SUPREME COURT OF VICTORIA

COURT OF APPEAL

S EAPCI 2021 0050

JASON LUKE MANDERSON — First Applicant

and

ALEX KEAN HONG TAN — Second Applicant

v

BENSONS PROPERTY GROUP PTY LTD — Respondent

JUDGES:	BEACH and SIFRIS JJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	2 August 2021
DATE OF JUDGMENT:	20 August 2021
MEDIUM NEUTRAL CITATION:	[2021] VSCA 227
JUDGMENT APPEALED FROM:	[2020] VCC 543; [2021] VCC 326 (Judge Woodward)

COSTS – Indemnity costs ordered against applicants – Open to judge to find applicants' failure to accept respondent's *Calderbank* offer unreasonable – Applicants' own offers irrelevant – Respondent entitled to pursue specific performance – Trial primarily concerned issues raised by applicants' defence and counterclaim – No contravention by respondent of *Civil Procedure Act 2010* – Application for leave to appeal refused.

PRACTICE AND PROCEDURE – Application for leave to introduce further proposed ground of appeal relating to award of damages not argued below – No proper explanation for delay – No evidential basis for proposed further ground – Application refused.

APPEARANCES:	Counsel	Solicitors
For the Applicants	In person	
For the Respondent	Mr C A Connor	Tony Hargreaves & Partners

BEACH JA
SIFRIS JA:

Introduction

1 By a contract of sale entered into on 18 March 2016, the applicants purchased from the respondent, apartment G04 of a proposed development called Vanguard Malvern (the 'Apartment') for $684,400 (the 'Contract').

2 By late 2018, the development was near completion and settlement under the Contract was set for 6 December 2018. Prior to settlement, the applicants asked to be released from the Contract and later raised concerns about the size of the Apartment. Settlement did not take place as contemplated and in January 2019, the respondent served and then withdrew a rescission notice. On 8 February 2019, the respondent notified the applicants that it required payment of the balance of the purchase price under the Contract. On 22 February 2019, the applicants notified the respondent that the Contract was rescinded.

3 The respondent thereafter commenced a proceeding against the applicants in the County Court of Victoria on 5 March 2019 seeking specific performance of the Contract, or damages in lieu.

4 By a defence and counterclaim, the applicants denied that they had failed or refused to perform the Contract and claimed that they had validly rescinded the Contract under the common law for breach, or for misleading or deceptive conduct, and were entitled to the return of their deposit of $68,440 and damages of $137,538.56, a total of $205,998.56.

5 The applicants' primary contention was that the respondent had agreed to sell them an apartment with an internal size of 62m² and an external size of 24m², an overall size of 86m², and that it had delivered a substantially smaller apartment and was not ready willing and able to perform the Contract.

6 On 1 July 2019, the respondent made a *Calderbank* offer. The offer was not accepted by the applicants.

7 In the final result, the applicants' defence was not made out and their counterclaim

was dismissed. The respondent was awarded damages in the sum of $40,659.95 in addition to retaining the deposit. The respondent was awarded indemnity costs from 1 July 2019 on the basis that the applicants had acted unreasonably by failing to accept the *Calderbank* offer.

8 The applicants seek leave to appeal against the indemnity costs order.

9 By a further application filed 15 July 2021, the applicants applied to amend their application for leave to appeal by introducing a further ground of appeal relating to the award of damages, a ground or submission not made below and out of time. No formal application was made to extend the time within which to make the application.

10 For the reasons set out below, the indemnity costs order was open to and within the discretion of the trial judge. Leave to appeal will be refused.

11 Further, for the reasons set out below, the application to amend the application for leave to appeal, to introduce a ground not raised below, will be refused.

