SUPREME COURT OF VICTORIA

COURT OF APPEAL

No 6321 of 2005

MACEDON RANGES SHIRE COUNCIL — Applicant

v

GLENN ALEXANDER THOMPSON — Respondents

and

CHERYL MAREE THOMPSON

APPLICATION ON SUMMONS

JUDGES:	REDLICH JA and BEACH AJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	28 August 2009
DATE OF JUDGMENT:	24 September 2009
MEDIUM NEUTRAL CITATION:	[2009] VSCA 209

Costs – Discontinuance of appeal – Indemnity costs – Whether appeal hopeless – Respondents unrepresented – Whether punitive cost order appropriate where unrepresented litigant discontinues appeal – Rule 64.14(3).

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr G J Ahern	Maddocks Lawyers
For the Respondents	In person	

REDLICH JA
BEACH AJA:

1 By Notice of Discontinuance dated 23 June 2008 the appellants wholly discontinued an appeal against a decision of trial judge of this Court. The consequence of the discontinuance of the appeal was that the appellants were required to pay the costs of the respondent (on a party/party basis), unless the Court otherwise orders.[1] In July 2008 the second respondent ('the Authority') successfully applied, by summons, for an order that the appellant pay its costs on an indemnity basis. The first respondent ('the Council') now seeks the same such order from this Court, including an order that its costs be paid out of monies paid into court by the appellants pursuant to an order previously made that the defendant provide security for costs.

The Application

2 The Council submits that the Court should exercise its discretion to make an order for the payment of indemnity costs, on the basis that the discontinued appeal was 'hopeless' in that it had no prospect of success.[2] It relies upon r 64.14(4) of the *Supreme Court (General Civil Procedure) Rules 2005* which provides in substance that following the discontinuance of an appeal the Court of Appeal may make such order as to costs as it sees fit.

Summary of Proceedings

3 In 2005 the appellants instigated proceedings (the new claim) against the Council and the Authority alleging misfeasance in public office and fraud. These allegations related to the sealing of plans in relation to two parcels of land, which have been described in previous proceedings as the 'Tylden Road land' and the 'Woodleigh Heights land'. The factual allegations made in the statement of claim

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1 Rule 64.14(3).

2 *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397; *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225.

related to events that were alleged to have occurred in the early 1980s in respect of the Tylden Road land and during the period 1979 to 1989 in respect of the Woodleigh Heights land. They are described in the following passage from the judgment of Mandie AJA (as he then was) with whom Neave JA agreed, on the hearing of the application of the Water Authority for indemnity costs in relation to the discontinued appeal.

> The appellants had purchased the Tylden Road land which formed part of a subdivision that had been approved by the Council. The appellants became involved in a dispute with the Council and the Authority and involved in litigation in which they successfully defended certain claims made by the Council. Then appellants then brought a proceeding in the County Court against the Council and the Authority to recover money that they had paid out for works carried out by the Council and the Authority. This proceeding was settled in 1991 and the appellants gave the respondents a release in consideration of $40,000 plus costs. The release related to 'all claims, suits and demands, whatsoever the subject matter of this proceeding'. The appellants also purchased, in 1979, certain allotments within the Woodleigh land a dispute arose relating to the supply of water which resulted in a proceeding, in 1995, by the appellants against the Council and the Authority in which the appellants alleged that they had suffered a consequential loss upon a mortgage sale in 1984. This proceeding was also settled (in 1999) and the appellants gave a release to the Council and the Authority in consideration of money paid to them.[3]

4 In response to the new claim brought by the appellants, the Council and the Authority applied for summary judgment before Master Efthim (now Efthim AsJ). They did so on the basis that the matters had been previously the subject of settlement, that the subject of the new claim was so closely connected with the subject matter of earlier proceedings they should have been raised in the earlier proceedings[4] and that the appellant was barred by the relevant statutory limitations period. The appellants, who were then represented by solicitors and Senior Counsel, disputed that the matters had been previously resolved by earlier litigation and sought to rely upon the fraud exception to the six year limitation period applicable to the tort of misfeasance in public office.[5] In May 2006, Master Efthim granted the application for summary dismissal of the proceedings on the basis that it was statute

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3 At [9].

