in order to establish the claim against the engineer are also "in relation to" the claim against the Architect. One must look at the claim against the Architect as pleaded and ask whether the item in question was necessarily and properly incurred for the purpose of prosecuting that claim.

19. But it is argued that there may be more to the Registrar's task of applying the order than simply considering what its words mean.

Orders for costs involving multiple defendants – The rule in Kelly's Directories

20. Where the Plaintiff sues several defendants and succeeds against some but not all, how should an order for costs against the unsuccessful defendant be interpreted? The law in this area has changed considerably over the years. In the authoritative Victorian text book on costs, *Oliver "Law of Costs"* the learned author says (at p.69):

> "Where one defendant is ordered to pay the Plaintiff's costs and the action is dismissed against the other defendant, the unsuccessful defendant must, in the absence of a special order pay the whole of the plaintiff's costs, and is not entitled to any eduction on account of the joinder of the successful defendant;"

The authority cited by the learned author for this proposition is *"Kelly's Directories v Gavin* (1901) 2 Ch. 763.

21. The learned author continues (on the same page):

"In Chancery, where the plaintiff obtains an order against more than one defendant, all such defendants, in the absence of a special order, are liable for the whole of the costs. It is the practice where the rule would work an injustice, to make an order which has the effect of fixing liability on each defendant for so much of the costs as are attributable to his defence. *(see Dansk Rekylriffel v Snell (1908) 2 Ch 127).* But at common law where defendants set up separate defences and judgment is given against both with costs, a defendant is not liable for costs caused by a defence set up by the other, although he is, of course, liable together with his co-defendant for the general costs of the action.

In *Stumm v. Dixon* (1889) 22 QB 529 where the plaintiff succeeded against both defendants, Esher M.R. said (at p.533):

> 'When an action is tried against two or more defendants, and any defendant separates in his defence, and the judgement is against all, the law is that each of them is liable for the damages awarded by the judgment, and each of them is liable to the plaintiff for all costs taxed on his behalf as properly incurred by him in the maintenance of his action, except as to costs caused to him by so much of the separate defence of any defendant as is and can only be, a defence for that defendant as distinguished from other defendants. With regard to such costs so caused to the plaintiff, he is entitled by law to recover them against that defendant alone who has so caused him to incur them.'

Fry L.J who dissented from this view, said:

> 'As a general rule I conceive that at law all the defendants to an action are jointly and severally liable for all costs awarded against the defendants, even though one defendant may have severed his defence..'

In Hobson v. Leng (1914) 3 K.B. 1245, where one defendant set up a defence not taken by the others, it was held that the former was alone was responsible for the plaintiff's costs caused by that defence. The Chancery rule is applied in Victoria."

22. The breadth of the learned author's interpretation of *Kelly's Directories* was criticised by Ormiston J. in a very learned judgment (the leading judgment on this point) in *Dimos v Willets* (2000) 2 VR 170 at. p.179, where his Honour said that it should now be regarded as obsolete. He continued:

"That is not to say however that a judge… may not exercise the court's discretion so as specifically to grant the plaintiff all its costs against the unsuccessful defendant, including those costs incurred which solely relate to suing the successful defendant.

In my opinion the decision in Kelly's Directories has been taken, in certain works, including unfortunately *Oliver on Costs*, to stand for too wide a proposition. At most Byrne J. determined no more than that, where a plaintiff is successful in a Chancery suit against one defendant and unsuccessful against another, who receives *no* order for payment of its costs, the plaintiff is ordinarily entitled to an order for the costs of the proceeding, which order,

when correctly construed, will comprehend all the costs necessarily and properly incurred in bringing the proceedings against both defendants. Moreover, even if the practice so described should be seen as extending to cases where the successful defendant itself obtains an order for costs, then, having regard to the costs regime then applying in the various divisions of the High Court of Justice, the practice of making such an order as well as its interpretation should be seen as having been confined to proceedings in the Chancery Division."