The Calderbank offer

12 The *Calderbank* offer was contained in a letter from the respondent's solicitor to the applicants marked 'Without Prejudice Save As to Costs' as follows:

> We confirm that the parties have exchanged affidavits of documents and are now in a position to properly assess their respective positions. The next step requires the parties to engage a joint expert surveyor for the purpose of preparing an assessment and report in relation to the central issues for determination in this proceeding. The parties then have until 2 August 2019 to file and serve any additional expert reports prior to participating in a judicial resolution conference before a Judicial Registrar on 8 August 2019.
>
> The costs of the joint expert surveyor are to be born equally by the parties. The costs to be incurred with respect to finalisation of expert evidence and the judicial resolution conference will be significant. Our client is conscious of the cost to be incurred by the parties and wishes to put forward a proposal for the resolution of this matter at this stage in the interests of avoiding further cost and delay.
>
> To this end, we are instructed to put the following offer to you in full and final settlement of the proceeding and the proceeding by counterclaim:-
>
> 1. The [applicants] shall agree to complete settlement of their purchase of the [Apartment] by 5:00pm on 2 September 2019 in accordance with the [Contract];
>
> 2. Subject to settlement of the purchase of [the Apartment] taking place on or

before 2 September 2019, [the respondent] will:-

(a) reinstate the agreement to provide a rebate of $34,400.00 to the [applicants] at settlement as set out in the letter from Rick Curtis, Managing Director of [the respondent], to [the applicants] dated 18 March 2016 (subsequently forfeited as a consequence of the [applicants'] failure to settle);

(b) further to (a) above, [the respondent] will provide an additional rebate to the [applicants] of $15,000.00 on the purchase price; and

(c) [the respondent] will waive its entitlement to charge interest and costs payable under the [Contract] as a consequence of the [applicants'] default including the costs of this proceeding incurred to date.

3. The proposal set out in paragraphs 1 & 2 above is subject to and conditional upon the parties entering into a Deed of Settlement and Release recording the terms of settlement and providing for mutual releases in relation to the subject matter of this proceeding and confidentiality.

With respect to [the respondent's] offer to reinstate the previous rebate, pay an additional rebate and forego interest and costs under the contract, to assist you in assessing this offer we are instructed the value of this offer is calculated as follows:-

Item	**Amount**
Reinstated rebate pursuant to letter dated 18 March 2016	$34,400.00
Additional Rebate	$15,000.00
Accrued late settlement interest owing pursuant to Special Condition 9 of the [Contract] calculated at 14% simple interest from 6/12/2018 to 1/7/2019 being 209 days	$45,601.99
Costs and expenses incurred pursuant to Special Condition 14 of the Contract of Sale	$5,013.80
Totals	$109,015.79

In addition to the costs and interest owing under the [Contract], [the respondent] has incurred the costs of this proceeding to date in the sum of approximately $30,000.00. These costs will be claimed should the offer set out in this letter be rejected in addition to the costs and interest referred to above. The total amount [the respondent] is offering to forego pursuant to this offer, if accepted, is $139,015.79.

This offer is open to be accepted for a period of 14 days from the date of this letter after which time it shall lapse. Failing acceptance of this offer, should the proceeding proceed to trial and orders are made on terms no more favourable to you than the terms of this offer, a copy of this letter shall be produced to the Court upon application for our client's costs on an indemnity basis in accordance with the principles enunciated in *Calderbank v. Calderbank* [1975] 3 All ER 333, *Cutts v. Head* [1984] 1 All ER 597, and applied by the Victorian Court of Appeal in *Hazeldene's Chicken Farm Pty Ltd v. Victorian Workcover Authority No. 2* (2005) 13 VR 435.

The course of the trial

13 The trial was held in three stages. Stage 1 dealt primarily with the applicants' case. It was dismissed. Stage 2 dealt with the appropriate remedy, the respondent having succeeded in defeating the applicants' claims. The trial judge held however, that an order of specific performance was not appropriate. Stage 3 dealt with the respondent's damages claim. Damages in the sum of $40,659.95, in addition to retention of the deposit, were ordered.

Stage 1

14 Stage 1 comprised a trial over three days before Judge Woodward on 25–26 November 2019 and 10 December 2019. His Honour delivered reasons for judgment on 6 May 2020 ('First Reasons').[1]

15 The critical matters dealt with at trial as part of Stage 1 were as follows:

(a) whether the applicants were entitled to rescind the Contract because the Apartment as constructed was allegedly substantially different from what they had agreed to purchase;

(b) alternatively, whether the applicants were entitled to avoid the Contract because of the respondent's alleged misleading and deceptive conduct.