4 *Port of Melbourne Authority v Anshun* (1981) 147 CLR 589.

5 Section 27(b) of the *Limitations of Actions Act* 1958.

barred and that the appellants were seeking to re-agitate issues resolved upon settlement of the earlier proceeding or in the alternative, were seeking to agitate issues so closely connected as to enliven the principles of *res judicata* and *Anshun* estoppel. Master Efthim ordered that the appellants pay indemnity costs in respect of these proceedings.

5 The appellants thereafter became self-represented, the first named appellant appearing on behalf of both appellants. They appealed from the decision of the Master to a judge of the trial division. On 29 November 2006, the trial judge dismissed the appeal. We, once again, gratefully adopt Mandie AJA's summary of the reasons of the trial judge:

> In his reasons for judgment, the [trial] Judge concluded, in relation to the Tylden Road land, that the appellants' claim could not succeed because, inter alia, it was the subject of a release upon settlement of the County Court proceedings and because the relevant limitation period had expired at a time when the appellants were already aware of all of the facts necessary to found their claim of misfeasance in public office (or such facts were ascertainable upon the exercise of reasonable diligence). Thus, there was no arguable basis for the appellants' contention that there had been any relevant concealment of facts by the respondents. The [trial] Judge further concluded, in relation to the Woodleigh land, inter alia, that their claim was barred by the full and complete release that they had given in the terms of settlement in the Supreme Court proceeding and that there was no arguable basis on which the limitation defence could be avoided. This is a bare summary which does not do justice to the full and detailed analysis contained in the 57 page reasons for judgment.[6]

6 The Council and the Authority each then applied for an order that the costs of the appeal before the trial judge be payable on an indemnity basis. On 7 December 2006 the trial judge granted this order. In doing so, his Honour, identified six bases upon which he concluded that such an order was justified in the circumstances:

> (a) first, that the case fell within the principle identified by Woodward J in *Fountain Selected Meat (Sales) Pty Ltd v International Produce Merchants Pty Ltd & Ors*[7] as being one where the applicant, properly advised, 'should have known he had no chance of success' and 'must therefore be presumed to have been commenced or continued for

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6 At [13].

7 (1988) 81 ALR 397.

some ulterior motive or because of some wilful disregard of the known facts or the clearly established law;

(b) secondly, that the proceeding was brought, in large part, in breach of terms of settlement;

(c) thirdly, that the appellants had failed to make out an arguable case with respect to allegations of fraud and in particular fraudulent concealment of material facts;[8]

(d) fourthly, that the conduct of the appeal was 'marked by extended vilification of opposing parties', counsel and legal representatives;

(e) fifthly, that the appeal was brought in the face of reasons that identified fundamental problems with the appellants' claim, placing the appellants on 'plain warning that there was no sensible basis for the appeal' and the likelihood of indemnity costs (indemnity costs being, in fact, granted in respect of the proceedings before the Master); and

(f) sixthly, that each of the above matters in combination constitute special circumstances such as to justify an award of indemnity costs.[9]

7 The appellants then filed a notice of appeal, dated 21 December 2006, against the orders made by the trial judge. The Council consequentially issued a summons seeking security for the Council's costs of the appeal. This application was heard on 5 September 2007 by the Court of Appeal (Buchanan and Redlich JJA) along with a similar application made by the Authority. The Court ordered that the appellants provide security for the costs of the appeal of the Council and the Authority, being in each case an amount of $30,000. This amount, of $60,000, was duly paid into court on 4 October 2007. The parties were then informed, on 29 May 2008, that the appeal had been listed for hearing on 19 August of that year.

