

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMERCIAL AND EQUITY DIVISION

Not Restricted

S CI 2011 5362

SITZLER SAVAGE PTY LTD (ACN 089 842 875)

Plaintiff

v

NORTHERN MINING HOLDINGS PTY LTD
(ACN 147 906 018)

First Defendant

SAMUEL SAVAGE; MARY-ELLEN QUIGLEY AND
TEREASA CLEGG (EXECUTORS OF THE ESTATE OF
JOHN THOMAS SAVAGE, DECEASED)

Second Defendant

ASSOCIATE JUDGE: Zammit AsJ
WHERE HELD: Melbourne
DATE OF HEARING: 20 and 21 December 2011
DATE OF JUDGMENT: 21 March 2012
CASE MAY BE CITED AS: Sitzler Savage v Northern Mining Holdings and Anor
MEDIUM NEUTRAL CITATION: [2012] VSC 104

PRACTICE AND PROCEDURE – Application for leave to discontinue proceedings – Plaintiff joined without its authority – Whether costs should be awarded against non-party and legal representatives – Costs – Discretion of the Court to award costs – Whether costs awarded on a ‘solicitor client’ or ‘indemnity’ basis – rr 25.02, 25.05, 63.15 and 63.23 of the *Supreme Court (General Civil Procedure) Rules 2005* – s 24 of the *Supreme Court Act 1986*

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiff	Mr MNC Harvey	Norton Rose Australia
For the First Defendant	Mr D Collins SC with Mr JB Davis	Norton Gledhill
For non-parties Mr William Gibbins and Gibbins Investments Pty Ltd	Mr AJ Kelly SC with Mr D Guidolin	Wisewould Mahony
Peko Rehabilitation Project Pty Ltd	Mr R Peters	Lander & Rogers
Norton Rose Australia	Mr R Brett QC	Norton Rose Australia

HER HONOUR:

1 This proceeding was commenced on 7 October 2011 on instructions provided by
Mr Vincent Savage, one of two directors of the plaintiff, Sitzler Savage Pty Ltd
(‘Sitzler’), against Northern Mining Holdings Pty Ltd (‘Northern Mining’), the first
defendant, and against the estate of John Thomas Savage. The plaintiff now seeks
leave to discontinue this proceeding.

2 The parties do not oppose an appropriate order terminating the proceeding.
However, the question to be determined is whether Sitzler should pay costs. The
opposing parties submit that Sitzler did not authorise the proceeding and that
Vincent Savage and solicitors Norton Rose Australia (‘Norton Rose’) should pay the
costs of the proceeding.

3 There are four summonses before the Court.

4 The first summons in time was filed on 24 October 2011 by Northern Mining seeking
judgment on the grounds that Norton Rose did not have instructions from Sitzler to
commence and prosecute the proceeding and an order that Norton Rose and Vincent
Savage pay its costs of the proceeding to be taxed on an indemnity basis.

5 The second summons was filed by Sitzler on 22 November 2011. Sitzler seeks orders
that it has leave to discontinue this proceeding pursuant to r 25.03 of the *Supreme
Court (General Civil Procedure) Rules 2005* and that Sitzler pay Northern Mining’s
costs and the costs of a non party, Peko Rehabilitation Project Pty Ltd (In liq) (subject
to DOCA) (‘Peko’).

6 The two remaining summonses were filed by non-parties to this proceeding: William
Gibbins and Gibbins Investment Pty Ltd (‘Gibbins’) on 1 December 2011 and Peko on
2 December 2011. The Gibbins and Peko summonses seek orders pursuant to r 63.15
that Sitzler not pay the costs of or incidental to this proceeding, but rather that
Norton Rose and Vincent Savage pay the costs of and incidental to this proceeding.

They also seek an order that Norton Rose and Vincent Savage may not recover, directly or indirectly, from Sitzler their costs of this proceeding.

7 Sitzler relies on the affidavit of Vincent Savage dated 22 November 2011 and two affidavits of David Porter dated 7 December 2011.

8 Northern Mining relies on the affidavit of Andrew John Green dated 24 October 2011.

9 The Gibbins parties rely on three affidavits of William John Gibbins dated 25 October, 5 December and 22 December 2011.