16 A key issue was whether the appropriate method of measurement of the area of the Apartment was, as the respondent contended, the Property Council of Australia method (the 'PCA method') which was consistent with industry standards or, as the applicants contended, the interior face or title method.

17 In his First Reasons, his Honour found that if the PCA method was applied then the Apartment as constructed was 84m^2 in area, producing a variance of less than 2%, whereas if the title method (or equivalent) was applied and based on expert evidence the area was 80.3m,^{2} a variance of 6.6%.[2]

18 His Honour held that it was unnecessary for him to reach a concluded view on the

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1 *Bensons Property Group Pty Ltd v Manderson and Tan* [2020] VCC 543.

2 Ibid [52].

question of the correct method of measurement. However, he concluded that on balance the title method would have been the appropriate method.

19 However, his Honour also found that a Special Condition contained in the Contract permitted a variance of up to 7% in the area of the Apartment and as such the Apartment as constructed was within the bounds of what had been agreed.

20 His Honour held that the applicants' claims of contractual breach and misleading or deceptive conduct were not made out. Judgment was given for the respondent and the counterclaim was dismissed. There is no appeal against these orders.

21 His Honour then dealt with the respondent's claim for specific performance and said that as the applicants had not adduced any evidence or made any submissions in opposition to specific performance he would ordinarily make such an order, but as the applicants were self-represented and because of the emergence of COVID-19 there may be matters the applicants might wish to raise as to why, in the exercise of his discretion, he should refuse specific performance and order damages instead.

22 His Honour made orders for the parties to consult and endeavour to agree on appropriate orders disposing of the proceeding and, failing agreement, to file further written submissions limited to the issue of relief.

Stage 2

23 No agreement was reached, and the parties filed written submissions and supporting documents. The respondent sought specific performance which the applicants opposed essentially on the grounds of hardship and futility.

24 Stage 2, relating to whether specific performance should be awarded and costs, was determined on the papers. His Honour delivered reasons for judgment on 23 June 2020 ('Second Reasons'),[3] refusing specific performance in the exercise of his discretion based on the applicants' hardship, leaving the respondent to pursue its claim for damages in lieu and

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[3] *Bensons Property Group Pty Ltd v Manderson & Anor (No 2)* [2020] VCC 543.

making findings on costs including indemnity costs.

25 Authenticated orders were made on 26 June 2020. Judgment was entered for the respondent for damages, in substitution of specific performance, to be assessed at a further hearing and the applicants' counterclaim was formally dismissed.

26 In relation to costs, his Honour said that in their submissions the applicants did not address the *Calderbank* offer made by the respondent on 1 July 2019. He held that the respondent was entitled to an order for indemnity costs based on its *Calderbank* offer. His Honour held that he was satisfied that the timing of the offer, the substantial discounts on the purchase price and the foregoing of interest were such that the applicants' failure to accept the offer was unreasonable.

27 His Honour noted the applicants' submission that costs should be reserved pending the assessment of damages on the basis that the assessment might establish that the respondent had acted unreasonably and failed to mitigate its loss, in not itself moving to rescind the Contract and resell the Apartment.

28 His Honour said that in his view, whilst it was difficult to imagine any circumstance where an assessment of damages could lead to that result, he could not rule out entirely the possibility that an assessment could produce an unexpected result. His Honour said he was satisfied that the respondent was entitled to pursue specific performance of the Contract to trial. He stayed the order as to costs until after the hearing and assessment of damages and reserved liberty to the applicants to apply to vary the costs order if, for any reason, damages were assessed in an unexpectedly low sum.

29 The orders made on 26 June 2020 are in the following terms:

> 1. There be judgment for the [respondent] for damages to be awarded pursuant to section 38 of the *Supreme Court Act 1986* (Vic) in substitution for an order for specific performance.
>
> 2. Such damages are to be assessed at a further hearing on a date to be fixed.
>
> 3. By 4.00 pm on 31 July 2020 the [respondent] is to file and serve full particulars of the damages which it seeks.
>
> 4. The [applicants'] counterclaim be dismissed.

5. The [applicants] to pay the [respondent's] costs of the proceeding (including reserved costs) to be taxed on the standard basis up to and including 1 July 2019 and on an indemnity basis thereafter.

