IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL COURT
COMMERCIAL LIST

Not Restricted

S ECI 2020 02653

M C WHOLESALING PTY LTD (ACN 621 035 265) & ANOR (according to the Schedule) — Plaintiffs

v

MING CHE & ORS (according to the Schedule) — Defendants

JUDGE:	DELANY J
WHERE HELD:	Melbourne
DATE OF HEARING:	By written submissions dated 18 November 2022, 22 November 2022, 2 December 2022, 5 December 2022 and 9 December 2022
DATE OF RULING:	22 May 2023
CASE MAY BE CITED AS:	*M C Wholesaling Pty Ltd & Anor v Che & Ors (No 5)*
MEDIUM NEUTRAL CITATION:	[2023] VSC 267

COSTS — Proceeding discontinued — Whether plaintiffs should pay costs on indemnity basis — Freezing orders obtained and maintained on basis of allegations of fraud — Unreasonable rejection of Calderbank offer — Costs awarded on indemnity basis — *NIML Ltd v Man Financial Australia Ltd (No 2)* [2004] VSC 510, *Russian Airlines v Leeds* [2018] EWHC 1735 (Ch), *Aljade and Malaysian Kuwaiti Investment Co SDN BHD (MKIC) v Oversea-Chinese Banking Corp Ltd (OCBC)* [2004] VSC 351, *Leichhardt Municipal Council v Green* [2004] NSWCA 341, *Bathurst Real Estate Pty Ltd v Fairbrother (No 2)* [2022] NSWSC 408 referred to.

COSTS — Whether non-party costs order should be made — Costs order sought against sole director of plaintiffs — Plaintiff solvency dependent on recoverability of unsecured loans — Making and pursuit of serious fraud allegations by and at instigation of director — Appropriate to make costs order against director personally — *Bakers Investment Group (Australia) Pty Ltd v Caason Investments Pty Ltd* [2015] VSC 644, *JAB Nominees (Aust) Pty Ltd v Auswild* [2020] VSC 731 referred to.

COSTS — Whether costs to be awarded on gross sum basis — Insufficient evidence for Court to estimate costs — *Supreme Court (General Civil Procedure) Rules 2015* (Vic) rr 63.07, 63.71.

COSTS — Duplicative summons — No order as to costs.

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs and First to Seventeenth Defendants by Counterclaim (including Wenjun Zhang)	A L Ounapuu	H & H Lawyers until 3 May 2023 Amberlake Lawyers from 3 May 2023
For the Second Defendant	S Thomas	J2 Legal
For the Third and Fourth Defendants	S V Palmer	Oakley Thompson & Co

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HIS HONOUR:

Introduction

1 This ruling concerns the costs orders that should be made following the discontinuance of this proceeding by the plaintiffs, M C Wholesaling Pty Ltd ('MC Wholesaling') and Australia Productions Pty Ltd ('AusPro'), against the second defendant, Bo Zhang ('Luke'), the third defendant, Lin Zheng ('Rocky'), and the fourth defendant, Linfang Pty Ltd ('Linfang'), a company associated with Rocky.

2 The parties agree that, as the proceeding has been discontinued against Luke, Rocky and Linfang, those defendants are entitled to their costs. The issues in dispute are:

(a) whether Luke, Rocky and Linfang are entitled to costs on a standard basis or on an indemnity basis, in particular on the basis that:

(i) Luke served an offer of compromise on the plaintiffs;

(ii) Rocky served a Calderbank offer on the plaintiffs;

(iii) the discontinued defendants contend that the plaintiffs' claim was always doomed to failure; and/or

(iv) the discontinued defendants contend that the plaintiffs knowingly made or persisted with false or unsubstantiated allegations of fraud against them;

(b) whether it is appropriate to make a costs order against the sole director of the plaintiffs, Wenjun Zhang ('Andy'), personally; and

(c) as between the plaintiffs and Luke only:

(i) whether it is appropriate to make a gross sum costs order; and

(ii) whether Luke is entitled to the costs of his summons dated 12 October 2022 and filed on 13 October 2022 and, if so, whether on a standard or indemnity basis.

3 The history of the conduct of the proceeding by the plaintiffs is critical to the determination of the disputed costs issues.

4 The proceeding was initiated on 22 June 2020. It began with an ex parte application for freezing orders which I heard and determined on 23 June 2020. In support of the freezing orders, the plaintiffs filed an affidavit of Andy, the driving force behind the plaintiffs, dated 19 June 2020 ('Zhang Affidavit') and an outline of submissions. The basis for the freezing orders was allegations of fraud against Luke, Rocky and the first defendant, Ming Che ('Aries').

5 The Zhang Affidavit included evidence that:[1]

> Aries and Luke (with the assistance of Rocky) skimmed the Plaintiffs' stock, issued fraudulent invoices to cover their tracks and sold the stock to third parties for amounts greater than that charged to our customers, and kept the profit for themselves.

6 Under the heading 'Fraudulent delivery fees', the Zhang Affidavit stated:[2]

> I believe that Rocky (via Linfang) has issued invoices to MCW [the first plaintiff] claiming "logistics fees" for purportedly delivering stock to our customers (which invoices have been paid), when in fact those goods were unlawfully taken and sold to third parties. Based upon Rocky's average fortnightly "logistics fees" ($7,000) and the quantum of goods the subject of the fraudulent invoices ($10.4 million), for the period from July 2018 to February 2020, I estimate that Rocky has fraudulently claimed at least $200,000 in "logistics fees".

7 In submissions in support of the freezing orders, the plaintiffs asserted that:[3]

> (a) in breach of their fiduciary and contractual obligations to the Plaintiffs, the First Defendant (**Aries**) and the Third Defendant (**Rocky**) unlawfully "skimmed" approximately $10.4 million of the Plaintiffs' powdered milk stock;
>
> (b) Aries, Rocky and the Second Defendant (**Luke**) (who knowingly assisted and participated in the scheme):
>
> (i) sold the skimmed stock to third parties for profit; and
>
> (ii) utilised a fraudulent invoicing scheme to cover their tracks;

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1 Affidavit of Wenjun Zhang affirmed 19 June 2020, [29].

2 Ibid [32].

3 Plaintiffs, 'Plaintiffs' Outline of Submissions', 22 June 2020 ('Plaintiffs' Freezing Order Submissions'), [2] (footnotes omitted).

(c) by reason of the Defendants' fraudulent conduct:

(i) the Defendants hold on trust for the benefit of the Plaintiffs their unlawfully acquired profits, which are estimated to be between $300,000 - $2.6 million;

(ii) the Plaintiffs have suffered loss and damage:

(A) missing stock: $41,382.50;

(B) credit notes provided to the Plaintiffs' affected customers: $61,505;

(C) payment of fraudulent logistics fees to Rocky: approximately $200,000;

8 The plaintiffs' submissions stated that:[4]

> Risk of dissipation may be inferred where, as here, the applicant's cause of action is based in fraud (or there exists some other form of dishonesty on the part of the defendant) and there is prima facie evidence to support a good arguable case on this ground.
>
> …
>
> The risk that the Defendants may remove their assets from the jurisdiction should be inferred from the prima facie evidence of their fraudulent conduct. The Defendants went to considerable lengths to conceal their fraud and did so successfully for at least 18 months. The fraud involved a substantial amount of money and a reasonable degree of sophistication.

9 The submissions proceeded to set out 'compelling evidence of the Defendants' fraudulent scheme'.[5]

10 On 23 June 2020, in my reasons for granting the freezing orders, I explained that:[6]

> Based on the affidavit evidence, it appears that the first and third defendant were engaged in systematic fraud over a prolonged period of time. From the 17 February 2020 conversation between Mr Zhang and Aries, it appears that Aries gave product to the second defendant, Luke, and that Luke sold the product, and Luke and Aries shared the profit. The documentary evidence shows that payments of invoices were made by companies of which the second defendant is or was a director. On that basis, it appears that each of the defendants were involved in a fraudulent scheme.
>
> …

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4 Ibid [5], [7] (citations omitted).

5 Ibid [6].

6 *Ex parte M C Wholesaling Pty Ltd* (Unreported, Supreme Court of Victoria, Delany J, 23 June 2020), [23], [30].

> The nature of the allegations made against the defendants; serious allegations of systematic and sophisticated fraud, and the evidence to which I have referred is such that it may be inferred there is a risk of dissipation of assets if a freezing order is not made.

11 The fraud allegations were not picked up in the pleadings that followed, but the freezing orders continued for periods ranging from one month to over two years against Luke, Rocky and Linfang until they were discharged.

12 By their original Statement of Claim dated 9 October 2020, the plaintiffs alleged that Aries and Rocky owed them fiduciary duties[7] and that, in breach of those duties, Aries and Rocky unlawfully diverted stock.[8] The diversion was alleged to occur in two ways.[9] Firstly, by not delivering stock to the plaintiffs' customers, instead generating and using fake invoices and fake email addresses and issuing replacement invoices to the plaintiffs' customers with significantly lower levels of stock. Secondly, by failing to deliver returned product to the plaintiffs' warehouses. It was alleged that Luke knowingly received and on-sold diverted stock.[10]

13 By order made on 17 June 2021, the plaintiffs were granted leave to join Linfang as the fourth defendant.

14 By their Amended Statement of Claim dated 13 October 2021, the plaintiffs abandoned their allegations that Rocky owed fiduciary duties which had been breached. Instead, they pleaded knowing assistance and knowing receipt by Rocky and Linfang in relation to Aries' breach of duties.[11]

15 The timing and the circumstances of the discontinuance are as follows. On 29 August 2022, Barrett AsJ ordered that the plaintiffs and defendants by counterclaim make discovery of various categories of documents. On 11 October 2022, Aries filed a summons seeking an order that the plaintiffs' claims be dismissed

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7 Plaintiffs, Statement of Claim, 9 October 2020 ('Statement of Claim'), [14]-[15], [22]-[23].
8 Ibid [24]-[26].
9 Ibid [24].
10 Ibid [27]-[29].
11 Plaintiffs, Amended Statement of Claim, 13 October 2021 ('Amended Statement of Claim'), [29A]-[29G].

on the basis of non-compliance with the 29 August discovery Order. On 13 October 2022, Luke filed a summons dated 12 October 2022 in substantially the same terms. Both applications were listed for hearing on 18 October 2022.

16 On 17 October 2022, the solicitors for the plaintiffs sent a letter stating that the plaintiffs wished to discontinue the proceeding against Luke, Rocky and Linfang. They sought the consent of all parties to the discontinuance pursuant to r 25.02(2)(b) of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ('Rules'). Consent was not forthcoming. At the hearing on 18 October 2022, the plaintiffs sought and were granted leave to discontinue the proceeding against Luke, Rocky and Linfang. I dismissed Luke's summons dated 12 October 2022 and filed 13 October 2022 without adjudication on the merits. I ordered that the question of costs of the discontinuance and of Luke's summons be determined on the papers.