8 The appellants then obtained legal representation in preparation for the appeal. By notice dated 23 June 2008 they discontinued the whole of their appeal against both respondents.[10] That day the Authority filed an application seeking an order that the appellants pay their costs on an indemnity basis. As is noted above, this application was granted, the Court concluding that the appeal 'must be regarded

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8 Referring to *Thorne & Ors v Doug Wade Consultants Pty Ltd & Ors* [1985] VR 433, 500.

9 Referring to *Ugly Tribe Company Pty Ltd v Mario Sikola & Ors* [2001] VSC 189.

10 Pursuant to r 64.14(2)(a) of the *Supreme Court (General Civil Procedure) Rules 2005*.

as having been hopeless'.[11] Having come to that view, the Court found it unnecessary to consider other bases upon which it was submitted that the appellants ought be ordered to pay costs on an indemnity basis. This included the Authority's submission that the appellants had made allegations of fraud that were held to be unfounded and had made certain allegations in relation to the Court itself.[12] Mandie AJA said:

> In my opinion an order for indemnity costs is called for in the present matter simply because the appeal must be regarded as having been hopeless. As the judgment appealed from demonstrates, the claims made by the appellants in the proceeding were the subject of full and complete releases contained in terms of settlement of earlier proceedings. In addition, the claims were statute barred and, as the judge found, the appellants were aware of all of the relevant facts within the limitation periods. As I have said, having abandoned the appeal, the appellants cannot seek to contradict the judicial determinations that led to the summary judgment in the Trial Division.[13]

The present application

9 The Council now seeks indemnity costs on the basis that the appeal was hopeless. It submitted that this conclusion followed from the findings of the trial judge that the claims made were the subject of full and complete releases and the finding that the claims were statute barred. The application was submitted on the basis that the merits of the appeal was determinative in justifying an order for indemnity costs.

10 Glenn Thompson, the first listed appellant, once again appears in person on behalf of the appellants. Mr Thompson submits that an award for indemnity costs would be inappropriate. He makes a number of serious allegations concerning the trial judge and the legal representatives involved in the proceeding which need not be repeated given the conclusion we have reached. It is sufficient to observe that while it appears that Mr Thompson genuinely holds to these beliefs, they involve a serious misunderstanding of the evidence and its legal implications. No material has

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11 At [30].

12 At [31].

13 At [30].

been advanced by written or oral submissions which might on any view support these allegations. The remainder of the submissions constituted an attempt to re-litigate the matters decided by the trial judge instead of focussing upon why an order for indemnity costs was not warranted. The appeal having been discontinued by the appellants, it is inappropriate that the costs hearing provide the forum for the appellants to agitate their complaints about the trial.

11 One issue which arises in the present application is the delay between the application of the Council and that of the Authority. The explanation for the delay is contained in the affidavit of Jacqueline Sue Partridge solicitor for the Council who deposed:

> The council did not make its application for an indemnity costs order at the same time as the application made by the Water Authority. The Council elected to pursue alternative avenues and entered into discussions with the appellants, through their lawyers, Isakow lawyers. No resolution was reached with the appellants as to the payment of the Council's costs of the appeal. The Council's preference was that Mr Ahern settle the materials for this application and appear on its behalf given that he had acted in this matter on behalf of [the] Council in each step of the proceedings since they were commenced in May 2005. Mr Ahern was briefed in March 2009. The timing of the issuing of this application was in light of his other commitments.

12 It was not contested by the appellant that such attempts to resolve the issue had been made by representatives for the Council. We observe, however, that the appellants lawyers filed a Notice of Ceasing to Act on 2 September 2008, 3 days before the application for an indemnity costs order was heard from the Water Authority. The Summons in this application was not filed until 5 June 2009. The explanation for the delay in seeking indemnity costs is not entirely satisfactory.