10 Peko relies on the affidavit of Simon Alexander Wallis Smith dated 6 December 2011.

11 The Gibbins parties appear by leave in this proceeding. Peko's appearance comes about by summons dated 10 October 2011 filed on behalf of Sitzler to join Peko as a defendant. Before the Court determined the summons the proceeding was stayed by orders made 27 October 2010 while Vincent Savage considered seeking leave *nunc pro tunc* pursuant to s 237 of the *Corporations Act 2001* to commence the proceeding in Sitzler's name. Vincent Savage commenced a proceeding in this Court seeking leave under s 237 of the *Corporations Act 2001* but subsequently discontinued that proceeding.

12 On 21 December 2011 Gibbins became the sole owner of all of the 100 shares in Sitzler.

13 The change in ownership of Sitzler does not change the issues before the Court which must be determined.

The Evidence

14 Sitzler has two directors, William Gibbins and Vincent Savage. It had 100 issued shares and two shareholders: the executors of the estate of the late John Thomas Savage ('the executors') as to 45 shares and Gibbins as to 55 shares.

- 15 Sitzler was one of a group of three companies established by Mr John Thomas Savage to run a mining business in the Northern Territory. The other members of the group were Peko and Australian Magnetite Pty Ltd.
- 16 William Gibbins and Vincent Savage are directors of Peko. The shareholders of Peko are Gibbins, as to 55 shares and the executors, as to 45 shares. Peko is currently subject to a controller and an administrator (and a Court appointed liquidator).
- 17 Sitzler's role in the group was to hold a number of mining tenements in the Northern Territory ('the tenements'). Sitzler does not trade and has no employees. The value of the mining tenements is between \$60 million to \$100 million.¹ The mining tenements are Sitzler's only assets. Peko's role was to operate the business and enter into any necessary transactions in relation to the business.² William Gibbins' evidence is that Peko was incorporated for the purpose of exploiting those tenements and for that purpose was given a licence by Sitzler for the exclusive use of those tenements.³ Until July 2008, Mr John Thomas Savage was a director of Sitzler and Peko. From that date Vincent Savage became a director of both companies and Australian Magnetite Pty Ltd.
- 18 By a research and development concessional loan agreement entered into on 21 November 2003 ('the loan agreement'), the Commonwealth of Australia, acting through the Industry and Research Development Board, agreed to advance funds to Peko in total of \$1,775,135. The purpose of these funds was to finance partially Peko's commercialisation of certain mineral processing technologies with respect to the mining tenements.⁴ Under the loan agreement Sitzler granted to Peko an exclusive licence over the tenements. Peko defaulted under the loan agreement. By a deed entered into in July 2006 ('the variation deed') Sitzler agreed to grant new

¹ Affidavit of Vincent Savage sworn 22 November 2011 at [21].

² Ibid at 18.

³ Affidavit of William John Gibbins sworn 25 October 2011 at [8].

⁴ Ibid at [23].

licences of the tenements and extend the time of the repayment to the Commonwealth.⁵

19 Recital A to the variation deed records the loan agreement between the Commonwealth and Peko as borrower. Recital B records: Under the Loan Agreement, the Commonwealth agreed to advance \$3,268,910 to [Peko] for the purpose of partly financing [Peko's] project to commercialise mineral process technologies related to the recovery of cobalt, copper and magnetite from tailings ('the Project').⁶ Recital D notes that Peko defaulted under the loan agreement.

20 Recital F records that the Commonwealth was willing to forebear from proceeding against Peko and the director on the basis that Peko and the director enter into and comply with the variation deed. Clause 9 of the variation deed provides in summary that the Pre-Deed Licence which was granted prior to the variation deed was terminated and a new licence is put in place.

21 Clause 9.6 of the variation deed provides:

9.6 The licence over each Licensed Asset is granted on the following terms:

- a. the licence commence on the Effective Date and ends on the date the Debt is repaid in full (Expiry Date);
- b. the licence entitles Peko to the exclusive use of the Licensed Assets, to all revenue derived from the Licensed Assets and otherwise to all rights and benefits of Sitzler as the holder of the Licensed Assets;
- c. the licence survives either or both Sitzler or [Peko] becoming insolvent or entering into any form of administration.