17 On 2 November 2022, pursuant to the grant of leave, the plaintiffs discontinued the proceeding as against Luke, Rocky and Linfang.

18 For the reasons that follow, I have determined that:

(a) Luke, Rocky and Linfang are entitled to their costs on an indemnity basis;

(b) it is appropriate to make a costs order against Andy personally;

(c) as Luke has not adduced evidence upon which the Court could fairly estimate costs, it is not appropriate to make the gross sum costs order that he seeks; and

(d) there should be no order as to the costs of Luke's summons dated 12 October 2022 and filed 13 October 2022.

A Costs on Standard Basis or Indemnity Basis

A.1 The parties' submissions

A.1.1 Luke's submissions

19 Luke seeks his costs on an indemnity basis. In addition, he seeks an order that existing costs orders that the plaintiffs pay his costs on a standard basis be discharged and that the plaintiffs be ordered to pay those costs on an indemnity basis.

20 Luke submits that early in the proceeding he served an offer of compromise offering to 'walk away', together with payment of 80% of his standard costs. The offer was not accepted. Luke submits that, by reason of the discontinuance, he was successful in his defence, and he has obtained a better result than the offer of compromise and is therefore entitled to indemnity costs. He submits that, if the offer was an offer to capitulate, then 'this is exactly what the plaintiffs have done by reason of the notice of discontinuance'.[12]

21 Luke also submits that the plaintiffs alleged that he 'had been in *knowing receipt* of stock apparently allocated to other customers' and that the plaintiffs 'pleaded fraud as against the defendants', including him, and that the claim against him was 'always doomed to failure'.[13] He relies on statements in *Sidameneo (No 456) Pty Ltd v Ward* ('*Sidameneo*')[14] where Croft J observed that, where a plaintiff discontinues a proceeding, the court in awarding indemnity costs must be satisfied that the plaintiff's case was 'hopeless from the outset'.[15] His Honour further observed that:[16]

> [I]n some cases the judge may feel sufficiently confident that one party would almost certainly have succeeded or that its discontinuance is an acknowledgement of almost certain defeat or amounting to "effective surrender" and so determine the issue on the basis of that outcome.

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12 Second Defendant, 'Reply Submissions as to Costs of the Second Defendant', 9 December 2022 ('Second Defendant's Reply Submissions'), [3].

13 Second Defendant, 'Submissions as to the Costs of the Second Defendant', 22 November 2022 ('Second Defendant's Submissions'), [3]-[4].

14 [2011] VSC 559.

15 Ibid [25].

16 Ibid [26] (citations omitted).

22 Finally, Luke submits that, unlike the plaintiffs, he has always acted reasonably throughout the proceeding. He draws attention to and relies on the plaintiffs' failure to file their proper basis or overarching obligations certificates as required by s 42 of the *Civil Procedure Act 2010* (Vic) ('CPA').

A.1.2 Rocky and Linfang's submissions

23 Rocky and Linfang seek an order that the plaintiffs and Andy pay their costs, including reserved costs, on an indemnity basis. They also seek an order that previous orders that the plaintiffs pay their costs on a standard basis be varied to provide that those costs be paid by the plaintiffs and Andy on an indemnity basis. Further, that the costs order against Rocky dated 17 June 2021 be vacated.

24 Rocky and Linfang submit that knowingly making or persisting with allegations of fraud that are false or lack a proper foundation under the cloak of litigation privilege constitute special circumstances justifying an indemnity costs order.[17] They submit that the plaintiffs have made serious allegations of fraud, dishonesty and theft against them which should never have been brought and which the plaintiffs have now abandoned. Further, that the 'false allegations of theft and fraud were a slur on their [delivery] business and their reputations both in the Chinese community and more broadly'.[18]

25 Rocky and Linfang submit that the plaintiffs claimed substantial compensation and, on a false basis, obtained, and then refused to discharge, a freezing order for $402,887. They submit that they have had to sell their truck and have lost their business, that Rocky now exists on social security benefits, and that they should be compensated for the costs incurred in defending themselves against the plaintiffs' false fraud allegations.

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17 Citing *Ugly Tribe Co Pty Ltd v Sikola* [2001] VSC 189; *Taouk v Louis (No 3)* [2014] NSWSC 1117.

18 Third and Fourth Defendants, 'Third and Fourth Defendants' Costs Submissions', 18 November 2022 ('Third and Fourth Defendants' Submissions'), [3].

26 Rocky and Linfang also submit that they are entitled to costs on an indemnity basis by reason of a Calderbank offer served by Rocky on 22 February 2021 offering to settle the matter on a 'walk away' basis, with each party bearing their own costs.

27 Rocky and Linfang point to the following further circumstances as justifying an order for indemnity costs:

(a) Rocky 'established that MCW [the first plaintiff] had issued replacement invoices to Fen Fa to conceal that they had been paid in cash' and that 'that the plaintiff's own records showed Rocky had not stolen stock collected from customers';[19]

(b) the plaintiffs abandoned claims amounting to $399,570, joined Linfang and changed their case, making 'new vague ambiguous and broad allegations of fraud and theft',[20] at which point the proceeding was reset and costs up until that point were wasted;

(c) the new claims were hopeless and should not have been made, including the allegation regarding the allocation of stock between level 1 and level 2 customers, which cannot be discerned from the plaintiffs' sale records and is contradicted by statements on the plaintiffs' own website. The plaintiffs resisted making discovery of historical records, and recently conceded that there are no documents to support these allegations; and

(d) the new allegations of theft were also false, and an analysis of the plaintiffs' records (made difficult because the discovered records were incomplete and heavily redacted) did not support them.

28 Rocky and Linfang submit that the plaintiffs' claim lacked any merit and Rocky had valid defences. In support of the costs orders that they seek, Rocky and Linfang also

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19 Ibid [6].
20 Ibid (footnotes omitted).

rely on the plaintiffs' conduct in resisting making proper discovery and repeatedly failing to comply with orders for discovery.

A.1.3 The plaintiffs' submissions

29 The plaintiffs accept that they are liable to pay Luke, Rocky and Linfang's costs on a standard basis, but submit that there is no reason to depart from that position.

A.1.3.1 Luke's costs

30 The plaintiffs submit that Luke's offer of compromise does not entitle him to indemnity costs. Firstly, because the costs consequences of a failure to accept an offer of compromise, as set out r 26.08 of the Rules, do not apply where a proceeding is discontinued. Secondly, the letter under which the offer of compromise was served did not express the offer to also function as a Calderbank offer. Thirdly, even if the letter and offer of compromise are construed as a Calderbank offer, the plaintiffs' rejection of the offer was not unreasonable. That is so because:

(a) the offer was, in effect, an offer to capitulate — Luke offering only to forgo 20% of his costs, on a standard basis;

(b) the offer was made at a very early stage in the proceeding, before pleadings had closed, before Aries counterclaimed to join 11 further parties, and before discovery and expert evidence;

(c) the thrust of the covering letter was that the evidence would disclose that the plaintiffs had stated on multiple occasions that Luke was 'innocent' of any wrongdoing. Even if such evidence was adduced, it would not necessarily disqualify the plaintiffs from the relief sought; and

(d) it is by no means clear that the rejection of a Calderbank letter necessarily has indemnity costs consequences where the proceeding is discontinued without any adjudication on the merits.

31 As to Luke's submission that he is entitled to indemnity costs because the claims were 'always doomed to failure', the plaintiffs submit that the submission should be

rejected because it is 'faintly pressed' and does not engage with any of the relevant principles.

A.1.3.2 Rocky and Linfang's costs

32 The plaintiffs submit that, for the following reasons, their rejection of Rocky's Calderbank offer was not unreasonable:

(a) the offer was made at a very early stage of proceedings, before pleadings had closed and Aries counterclaimed to join 11 further parties, and before expert evidence. In particular, it was made before the plaintiffs amended their claim to join Linfang;

(b) the thrust of the letter was that the plaintiffs' fraud claim lacked sufficient particulars, the report relied upon by the plaintiffs disclosed inaccuracies and inadequacies, and the novation argument lacked legal merit. However, that did not necessarily mean that the plaintiffs' claim for breach of fiduciary duty would fail. The letter did not attack the alleged fiduciary duties or the existence of the diversion agreement; and

(c) the vast bulk of Rocky and Linfang's legal costs were incurred after the joinder of Linfang, and it would be 'difficult and arbitrary' to give Rocky the benefit of indemnity costs consequences where those parties were later jointly represented and incurred the bulk of legal costs during that period of joint representation.[21] If the Court is minded to order that the plaintiffs pay indemnity costs from the date of expiration of the Calderbank offer onwards then only Rocky should have the benefit of that order.

33 The plaintiffs dispute Rocky and Linfang's submissions that they brought and then abandoned baseless claims of the most serious sort. They dispute that the allegations of which Rocky and Linfang complain were made in the Statement of Claim or in the Amended Statement of Claim. By their Statement of Claim, they

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21 Plaintiffs, 'Submissions as to Costs of Discontinuance and Second Defendant's Summons dated 13 October 2022, 18 November 2022 ('Plaintiffs' Submissions'), [18].

alleged that Rocky was party to an undisclosed arrangement to on-sell stock, which the plaintiffs had been paid for, at a profit and, because he was a fiduciary, he was liable to account for that profit. By their Amended Statement of Claim, the plaintiffs claimed that Rocky and/or Linfang assisted Aries in his dishonest and fraudulent design, with knowledge of circumstances which would indicate to a reasonable person the existence of Aries' design. Actual knowledge was not alleged. They submit that there was no allegation against Rocky or Linfang of theft or fraud, and that the case falls well short of the examples relied upon by Rocky and Linfang.

A.2 Costs of discontinuance: The Rules

34 Rule 63.15 of the Rules, entitled 'Discontinuance or withdrawal', provides that, unless the Court otherwise orders, a party who discontinues part of a proceeding shall pay the costs of the party to whom the discontinuance relates. That rule does not specify whether the costs are to be paid on a standard or an indemnity basis.

35 Rule 63.28, entitled 'Bases of taxation', provides that:

> Subject to this Part, costs in a proceeding which are to be taxed shall be taxed on—
>
> (a) the standard basis;
>
> (b) the indemnity basis; or
>
> (c) such other basis as the Court may direct.

A.3 Indemnity costs: Disposition

A.3.1 Luke's offer of compromise

A.3.1.1 Costs consequences of an offer of compromise where the proceeding is discontinued

36 On 6 August 2020, Luke sent an offer of compromise to the plaintiffs.

37 Rule 26.02(1) of the Rules provides that:

> A party may, in respect of any claim in a proceeding, serve on another party an offer of compromise on the terms specified in the offer.