General principles as to indemnity costs

13 In applying for costs on an indemnity basis, the Council is seeking a departure from the usual course[14] which requires it to demonstrate the existence of special

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14 *Ugly Tribe Company Pty Ltd v Marios Sikola & Ors* [2001] VSC 189, [7]; *Spencer v Dowling* [1997] 2 VR 127. See also the terms of rule 64.14(4) that requires that the Court 'otherwise orders' for a grant of indemnity costs.

circumstances.[15] Nettle JA, in *Murdaca v Maisano*[16] delivering the principal judgment referred to the passage from the much cited authority of *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchant Ltd* in these terms:

> As Woodward, J. put it, it is appropriate to consider awarding solicitor/client costs or indemnity costs whenever it appears that a party properly advised should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive or because of some wilful disregard of the known facts or to clearly established laws.[17]

14 The Council also referred to an often cited passage from the judgment in *Colgate Palmolive v Cussons* where Sheppard J, although cautioning that the categories are not closed, listed some of the circumstances which have been thought to warrant the discretion for an award of indemnity costs –

> ... [I]t is useful to note some of the circumstances which have been thought to warrant the exercise of the discretion. I instance the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud (both referred to by Woodward J in *Fountain* and also by Gummow J in *Thors v Weekes;* evidence of particular misconduct that causes loss of time to the court and to other parties (French J in *Tetijo*); the fact that the proceedings were commenced or continued for some ulterior motive (Davies J in *Ragata)* or in wilful disregard of known facts or clearly established law (Woodward J in *Fountain* and French J in *J-Corp*); the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions (Davies J in *Ragata*); an imprudent refusal of an offer to compromise (eg *Messiter v Hutchinson; Maitland Hospital v Fisher (No 2); Crisp v Kent* (SCNSW)(CA), 27 Sept 1993, unreported) and an award of costs on an indemnity basis against a contemnor (eg Megarry V-C in *EMI Records*). Other categories of cases are to be found in the reports. Yet others to arise in the future will have different features about them which may justify an order for costs on the indemnity basis. The question must always be whether the particular facts and circumstances of the case in question warrant the making of an order for payment of costs other than on a party and party basis. (citations omitted).[18]

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15 *Ugly Tribe Company Pty Ltd v Marios Sikola & Ors* [2001] VSC 189, [7] (Harper J); *Australian Electoral Commission v Towney (No 2)* (1994) 54 FCR 383, 388 (Foster J).

16 [2004] VSC 123 [40].

17 (1988) 81 ALR 397.

18 (1993) 118 ALR 248, 257.

Where the proceeding has no prospect of success

15 Costs may be ordered whenever it appears that an action has been commenced in circumstances where the applicant properly advised should have known it had no chance of success. When a litigant presses on where on proper consideration their case should have been seen to be hopeless, the discretion to make a special costs order may be enlivened. French J (as he then was) in *J-Corp Pty Ltd v Australian Builders Labourers Federated Union of Workers Western Australia & Anor*[19] considered that the discretion to award such costs would be enlivened when a party persisted, for whatever reason, in what should on proper consideration have been seen to be a hopeless case, and alluding to the presumption referred to by Woodward J in *Fountain Selected Meats* said that it was an unnecessary condition of the power to award such costs that a collateral purpose or some species of fraud be established. But where the litigant did not recognise that its case was without merit a court may be disinclined to make a special costs order.[20] The Court must measure the litigant's conduct against the facts then known or which ought to have been known, the inquiries that the litigant ought reasonably to have made and the legal advice which the litigant ought reasonably to have obtained.[21] This exercise may be subject to some qualification in respect of a self represented litigant.

Self represented litigants and indemnity costs

16 The appellants were 'self-represented' throughout the period in which the Notice of Appeal and appeal books were filed (the notice of discontinuance coming approximately 6 weeks after legal advisors had been retained). The question, therefore, arises as to the extent to which the fact the appellants were self-represented ought weigh in the exercise of the Court's discretion as to costs. This

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19 Unreported FCA, 9 February 1993 (French J).