22 Recital G records that Sitzler had, prior to the date of the variation deed granted to Peko, an exclusive licence of the mining tenements (listed in Item 1 of Schedule 2 to the variation deed) and that Sitzler now agreed to grant new licences to Peko over the mining tenements on the terms of the variation deed.

⁵ Affidavit of Vincent Savage sworn 22 November 2011, Exhibit VS8.

⁶ Ibid.

23 In breach of the 2006 variation deed, Peko did not repay moneys to the Commonwealth.

24 In September 2007, Heads of Agreement were entered into between Mr John Thomas Savage, Peko, Sitzler, Australian Magnetite, Bactron Pty Ltd, BIGA Nominees Pty Ltd, Mr Gibbins and Gibbins Investments ('2007 Heads of Agreement'). Recital F defined the Project as follows:

F. In addition to extracting magnetite from the Tailings, Peko also proposes to extract gold, copper and cobalt from the Tailings (the Project).

25 Recital H of the 2007 Heads of Agreement referred to advances which William Gibbins procured for the Project and to entities which conducted activities related to the Project. Recital L recorded the agreement of Gibbins Investments and another company controlled by William Gibbins to provide further capital for the Project. Clause 6 of the 2007 Heads of Agreement provides:

Management

6. John Savage shall be the manager of the Project responsible for marketing. Vincent Savage shall be responsible for the Project's management and financial matters. [William] Gibbins shall be responsible for the Project's transport and logistics.

26 On 4 February 2008, Peko granted a charge over its assets to the Commonwealth to secure the debt Peko owed under the 2006 variation deed. The Peko charge over its assets to the Commonwealth included its licence from Sitzler.⁷

27 On 8 July 2008, Vincent Savage was appointed director of Sitzler, Peko and Australian Magnetite, in place of the late John Thomas Savage.

28 Peko defaulted in its performance of its obligations to the Commonwealth and on 7 September 2009 the Commonwealth appointed a receiver under its charge. Peko was placed into liquidation on 17 February 2010. Peko is currently in administration pursuant to a deed of company arrangement ("DOCA").

⁷ Ibid Exhibit VS10.

29 John Thomas Savage senior died on 2 May 2010.

30 Sitzler’s constitution contains Article 37 that gives its shareholders pre-emptive rights when one of them seeks to transfer shares in the company.⁸ On or about 29 April 2010 (some two days prior to John Thomas Savage’s death) his attorney, Samuel Savage entered into a contract to sell to Minquip Pty Ltd his 45 shares in Sitzler. Vermillion Resources Pty Ltd (“Vermillion”) took an assignment of the sale agreement from Minquip on or about 8 October 2010.

31 The first time Vincent Savage saw Sitzler’s constitution was on 26 October 2010 and he was not aware of the pre-emptive procedure found in Article 37 of Sitzler’s constitution.⁹

32 Litigation arose out of the sale agreement of John Thomas Savage’s 45 shares to Minquip/Vermillion. The Federal Court proceeding was commenced by Gibbins Investments to restrain the completion of the sale and to compel compliance with Article 37 which gave Gibbins Investments pre-emptive rights in respect of the shares in Sitzler owed by the estate of John Thomas Savage.

33 On 30 May 2011, Justice Gordon gave judgment in the Federal Court proceeding and restrained the executors of the estate of John Savage from dealing with the shares in Sitzler other than in accordance with the pre-emptive rights provision in Article 37.

34 There were appeals and cross appeals from Justice Gordon’s decision. On 10 November 2011 the appeal by Vermillion in the Federal Court of Australia was heard and determined, with that appeal being dismissed. An order was made providing for the executives to comply with Article 37.

35 By deed made 24 March 2011, the Commonwealth purported to assign to Northern Mining the debt and contractual rights under the 2006 variation deed, and the charge.

⁸ Exhibit VS22.

⁹ Affidavit of Vincent Savage sworn 22 November 2011 at [78].

36 In June 2011, Peko’s liquidators commenced proceedings in the Federal Court for approval of an arrangement between Peko and Northern Mining (‘the liquidator’s proceeding’). The liquidator’s proceeding was discontinued in July 2011.