38 Rule 26.08 of the Rules, 'Costs consequences of failure to accept', relevantly provides that:

(1) This Rule applies to an offer of compromise which has not been accepted at the time of verdict or judgment.

…

(4) Where an offer of compromise is made by a defendant and the plaintiff unreasonably fails to accept the offer and the claim to which the offer relates is dismissed or judgment on the claim is entered in favour of the defendant, then unless the Court otherwise orders—

(a) the defendant shall be entitled to an order against the plaintiff for the defendant's costs in respect of the claim until 11.00 a.m. on the second business day after the offer was made, taxed on the ordinarily applicable basis; and

(b) the defendant shall be entitled to an order against the plaintiff in respect of the defendant's costs after the time referred to in paragraph (a) taxed on an indemnity basis.

…

39 Luke directed attention to r 26.08 in support of the proposition that, having 'obtained a better result than the offer of compromise … [he] is entitled to be awarded indemnity costs'.[22] However, he did not explain how a discontinuance enlivens the operation of r 26.08.

40 Rule 26.08(4), which is directed to an award of indemnity costs against a plaintiff, requires the claim to which the offer relates to be 'dismissed or judgment … entered in favour of the defendant'. Discontinuance by a plaintiff is neither a dismissal nor a judgment in favour of the defendant.

41 In *Brott v Maher*,[23] the Court of Appeal considered the effect of an offer of compromise on the costs of an appeal. The Court was there considering r 26.12 of the *Supreme Court (General Civil Procedure) Rules 1996* (Vic) ('1996 Rules'), which was relevantly in the following terms:

(3) Where on an appeal—

(a) a party has made an offer in writing to the other party (whether or not expressed to be without prejudice) to compromise the appeal on the terms specified in the offer;

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22 Second Defendant's Submissions, [8].

23 [2004] VSCA 186.

(b) the offer was open to be accepted for a reasonable time, but was not accepted; and

(c) the party making the offer obtains an order on the appeal no less favourable to that party than the terms of the offer—

the Court of Appeal shall take those matters, and also the stage of the appeal at which the offer was made, into account in determining what order for costs to make in respect of the appeal.

42 Nettle JA, with whom Eames JA and Phillips JA agreed, observed that:[24]

> Ordinarily the costs payable consequent upon the filing of an offer of compromise are governed by R 26.12 of the Rules of Court, but because the operation of that rule is conditioned upon a hearing and determination of the appeal, and because plainly there has been none in this case, strictly it does not apply.
>
> But although R 26.12 does not apply in terms, it appears to me that it serves as a useful guide for the exercise of the discretion for which R 64.14(4) provides.

43 Rule 26.12 of the 1996 Rules spoke of obtaining 'an order'. Rule 26.08 of the Rules speaks of a proceeding being 'dismissed or judgment … entered'. The reasoning of Nettle JA, as his Honour then was, in *Brott v Maher* has equal application in the present circumstances. The operation of r 26.08 is conditioned upon the proceeding being dismissed or judgment having been entered. As neither of those events have occurred in this case, r 26.08 does not apply.

A.3.1.2 Does Luke's offer of compromise constitute a Calderbank offer?

44 While the rules relating to offers of compromise do not apply when a proceeding is discontinued, it is necessary to consider whether Luke's offer of compromise is effective as a Calderbank offer.

45 Luke's offer of compromise was accompanied by a covering letter which was specified to be 'without prejudice save as to costs'. However, neither the offer of compromise itself nor the covering letter stated that they would be adduced into evidence on the question of costs or that costs would be sought on an indemnity basis.

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[24] Ibid [4]-[5].

46 As Gillard J explained in *MT Associates Pty Ltd v Aqua-Max Pty Ltd*:[25]

> [A]n offer is a Calderbank offer if it is expressed to be without prejudice save to the question of costs and an indication that the letter will be adduced into evidence on the question of costs. There are no other special features which make it a Calderbank offer.

47 There must be something in the offer, the covering letter or the surrounding circumstances that manifests an intention on the part of the offeror that the offer and letter were intended to be relied upon with respect to costs irrespective of the effectiveness of the letter of compromise under the Rules.[26]

48 In *Secretary, Department of Business and Innovation v Murdesk Investments Pty Ltd (No 2)*,[27] Emerton J observed:[28]

> 31 … In the absence of an express statement of intention in a covering letter, the intention of the offeror may be discerned by reference to the form and content of the offer itself to ascertain whether it is capable of operating as an offer more generally, and whether it was intended to be made 'without prejudice save as to costs' and to be adduced in evidence on the question of costs if not accepted.
>
> 32 In this case, Murdesk's offer of compromise is in short form. …
>
> 33 Murdesk's offer of compromise contains no indication that it will be adduced in evidence on the question of costs and that those costs will be sought on an indemnity basis. …
>
> 34 Having regard to its form, it seems unlikely that Murdesk's offer of compromise was intended to operate as a *Calderbank* offer if it could not operate under the Rules. …

49 The words 'without prejudice save as to costs' forming part of the covering letter to Luke's offer of compromise are, without more, insufficient to evince an intention that the letter and enclosed offer would be relied upon as a Calderbank offer.[29]

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25 [2000] VSC 163, [125].

26 *Whitney v Dream Developments Pty Ltd* [2013] NSWCA 188; (2013) 84 NSWLR 311, 322 [42]-[43] (Bathurst CJ), 323-324 [57]-[60] (Barrett JA), 327 [77] (Emmett JA); *Ziliotto v Hakim* [2013] NSWCA 359, [129] (Tobias AJA).

27 [2012] VSC 586.

28 Ibid [31]-[34].

29 *Ziliotto v Hakim* [2013] NSWCA 359, [128].

50 As I am not satisfied that Luke's offer of compromise constitutes a Calderbank offer, it is not necessary to consider whether the plaintiffs' rejection of the offer was unreasonable.

A.3.2 Rocky's Calderbank offer

A.3.2.1 Rocky's costs

51 On 22 February 2021, Rocky served a Calderbank offer on the plaintiffs offering to settle the matter on the basis that the plaintiffs discontinue their cause of action against him, with no order to be made as to costs.

52 In order to justify an award of indemnity costs, a Calderbank offer must represent a genuine compromise of the dispute and it must have been unreasonable for the offeree to reject it.

53 The plaintiffs did not submit that Rocky's offer did not involve a real and genuine element of compromise. The only question is whether the plaintiffs' rejection of Rocky's offer was unreasonable. It is necessary to deal with each of the arguments relied on by the plaintiffs in answer to that proposition.

54 The plaintiffs submit that the rejection of the offer was not unreasonable because it was made at a very early stage of the proceeding. I do not agree. The history of the proceeding does not make that proposition good.

55 The proceeding was commenced on 22 June 2020. A mediation took place on 1 September 2020. The Statement of Claim was filed in October 2020, and defences and replies were filed in November 2020. Discovery was made in late 2020 and early 2021 — in particular by Rocky by an affidavit of documents dated 18 January 2021 and a further affidavit of documents dated 4 February 2021. On 14 October 2020, the plaintiffs filed an expert report as to losses incurred by the plaintiffs and the estimated profit made by the defendants.

56 By the time Rocky served the Calderbank offer on 22 February 2021, the plaintiffs had sufficient information available to them to make an informed assessment of the

strength of Rocky's defence. Although amended pleadings were subsequentially filed, these were as a result of the plaintiffs filing an Amended Statement of Claim. Rocky ought not be deprived of indemnity costs merely because, after the service of his Calderbank offer, the plaintiffs decided to amend their claim.

57 Separately, the plaintiffs submit that:[30]

> [T]he thrust of the letter was that the Plaintiffs' fraud claim lacked sufficient particulars, the PKF Report disclosed inaccuracies and inadequacies and the novation argument lacked legal merit. Again, even if that is accepted, that did not mean that the Plaintiffs' claims for breach of fiduciary duty would necessarily fail. There was no attack in the letter upon the alleged fiduciary duties or the existence of the diversion agreement. Indeed, the author of the letter noted that, at that time, over 7,000 pages of WeChat messages had recently been discovered and not yet been reviewed.

58 The first matter to be observed in response is that a Calderbank offer need not specify the basis of the offeror's contention that the offeree should accept the compromise. As stated by Redlich J in *Aljade and Malaysian Kuwaiti Investment Co SDN BHD (MKIC) v Oversea-Chinese Banking Corp Ltd (OCBC)*:[31]

> Any attempt to prescribe the reasoning which must accompany an offer should be resisted. Whether there is a need for the offeror to descend to specificity as to why the offer should be accepted must depend upon a consideration of all of the circumstances existing at the time of the offer. The extent to which the weakness of a party's position is exposed through the pleadings, affidavits and the various communications between the parties during the course of the litigation may bear upon the significance of the absence of specificity in the informal offer.

59 The second matter to note is that Rocky's Calderbank offer identified various arguments in support of his prospects of success in the litigation. The letter included an analysis of the merits of the plaintiffs' claim that Rocky's delivery driver agreement was novated to the plaintiffs.

60 It matters not that the offer did not address every matter pleaded by the plaintiffs. I am satisfied that Rocky's explanation as to the (alleged lack of) merits of the

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30 Plaintiffs' Submissions, [17].

31 [2004] VSC 351, [87], approved in *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority (No 2)* [2005] VSCA 298; (2005) 13 VR 435, 442 [27] (Warren CJ, Maxwell P and Harper AJA).

plaintiffs' claim regarding novation, together with the other matters raised in the Calderbank offer, satisfactorily explained why the offer should be accepted, should such an explanation have been required.

61 No evidence has been adduced by the plaintiffs as to the reason for their refusal of the offer. They have not submitted that, because the offer was made too 'early' in the proceeding or because of the absence of explanation in the offer, they were not in a position to properly assess the merits of Rocky's defence or the offer itself.

62 Next, the plaintiffs contend that the vast bulk of Rocky and Linfang's legal costs were incurred after the joinder of Linfang and that, as a result, it would be 'difficult and arbitrary' to give Rocky the benefit of an indemnity costs order.[32]

63 In *Leichhardt Municipal Council v Green*,[33] Santow JA identified the public policy considerations underpinning the imposition of costs orders where a Calderbank offer has been made but not accepted:[34]

> It can be seen from these cases that the practice of Calderbank letters is allowed because it is thought to facilitate the public policy objective of providing an incentive for the disputants to end their litigation as soon as possible. Furthermore, however, it can be seen as also influenced by the related public policy of discouraging wasteful and unreasonable behaviour by litigants.

64 Permitting a litigant to avoid an indemnity costs order that would otherwise follow from the unreasonable rejection of a Calderbank offer because, after the rejection of the offer, the recipient of the offer expanded the case and added new parties, would undermine the public policy considerations identified by Santow JA.