23. In *Dimos v Willets* the respondent succeeded against the appellant but failed against the other defendant in the action, who was the Registrar of Titles. The appellant was ordered to pay the respondent's costs of the action and the respondent was ordered to pay the costs of the Registrar of Titles. The Taxing Master interpreted the costs order against the appellant as meaning that he had to pay not only the respondent's costs but also the costs the respondent was ordered to pay to the Registrar of Titles. As to this, Ormiston J said (at p.180):

> "To accept the meaning given to the trial judge's order by the taxing master ……. would countenance an inconsistency ……. inasmuch as the plaintiff would receive, without specific order, from the first defendant the costs of issues relating to the claim against the second defendant on which not only had he failed on the merits but also in respect of which the second defendant herself has obtained an order for costs. Of course they have each incurred their own costs (so they are not identical) but the plaintiff should not recover costs from a party to whom they do not relate and in respect of a claim in which he has failed, unless the judge specifically orders that they be so recovered."

24. It would seem from the foregoing that an order for costs against the Architect with no order for costs against the other respondents does not necessarily mean that he must pay all the costs of the action, whether related to the dispute against him or not. If the case of *Kelly's Directories* ever supported such a view it is clearly no longer good law.

The rule of thumb

25. Mr Riordan submitted that, in assessing the costs, the Registrar should apply what is called "the rule of thumb" in assessing the costs. To understand the argument this rule requires some analysis.

26. A foundation of the rule is exemplified by the case of *Longreach Oil Limited v Southern Cross Exploration NL* (unreported) 9 March 1998 per Young J. That case concerned the retainer of a single solicitor by several defendants. A single order for costs was made in favour of all seven defendants against the Plaintiff. Young J said that, in the absence of evidence that some other liability was assumed by the defendants it should be assumed that each is liable for an equal amount of costs. In those circumstances, the unsuccessful plaintiff is only liable to pay to each of the successful defendants the amount of costs that that defendant has to pay to the common solicitor. In the case of a joint retainer by seven successful

defendants, each would be entitled to an order against the unsuccessful plaintiff for one seventh of the costs that he incurred in common with the other defendants plus any separate costs he incurred himself. The principle is that, since that is all he has to pay to the common solicitor, it is all he can recover from the unsuccessful plaintiff. In those circumstances, his Honour said, "the order probably means that the taxing officer was entitled to follow the rule of thumb".

27. In *Trade Practices Commission v Nicholas Enterprises Pty Ltd & ors* (1979)28 ALR 201 the plaintiff sued a number of parties and succeeded against some but failed against others. Fisher J applied the rule of thumb to an order for costs in favour of the successful defendant, awarding it only half its costs, after finding that that would "achieve a just result" (p.209). However in regard to the two unsuccessful defendants who were found to have entered into an unlawful understanding, his Honour refused to apportion the costs between them, saying (at p.210):

> "The plaintiff as the successful party is prima facie entitled by way of indemnity to its costs of the action, and if one of the unsuccessful defendants is unable or unwilling to meet its share of the obligation, the misfortune should be that of its partner in crime and not of the plaintiff".

It must be remembered that, in that case, the two defendants concerned were joint tortfeasors. That is not the case here.

28. In the unreported case of *Woodward & anor v Gaha & ors* (Supreme Court of New South Wales 28 September 2005) there were three defendants. The claim against the first defendant was dismissed "with the costs … of the proceedings" but the plaintiff succeeded against the other two. All three defendants had instructed the same solicitor. The plaintiff had acknowledged on the first day of the hearing that it could not succeed against the first defendant and the trial really only concerned the other two defendants. The first defendant sought an order that the plaintiff pay a fixed proportion of his costs pursuant to the rule of thumb. Rolfe J refused to apply the rule of thumb, saying (at p.6):

> "The court would not be justified … in making an order … which would define the costs to which Mr Gaha is entitled in such an arbitrary way, and in a way which, in my opinion, would entitle … Mr Gaha to a far greater proportion of the costs than that to which he is otherwise entitled."

29. His Honour added:

> "I should add that nothing I have said in these reasons is intended to indicate that the costs assessor may not, in his or her discretion, decide to apply the "rule of thumb" to such of the costs as he finds are truly joint costs."