37 In the liquidator’s proceeding, the then liquidators of Peko sought orders from the court that the liquidators may, on Peko’s behalf, enter into four agreements.¹⁰

38 The first agreement is a sale agreement of Peko’s plant and equipment and mineral extraction patent to Northern Mining.

39 The second agreement is the “Off-Take Agreement”. By this agreement Peko was to sub-licence the mining tenements to Northern Mining and assigned its interest in the tailings to Northern Mining. In return, Northern Mining was to make a \$400,000 payment to the receiver and Manager and then periodic payments, totalling \$1.5 million. At the end date, Northern Mining was required to pay \$5 million to the receiver and manager. The end date was five years from the Off-Take Agreement or after treatment and removal of all the tailings in the mining tenements, whichever was earlier. The final payment was \$100,000 to the liquidators to meet their costs and expenses.

40 The Off-Take Agreement also provided if Gibbins Investments obtains the right to acquire John Thomas Savage’s share in Sitzler, Northern Mining will purchase those shares before the end date.¹¹

41 The third agreement is the option agreement. The option agreement provides for Gibbins Investments granting to Northern Mining an option to purchase its shares in Sitzler for an option fee of \$9.295 million. Further, Gibbins Investments agrees to use reasonable endeavours to acquire John Thomas Savage’s shares in Sitzler and Northern Mining agrees to buy them for no more than \$7.605 million.¹²

42 The fourth agreement is not relevant for the purpose of the present applications.

¹⁰ Ibid, Exhibit VS12.

¹¹ Ibid, Exhibit VS18, Off-Take agreement, clause 8.

¹² Ibid, Exhibit VS18 – Option Agreement – clause 7.

43 Vincent Savage did not become aware of the liquidator's proceeding until 13 July 2011. Vincent Savage's evidence is that 'this gave me very limited time to respond'.¹³

44 Vincent Savage formed a view that having read the four agreements, that they were:¹⁴

... a scheme concocted for the sole purpose of ensuring that the value inherent in the Mining Tenement did not flow to [Sitzler]. As Gibbins Investments was proposed to be a party to some of the four agreements and stood to receive substantial money under those agreements, I was concerned that Mr Gibbins was acting in concert with Northern Mining to implement that scheme.

45 Exhibit VS15 of Vincent Savage's affidavit contains letters sent from Norton Rose on Vincent Savage's instructions in relation to the concerns he had relating to the liquidator's proceeding and the four agreements. A letter dated 15 July 2011 from Norton Rose to Lander & Rogers, solicitors for Peko's liquidators, states:

We act for Vincent Savage, a director of Sitzler Savage Pty Ltd (SSPL). Due to a deadlock with the other director of SSPL our client is presently unable to cause SSPL to give us instructions.

...

In the above circumstances, we are instructed to request an adjournment for one month of the hearing of your client's application on 19 July 2011 so that our client can properly consider:

- 1 the voluminous material exhibited to Mr Wallace-Smith's first affidavit;
- 2 whether SSPL should bring proceedings against any person;
- 3 if our client forms the view that SSPL should bring such proceedings and our client's fellow directors will not agree for SSPL to do so, whether our client should seek orders under Part 2F.1A of the *Corporations Act* allowing our client to do so in the name of SSPL.

46 Lander & Rogers responded to Norton Rose by letter dated 8 August 2011. The letter states amongst other things:¹⁵

We note that you act for a director of Sitzler Savage Pty Ltd (SSPL). It is therefore not clear how your client has standing to oppose our client's

¹³ Ibid, at [41].

¹⁴ Ibid, at [43].

¹⁵ Ibid, Exhibit VS16.

application to the court.

47 The liquidator's proceeding was discontinued by 8 August 2011. The liquidators went down the path of a DOCA of Peko.

48 On 18 July 2011, Norton Rose wrote on behalf of Vincent Savage to Wisewould Mahony, solicitors for the Gibbins parties. Norton Rose says Vincent Savage:¹⁶

would like to convene a board meeting of [Sitzler] to discuss with [Gibbins]:

1. [Sitzler's] response to the liquidators [Peko's] application; and
2. the further management of the Mining Tenements controlled by [Sitzler].