6. Order 5 is to be stayed until after the hearing and assessment of damages in accordance with order 2 above.

7. Liberty is reserved to the [applicants] to apply to vary order 5 above in the circumstances described in paragraph [13] of [the Second Reasons].

8. Reserve liberty to the parties to apply by email to the Associates to his Honour Judge Woodward … for further directions upon giving reasonable notice to all other parties.

Stage 3

30 Stage 3, relating to the assessment of damages, was determined on the papers after extensive orders and directions were made. His Honour delivered reasons for judgment on 29 March 2021 ('Third Reasons'),[4] awarding the respondent damages in the sum of $40,659.94 and making final orders on costs. The orders are in the following terms:

1. There is judgment for the [respondent] against the [applicants] in the sum of $40,659.94, which sum includes interest to the date of these orders.

2. The [applicants] pay the [respondent's] costs of the proceeding (including reserved costs) on the standard basis up to and including 1 July 2019, and on an indemnity basis thereafter.

31 In its claim for damages dated 24 August 2020, the respondent sought damages to a maximum of $257,281.63, putting its case forward on a range of possible dates and quantum of damages.

32 Following written submissions by both parties in relation to damages, his Honour assessed the respondent's loss in the amount of $102,054.67 which, after taking into account the forfeiture of the deposit, resulted in an award of damages of $40,659.95.

33 In assessing the damages, his Honour said that it was unreasonable for the respondent to continue to press for settlement from the point where the objective facts showed that a prompt rescission and resale was the appropriate course. He also held that it may have suited the respondent's broader commercial objectives to press for specific performance until trial, but in the case of these particular counterparties and this particular contract, it was

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4 *Bensons Property Group Pty Ltd v Manderson and Tan (No 3)* [2021] VCC 326.

commercially imprudent.

34 His Honour held that what was just between the parties in the particular circumstances of this case was to fix the date for assessment as 22 February 2019,[5] which resulted in a lower quantum of damages than the respondent had claimed.

Proposed grounds of appeal

35 The applicants filed an application for leave to appeal on 9 May 2021 against the second order made on 29 March 2021.

36 The applicants' proposed grounds of appeal are as follows:

> 1. His Honour erred in holding that the [applicants'] failure to accept the [respondent's] *Calderbank* offer was unreasonable without considering all relevant matters, as required by authority, in particular the extent and reasonableness of the compromise offered.
>
> 2. His Honour erred in disregarding offers made by the [applicants] as falling a long way short of the outcome prior to the [respondent] providing particulars of their claim for damages, his Honour determining the quantum of damages or the outcome being known.
>
> 3. When determining costs his Honour erred in failing to take into account the material matter of the [respondent's] unreasonable pursuit of specific performance which unnecessarily protracted the proceedings and the apparent misconduct that should have disentitled the [respondent] to costs pursuant to authority or alternatively to ss 19, 24 and 28 of the *Civil Procedure Act 2010*.
>
> 4. Accordingly, his Honour erred in awarding costs, in particular indemnity costs, in favour of the [respondent].

37 However, in the amended application for leave to appeal, also mistakenly dated 9 May 2021, proposed ground 4 is deleted and a new proposed ground 4 relating to the award of damages is inserted as follows:

> 4. His Honour erred in overlooking the evidence of Mr Richard Francis Curtis when determining damages, in particular marketing costs.

38 Proposed ground 4 in the initial application is unnecessary in any event. It is embraced by proposed grounds 1-3. The new proposed ground 4 is the subject of the application for leave to amend the proposed grounds of appeal and in respect of which no

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5 This was the date that the applicants notified the respondent that the Contract was rescinded.

application for the extension of time is made.

Consideration

39 The decision to award indemnity costs is a discretionary decision that will only invite appellate review if either a specific error is made out or the decision is demonstrably unreasonable or unjust. In *House v King*,[6] the Court said:

> The manner in which an appeal against an exercise of discretion should be determined is governed by established principles. It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so. It may not appear how the primary judge has reached the result embodied in his order, but, if upon the facts it is unreasonable or plainly unjust, the appellate court may infer that in some way there has been a failure properly to exercise the discretion which the law reposes in the court of first instance. In such a case, although the nature of the error may not be discoverable, the exercise of the discretion is reviewed on the ground that a substantial wrong has in fact occurred.[7]

Proposed ground 1

40 By proposed ground 1, the applicants contend that their failure to accept the respondent's *Calderbank* offer was not unreasonable, having regard to 'all relevant matters' and 'in particular the extent and reasonableness of the compromise offered'.