65 It is clear that at least Rocky is entitled to an order that his costs be paid on an indemnity basis. Whether Linfang is also entitled to an indemnity costs order requires separate consideration.

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32 Plaintiffs' Submissions, [18].
33 [2004] NSWCA 341.
34 Ibid [14].

A.3.2.2 Linfang's costs

66 Rocky and Linfang submit that the Amended Statement of Claim claimed that Rocky, as the director and controller of Linfang, was liable as an accessory for knowing involvement in the matters the subject of the allegations against Linfang. They submit that, as a result, in conducting his defence, Rocky was required to defend the allegations made against Linfang. The work and costs involved were the same.

67 Rocky and Linfang submit that there was no need for a further Calderbank offer to have been made by Linfang and that it is also entitled to rely on and receive the costs benefit of the earlier offer made by Rocky:[35]

> The plaintiffs decided to join Linfang and change and expand their case to make further and expanded false claims against Rocky and Linfang knowing that they had rejected the Calderbank offer.

68 By the Amended Statement of Claim, the plaintiffs plead that Rocky assisted Aries' dishonest and fraudulent design with knowledge of the circumstances constituting that design. Further or alternatively, that Linfang assisted Aries' dishonest and fraudulent design with knowledge of the circumstances constituting that design. The particulars relied upon to support the pleading insofar as it relates to Linfang state:[36]

> MCW and AusPro [the plaintiffs] refer to and repeat the particulars to paragraph 29A and say that the actions of Rocky are attributable to Linfang as he was at all relevant times the controlling mind of Linfang and acting within the scope of his actual and ostensible authority as agent for Linfang.

69 The particulars make it clear that the plaintiffs rely on the conduct of Rocky to underpin the plea against Linfang. Linfang is, in essence, alleged to be the alter ego of Rocky.

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35 Third and Fourth Defendants, 'Third and Fourth Defendants' Costs Submissions in Reply', 5 December 2022 ('Third and Fourth Defendants' Reply Submissions'), [11].

36 Amended Statement of Claim, [29C].

70 After Linfang was joined, the same solicitors represented Rocky and Linfang. I accept Rocky and Linfang's submission that the work and costs involved in Rocky and Linfang's defences were the same.

71 It is questionable whether there was a proper basis to join Linfang to the proceeding. While the earlier Calderbank offer by Rocky cannot have direct application to Linfang; it was made before Linfang was a party, the earlier offer should have been accepted. If it had been accepted, Linfang would never have been joined. In these circumstances, in the exercise of the general discretion as to costs, it is appropriate to order that the costs of Linfang also be paid on an indemnity basis. To make such an order is consistent with the observations of Kunc J in obiter in *Bathurst Real Estate Pty Ltd v Fairbrother (No 2)*[37] where his Honour said:[38]

> Subject only to the requirements of being exercised judicially and for a proper purpose, the Court's costs discretion is a wide one. There may well be cases where a successful defendant who is not a party to proceedings at the time when other defendants made an effective Calderbank offer may nevertheless be able to take advantage of that offer. This might be the case, for example, if the later joined defendant could demonstrate that early settlement with the other defendants would have meant that the later joined defendant would never have been vexed with the litigation.

A.3.3 General discretion as to costs

72 While it is appropriate to make an indemnity costs order in favour of Rocky and Linfang following the plaintiffs' unreasonable rejection of Rocky's Calderbank offer, it is necessary to look more broadly to the general discretion as to costs in order to determine, firstly, whether to make an indemnity costs order in favour of Luke, secondly, whether to order that the plaintiffs pay Rocky's costs prior to the Calderbank offer on an indemnity basis and, thirdly, whether earlier standard costs orders should be varied to require payment of those costs on an indemnity basis.

A.3.3.1 Case hopeless from the outset

73 Luke seeks an indemnity costs order relying on *Sidameneo* in which Croft J observed that, where a plaintiff discontinues a proceeding, where the court is satisfied that the

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37 [2022] NSWSC 408.
38 Ibid [29].

case was 'hopeless from the outset', an indemnity costs order will be justified.[39] Luke submits that the plaintiffs pleaded fraud and the claim against him was 'always doomed to failure'.[40] Rocky and Linfang similarly contend that the plaintiffs' claim 'lacked any merit'.[41]

74 Although in *Sidameneo* Croft J did not order indemnity costs, Luke submits that this case is distinguishable on the facts as here:[42]

> a. the second defendant served correspondence outlining that the Plaintiffs' action:
>
> i. Is a gross misrepresentation by the Plaintiffs of the facts it relied on in support of its claims;
>
> ii. would be an abuse of the Court process; and
>
> iii. would be a breach of the Plaintiffs' duty of candour to the Court.
>
> b. the plaintiffs were never able to particularise the damages they sought;
>
> c. the plaintiffs made claims of knowing receipt in circumstances that, despite amendments to the statement, were not properly particularised or articulated;
>
> d. The plaintiffs have not offered any reason as for the discontinuance; and
>
> e. The discontinuance of the claim by the plaintiffs is acknowledgement of almost certain defeat or amounting to "effective surrender".

75 In *Manderson M & F Consulting (a Firm) v Incitec Pivot Ltd (No 3)*,[43] Croft J summarised applicable principles concerning indemnity costs more broadly:[44]

> 8 The jurisdiction of the court as to costs is conferred by s 24(1) of the *Supreme Court Act 1986*, in the following terms:
>
> 24(1) Unless otherwise expressly provided by this or any other Act or by the Rules, the costs of and incidental to all matters in the Court, including the administration of

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39 Second Defendant's Reply Submissions, [8]; quoting *Sidameneo (No 456) Pty Ltd v Ward* [2011] VSC 559, [25].
40 Second Defendant's Submissions, [4].
41 Third and Fourth Defendants' Submissions, [9].
42 Second Defendant's Reply Submissions, [9].
43 [2011] VSC 441.
44 Ibid [8]-[12] (citations omitted).

> estates and trusts, is in the discretion of the Court and the Court has full power to determine by whom and to what extent the costs are to be paid.

This general discretion must be exercised in accordance with Order 63 of the Rules.

9 The usual order as to costs is an award of costs to the successful party on a party and party basis. This position is reflected in r 63.31 of the Rules. Nevertheless, the court has a discretion to make special costs orders. The previously identified categories of circumstances that warrant a special costs order provide guidance in relation to the exercise of this discretion. These categories were identified by Sheppard J in *Colgate Palmolive Company v Cussons Pty Ltd* as including:

> … the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud … ; evidence of particular misconduct that causes loss of time to the Court and to other parties … ; the fact that the proceedings were commenced or continued for some ulterior motive … or in wilful disregard of known facts or clearly established law … ; the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions … ; an imprudent refusal of an offer to compromise … ; and an award of costs on an indemnity basis against a contemnor …

10 In *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd*, Woodward J commented in relation to the commencement or continuation of proceedings with no chance of success:

> … it appears that an action has been commenced or continued in circumstances where the applicant, 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 the clearly established laws.

11 Further, with respect to this category or circumstance, the Victorian Court of Appeal said in *Macedon Ranges Shire Council v Thompson* that:

> *Where the proceeding has no prospect of success*
>
> 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* 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. 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. This exercise may be subject to some qualification in respect of a self represented litigant.
>
> 12 As was made clear by Sheppard J in *Colgate Palmolive Company v Cussons Pty Ltd*, a special costs order may be warranted where a party has engaged in misconduct leading to unnecessary costs or delay. …

76 Luke submits that the claim against him was always doomed to failure because:[45]

> The Plaintiffs' [sic] pleaded that Aries *would manage customer orders* and *had the power to affect [the Plaintiffs'] legal position in respect of the allocation of stock to [the Plaintiffs'] customers*. This fundamentally contradicted the argument that the First Defendant had breached any fiduciary duty by the allocation of stock to the Second Defendant in the manner pleaded. Further, by reason of section 128 of the Corporations Act 2001, the Second Defendant was entitled to rely on the allocation of stock by the First Defendant to the Second Defendant.

77 Rocky and Linfang similarly submit that the plaintiffs' claim lacked any merit because they pleaded that Aries had authority to give directions as to the delivery of stock. Aries ran the businesses, engaged Linfang and gave directions as to where and to whom to deliver stock. Further:[46]

> By operation of s.128 of the *Corporations Act* 2001 (Cth) the plaintiffs were not entitled to assert that the third and fourth defendants were not entitled to assume Aries had the authority to provide instructions to them.

78 This submission reflects a pleading in Rocky and Linfang's Defence to the Amended Statement of Claim where express reliance was placed on ss 128 and 129 of the *Corporations Act 2001* (Cth).[47]

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45 Second Defendant's Submissions, [4] (citations omitted) (emphasis in original).

46 Third and Fourth Defendants' Submissions, [10].

47 Third and Fourth Defendants, Defence to the Amended Statement of Claim, 14 December 2021, [34]-[37].

79 There are two issues with these submissions. Firstly, so far as the submissions are made by Luke, they do not accord with his defence, which was not put on the basis of s 128. Secondly, I am not satisfied on the basis of the matters relied on that the plaintiffs' claim against Luke, Rocky and Linfang necessarily fails such that it can be said that their case was 'hopeless from the outset'.

80 It is necessary to say something about the plaintiffs' pleaded case against Luke and his defence to that case.

81 The Statement of Claim alleged that the defendants entered into an agreement to divert stock from the plaintiffs ('skimmed stock') and sell the stock to third parties for a profit.[48] Further, that Luke or his associates received the skimmed stock, Luke knew the skimmed stock was not intended to be delivered to him and he on-sold the skimmed stock for a profit.[49]

82 The Amended Statement of Claim added an allegation that Luke received the skimmed stock as a consequence of Aries' dishonest and fraudulent design with knowledge of the circumstances constituting that design.[50]

83 Luke denied any agreement to divert stock and denied receiving skimmed stock.[51] He denied knowledge that the skimmed stock was not intended to be delivered to him, or that he received the skimmed stock as a consequence of Aries' dishonest and fraudulent design.[52] He pleaded that there was an agreement between himself and the plaintiffs pursuant to which the plaintiffs would provide stock and invoices in the names of third parties, that were rejected by those third parties, to Luke, who would pay the invoices and the plaintiffs would amend the invoices at the end of each financial year so that the invoices paid by Luke were addressed to him.[53] Pursuant to this agreement, he received stock and invoices in the names of third

48 Statement of Claim, [24].
49 Ibid [27]-[29].
50 Amended Statement of Claim, [28A].
51 Second Defendant, Defence to the Amended Statement of Claim, 24 November 2021 ('Second Defendant's Defence to the Amended Statement of Claim'), [24], [27].
52 Ibid [28]-[28A].
53 Ibid [27].

parties and paid the invoices addressed to third parties.[54] Further, that he reasonably and honestly believed that the stock he received and purchased was transacted at arms-length with the plaintiffs and in the usual course of business dealings.[55]

84 Based on the pleadings, there appears to be no dispute that Luke received and paid invoices addressed to third parties and received stock accordingly. What is in dispute is whether that occurred pursuant to a legitimate agreement with the plaintiffs to receive stock rejected by other customers, or pursuant to an agreement with the defendants to divert stock from the plaintiffs' customers.