49 In response by letter dated 20 July 2011, Wisewoulds writes to Norton Rose that William Gibbins is available for a board meeting in the following week and that William Gibbins requires further information before attending any board meeting. The letter confirms that William Gibbins will be assisted by an agenda for the meeting and requires Vincent Savage to provide, amongst other things, information in relation to proposed resolutions; Vermillion's role and relationship with Vincent Savage.¹⁷

50 By 21 July 2011, Vermillion had provided \$50,000 to fund out of pocket legal expenses incurred by Vincent Savage in responding to the liquidator's application. Vincent Savage was not obliged to repay that money and Vermillion has only requested that Vincent Savage refrain from taking any action that will be contrary to Vermillion's interest without first discussing the action with Vermillion.¹⁸

51 In an affidavit sworn by Vincent Savage on 21 July 2011 in the liquidator's proceeding, Vincent Savage deposes:¹⁹

If, at our directors' meeting on 29 July 2011, Mr Gibbins and I do not agree that Sitzler Savage intervene in this proceeding, I will make an application to this court to commence a derivative action under Part 2F.1A of the *Corporations Act 2001* on behalf of Sitzler Savage to

¹⁶ Ibid, Exhibit VS24.

¹⁷ Ibid.

¹⁸ Ibid.

¹⁹ Ibid, Exhibit VS26.

restrain the liquidators from executing the proposed Off-Take agreement.

52 On 21 July 2011, Norton Rose wrote to Gibbins' lawyers on behalf of Vincent Savage giving notice of a meeting of directors. The agenda proposed by Vincent Savage for consideration of Sitzler's directors included:²⁰

AGENDA FOR MEETING OF DIRECTORS OF SITZLER SAVAGE PTY LTD

It is proposed that the directors of Sitzler Savage Pty Ltd (Company) meet at the offices of Norton Rose Australia, ... to consider, and if thought appropriate, to pass resolutions relating to the following matters:

...

2. Any steps the Company should take to protect the Mining Tenements owned by and exploration licences (in application) held by the Company, including:

...

3. whether:

(i) the Company should oppose the application of the liquidators of Peko Rehabilitation Project Pty Ltd (Receiver and Manager Appointed) (in liquidation) seeking orders under s 477(2B) of the *Corporations Act 2001* (Cth) in the Federal Court of Australia proceeding VID 708 of 2011 (liquidator's application); and

(ii) if so, whether the Company should appoint Norton Rose Australia or some other lawyers should be appointed to act for the company in the liquidated application.

53 On 6 September 2011, Norton Rose wrote to Northern Mining advising that it acts for Vincent Savage.²¹ After demanding information from Northern Mining, Norton Rose says that if Northern Mining does not provide the information they will 'seek Vincent Savage's instructions to commence a proceeding in the name of [Sitzler] against Northern Mining to obtain details of the payout amount'.

54 By fax dated 7 September 2011, Northern Mining's solicitors questioned Norton Rose's retainer:²²

²⁰ Ibid, Exhibit VS24.

²¹ Ibid, Exhibit VS16.

²² Ibid.

We refer to your letter to [Northern Mining] dated 6 September 2011. Please let us know by return upon what basis:

- (a) Norton Rose purports to act for [Sitzler], if that be the fact; and
- (b) [Sitzler] contends it is a surety in respect of a secure debt owed by [Peko] to [Northern Mining].

55 By a letter dated 15 September 2011 to Peko's liquidator's solicitors, Norton Rose states that it 'now acts for Sitzler Savage Pty Ltd'. The letter states:²³

Pursuant to the terms of an agreement executed in 2007 between John Thomas Savage, Peko, SSPL, Australian Magnetite Pty Ltd, Bactron Pty Ltd, BIGA Nominees Pty Ltd, William Gibbins and Gibbins Investments Pty Ltd (2007 agreement), Vincent Savage has authority for management and financial affairs regarding Peko, and the Mining Tenements sub-let to Peko under cl 9 of the R&D concessional loan agreement (R&D concessional loan agreement) between the Commonwealth of Australia, Peko, John Thomas Savage and [Sitzler] dated 5 July 2006. Insofar as those matters are concerned we are instructed to act for [Sitzler].