41 The trial judge held that the *Calderbank* offer provided the applicants with 'substantive discounts' and a saving of almost $140,000. It also gave the applicants a fresh opportunity to settle. Further, his Honour considered that the applicants' offers fell a long way short of the outcome achieved by the respondent. The trial judge concluded:

> I am satisfied that the timing of the offer, the substantial discounts offered on the purchase price and the foregoing of interest, were such that the [applicants'] failure to accept the offer was unreasonable.[8]

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6 (1936) 55 CLR 499.

7 Ibid 504–5 (Dixon, Evatt and McTiernan JJ).

8 Second Reasons, [10].

42 First, the applicants submitted that it was reasonable for them not to accept the *Calderbank* offer at a time when the report of the joint expert surveyor, Paul Murrihy, had not been produced. It was submitted that the report provided an independent measurement of the Apartment and would determine the strength of the applicants' claim.

43 The submission is without merit. First, it was not raised below and secondly, the report or survey did not, in any event, have any effect on the applicants' position. Despite finding a permitted variance, the applicants persisted with their defence and counterclaim. No extension of time within which to consider the *Calderbank* offer was requested and it was clearly open to the judge to find that it was unreasonable for the applicants not to accept the offer. Finally, an offer may be made at any time — the earlier the better — and it is no answer in this case to suggest that its consideration should be delayed until an assessment of the strengths and weaknesses of the respective cases can be undertaken. This, necessarily and inevitably, would have involved further delay and substantial costs as pointed out by the respondent in paragraph two of the *Calderbank* offer. The offer was required to be assessed, by the offeree, and indeed by the Court, as at the time it is made.

44 Next, it was submitted that the *Calderbank* offer was predicated on performance, albeit at a reduced cost, a position that the trial judge (later) considered remote, unable to occur and unreasonable for the respondent to press for at the time of the offer. It was submitted that the respondent knew from as early as 30 October 2018 that the applicants were unable to obtain a loan for the amount required to complete the purchase and that by their own notice of rescission of 11 January 2019, the respondent must have realised that settlement was remote.

45 The submission is without merit. First, and most importantly, the trial judge held that the respondent was entitled to pursue its primary claim of specific performance up to the trial. It was only after Stage 1 of the trial that the judge decided, in the exercise of his discretion and at Stage 2 and for the reasons given, to deny the claim for specific performance, and entertain a claim for damages. This decision, in June 2020, did not have the effect of recasting the position that existed in February 2019 or July 2019. The judge was conscious of the need to avoid viewing matters with the benefit of hindsight and the decision to assess

damages as at 22 February 2019, for the reasons given, had no effect on the exercise of the discretion as to costs.

46 Secondly, the applicants' offers between January and October 2019, set out below, were all based on settlement of the Contract, the desired position of the applicants.

47 Finally, on this ground, it should be noted that no application was made by the applicants to revisit the indemnity costs order, whether under the liberty to apply expressly reserved in the orders of 26 June 2020, or otherwise.

48 We agree with the judge that failure to accept the *Calderbank* offer was, in all of the circumstances, unreasonable. It was certainly open to the judge in the exercise of his broad discretion to make such an order. For the reasons given, the decision is not unreasonable or plainly unjust and leave to appeal on this ground is refused.

49 Before leaving this ground, we should record our opinion, that where a trial is conducted in stages, which is often desirable, it is preferable to wait until the end of the trial, before entertaining any costs applications.

Proposed ground 2

50 By proposed ground 2, specific error is alleged. The applicants contend that the judge erred in regarding offers made by the applicants as falling a long way short of the relief ultimately obtained by the respondent, in circumstances where the question of the respondent's damages had not been determined.