85 The claim against Luke for knowing receipt could only be determined after the Court determines whether or not there was a breach of fiduciary duty by Aries. It is the case as noted by Luke in his submissions that, on the plaintiffs' own pleading, Aries 'had the power to affect … [the plaintiffs'] legal position in respect of the allocation of stock to … [the plaintiffs'] customers',[56] with the result, so it is contended, that there was no breach of fiduciary duty by Aries in the allocation of stock to Luke in the manner pleaded. Although it may be that the plaintiffs accept that Aries had authority to allocate stock to Luke, the question of whether or not, in allocating stock, Aries breached his fiduciary duties is a matter which would need to be tested at trial. Similarly, the question of whether Luke was a knowing recipient and therefore also liable, and the existence or otherwise of the agreement alleged by Luke, an agreement said to be partly oral and partly implied,[57] are matters which would need to be tested at trial. To attempt to resolve those matters now would require the Court to impermissibly adjudicate the merits. As Croft J observed in *Sidameneo*, where there has been no adjudication on the merits, 'it is not appropriate to attempt to assess the likely outcome of a hypothetical trial'.[58]

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54 Ibid [27A].
55 Ibid [27].
56 Amended Statement of Claim, [11K].
57 Second Defendant's Defence to the Amended Statement of Claim, [27(a)]; Affidavit of Bo Zhang affirmed 16 July 2020, [16]-[18].
58 *Sidameneo (No 456) Pty Ltd v Ward* [2011] VSC 559, [26].

86 In the circumstances, I am not satisfied that it can be said that the plaintiffs' case against Luke was 'hopeless from the outset'.

87 Given the manner in which the plaintiffs' case was framed, whilst Rocky and Linfang expressly pleaded reliance on s 128, without determination of factual questions involving Aries and without detailed consideration of s 128 as would occur at trial, I am not satisfied that it is necessarily the case that no liability on the part of Rocky or Linfang could arise by reason of s 128.

88 Separately, in support of an indemnity costs order from the outset, Luke relies on correspondence forwarded to the plaintiffs' solicitors outlining that the action was a gross misrepresentation of the facts, would be an abuse of the Court's process and would be a breach of the plaintiffs' duty of candour to the Court.

89 Although not identified as the 'correspondence' referred to in his submissions, Luke's solicitors' letter of 6 August 2020 was produced on the application. Amongst other things, it states that the plaintiffs:[59]

> [F]ailed to disclose to the Court the numerous communications its director had with our client post the discovery of the alleged "skimming" … [in which] your client advises our client (in open communication via WeChat messages and several phone calls) that he knew our client was innocent of any wrongdoing.

90 However, Luke has not produced the communications referred to in the 6 August 2020 letter. He has not extracted the content of the messages, nor has he identified the date on which they were sent. He has not substantiated the assertions in his submissions that the plaintiffs' case was always doomed to failure or that the claims made against him amounted to an abuse of process.

91 I do not accept the submission by Luke that the plaintiffs 'made claims of knowing receipt in circumstances that, despite amendments to the statement, were not properly particularised or articulated',[60] or that the discontinuance of the claim by

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59 Exhibit QJY-1 to the Affidavit of Qiushi Josh Yu affirmed 22 November 2022.

60 As alleged in the Second Defendant's Reply Submissions, [9(c)].

the plaintiffs is, in all the circumstances, acknowledgement of almost certain defeat or amounting to 'effective surrender' so as to justify an order for indemnity costs.[61]

92 For the reasons stated, I am not satisfied that Luke, Rocky or Linfang have established an entitlement to indemnity costs on the basis that the plaintiffs' case was hopeless from the outset.

A.3.3.2 Allegations of fraud and other serious misconduct

93 When deciding the claims by the discontinued defendants for indemnity costs, it is necessary to consider the conduct by the plaintiffs of the proceeding as a whole prior to discontinuance. When regard is had to that conduct, including the basis on which the proceeding was initiated and the freezing orders made and maintained, this is a case where indemnity costs orders are appropriate from the outset in favour of each of Luke and Rocky and, from its joinder, including any previous standard costs orders in its favour, in favour of Linfang on an indemnity basis.

94 In this case, serious allegations of fraud were made by the plaintiffs against the discontinued individual defendants from the outset of the proceeding. Those allegations formed the basis of freezing orders obtained ex parte against each of them, some of which orders remained in place for extended periods.

95 Courts have widely recognised that unfounded fraud allegations may justify an indemnity costs order. In *NIML Ltd v Man Financial Australia Ltd (No 2)* ('*NIML*'),[62] Harper J observed that:[63]

> Allegations of fraud should only be made on the basis of evidence, worthy of serious consideration, which points to dishonesty in the subject of the allegation. Loose allegations of fraud are a blot on the adversarial system, and may — where, for example, they are made in terrorem — amount to an abuse of process. It is therefore important that those inclined to make such a serious allegation on an inadequate, or no, foundation be discouraged in their purpose by the prospect of having to pay costs as between solicitor and client.

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61 As alleged in the Second Defendant's Reply Submissions, [9(e)].
62 [2004] VSC 510.
63 Ibid [6].

96 While *NIML* and other like cases concern costs orders following the delivery of judgment and the allegations in this case have not been tried and ruled upon, I am satisfied that an order for indemnity costs may be justified in circumstances where a plaintiff, having made serious fraud allegations, discontinues the proceeding for which such allegations provided the initial and on-going basis.

97 Attention was directed in submissions to the following statement by Rose J in *Russian Airlines v Leeds* ('*Russian Airlines*'):[64]

> Where a claimant makes serious allegations of fraud, conspiracy and dishonesty and then abandons those allegations, thereby depriving the defendant of any opportunity to vindicate his reputation, an order for indemnity costs is likely to be the just result, unless some explanation can be given as to why the claimant has decided that the allegations are bound to fail.

98 Professor Dal Pont in Law of Costs describes the rationale for the an award of indemnity costs as follows:[65]

> It reflects the notion that a person should not allege fraud or other improper conduct without a proper evidentiary foundation, as such an allegation may be recounted in the community and through the media, and harm a litigant's reputation before evidence has been offered and submitted to the scrutiny of cross-examination or rebuttal.

99 Although the plaintiffs dispute that any allegations of theft or fraud were made against Rocky and Linfang,[66] when the conduct of the proceeding overall is considered, including the application for freezing orders, it is clear that fraud was at the heart of the plaintiffs' case against the discontinued defendants.

100 The General Indorsement of Claim dated 22 June 2020 stated that:

> **Fraudulent invoicing scheme**
>
> 5. In breach of their duties to the Plaintiffs, Aries and/or Rocky:
>
> (a) unlawfully took the Plaintiffs' property;
>
> (b) sold the Plaintiffs' property for personal profit;

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64 [2018] EWHC 1735 (Ch), [53].

65 G E Dal Pont, *Law of Costs* (LexisNexis Butterworths, 4th ed, 2018) [16.63] (citations omitted).

66 It is presumed that the plaintiffs also dispute that any allegations of fraud were made against Luke, although the plaintiffs' submissions do not directly address this.

(c) defrauded the Plaintiffs and their customers by generating and using fake invoices and fake email addresses.

6. The Second Defendant (**Luke**):

(a) knowingly assisted Aries and/or Rocky to breach their duties to the Plaintiffs;

(b) knowingly received the Plaintiffs' property and/or the proceeds of sale of that property in breach of trust.

101 The Zhang Affidavit relied on in support of ex parte freezing orders and the outline of submissions dated 22 June 2020 in support of the freezing orders, extracts of which are reproduced above, make clear allegations of fraud against Luke, Rocky and Aries.

102 The freezing orders, originally obtained ex parte on the basis of such evidence and submissions, remained in place against Luke until 17 July 2020, against Linfang until 19 November 2020 and against Rocky until 9 September 2022.

103 The basis upon which the freezing orders were obtained and maintained, including against Linfang, was fraud. The plaintiffs' counsel said as much at the hearing on 9 September 2022 of an application to discharge the freezing order against Rocky:[67]

> Well, the methodology has changed, and that's the point. So what has happened - we're saying the basis on which Your Honour initially made the freezing order was because of the conduct by the defendants, which was to deal with the plaintiff's stock surreptitiously and to engage in that conduct, which effectively was a fraud upon the plaintiffs. Now, that allegation has not changed. The methodology has changed but the allegation has not.

104 Although the express allegations of fraud did not flow through to the pleaded case, the case against the discontinued defendants and each of them was one of which dishonesty and the alleged diversion of goods was a key feature. There may be forensic reasons why, when preparing pleadings, a decision was made not to allege fraud. However, that does not change the fact that the case was initiated and maintained as one in which Luke and Rocky engaged in fraudulent misconduct.

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67 Transcript, 9 September 2022, 21:16-24.

105 The Zhang Affidavit described what was said to be a 'fraudulent invoicing scheme'.[68] Andy deposed that the plaintiffs' internal accountant, Ms Wang, reported to him that she had identified apparent anomalies in the invoices issued to six of the plaintiffs' customers, including 'FenFa'. When comparing the invoices received by the customers to the invoices in the plaintiffs' system, Andy deposed that he discovered that four of the invoices the customers received were different to those in the system — specifically, the invoices received by customers listed less product than the invoices generated by the plaintiffs' system. Two of those invoices were addressed to FenFa for amounts totalling $399,570. Andy deposed that he subsequently discovered that customers' email addresses had been modified in the plaintiffs' system such that the invoices generated in the system were not sent to the customers, but rather to fake email addresses. In their submissions in support of the freezing orders, the plaintiffs pointed to the four invoices as 'compelling evidence of the Defendants' fraudulent scheme'.[69]

106 The Statement of Claim, dated 9 October 2020, alleged that the defendants agreed to divert stock from the plaintiffs.[70] The particulars referred to the same four invoices, which were alleged to have been issued by Aries.[71]

107 Reliance on the two FenFa invoices was subsequently abandoned in the plaintiffs' Amended Statement of Claim filed on 13 October 2021.

108 I accept that the serious allegations made against Luke and Rocky in the proceeding are likely to have had an adverse impact on their reputations. For periods of time while the proceeding was on foot, the plaintiffs relied on such serious allegations, later abandoned, to obtain and maintain freezing orders. As discussed by Rose J in *Russian Airlines*, by the plaintiffs discontinuing the proceeding against them, those defendants have been deprived of the opportunity to vindicate their reputations.

