This case concerned easements over adjoining land on Kangaroo Island. The applicant sought a declaration that easement B over their land, claimed by the first respondent, was invalid. It also sought an order that easements C and J, in their favour over the first respondent’s land, be joined.

The applicant failed in its claim that easement B was invalid. However, it succeeded in its claim that the title should be rectified to join easements C and J. Each party sought the costs of the proceedings.

The applicant sought its costs from 13 September 2018 on the basis of a Calderbank letter sent to the first respondent which included an offer of compromise that was not accepted. The applicant contends this would have left the respondent in the same position as was ultimately found by the Court. The respondent contends it should have its costs of the litigation in relation to easement B upon which it was successful.

Held:

1. The principal issue in the litigation in terms of time and resources was the validity of easement B.
2. It is not possible to make an evaluative judgment of the post-judgment position of the respondent vis-à-vis the position it would have been in if it had accepted the compromise on the evidence before the Court.

3. The applicant should pay, by way of set-off, 75 per cent of the first respondent’s costs of the proceedings.

A, DC v Prince Alfred College Inc (No 2) [2016] SASC 27, discussed.  
Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 4) [2017] FCA 120; Hanson-Young v Leyonhjelm (No 5) [2020] FCA 34; Tickell v Trifleska Pty Ltd (1990) 25 NSWLR 353, considered.
KI SEAPORT PTY LTD (ACN 167 774 058) v ABSTRAXION PTY LTD (ACN 125 885 109) & ANOR (No 2)
[2020] SASC 154

Civil

STANLEY J: This was a case concerned with easements over adjoining land on Kangaroo Island.

KI Seaport sought a declaration that the easement B claimed by Abstraxion over KI Seaport’s land was invalid. It also sought an order requiring the Registrar-General to rectify the misdescription on the register of easements C and J for the provision of three-phase power over Abstraxion’s land with the result that non-contiguous easements would be joined.

KI Seaport failed in its claim that easement B was invalid. However, it succeeded in its claim that the title should be rectified to join easements C and J.

Each party now seeks an order for the costs of the proceedings.

KI Seaport seeks its costs from 13 September 2018 on the basis of a Calderbank letter which included an offer set out in a draft deed which proposed that a new easement be granted which would replace easement B but provide Abstraxion with the same benefit it obtained from easement B. KI Seaport contends this offer, which was not accepted by Abstraxion, was a reasonable compromise. Accordingly, KI Seaport contends that it should have its costs from a reasonable period after Abstraxion’s failure to accept this offer, especially in circumstances where it was successful on the other issues in the litigation including admissibility of evidence, the correction of easements C and J, and Abstraxion’s argument relating to estoppel.

On the other hand, Abstraxion contends that it should have its costs of the litigation in relation to easement B upon which it was successful. While KI Seaport succeeded on its claim in relation to easements C and J, Abstraxion contends that KI Seaport propounded this claim on three separate bases but only succeeded on one. In the circumstances, it would be appropriate for KI Seaport to pay Abstraxion 80 per cent of its costs of the proceedings by way of set-off.

The awarding of costs involves the exercise of judicial discretion. The discretion is to be exercised by reference to factors connected to the conduct of the litigation. While the general rule is that a successful party is entitled to its costs, that precept is of limited assistance in this case.
The Full Court explained the modern approach to awarding costs in *A, DC v Prince Alfred College Inc (No 2)* as follows:

The principles governing the exercise of the costs discretion are well established. The Court exercises a judicial discretion with respect to costs in which the general rule is that costs ordinarily follow the event unless there are special circumstances justifying another order. In more recent times, courts more readily modify the general rule recognising that the interests of justice sometimes require a reduction in the costs that would otherwise have been awarded to a successful party when that party has failed on particular disputed questions of fact or law. In *Ruddock v Vardalis (No 2)*, Black CJ and French J summarised the principles as follows:

Within the general discretion of the courts to award costs it is accepted by decisions in both Australian and English jurisdictions that:

- Ordinarily costs follow the event and a successful litigant receives costs in the absence of special circumstances justifying some other order.

- Where a litigant has succeeded only upon a portion of the claim, the circumstances may make it reasonable that the litigant bear the expense of litigating that portion upon which he or she has failed.