51 The applicants made four offers as follows:

(c) an offer on 22 January 2019 to purchase the Apartment at a reduced rate of $600,305 ($49,695 less than the effective purchase price);[9]

(d) an offer on 9 September 2019 to purchase the Apartment at a reduced rate of $595,000 ($55,000 less than the effective purchase price);[10]

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[9] The applicants were in any event entitled to a settlement rebate of $34,400. The sum of $49,695 comprises a discount of $39,695 and $10,000 for 'costs and time'. Although not a *Calderbank* offer, the offer is expressed as being 'WITHOUT PREJUDICE EXCEPT AS TO COSTS'.

(e) an offer on 29 September 2019 to purchase the Apartment at a reduced rate of $610,000 ($40,000 less than the effective purchase price);[11] and

(f) an offer on 28 October 2019 to purchase the Apartment at a reduced rate of $625,000 ($25,000 less than the effective purchase price).[12]

52 The judge said:

> [The applicants] seek to rely upon a number of offers they made to settle the proceeding. However, all of those offers fell a long way short of the outcome achieved by [the respondent] in the proceeding and can therefore be disregarded.[13]

53 It was contended by the applicants that had the respondent accepted any one of the applicants' offers it would have been in a more favourable position having secured performance of the Contract and minimised its loss. The respondent's decision to reject all of these offers and continue its pursuit of specific performance was in the circumstances, it was submitted, unreasonable.

54 The submission is misconceived and is without merit. The critical issue is the respondent's *Calderbank* offer, not the offers made by the applicants. Those offers are irrelevant to a consideration as to whether the applicants acted unreasonably in not accepting the *Calderbank* offer. It is no answer to say 'I did not accept your offer because you did not accept my offers'. In any event there was only one offer, the first offer of 22 January 2019, made by the applicants before the respondent's *Calderbank* offer of 1 July 2019. It was not unreasonable for the respondent to reject the first offer. It was not a *Calderbank* offer, was open for acceptance for a day[14] and most importantly required in addition to the agreed rebate, a discount of $49,695 which was not justified either at the time, or later, the

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10 Reference is made to the agreed rebate of $34,400 and a further discount of $44,250 on account of the alleged size differential, $4,106 on account of interest on the deposit and $6,644 being part of the costs incurred. The offer is a *Calderbank* offer.

11 Reference is made to the agreed rebate of $34,400 and a further discount of $40,000 on account of the alleged size differential. No claim is made for interest on the deposit or costs. The offer requires the respondent to waive interest and costs. The offer is not a *Calderbank* offer but is expressed as 'Without Prejudice Except As To Costs'.

12 Reference is made to the agreed rebate of $34,400 and a further discount of $25000 on account of the alleged size differential. Otherwise, the offer is in the same terms as the offer of 29 September 2019.

13 Second Reasons, [11].

14 It was made by email at 4.03 pm on 22 January 2019 and was 'open for acceptance until 5pm tomorrow, Wednesday 23 January 2019, when it lapses'.

respondent having succeeded on the size differential point, the very point that formed the basis of the further discount in the first offer, and indeed the later offers.[15] At this stage, the respondent was entitled to pursue a claim for specific performance, as it turned out without deduction. The later decision to award damages, does not have the suggested effect of assessing the matter as at the earlier date, the date of the offers. In any event, the judge was correct, in the circumstances, to hold that the offers were too low and could be disregarded.

55 Accordingly, the applicants' offers do not provide a basis to contend that it was reasonable to reject the *Calderbank* offer. The specific contended error has not been made out and accordingly leave to appeal on this proposed ground is refused.

Proposed ground 3

56 By proposed ground 3, specific error is alleged. The applicants contend that, in light of the judge's findings, the respondent should not have pursued the remedy of specific performance and that by such pursuit the proceedings were unnecessarily protracted thereby disentitling the respondent to costs.

57 It was submitted by the applicants that the respondent's pursuit of specific performance was unreasonable and constituted misconduct under the *Civil Procedure Act 2010*. This pursuit, it was contended, 'consumed a very material portion of the proceedings and if [the respondent] had acted reasonably a very significant portion, or all, of the costs for both [the respondent] and [the applicants] would not have been incurred'. In these circumstances, and by reference to authority, it was contended that the respondent should pay the applicants' costs or at a minimum the respondent should not recover any costs.