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68 Affidavit of Wenjun Zhang affirmed 19 June 2020, [19]-[24].
69 Plaintiffs' Freezing Order Submissions, [6].
70 Statement of Claim, [24(a)].
71 Ibid.

109 The freezing order against Rocky was in the sum of $402,887. When granting the freezing orders, I observed that:[72]

> Based on the value of the fraudulent invoices, in excess of $10.4 million, Mr Zhang suspects that the defendants may have made an unlawful profit of between $300,000 and $2.6 million by generating fraudulent invoices. He gives evidence of approximately $41,383 in missing stock; stock which customers had asked Aries to collect but which was not returned to the plaintiffs' warehouse and of $61,505 of credit notes which the plaintiffs have provided in favour of impacted customers.

110 At the directions hearing on 8 April 2022, counsel for the plaintiffs conceded that the quantum of their claims against Rocky was nothing like $400,000, and instead did not exceed $60,000.[73]

111 It is important to record that, notwithstanding that the plaintiffs had abandoned any (express) allegations of fraud, had abandoned the allegations regarding the FenFa invoices and had accepted that the quantum of their claim against Rocky did not exceed $60,000, they refused to discharge the freezing order against Rocky in the amount of $402,887. This was the case despite requests from Rocky on 27 October 2020, 7 September 2021, 21 April 2022, 3 May 2022, 19 May 2022 and 11 August 2022 that the plaintiffs agree to discharge the freezing order against him.[74]

A.3.3.3 Appropriate to order indemnity costs

112 Having regard to the plaintiffs' conduct of the proceeding outlined above, I am satisfied that it is appropriate to order that the plaintiffs pay Luke, Rocky and Linfang's costs of and incidental to the entire proceeding, including reserved costs, on an indemnity basis.

113 Given that fraud allegations were relied on at the outset to support freezing orders and that the spectre of fraud on the part of those against whom the proceeding has now been discontinued hung over the conduct of the proceeding, I consider that it is

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72 *Ex parte M C Wholesaling Pty Ltd* (Unreported, Supreme Court of Victoria, Delany J, 23 June 2020), [21].

73 Transcript, 8 April 2022, 3:1-9.

74 Affidavit of Reuben James Lipohar sworn 18 November 2022, [27], Exhibit RJL-1 to the Affidavit of Reuben James Lipohar sworn 6 September 2022; Exhibit JL-3 to the Affidavit of Jeanie Lee sworn 6 September 2022.

appropriate to revisit and to vary all previous costs orders. That is, to vary those orders to provide that the plaintiffs pay Luke, Rocky and Linfang's costs previously ordered to be paid on a standard basis on an indemnity basis.

114 I will not vacate the costs order made against Rocky dated 17 June 2021. Rocky has not made any specific submissions as to why that order should be vacated beyond his general submissions as to costs.

B Costs order against Andy personally

B.1 The parties' submissions

B.1.1 Luke's submissions

115 Luke submits that the manner in which the proceeding has been conducted by Andy, the sole director of the plaintiffs, is an exceptional circumstance warranting a non-party costs order against Andy personally.

116 By reference to the factors identified by Elliott J in *Bakers Investment Group (Australia) Pty Ltd v Caason Investments Pty Ltd*,[75] extracted below, Luke submits that Andy, as director, attended mediations, swore affidavits in relation to freezing orders, gave instructions as to the cause of action the subject of strike out applications, refused Luke's offer of compromise, and then caused the proceeding to be discontinued.

117 Luke submits that the plaintiffs are effectively 'straw men', having only $117.35 and $147.20 in their bank accounts as at 31 July 2022, indicating that they may be insolvent and could only be solvent by the provision of capital from a non-party. Given that MC Wholesaling has not traded since 21 July 2021 and AusPro has a financial position of $(179,740), it 'would not be unreasonable to infer that the plaintiffs would have periods of insolvency' and that, if they are solvent, 'such solvency is solely dependent upon Andy providing the required funds'.[76]

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75 [2015] VSC 644, [16] (leave to appeal refused in *Carter v Caason Investments Pty Ltd* [2016] VSCA 236; (2016) 341 ALR 154).

76 Second Defendant's Reply Submissions, [10].

118 Although the plaintiffs' solicitor currently holds $245,000 as security for Luke's costs, Luke submits that his costs exceed that amount. He further submits that, if the plaintiffs become insolvent, the monies held on trust for security will be claimed by the liquidator. Luke is not a secured creditor in relation to the monies held as security for costs.

B.1.2 Rocky and Linfang's submissions

119 Rocky and Linfang also seek a costs order against Andy personally.

120 Rocky and Linfang rely on observations by Mason CJ and Deane J in *Knight v FP Special Assets Ltd* ('*Knight*').[77] They submit that Andy is connected to, and has a direct personal interest in, the proceeding, which they allege was brought for his benefit. Andy is the sole director of the plaintiffs, which operate what the plaintiffs describe in their pleadings as 'Andy's milk powder wholesaling business'. Andy provided assistance to the plaintiffs and exercised management, control and influence over the proceeding, including providing instructions as to the false allegations of fraud, theft and dishonesty. He and his other companies funded the proceeding and stood behind the plaintiffs. He provided a personal undertaking as to damages and compensation in respect of the freezing orders, and prolonged the proceeding while making offers to attempt to procure a release from his undertaking to pay damages and compensation.

121 Rocky and Linfang further submit that the plaintiffs are now 'persons of straw' because Andy has stripped them of cash. Bank statement discovered by the plaintiffs show that, as at 24 October 2022, the plaintiffs each had less than $1,000 in their accounts. Rocky and Linfang submit that:[78]

> Andy established a labyrinthine corporate structure and transferred many tens of millions of dollars from the plaintiffs for his own benefit. It will be almost impossible to trace the movement of all the funds transferred from the plaintiffs, particularly given Andy's reluctance to discover financial records. Andy knows where MCW's funds have gone and can ensure funds are

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77 [1992] HCA 28; (1992) 174 CLR 178.

78 Third and Fourth Defendants' Submissions, [19].

returned to the plaintiffs to meet the cost orders. A personal cost order against him is justified to ensure he does so.

B.1.3 Andy's submissions

122 Andy submits that no costs order should be made against him personally. He submits that the 'informing principle' of a non-party costs order was explained by the Court of Appeal in *Gdanski v Palms Court Management Pty Ltd*[79] as follows:[80]

> The informing principle … is that, if a party to litigation is liable to pay the costs of the successful party but is unable because of insolvency to do so, justice may require the costs to be paid by a non-party if it can be shown that the non-party played an active part in conducting the litigation and stood to benefit from a successful outcome.

123 Andy submits that Luke, Rocky and Linfang fall at the first hurdle: the plaintiffs are not insolvent, nor are they persons of straw. He submits that the evidence concerning amounts in the plaintiffs' bank accounts and financial statements is 'irrelevant, unpersuasive and inconclusive', and the Court would need 'far more evidence' as to the plaintiffs' financial position to conclude that they are insolvent or persons of straw. Further, the plaintiffs have paid funds into Court as security for Luke and Rocky's costs, and there is no evidence to suggest that those sums are insufficient.

124 Andy submits that, even if the plaintiffs are insolvent or persons of straw, the defendants have not identified any conduct of Andy that is sufficient to render him the 'real party to the litigation'. He submits that it is 'entirely unremarkable' that, as a director of the plaintiffs, he gave instructions, attended hearings and mediations, and exercised management and control over their participation in the proceeding.[81]

125 Andy does not concede that he was the source of the funds for the litigation or that he had a sufficient interest in the litigation. He denies that the proceeding was without merit, that the institution of the proceeding was without reasonable grounds or that it was continued on the basis of a stubbornly and totally unreasonably held

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79 [2017] VSCA 348.

80 Ibid [66] (Maxwell P, McLeish JA and Keogh AJA).

81 Wenjun Zhang, 'Andy's Submissions as to Costs of Discontinuance and Second Defendant's Summons dated 13 October 2022', 2 December 2022 ('Andy's Submissions'), [10].

belief, as would be required in order to enliven the discretion to award costs against a director assisting a corporate litigant in the conduct of litigation.

126 Finally, as to Rocky and Linfang's submission that costs ought to be awarded against him for non-compliance with s 16 of the CPA, Andy submits that, pursuant to s 30 of the CPA, any such application must be made on summons with supporting affidavit material and before the finalisation of the proceeding. Rocky and Linfang have not complied with the procedural requirements and, upon the filing of the notices of discontinuance, the proceeding as against Luke, Rocky and Linfang was brought to an end and finalised.

B.2 Costs order against Andy personally: The relevant principles

127 Section 24(1) of the *Supreme Court Act 1986* (Vic) provides that the costs of and incidental to all matters in the Court are in the discretion of the Court which has full power to determine by whom and to what extent the costs are to be paid.

128 The categories of case in which the Court will order costs against a non-party are not closed.[82] It is not a precondition to the exercise of power to award costs against a non-party that the unsuccessful party is impecunious.[83]

129 In *Bakers Investment Group (Australia) Pty Ltd v Caason Investments Pty Ltd*,[84] Elliott J set out the principles applicable to the award of costs against a non-party, including by quoting from the leading decision of the High Court in *Knight*:[85]

> 12 The making of orders against non-parties under s 24(1) is exceptional. But care must be taken in using this term, so that it is not understood as imposing a threshold that goes beyond the language of the statutory provision. As was stated by the Privy Council in *Dymocks Franchise Systems (NSW) Pty Ltd v Todd*:
>
> > Although costs orders against non-parties are to be regarded as "exceptional", exceptional in this context means no more than outside the ordinary run of cases where parties pursue or

82 *FPM Constructions Pty Ltd v Council of the City of Blue Mountains* [2005] NSWCA 340, [210]; *Kebaro Pty Ltd v Saunders* [2003] FCAFC 5, [103].

83 *Dunghutti Elders Council (Aboriginal Corporation) RNTBC v Registrar of Aboriginal and Torres Strait Islander Corporations (No 4)* [2012] FCAFC 50; (2012) 200 FCR 154, [87].

84 [2015] VSC 644.

85 Ibid [12]-[16] (citations omitted).

defend claims for their own benefit and at their own expense. The ultimate question in any such "exceptional" case is whether in all the circumstances it is just to make the order.