20 *Hurstville Municipal Council v Connor* (1991) 24 NSWLR 724; *Monitronix Ltd v Michael* (1992) 7 WAR 195; *Ugly Tribe Co Pty Ltd v Sikola*, [2001] VSC 189, [18] (Harper J); *Clarke v Deputy Commissioner of Taxation* (2002) 50 ATR 173.

21 *Aljade and MKIC v OCBC* [2004] VSC 351.

question was not raised for consideration by the Court in the application by the Authority.

17 But as a general rule a court will be more reluctant to make an order for indemnity costs against a litigant in person than against a represented litigant.[22] The prevailing circumstances of the case might be such as to allow the Court to overcome this reluctance.[23] Robson J in *Vink v Tuckwell*[24] conveniently summarised the effect of the authorities dealing with circumstances in which a non-represented litigant might be subject to an order for indemnity costs as follows:

> **[103]** There are special considerations applying to indemnity cost orders against litigants in person, as the following authorities disclose.
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> **[104]** In *Bhagat v Royal and Sun Alliance Life Assurance Australia Ltd,* Hodgson CJ in Eq observed:
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> ... I accept that a court does have to make allowances for the position of litigants in person, and to try to ensure that such a litigant does not lose out because of lack of expertise; although there is a limit to what the Court can do in that regard, while still remaining an impartial determinant of a dispute. The Court may in those circumstances refrain from making orders against litigants in person for conduct that might be considered as justifying orders for costs against represented litigants. By the same token, litigants in person can cause great hardship and expense to other parties, through making allegations and claims that lawyers would recognise as allegations and claims that could not reasonably or even properly be made, and through making proceedings much longer and much more expensive than they would otherwise be, by not focusing accurately on the real issues in the case. Conduct of that nature by legally represented parties would often lead to orders for indemnity costs. Litigants in person may escape the consequence of indemnity costs, but I do not think that the circumstance that a party is a litigant in person is a ground for displacing the ordinary result that costs follow the event.
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> **[105]** In *Bhagat v Global Custodians Ltd,* the Full Court of the Federal Court (constituted by O'Loughlin, Whitlam and Marshall JJ) observed Hodgson CJ in Eq did not say that litigants in person always escape the consequence of indemnity costs and declined to interfere with the decision of the trial judge to order indemnity costs against the unrepresented litigant. These judgments were cited with approval by Kenny J in *Ogawa v The University of Melbourne (No 2).*

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22 *Ogawa v The University of Melbourne (No 2)* [2004] FCA 1275; *Bhagat v Royal & Sun Alliance Life Assurance Australia Ltd* [2000] NSWSC 159.

23 *Spalla v St George Motor Finance Ltd (No 8)* [2006] FCA 1537.

24 (2008) 67 ACSR 547.

[106] In *Spalla v St George Motor Finance Ltd (No 8)*, Kenny J said:

> From time to time the courts overcome their reluctance to order indemnity costs against a self-represented litigant: see, for example, *Bhagat v Global Custodians* and *Ogawa v The University of Melbourne (No 2)*.

[107] Further in *Salfinger v Niugini Mining (Australia) Pty Ltd (No 4)*, Heerey J said as follows:

> In *Spalla v St George Motor Finance Ltd (No 8)*, Kenny J recently noted that courts have from time to time overcome a reluctance to order indemnity costs against self-represented litigants: *Bhagat v Global Custodians* and *Ogawa v The University of Melbourne (No 2)*. Kenny J considered the competing interests in determining whether to make an award of indemnity costs against a self-represented litigant. A lack of knowledge of the law, unfamiliarity with court practice and a lack of objectivity are common traits of unrepresented litigants. A person's ability to redress should not depend on lawyerly skills or an ability to pay for legal representation. However, the Court owes a duty to all parties to ensure that the trial is conducted in a fair and timely fashion and without significant difficulties and unnecessary expense for the parties against whom an unrepresented litigant proceeds: see *Bhagat v Royal and Sun Alliance Life Assurance Australia*. In this instance the expense, delay and difficulties caused by the applicant's fraudulent and unreasonable behaviour overshadow any limitations that arose from his status as self-represented.