- A successful party who has failed on certain issues may not only be deprived of the costs of those issues but may be ordered as well to pay the other parties' costs of them. In this sense “issue” does not mean a precise issue in the technical pleading sense but any disputed question of fact or law.

The modification of the ordinary rule to reflect the way in which particular issues in the litigation are determined is a response to those ‘cases in which issues are raised which unduly extend the time and expense of litigation’.

In *Victoria and Master Builders Association of Victoria* Ormiston JA explained that in an era of high cost litigation it had become necessary to more often allocate costs according to success on particular issue because ‘regrettably there are many cases in which issues are raised which unduly extend the time and expense of litigation’. Those observations were echoed in *Mickelberg v Western Australia* by Newens J who referred also to ‘the burdens imposed on the public resources of the Court’ by parties pursuing claims on which they are ultimately not successful.

Just as parties must make a cost benefit and risk analysis decision on whether to bring an action at all, so too must decisions be made about which claims to include within an action. Parties should not be encouraged to add to a claim which has sufficient prospects, in itself, to justify the bringing of an action other claims, of doubtful merit, on the assumption that the costs of pursuing the latter claims will be recovered because of success on the good claim.

In adversarial litigation the parties and their legal advisors carry the primary responsibility for ensuring the cost-effectiveness of litigation because they have a particular knowledge and understanding of the controversy, and the available evidence, which the court cannot know because of legal professional privilege.

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1 [2016] SASCFC 27.
2 [2016] SASCFC 27 [5]-[13].
It is therefore the responsibility of the legal profession to actively consider the affect of adding doubtful claims, or mounting defences to good claims without any foundation for doing so, on the efficient resolution of the proceedings. In accordance with that duty legal practitioners must give advice on the relative merits of the possible claims and defences and on the cost and time implications of pursuing those claims so that the litigant is in a position to give informed instructions on how to conduct the proceedings.

The authorities to which we have referred make it clear that the rule does not only apply to a ‘precise issue in the technical pleading sense’ but extends to any substantial disputed question of fact or law. There is of course a limit to the dissection of an action which is practically possible.

On the other hand, the court should not be overly parsimonious in the award of costs to a plaintiff who has won a judgment against a wrongdoer who has denied liability on all of the grounds of the plaintiff’s claim.

There can be no precision in the balancing of the tension between the ordinary rule and its qualification. Much will depend on the extent to which the costs of the litigation of the separate issues can easily be separated out and on the reasonableness of the forensic decision of the successful party to pursue, not only the claims on which he or she succeeded, but also those claims on which he or she failed.

KI Seaport seeks to rely upon authorities which consider the meaning of settlement offers or offers of compromise. Those authorities concern the making of costs orders where there is an unreasonable failure to accept an offer of compromise before trial. It submits that it was unreasonable of Abstraxion not to accept its offer of compromise of 13 September 2018. I do not accept this submission.

The principal issue in the litigation in terms of time and resources was the validity of easement B. While there is much to be said in favour of encouraging parties to litigation to compromise, I have some difficulty with the submission put by KI Seaport. First, it involves acceptance of the proposition that a successful party to litigation who fails to accept an offer of compromise proffered by the party which is ultimately unsuccessful in the litigation should be ordered to pay costs where the Court has vindicated the defence of its legal rights. Second, KI Seaport’s submission in relation to the easement B issue depends upon the contention that Abstraxion ultimately would have been in as good a position if it had accepted KI Seaport’s offer, as the position is now, given the finding that easement B is valid.

KI Seaport’s offer was to grant a new easement which shaved 7.5 square metres off the western edge of easement B. Whether acceptance of that offer would have left Abstraxion in as good a position as it enjoys given the validity of

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3 Romero v Farstad Shipping (Indian Pacific) Pty Ltd (No 4) [2017] FCA 120 at [73]; Hanson-Young v Leyonhjelm (No 5) [2020] FCA 34 at [48]; Tickell v Trifleska Pty Ltd (1990) 25 NSWLR 353 at 354-355.
easement B involves an evaluative judgment I cannot make on the evidence I have received.

In these circumstances, I cannot make any order based on the so-called Calderbank offer relied upon by KI Seaport.

Having regard to the respective successes and failures of the parties I consider a fair outcome is that, by way of set-off, KI Seaport should pay 75 per cent of Abstraxion’s costs of the proceedings, to be agreed or taxed.