13 The discretion to be exercised is unfettered. There is no onus of proof.

14 In *Knight v FP Special Assets Ltd*, Mason CJ and Deane J referred to a category of cases in which a non-party order might be made, stating:

> For our part, we consider it appropriate to recognize a general category of case in which an order for costs *should* be made against a non-party and which would encompass the case of a receiver of a company who is not a party to the litigation. That category of case consists of circumstances where the party to the litigation *is an insolvent person or a [person] of straw*, where the non-party *has played an active part in the conduct of the litigation and* where the non-party, or some person on whose behalf he or she is acting or by whom he or she has been appointed, *has an interest in the subject of the litigation*. Where the circumstances of a case fall within that category, an order for costs *should* be made against the non-party if *the interests of justice require that it be made*.
>
> (Emphasis added.)

15 In determining whether or not a costs order ought to be made against a non-party, the moving party need not establish that the non-party is, in effect, *the* opposing party. It may be sufficient if the non-party, by its involvement, may properly and fairly be described as *a* real party to the litigation.

16 Each case must depend upon its own facts, and no restriction ought to be placed upon the court's discretion other than that it is to be exercised judicially. The following factors may be relevant to the exercise of the court's discretion:

(1) The extent to which the non-party has funded the litigation.

(2) The extent to which the non-party has a real interest in the fruits of the litigation if the assisted party were successful.

(3) The level of control the non-party exercised, or was entitled to exercise, over the conduct of the litigation, including its resolution.

(4) Whether or not the non-party attended any mediation of the dispute.

(5) The financial position of the assisted party.

(6) Whether the conduct of the litigation by the assisted party, or, if applicable, the funding non-party, in either

prosecuting or defending a claim, was unreasonable, improper or an abuse of process.

(7) Whether security for costs was previously sought.

(8) Whether a timely warning was given by the successful party to the non-party that costs would be sought against it.

(9) The extent of the impact on the court of the involvement of the non-party.

(10) Whether the non-party agreed to provide an indemnity to the assisted party for any adverse costs order.

130 In *JAB Nominees (Aust) Pty Ltd v Auswild*,[86] Riordan J observed that:[87]

> It is apparent that to enliven the discretion to award costs against a non-party 'something more' is required than a director merely assisting the corporate litigant in the conduct of litigation, which may be in accordance with his or her fiduciary duties. The 'something more' required to enliven the discretion may be:
>
> (a) a director giving instructions to pursue a claim or defence which has no real prospects of success;
>
> (b) the institution of a proceeding based on fraud without reasonable grounds; or
>
> (c) the continuation of such a proceeding on the basis of a 'stubbornly and totally unreasonably' held belief.

B.3 Costs order against Andy personally: Disposition

B.3.1 The plaintiffs' financial position

131 The first issue, the predominant focus of the parties' submissions, is whether the plaintiffs are insolvent or persons of straw. Although not a prerequisite, this is a relevant factor when considering whether to make a costs order against a non-party.[88]

132 Accountant Xin Weng deposes in her affidavit dated 2 December 2022 ('Weng Affidavit') that, as at 30 June 2022, MC Wholesaling had estimated net assets of $6,203,027. As at 30 November 2022, MC Wholesaling's balance sheet showed net

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86 [2020] VSC 731.

87 Ibid [273] (citations omitted).

88 Although Andy is a defendant to Aries' counterclaim, he is not a party to the proceeding proper.

assets of $5,859,777.16. While the net assets figure for MC Wholesaling at both dates is very healthy, the health of the balance sheet is heavily dependent upon the recoverability of intercompany loans; loans from other companies controlled by or associated with Andy.

133 The Weng Affidavit states that, as at 30 June 2022, AusPro had estimated net assets of $(179,740). As at 30 November 2022, AusPro had $926.08 in its bank account, with negative assets according to its balance sheet; $(215,949.79). At both points in time, AusPro has a net deficiency of assets according to its own accounts.

134 The legal costs of the parties against whom the proceeding has been discontinued are very substantial. It is clear that the amount previously provided and currently held as security for the costs of those parties is insufficient to cover their costs. The affidavit of Julian Michael Vagg dated 9 December 2022 filed on behalf of Rocky and Linfang states that the total legal costs incurred by Rocky and Linfang as at 9 December 2022 were $721,128.57. Mr Vagg estimates that Rocky and Linfang would recover $681,532.06 on a taxation on an indemnity basis. Luke's submissions state that 'on an indemnity basis…[he] has incurred in excess of $304,000, with the final sum still to be calculated'.[89] While no affidavit material was filed on behalf of Luke as to his costs, assuming the accuracy of the costs estimates in his submissions, the total indemnity costs payable to Luke, Rocky and Linfang to date exceed $985,532.06.

135 AusPro clearly has insufficient assets available to meet an adverse costs order of anything like the magnitude of the total estimated costs to December 2022. The most recent financial information available shows that MC Wholesaling has net assets of $5,859,777.16 and, on the face of its balance sheet, has more than sufficient funds available to meet the estimated costs. However, MC Wholesaling is dependent for its healthy financial position upon the recoverability of unsecured loans from companies associated with or controlled by Andy. While I am not satisfied that MC Wholesaling is insolvent or a 'person of straw', I am satisfied that whether or not it

89 Second Defendant's Submissions, [15].

would choose to meet very substantial adverse costs orders against it lies in the hands of Andy.

B.3.2 Andy's role in the proceeding

136 I consider that these financial considerations concerning the plaintiff companies, combined with Andy's active role and conduct in relation to the proceeding, including maintaining allegations of fraud, means that it is appropriate to make a costs order against Andy personally in addition to the costs orders to be made against the corporate plaintiffs.

137 Andy's submissions state that:[90]

> The fact that a director instructs and assists solicitors with respect to litigation by a company is unremarkable.
>
> It is apparent that to enliven the discretion to award costs against a non-party "*something more*" is required than a director merely assisting the corporate litigant in the conduct of litigation, which may be in accordance with his or her fiduciary duties. The "*something more*" required to enliven the discretion may be:
>
> (a) a director giving instructions to pursue a claim or defence which has no real prospects of success;
>
> (b) the institution of a proceeding based on fraud without reasonable grounds; or
>
> (c) the continuation of such a proceeding on the basis of a "*stubbornly and totally unreasonably*" held belief.

138 The 'something more' to which the submissions refer in this case is the making and continued pursuit of serious allegations of fraud by and at the instigation of Andy. As the sole director of the plaintiffs, Andy was the person who made the initiating affidavit in support of the ex parte orders. It was Andy who provided the instructions for the commencement of the proceeding and the application for the freezing orders.

139 The following conduct and involvement by Andy in the proceeding provides additional support for the making of a costs order against Andy personally:

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90 Andy's Submissions, [5]-[6] (citations omitted).

(a) Andy provided the undertaking as to damages necessary for the purpose of obtaining freezing orders against Luke, Rocky and Linfang;

(b) as the sole director of the plaintiffs, it is to be inferred that it was Andy who provided instructions for the unreasonable rejection of Rocky's Calderbank offer; and

(c) as the sole director of the plaintiffs, it is to be inferred that it was Andy who provided instructions not to agree to discharge the freezing orders.

140 I am satisfied that Andy was the driving force behind the institution and maintenance of the claims of fraud and serious misconduct against Luke, Rocky and Linfang and the freezing orders. Those claims have now been abandoned, on the instructions no doubt of Andy. I will order that Andy personally pay the costs of Luke, Rocky and Linfang as otherwise ordered to be paid.

C Gross Sum Costs Order

C.1 The parties' submissions

C.1.1 Luke's submissions

141 Luke seeks a gross sum costs order pursuant to r 63.71 of the Rules. He relies on the statement of Croft J in *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 3)* ('*Sunland*')[91] extracted below. He submits that, by reason of the apparent impecuniosity of the plaintiffs, if a non-party costs order is not made, he is at risk that the plaintiffs could be placed into liquidation prior to any taxation being completed.

C.1.2 The plaintiffs' submissions

142 The plaintiffs submit that Luke has failed to demonstrate that the threshold for a gross sum costs order, that 'costs are incurred improperly or without reasonable cause or are wasted by undue delay or negligence or by any other misconduct or

91 [2012] VSC 399.

default', is satisfied and that, as such, the Court should not be satisfied that the jurisdiction to make such an order is satisfied.

143 They further submit that r 63.71 of the Rules only contemplates the Costs Court making a gross sum costs order on an application for the assessment of costs, and not the Court when making an underlying costs order itself.

144 Finally, the plaintiffs submit that Luke has not adduced evidence of his costs and does not state what the gross sum should be. If a gross sum is asserted to be claimable, then it should be the subject of evidence which can be tested.

C.2 Gross sum costs order: The relevant principles

145 Rule 63.71 of the Rules entitled 'Gross sum for costs', upon which Luke relies, provides:

> (1) Where costs are incurred improperly or without reasonable cause or are wasted by undue delay or negligence or by any other misconduct or default or where from any other cause the amount of costs is excessive—
>
> (a) only costs which were reasonable and proper shall be allowed; and
>
> (b) the Costs Court may assess those costs at a gross sum.

146 Given the stage at which this proceeding is at, the more appropriate rule is r 63.07(2)(c) which provides:

> (2) Where the Court orders that costs be paid to a party, the Court may then or thereafter order that as to the whole or any part of the costs specified in the order, instead of taxed costs, that party shall be entitled to—
>
> …
>
> (c) a gross sum specified in the order instead of taxed costs;

147 The object of that rule was summarised by Croft J in *Sunland* as follows:[92]

> The clear object of rule 63.07 of the Rules is, in my view, similar to the object of the corresponding Federal Court rule, as discussed by Sackville J in *Seven Network Limited v News Limited*, as follows:

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92 *Sunland Waterfront (BVI) Ltd v Prudentia Investments Pty Ltd (No 3)* [2012] VSC 399, [84] (citations omitted).

"(i) The purpose of the subrule is to avoid the expense, delay and aggravation involved in protracted litigation arising out of taxation: *Beach Petroleum v Johnson (No 2)*, at 120, per von Doussa J, applying *Leary v Leary* [1987] 1 All ER 261; *Harrison v Schipp* (2002) 54 NSWLR 738, at 742 [21] per Giles JA.

(ii) An order that costs be assessed as a gross sum does not envisage that any process similar to that involved in taxation should take place. On the contrary, the Court applies a much broader brush than would be used on a taxation of costs pursuant to O 62: *Beach Petroleum v Johnson (No 2)*, at 120, 124, per von Doussa J; *Harrison v Schipp*, at 743 [22], per Giles JA.

(iii) The Court should be confident that the approach taken to the estimate of costs is logical, fair and reasonable. The Court should be astute to avoid both overestimating the recoverable costs and underestimating the appropriate amount, for example by applying an arbitrary discount to the amounts claimed: *Beach Petroleum v Johnson (No 2)*, at 123, per von Doussa J.