18 Having reviewed the authorities, his Honour concluded that there ought be an order that part of the costs of the proceeding be paid on an indemnity basis:[25]

> [108] In this case, I take into account Mr Vink's lack of knowledge of the law, an unfamiliarity with court practices and a lack of objectivity as an unrepresented litigant. On the other hand, Mr Vink was not seeking redress for himself, nor did he have any other interest in seeking the orders that he did. I accept that there has been a reluctance on the part of courts to order indemnity costs against self-represented litigants, however in the circumstances of this case I feel that Mr Vink should not be excused from such an order if it is otherwise warranted.
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> **Conclusion**
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> [109] After considering all the matters submitted to me, I believe that Mr Tuckwell has established special circumstances that entitle me to depart from the usual order as to costs and to award costs on an indemnity basis. In my discretion I believe it is just, fair and reasonable that Mr Tuckwell be indemnified for his costs. I have taken into account all the matters referred to above including the fact that Mr Vink's complaints against Mr Tuckwell were without substance, his continuing the proceedings after Dodds-Streeton J had warned him of the weakness of his case and the material he relied on and after I found that his proceeding would very likely fail, that he suggested that an inquiry may find dishonesty on the part of Mr Tuckwell where there were no reasonable grounds for suggesting dishonesty, the delays through his

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25 At [108]-[109]. Referred to with approval by Hargrave AJA with whom Warren CJ agreed in *Vink v Tuckwell* (2008) 68 ACSR 265, [43].

reliance on inadequate evidence and his having no interest in the liquidation whatsoever.

Is an order for indemnity costs justified?

19 Conduct of a character which would warrant such an order in the case of a discontinued appeal must ordinarily be found within the conduct of the appeal. The matters raised by the appellants in the Notice of Appeal dated 21 December 2006 are primarily claims that the findings of the trial judge were against the evidence. It also contains grounds which claim that the appellants were denied natural justice and that the orders made by the trial judge were fabricated. The voluminous written submissions filed in response to this application also provide a number of allegations of fraud or bad faith against a wide range of persons involved in the previous proceedings.

20 In its outline of submissions the respondent did not seek to rely upon these allegations of fraud or misconduct by the appellant against the Council as justifying an award for indemnity costs (in contradistinction to the previous application by the Authority who did seek to rely upon such conduct). In oral argument it was only faintly pressed as the basis for making such an order. There is a significant question as to whether, in the circumstances of an application for costs of a *discontinued* appeal, such conduct assumes any significance. Unfounded allegations of fraud and misconduct were plainly made by the appellants before the Master and before the trial judge. An award for indemnity costs was duly made in respect of those proceedings. There would, however, be an element of what might be described as 'double counting' were those previous allegations to be relied upon as contributing to the circumstances in which an award of costs might be made in the case of a *discontinued* appeal.

21 Where a case is without merit but other factors are not present, the circumstances may not be regarded as sufficient to justify an order for indemnity costs. Kirby P (as he then was) in *Wentworth v Rogers (No 5)*[26] said :