58 At the conclusion of his First Reasons, the trial judge said:

> [The respondent] seeks specific performance of the Contract and the [applicants] have not adduced any evidence or made any submissions as to why that order should not be made, except by asserting that such an order is precluded by their defences based on *Flight v Booth* and misleading and deceptive conduct. On that basis I would ordinarily make the order for specific performance as sought.[16]

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15 Further, the offer did not take into account the respondent's increasing costs and interest.

16 First Reasons, [76].

59 The submission that specific performance should not have been pursued because it was ultimately not obtained overlooks, as submitted by the respondent, the primary approach of equity which ordinarily requires a party in breach of a contract of sale of land to specifically perform the contract according to its terms. This approach was applied by the trial judge who held that the respondent was entitled to pursue specific performance to trial.

60 As is self-evident from an examination of the First Reasons, the three day trial conducted on 25–26 November 2019 and on 10 December 2019 was primarily concerned with issues raised by the defence and counterclaim, and not with specific performance. A significant issue on the construction of the Contract, which required the assistance of expert evidence, was the method of measurement of the area of the apartment. The costs of the issue of specific performance were effectively confined to the one set of written submissions from each of the parties on that separate topic.

61 The submission made by the applicants that if the respondent had 'acted reasonably in rescinding the Contract and reselling the Apartment, alongside mitigating their losses, the entire proceeding and associated costs, or at least a very significant portion of them would have been avoided' is not supported by the facts and the course of the trial. Even if the respondent had rescinded the Contract and simply forfeited the deposit without suing the applicants for any resulting loss, there would still have been a trial. The applicants resisted any method of enforcement of the Contract and actively pursued recovery of both the deposit of $68,440 and damages of $137,558.56 by way of counterclaim, a total of $205,998.56.47.

62 There is nothing in the manner in which the respondent conducted itself in this proceeding that contravenes any of the sections of the *Civil Procedure Act 2010* referred to in proposed ground 3. The specific contended error has not been made out and accordingly leave to appeal on this proposed ground is refused.

Application for leave to amend application for leave to appeal —Proposed ground 4

63 The applicants seek leave to raise a further ground of appeal not relating to indemnity costs, but a belated challenge to part of the award of damages. Although not specifically

sought, they require an extension of time to make such application.

64 In short, the ground is to the effect that the damages award should be reduced by $21,450 on account of marketing costs. In proposed ground 4, the applicants contended that the judge 'overlooked a critical element of the evidence of Mr Richard Francis Curtis [the respondent's managing director] in relation to marketing costs' (paragraph 4 of Mr Curtis' affidavit sworn 2 October 2020). The judge had allowed $30,000 for marketing costs associated with a resale of the Apartment. It was submitted that Mr Curtis' evidence showed that the respondent was contractually entitled to a refund from the agent, or if not refunded a credit from the agent of $21,450, which could and should have been used to reduce marketing costs.

65 The ground was not argued below, and no relevant submission was made by the applicants to the judge concerning the so-called 'critical element of the evidence of Mr Curtis'. Moreover, there is no proper explanation for the applicants' delay in advancing this new proposed ground of appeal. The ground is in any event without merit and we do not propose to grant the necessary extension of time.

66 The period within which to appeal the order as to damages expired on 10 May 2021. The explanation for the delay is that the applicants are self-represented and overlooked 'material grounds for appeal'. It was also submitted that the applicants attempted to negotiate a resolution with the respondent and that the respondent made 'an unnecessary Creditors Petition to the Federal Court'. The applicants allege prejudice.

67 The respondent's solicitor, Peter Anthony Brown, filed an affidavit sworn 23 July, 2021, opposing the application. In his affidavit, Mr Brown deposes that despite the applicants advising on 14 June 2021 that they intended to file an amended written case, they did not indicate the nature and extent of the proposed amendments until 7 July 2021. This was two weeks before the date originally set for the hearing of the appeal and three weeks after the applicants had been advised by the Court of Appeal Registry (on 18 June 2021) as to how to progress the proposed amendment.

68 We do not accept the reason for the delay. Further, there is no prejudice to the

applicants because the proposed ground is in any event not arguable.