However this comment must be considered in the light of s.208F(2) of the *Legal profession Practice Act 1987* (New South Wales) which applied to that case and provided:

> "A costs assessor is to determine the costs payable as a result of the order by assessing the amount of the costs, that in his or her opinion is a fair and reasonable amount."

30. There is no specific provision in the *Victorian Civil and Administrative Tribunal Act 1998* requiring or authorising the Registrar to assess the costs in any particular way. The manner in which the costs are to be assessed must be determined by the order that is made. No doubt in assessing the costs to be allowed the registrar must determine what is fair and reasonable in the circumstances but he must do so within the framework of the costs order. In this case, the order was to pay the Applicants' costs of the proceeding in relation to their claims against the Architect. Since costs that meet that description have been awarded by the order, the registrar cannot refuse to allow them just because he thinks that would be fair in the circumstances.

31. In *Korner v Korner & Co Ltd* [1951] 1 Ch 10, a decision of the Court of Appeal, Singleton LJ, in a judgment with which Jenkins LJ agreed, said that the rule of thumb was convenient to apply "in an ordinary or straightforward case" but suggested that it should not be applied where, in the circumstances, it would not provide a result consistent with the outcome of the case. The Plaintiff in that case succeeded against the principal defendant but failed against the other seven. Most of the case was taken up with the case against the principal defendant who was ordered to pay the Plaintiff's costs. Very little time was taken with the dispute with the other seven, who succeeded on a technical point. The Court held that the rule was not applicable. It was also suggested *(at p. 18)* that the rule should not be extended.

32. The rule was discussed at length by Einstein J in *Currababula Holdings Pty Ltd v State Bank of New South Wales* [2000] NSWSC 232, another case relied upon by Mr Riordan. At paragraph 95, his Honour said (after reviewing the authorities):

> "These decisions reveal that the concern of the rule of thumb is to achieve substantial justice in the awarding of costs as between a partially successful plaintiff and various successful and unsuccessful defendants. The rule operates on the premise that defendants are proportionately responsible for and liable for the joint costs involved in mounting the defence. Thus a successful defendant cannot claim from the plaintiff more than a proportionate share of the joint costs of the action in addition to any costs separately referable to that defendant. Conversely, the partially successful plaintiff is prevented from looking to each of the unsuccessful defendants for more than an equal proportionate share of the costs not solely referable to the Plaintiff's case against one or other of the defendants individually, in addition to the costs that are so referable. In this way the rule of thumb prevents both the unjust enrichment of the partially successful plaintiff or successful defendant and the casting of an unfair burden on the unsuccessful defendants. Where the premise

is falsified or the rule does not achieve its intended effect, it finds no application."

33. His Honour proceeded to give illustrations from the authorities of situations where the premise would be falsified. In essence, it is falsified where the application of the rule would not have the effect of avoiding injustice or would produce an unjust result. It must also not be inconsistent with the order for costs that has been made (see para.99 of the judgment).

34. His Honour went on to say that, since the basis of the rule of thumb was that each of several defendants instructing a common solicitor is liable only for his proportionate share of the common costs, the rule ought not to be applied to awards of costs in favour of plaintiffs who are each liable to the solicitor for the whole of the costs, since the retainer is joint and several. (see also *Duchman v Oakland Dairy Company Ltd* [1930] 4 DLR 989 at p.992). This would suggest that it is the nature of the retainer in the particular case that is determinative. There is no evidence here as to the nature of the retainer by the Applicants but there have been changes in their representation. In any event, the problem does not arise because this is not a case where some of the Applicants have succeeded and some failed. They were fully successful and the order for costs is in favour of them all. It is not suggested that they are not, as a group, whether jointly or severally, liable to their solicitors for the costs claimed.