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26 (1986) 6 NSWLR 534

> The respondent sought an order for costs on an indemnity basis, seeking thereby to be protected from the necessary solicitor and client costs incurred by him in resisting this unmeritorious claim on numerous occasions both in the Court of Appeal and before the Equity Division. Reference was made to the decision of Holland J in *Degmam Pty Ltd (In Liq) v Wright (No 2)* [1983] 2 NSWLR 354. In that case Holland J held that, where an unsuccessful party had prolonged a trial by deliberately false allegations of fact, an appropriate order for costs might be made on an indemnity basis, save for costs unreasonably incurred by the successful party. That is the order which the respondent sought here.
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> Although, as has now been found, this case was without merit, I am not convinced that it was brought for the purpose of prolonging the litigation. On the contrary, I am sure that the appellant, misguidedly, considered that it would be a speedy way to conclude the litigation. Furthermore, I do not consider that the appellant has been deliberately false with the Court nor that she has made allegations which she believes or knows to be false. It is true that some of the allegations made are scandalous, resting as they do on a most flimsy and unconvincing basis. All of the other allegations were not, in law, sufficient to give rise to the cause of action which the appellant sought to advance in her statement of claim. But consideration must be given to the fact that in *Degmam* the party criticised was legally represented whereas here the appellant has done her best, unaided, to find her way through a relatively unfamiliar area of the law, not without its complications. In all of the circumstances, I consider that it will be sufficient to make the normal costs order.

22 Different considerations arise in assessing the suitability of an order for indemnity costs against an appellant who persists with an unmeritorious appeal and one who promptly discontinues the appeal upon the receipt of legal advice. We observe that the timeline of the appeal discloses the discontinuance of the appeal a short time after legal advice was provided. On 21 December 2006, the appellants, then self-represented, filed a Notice of Appeal. On 1 March 2008 the appellants (still unrepresented) filed an 11 volume appeal book. On 28 May 2008 a firm of solicitors sent a letter addressed to the Court of Appeal which explained:

> In recent days we have been retained by the appellants ... to act for them in this matter. We have briefed Ian Waller SC and Louie Hawas of Counsel to assist. The appellants were not legally represented at the hearing before the primary judge and until now have acted for themselves in the appeal.

23 On 29 May 2008 the appeal was fixed for hearing on 19 August 2008. On 23 June 2008 the solicitors on the record filed the Notice of Discontinuance on behalf

of the appellants.[27] By the written submissions Mr Thompson stated that he:

> abandoned [sic] the appeal principally to save money because it was plain that Dixon et al continued to deceive the Court and as set out in the addendum this Court of Appeal had already established its mind and Justice Buchanan expressed that mind before and without trial.

24 Later in oral argument this position was moderated to the statement that he was influenced, in part, by the observation at the security for costs application that the appeal faced significant difficulties.

25 There is a considerable policy advantage in ensuring that a punitive costs order is not made against a party who has elected to discontinue an unmeritorious appeal. As was said by Kirby P in *Huntsman Chemical Company Australia v International Pools* in respect of an abandonment:

> ... it would be undesirable for the Court, by its costs order, to discourage the proper, but late abandonment of unwinnable appeals or points. Yet this might occur if there were a suggestion that such an act of responsible advocacy would be penalised by the making of a special costs order.[28]

26 The appellant elected to discontinue shortly after retaining legal advice (following a period of approximately six weeks). In exercising the Court's discretion we take into account the fact that a self-represented litigant will not necessarily know that their case is hopeless or without merit. A court may more readily accept that the litigant without the benefit of legal advice commenced proceedings with a genuine, although wrongheaded belief that he had a legitimate basis for the appeal. Relevantly, Mr Thompson acknowledged during oral argument that he discontinued the appeal after concluding from comments made by the bench during the security for costs application that his appeal faced significant difficulties.

27 In our view this is not an appropriate case in which to exercise the special jurisdiction of the Court to order indemnity costs in respect of the discontinued appeal of the appellants. The application for indemnity costs is therefore dismissed.

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27 Isakow Lawyers filed a Notice of Solicitor Ceasing to Act on 2 September 2008.

28 (1995) 36 NSWLR 242, cf *Rhee v Mason* [1996] NSWCA 449; *Gruzman Pty Ltd v Bateman* [1996] NSWCA 235.

Subject to any argument that the appellant may wish to advance we would order that the Council should have its party/party costs paid out of monies that were paid into Court by the appellants pursuant to the order for security for costs made 5 September 2007.