69 The limited evidence does not establish the suggested marketing entitlement referred to above. Despite this limited evidence, the issue was not the subject of submissions. It is necessary to provide some context.

70 Clauses 3.4 and 3.4A of a Representative Deed between the respondent and Marshall White and Co Pty Ltd (the agent and 'Representative'), are in the following terms:

> 3.4 Notwithstanding any other provision of this Deed, and in particular clause 3.1, but subject always to clause 3A below, it is hereby expressly acknowledged and agreed by the Representative that if for any reason the Contract of Sale:
>
> (a) is terminated, rescinded or ends; or
>
> (b) fails to Settle on the due date for Settlement of that Contract of Sale or on such other date as [the respondent] and the Potential Purchaser and/or its nominee have agreed pursuant to a Contract Variation,
>
> then:
>
> (c) any right or interest of the Representative to the Fee pursuant to this Deed is void *ab initio*; and
>
> (d) [the respondent] shall be released from any obligation arising pursuant to this Deed or at law to pay the Fee; and
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> (e) the Representative shall within seven (7) days of a request in writing from [the respondent] to do so, refund to [the respondent] any part of the Fee which [the respondent] had paid to the Representative; and
>
> (f) [the respondent] may, at its absolute discretion, deduct from any monies due and payable to the Representative (whether or not such monies are owing under this Deed in respect to the Potential Purchaser or under any other deed, contract or arrangement between [the respondent] and the Representative and/or any third party) any sum to be refunded by the Representative in accordance with this clause 3.4
>
> 3.4A Clause 3.4 is made subject to the following:
>
> (a) Any refund of the Fee by the Representative under Clause 3.4(e) will not be required where the Contract of Sale is rescinded as a result of [the respondent] not proceeding with the development; and
>
> (b) Subject to the Representative at all times using its best endeavours to promptly resell all rescinded Contracts of Sale, [the respondent] will only claim a refund of the Fee by the Representative under Clause 3.4(e) up to a total maximum of $40,000 in Fees (plus GST) for each Project after first allowing a period of grace up to three (3) months from the date of rescission of the Contract during which period the Representative is to use best endeavours to resell the [property

> offered for sale by the respondent] and secure a new Contract for Sale for the [property offered for sale by the respondent].

71 Paragraph 30 of the applicants' submissions dated 22 September 2020, in relation to the assessment of damages states:

> Clause 3.4(a) of the contract between Marshall White and the [respondent] … provides that the [respondent] is not obligated to pay any Fees for the marketing and sale of Lot G04 should the contract be rescinded for any reason. Further, clause 3.4A(b) states that the [respondent] must provide Marshall White a period of no less than three (months) following the rescission of the contract of sale to resell that property at no additional cost.

72 Paragraph 4 of the affidavit of Mr Curtis sworn 2 October 2020, responding to paragraph 30 referred to in the previous paragraph, is in the following terms:

> In respect of paragraph 30 of the [Applicants'] Submissions dated 22 September 2020 clause 3.4A(b) of the Representative Deed … states that the [respondent] could only claim a refund of any Fees paid to Marshall White up to a maximum of $40,000. As a result of defaults by other purchasers of Vanguard Apartments the [respondent] has already recovered Fees from Marshall White up to the maximum $40,000. The provisions of clause 3.4A(b) of the Representative Deed were rendered inoperative by 9 April 2019 such that:
>
> a) the [respondent] is not entitled to claim a refund of the Fee paid to Marshall White Projects in respect of Lot G04;
>
> b) Marshall White Projects is not obliged to seek to resell Lot G04; and
>
> c) In order to sell Lot G04 through Marshall White One the [respondent] would need to separately engage Marshall White One on the same basis as referred to in paragraph 16 of my Affidavit of 20 August 2020.

73 Paragraph 4 merely responds to the applicants' submission, as stated above, and self-evidently provides no evidential basis for the contention sought to be advanced, namely, that the respondent was entitled to a refund or credit in relation to marketing costs.

74 Accordingly, the trial judge was justified, on the evidence, in including the sum of $30,000 as marketing costs. The application for leave to amend the application for leave to appeal is refused.