The application of the rule must not be inconsistent with the order

35. In *Currababula*, the proceedings had been brought by two plaintiffs against one defendant. One plaintiff succeeded and the other failed. An order for costs was made that the defendant pay to the first plaintiff 90% of the first plaintiff's costs and that the second plaintiff pay to the defendant 20% of the defendant's costs. When the costs came to be assessed, the assessor allowed to the first plaintiff 90% of its costs that related solely to the first plaintiff but only 45% of the costs that were jointly incurred for the benefit of both plaintiffs. Einstein J held that this was an incorrect approach for two reasons. First, because it concerned apportionment of costs between plaintiffs not defendants. Secondly, because the application of the rule in that case would not fulfil its purpose, in that it would cause injustice rather than prevent it. Finally, he said that, on its proper construction, the order for costs excluded the application of the rule because it was tailored to take into account the extent to which the parties were successful and so already provided a just outcome between the parties. It was not a simple order "plus costs."

Was this a special order?

36. In this case the order for costs made was not that the Architect pay the Applicants' costs of the proceeding. The costs were limited to those that fell within the description "in relation to their claims against the Architect". Had it been open to me to decide what order for costs should be made, I might have made a different order for costs. However, since the order arose

from the acceptance of an offer of settlement the wording of the order was dictated by the wording of the offer. Hence, no other order could have been made. Is this a special order as to exclude the operation of the rule of thumb?

37. In *Dimos v Willetts,* Ormiston J. said *(at p.187):*

> "The words 'of the action' should be read as having implicitly added to them the words 'as against the first defendant', but that is strictly unnecessary because the proceeding or event prima facie under consideration was that against the first defendant, who was thereby ordered to pay those costs."

38. At first sight, one might ask whether the words of qualification in this order "in relation to their claims against the Architect" add anything of substance. On balance I think they do. They do not simply identify who is to pay the costs which would be apparent for the order itself. They go further and describe what costs are to be paid. To the extent that any costs meeting that description would be excluded by the application of the rule of thumb, the rule could not be applied, consistently with the order.

39. More significantly, the authorities make it clear that the rule should only be applied where it would provide a just result in the particular circumstances of the case. This was not an "ordinary or straightforward" case. There were eight respondents. The first, the builder, did not appear and was in liquidation. The second was the Architect. The third was the building surveyor. The fourth was a company controlled by the fifth respondent who was the engineer. The sixth was a company controlled by the seventh respondent who was the checking engineer. The eighth was an insurance company which had provided certain indemnity in regard to the builder.

40. The application of the rule of thumb to such a case would be quite arbitrary. To divide the common costs by eight would not reflect the reality of the litigation. The parties against whom the most serious allegations were made were the Architect and the engineer. The allegations against the building surveyor were less substantial and the case against the insurer was not only much less substantial but also quite different in nature. The case against the builder was substantial but since it went into liquidation at an early stage very little of the common costs would have arisen from its involvement. It would be quite unfair to allocate the same proportion of the common costs to parties where the cases against them were so different. If one were to divide the common costs in an equitable manner then the principal shares would probably be borne by the Architect and the engineer but since I did not hear most of the available evidence even that is only conjecture.

41. Since an equal division would not achieve the aim of the rule of thumb, how should the common costs be divided to achieve a fair result? Since I never had the opportunity of deciding what the relative liabilities were, it is impossible for me to say. But in any case, I cannot alter the wording of the costs order. All I can do is see whether a quite arbitrary rule sometimes

used in the assessment of costs in ordinary or straightforward cases should be applied in this case. For the reasons given, I find that it should not be.

The application for declaratory of injunctive relief

42. In the alternative, the Architect seeks the declarations and injunctions pursuant to its application. Mr Riordan argued that the orders sought in the Architect's application ought to be made in order to prevent double recovery.

43. He also argued that it would be unjust to require the Architect to pay more than a fair proportion of the Applicants' costs in circumstances where the Architect has been deprived of the opportunity to recover contribution from the other Respondents.

Contribution, settlement and double recovery

44. Where a claim for the same loss is made against several defendants and is settled against only one, the question arises whether the agreed settlement amount is the whole of the loss suffered by the plaintiff. If it is, the plaintiff cannot proceed on to recover more against the other defendants because there is no longer any loss. There is a very interesting discussion on this subject in an article referred to me by counsel: *Multiple Defendant Litigation and the rule against double recovery* (2002) 10 TLJ 255. Unfortunately the learned author does not deal with the costs question that I have to resolve. In the present case, the settlement with the Architect preceded the settlement with the others so any claim against the Architect could not be said to have been extinguished by a prior settlement with a co-respondent.