(iv) Although the power to assess a gross sum for costs involves the exercise of a discretion, it is necessary to bear in mind fundamental principles applicable to an assessment of costs on a party and party basis. These include the principles contained in O 62 r 19 (embodying the 'necessary or proper' test) and those stated in *Stanley v Phillips* (1966) 115 CLR 470, at 478, per Barwick CJ (on a party and party taxation the emphasis is upon obtaining adequate representation to enable justice to be done, not upon the propriety of steps taken to ensure maximum success in the cause): *Auspine Ltd v Australian Newsprint Mills Ltd* (1999) 93 FCR 1, at 4–5 [12]–[15], per O'Loughlin J; *Charlick Trading Pty Ltd v Australian National Railways Commission* [2001] FCA 629, at [6]–[8], per Mansfield J.

(v) Although the methodology permitted by O 62 r 4(2)(c) initially involves a broader approach than on a normal taxation, the provisions of O 62 and Sch 2 provide assistance in fixing an appropriate gross sum: *Charlick Trading Pty Ltd v ANRC*, at [10], per Mansfield J."

148 In *Harrison v Schipp*,[93] Giles JA observed that:[94]

> Of its nature, specification of a gross sum is not the result of a process of taxation or assessment of costs. As was said in *Beach Petroleum NL v Johnson* (at 124), the gross sum "can only be fixed broadly having regard to the information before the Court"; in *Hadid v Lenfest Communications Inc* (at [35]) it was said that the evidence enabled fixing a gross sum "only if I apply a much broader brush than would be applied on taxation, but that … is what the rule contemplates". The approach taken to estimate costs must be logical,

93 [2002] NSWCA 213; (2002) 54 NSWLR 738.

94 Ibid 743 [22] (emphasis added).

> fair and reasonable (*Beach Petroleum NL v Johnson* (at 123); *Hadid v Lenfest Communications Inc* (at [27])). The power should only be exercised when the Court considers that it can do so fairly between the parties, and that includes sufficient confidence in arriving at an appropriate sum on the materials available (*Wentworth v Wentworth* (Court of Appeal, 21 February 1996, unreported) per Clarke JA).
>
> (emphasis added)

C.3 Gross sum costs order: Disposition

149 Luke has not provided any affidavit evidence as to his costs upon which the Court could proceed to logically, fairly and reasonably estimate costs. Absent affidavit evidence as to the quantum of Luke's costs of the proceeding, I do not consider that the power under r 63.07(2)(c) to award a gross sum can be exercised fairly and appropriately.

150 The dearth of material in support of Luke's application for a gross sum costs order is not explained by Luke's submission in reply that he is 'seeking leave' to obtain a gross sum costs order.[95] The rules extracted above do not speak of a requirement to obtain 'leave' to seek a gross sum costs order. The time has now passed for Luke to put on evidence in support of an application under r 63.07(2)(c) for a gross sum costs order. Should this matter proceed to a taxation in the Costs Court, it will be a matter for the Costs Court as to whether it is appropriate to assess Luke's costs at a gross sum under r 63.71(1)(b).

D Luke's Summons

D.1 The parties' submissions

D.1.1 Luke's submissions

151 Luke submits that, where his summons dated 12 October 2022 and filed 13 October 2022 was not heard only because it was redundant after the plaintiffs sought and were granted leave to discontinue (the plaintiffs' intention to seek leave only having been raised after the filing of the summons), his costs of the summons should also be paid on an indemnity basis.

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95 Second Defendant's Reply Submissions, [12].

D.1.2 The plaintiffs' submissions

152 The plaintiffs submit that there should be no order as to costs of Luke's summons, which was 'effectively identical' to Aries' summons.[96] They submit that, where there are multiple defendants who are separately represented but their interests align, courts have on multiple occasions stated that they expect a degree of cooperation to avoid unnecessary duplication. The same principle ought to apply to duplicative and unnecessary summonses.

153 They submit that further, and in any event, counsel for Luke was excused upon commencement of the hearing. He did not remain and press the summons or make any submissions in support of it. For all intents and purposes, Luke's summons was abandoned.

D.2 Luke's summons: Disposition

154 I am not persuaded that no order as to costs of Luke's summons should be made on the basis that the summons was 'abandoned' and Luke's counsel did not press the summons. Counsel was excused from further attendance at the hearing after the plaintiffs sought and were granted leave to discontinue the proceeding as against Luke, Rocky and Linfang. In those circumstances, there was no need for counsel for Luke to remain to argue a summons seeking to bring the proceeding against his client to an end when such relief had already been granted. To remain would have been inefficient and would have resulted in unnecessary costs.

155 I am, however, concerned that Luke's summons was largely duplicative of Aries' summons.

156 Both summons sought substantially identical relief: the dismissal of the plaintiffs' claims, on the same basis: non-compliance with the Order of Barrett AsJ. Luke's summons went no further than Aries' summons which, at the time Luke's summons was filed, had already been filed and listed for hearing. Aries' summons sought dismissal of 'the plaintiffs' claim' in its entirety, not only as against Aries.

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[96] Plaintiffs' Submissions, [21], [26].

157 Consistent with his obligation under s 20 of the CPA to cooperate with other parties in the conduct of a civil proceeding and his obligation under s 24 of the CPA to ensure costs are reasonable and proportionate, the appropriate course would have been for Luke to cooperate with Aries in relation to the conduct and hearing of Aries' summons, rather than to issue his own, substantially identical, summons.

158 It is well established that, subject to several provisos, the court 'will not normally allow two sets of costs to defendants where there is no possible conflict of interest between them in the presentation of their cases'.[97]

159 In *ACN 115 918 959 Pty Ltd v Hoeys Lawyers Pty Ltd (Costs Ruling)*,[98] Blue AJ observed that:[99]

> When multiple defendants have a common interest but are separately represented, the Court has a discretion to make an order having the effect that the unsuccessful plaintiff does not pay full costs in respect of all defendants: this may be achieved by disallowing costs of the additional defendant(s) or by reducing the costs payable by the plaintiff in respect of each defendant.

160 In *HP Mercantile Pty Ltd v Hartnett*,[100] the New South Wales Court of Appeal observed that:[101]

> [T]he ultimate question is not (as the respondents submit) whether they have acted reasonably, nor whether there has been shown to be duplication. The question is whether it is reasonable for the unsuccessful litigant to bear more than one set of costs. … That in turn reflects the fact that ultimately, as Hodgson JA explained in *Commonwealth v Gretton* [2008] NSWCA 117 at [121]:
>
> > underlying the general rule that costs follow the event, and the qualifications to that rule, is the idea that costs should be paid in a way that is fair, having regard to what the court considers to be the responsibility of each party for the incurring of the costs.

161 I am satisfied that these principles extend to the costs of duplicative summonses.

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97 *Statham v Shephard (No 2)* (1974) 23 FLR 244, 246.
98 [2018] VSC 508.
99 Ibid [39] (citations omitted).
100 [2017] NSWCA 79.
101 Ibid [14] (Bathurst CJ, Leeming and Payne JJA).

162 Ultimately, Aries' summons was heard and, although the plaintiffs' claim was not dismissed, the plaintiffs were ordered to pay Aries' costs of and incidental to his summons on a standard basis. Luke has not demonstrated why it is reasonable for the plaintiffs to bear more than one set of costs.

163 In the circumstances, and in light of the Court's obligation to give effect to the overarching purpose set out in s 7 of the CPA to facilitate the just, efficient, timely and cost-effective resolution of the real issues in dispute, it is appropriate that there be no order as to the costs of Luke's summons.

E Orders

164 For the reasons set out above, I will order that:

(a) the plaintiffs and Wenjun Zhang (Andy) pay the second, third and fourth defendants' costs of and incidental to this proceeding, including reserved costs, to be taxed on an indemnity basis if not agreed;

(b) any previous orders that the plaintiffs pay the second, third and/or fourth defendants' costs on a standard basis are varied to provide that those costs be paid by the plaintiffs and Wenjun Zhang (Andy) on an indemnity basis; and

(c) there be no order as to costs of the second defendant's summons dated 12 October 2022 and filed 13 October 2022.

SCHEDULE OF PARTIES

BY ORIGINAL PROCEEDING

M C WHOLESALING PTY LTD (ACN 621 035 265)	First Plaintiff
AUSTRALIA PRODUCTIONS PTY LTD (ACN 629 026 320)	Second Plaintiff
- and -	
MING CHE (also known as "ARIES")	First Defendant
BO ZHANG (also known as "LUKE")	Second Defendant
LIN ZHENG (also known as "ROCKY")	Third Defendant
LINFANG PTY LTD (ACN 150 877 124)	Fourth Defendant

BY COUNTERCLAIM

MING CHE (also known as "ARIES")	First Plaintiff by Counterclaim
MC SERVICES GROUP PTY LTD (ACN 629 969 651)	Second Plaintiff by Counterclaim
- and -	
WENJUN ZHANG (also known as "ANDY")	First Defendant by Counterclaim
M C WHOLESALING PTY LTD (ACN 621 035 265)	Second Defendant by Counterclaim
JY – ENTERPRISES TRADING PTY LTD (ACN 611 582 168)	Third Defendant by Counterclaim
AUSGO HEALTH PTY LTD (ACN 611 849 720)	Fourth Defendant by Counterclaim
LUCAS GLOBAL TRADING PTY LTD (ACN 612 911 083)	Fifth Defendant by Counterclaim
AUS MAX TRADING PTY LTD (ACN 627 054 924)	Sixth Defendant by Counterclaim
AZ JY ENTERPRISES PTY LTD (ACN 627 056 802)	Seventh Defendant by Counterclaim
AUSTRALIA PRODUCTIONS PTY LTD (ACN 629 026 320)	Eighth Defendant by Counterclaim
A Z GLOBAL CORPORATION PTY LTD (ACN 627 051 343)	Ninth Defendant by Counterclaim
A Z GLOBAL INVESTMENT PTY LTD (ACN 627 051 343)	Tenth Defendant by Counterclaim
BA NANA GLOBAL TRADING PTY LTD (ACN 612 703 018)	Eleventh Defendant by Counterclaim

LIN XU	Twelfth Defendant by Counterclaim
NUTRI HEALTH QUEENSLAND PTY LTD (ACN 627 061 394)	Thirteenth Defendant by Counterclaim
KUAJING DIRECT EXPRESS PTY LTD (ACN 624 763 006)	Fourteenth Defendant by Counterclaim
PRIME GLOBAL TRADING PTY LTD (ACN 632 373 383)	Fifteenth Defendant by Counterclaim
A Z CORPORATION VIC PTY LTD (ACN 639 216 952)	Sixteenth Defendant by Counterclaim
A Z INVESTMENT GROUP PTY LTD (ACN 169 689 445)	Seventeenth Defendant by Counterclaim
ALICE TRADING LIMITED (COMPANY NUMBER 2557828)	Eighteenth Defendant by Counterclaim