45. The law as to the liability inter se of joint and joint and several tortfeasors has been amended in Victoria by Part IV *Wrongs Act 1958*. In particular, s.24 (2) limits the amount of contribution recoverable from a person to such an amount as the court finds just and equitable, having regard to that person's responsibility for the damage. However the mechanism contemplated is that the person seeking contribution is already liable for, or has already paid, to the plaintiff, the damage suffered by the plaintiff and makes an application for contribution under s.23B. The Act does not limit the initial liability of that person to the plaintiff. That initial liability must exist for the application under s.23B to be made. In any case, I do not have before me an application for contribution.

The Double Recovery Argument

46. According to the affidavit of Suzanne Louise Kupsch sworn 7 December 2006 and filed in support of the application, in addition to the $1.4 million recovered pursuant to the offer of settlement from the Architect, the Applicants recovered other sums from other parties. An amount of $1.5 million "all in" from the Sixth and Seventh Respondents, $1.85 million "all in" from the Third Respondent, $75,000.00 from the Fifth Respondent and an undisclosed sum from the Eighth Respondent.

47. Mr Riordan said that, in the absence of evidence as to the breakdown of the sums received, I ought to infer that the sums recovered from those parties included the liability the paying respondent had in each case for the costs incurred by the Applicants in pursuing the claims against him or it. If the Applicants were now to recover from the Architect all of their common costs plus the costs referrable only to the proceeding against the Architect they would be recovering a greater sum than the costs they incurred in prosecuting the proceedings. I do not accept that I can draw any inference as to the extent to which the liability of any of the other respondents for the Applicants' costs has been satisfied. All that appears is that each claim was settled for an all-in figure which included any claim for costs.

48. Mr Riordan argued that, although it was impossible to say how much of each settlement sum received from the other Respondents involved recovery of a proportion of the common costs, that did not relieve me of the responsibility of making an appropriate reduction from the costs the Architect is liable to pay. Certainly, in regard to difficulties in assessing quantum of damages (which is what the authorities I was referred to relate to) the damages must be assessed, whatever the difficulties. But I am not here assessing damages nor am I even assessing the amount of costs.

49. Mr Riordan submitted that the Tribunal has power to prevent abuse of its process and should exercise this power in order to prevent the Applicants from recovering twice in respect of the same costs. He said that, if I were to infer that, in the course of settling with the other Respondent, the Applicants have already recovered part of the common costs they now seek from the Architect, it would be an abuse of the process of the Tribunal to allow the Applicants to recover on an assessment of costs now before the Registrar that part of the common costs which the Applicants have already recovered.

50. I accept the submission that, once a judgement creditor has recovered the amount of the judgement from one defendant, he is not entitled to recover any more from the others who were jointly and severally liable for payment of the same judgement (see *Ritchie's Uniform Civil Procedure NSW* [95.20] and the cases there cited; see also the discussion in *Baxter v Obacello Pty Ltd* (2001)205 CLR 635 per Gleeson CJ and Callinan J.)

51. What is sought is declaratory or injunctive relief to limit the amount of costs the Applicants can recover from the Architect. Any such relief must necessarily restrict recovery of a sum to which the Applicants would otherwise have been entitled upon the assessment of the costs pursuant to the order for costs that has been made. Even if I have power to make such an order, before interfering with established legal rights I would need to be satisfied that it would be inequitable to allow them to be enforced. It would only be inequitable to allow enforcement beyond whatever sum amounted to the full recovery of the Applicants' costs. It is notorious that an award of costs, unless it is an award of indemnity costs, does not provide the party in whose favour the order is made the full amount of the costs that have been

incurred. To what extent a party recovers his costs depends entirely upon the terms of the order. In this case, it was to be costs on a party-party basis but in addition, costs as described in the terms derived from the offer of settlement.

52. When a party settles a claim on an "all in" basis, the money or other consideration he receives, is taken in satisfaction of the amount or other relief claimed and also in satisfaction of right that party might otherwise have to apply for an order for his costs of the proceeding. Hence, the party that settles sells, in exchange for the settlement sum, not only his cause of action but also his potential claim for costs. In each of the settlements referred to, whatever amount from the settlement sum one might attribute to the potential claim for costs, that claim has been settled and the Applicants have received some consideration for it although I cannot assess its monetary value.

53. The amounts claimed by the Applicants in this proceeding against all the Respondents with respect to their alleged losses appear to well exceed the amounts they have recovered from them by way of settlement. It is not possible to do anything more than guess what might have already been recovered by the Applicants by way of costs from the other Respondents and it is quite impossible for me to say that, if the Applicants recover costs from the Architect in the terms of the order made they will be recovering more than the costs they have incurred in prosecuting the proceeding.

54. I agree with Mr Riordan that this seems to impose upon the Architect a liability for more than what might be regarded as his fair share of the costs. Nevertheless, that was the agreement that was entered into when the offer of settlement was accepted and the order for costs that was made simply gave effect to that agreement.

Right to contribution

55. Mr Riordan said that, if the Applicants had settled with the other respondents on a "costs plus" basis, they would not have been able to enforce any other orders for costs against the other respondents. I accept that, once they had recovered all of their costs from one or more of the Respondents the Applicants could not have enforced any remaining costs orders against the others to recover more than their total costs as assessed.

56. He also pointed out that the Architect would have had a right of contribution from the other respondents. Indeed, there were extant contribution proceedings between the Architect and other respondents that were settled, presumably upon terms agreed upon by the Architect.

57. I think any right to recover a sum of money would only arise once the Architect had paid more than his share. In the case relied upon by Mr Riordan, *Cook v McAuliffe & Others* (1923) 40 WN (NSW) 78, an order was made, against four respondents in a suit, that they pay the Applicant's costs. One respondent paid all of the costs and sought contribution against

another who refused to contribute. An order was made against that respondent for her share of the costs in favour of the respondent who had paid.

58. In this case there is no common order for costs against the respondents. There is a single order against the Architect and, because of the settlements that have been reached, it was unnecessary ever to make an order against the others. Further, this is not a case where one respondent has satisfied an order for costs that was made against other parties as well. The obligation by the Architect to pay costs arises from the order and is according to the terms of the order.

59. Mr Riordan said that, in view of the nature of the litigation it is likely that, had the matter proceeded, costs orders would have been made against each of the Respondents in favour of the Applicants. I accept that would probably have been the case. He said that the Applicants should be in no better position by settling with the other respondents on an "all in" basis than they would have been had there been a common order for costs. However I doubt that any order for costs I would have made would have been a common order. It is more likely that I would have made an order directed to achieve justice between the parties. Despite the commonality there were great differences between the cases against the various respondents and s.109 of the Act would have required the circumstances of the case against each respondent to be taken into account in order to arrive at an order for costs that was fair.

Public policy considerations

60. Mr Riordan said that a further reason for providing the relief would be to encourage settlement of litigation in that, in cases involving more than one respondent, a respondent will be disinclined to serve an offer of compromise if, upon acceptance of the offer, it will be solely liable to pay costs and will lose rights of contribution from other respondents. However a party offering to compromise a proceeding can decide for himself the terms of the offer that he makes and can cast it in terms appropriate to avoid any such difficulty.

Referral under s.95

61. The final relief sought in the amended application is that, pursuant to s.95 of the Act, I should refer to the Registrar the question, which of the items of costs incurred by the Applicants in pursuing their claims against the Architect related to the other Respondents. Because of the conclusion I have reached on the substantive submissions there is no point in doing this.

Conclusion

62. What the Registrar must decide as to each item on the bill of costs is whether that item relates to the claim made by the Applicants against the Architect.

63. For all of these reasons the declarations and injunctions sought in paragraphs 1, 2 and 3 of the Architect's amended application are refused. Costs will be reserved.

SENIOR MEMBER R. WALKER