56 By letters dated 16 September 2011, Gibbins' solicitors and Northern Mining's solicitors wrote to Norton Rose to dispute Norton Rose's retainer to act for Sitzler.²⁴

57 On 23 September 2011, Peko's liquidators became its administrators to consider a proposed DOCA with Northern Mining.

58 On 26 September 2011, Norton Rose wrote to Peko's solicitors saying that Norton Rose now acts for Sitzler and that Vincent Savage has authority to instruct on behalf of Sitzler pursuant to the 2007 Heads of Agreement:²⁵

We now act for [Sitzler]. Under the terms of an agreement executed in 2007 Vincent Savage has authority for management of financial matters regarding Peko, and the Mining Tenement sub-let to Peko under cl 9 of the R&D concessional loan agreement (R&D concessional loan agreement) between the Commonwealth of Australia, Peko, John Thomas Savage and SSPL dated 5 July 2006. Insofar as those matters are concerned, we are instructed to act for [Sitzler].

²³ Ibid, Exhibit VS21.

²⁴ Ibid, Exhibit VS21.

²⁵ Ibid, Exhibit VS18.

59 On 27 September 2011, Peko's solicitors challenged Norton Rose's instructions to act for Sitzler:²⁶

We have a copy of the 2007 agreement to which you (presumably) refer, between the parties you've indicated. However the terms of the version of the executed agreement we hold seem to differ somewhat from the terms you assert in your letter.

Clause 6 of that agreement states:

Vincent Savage shall be responsible for the Project's management and financial affairs.

'Project' is defined to be extraction of magnetite, gold, copper and cobalt from the Tailings [held by Sitzler Savage under the Tenements].

60 By letter dated 6 October 2011, Gibbins' solicitors again questioned Norton Rose's retainer.²⁷

61 By letter dated 6 October 2011 to Gibbins' solicitors, Norton Rose reasserts its retainer from Sitzler. Norton Rose asks William Gibbins' solicitors whether William Gibbins, a director of Sitzler, has any comments with regard to the commencement of proceedings against Northern Mining to obtain details for the payout amount or whether William Gibbins is of the view that the proceedings should not be commenced.²⁸

62 On 6 October 2011, Sitzler enters into a Loan Agreement with Vermillion in which Vermillion agrees to loan \$3,250,000 to Sitzler, the borrower. In addition, on or about 6 October 2011, a charge is given and indemnity agreements entered into.

63 In relation to the indemnity agreement, the parties are Vermillion, Sitzler and Vincent Savage. Clause 1.1 of the indemnity provides:²⁹

1. Indemnity

1.1 Vermillion from the date of this Deed [September 2011] indemnifies:

(1) Mr Savage; and

²⁶ Ibid.

²⁷ Ibid, Exhibit VS23.

²⁸ Ibid.

²⁹ Ibid, Exhibit VS29.

- (2) [Sitzler];
- Against all:
- (3) fees and disbursements payable to Norton Rose Australia;
and/or
- (4) costs orders made against Mr Savage and/or [Sitzler];

in any way related to or in connection with:

- (5) any court proceeding commenced within 3 months from the date of this Deed:
- (a) in the name of [Sitzler] against [Northern Mining] to ascertain, inter alia, the indebtedness of [Peko] to Northern Mining arising from or in any way attributable to:
- (i) the R & D Concessional Loan Agreement; and
- (ii) a deed of assignment dated 24 March 2011 of the indebtedness of Peko to the Commonwealth of Australia;
- (b) in the name of Mr Savage and/or [Sitzler] seeking orders under Part 2F.1A of the *Corporations Act 2001* (Cth) to enable a proceeding under subparagraph (a) to be brought or proceeded with (the Court Proceedings).

1.2 The indemnity in clause 1.1 is a principal and continuing obligation, under which Vermillion must attend to direct payment of all money required to be paid under clause 1.1 without the need for Mr Savage or [Sitzler] to first make payments of any such money.

...

3. Conduct of Court Proceedings

- 3.1 Mr Savage and [Sitzler] agree that they will confer with Vermillion prior to issuing the Court Proceedings and once the Court Proceedings have been commenced they will keep Vermillion informed on the status and progress of the Court Proceedings.
- 3.2 Mr Savage and [Sitzler] agree that they will not conclude the Court Proceedings without prior consultation with Vermillion.
- 3.3 Mr Savage and [Sitzler] will disclose to Vermillion upon such information coming to their knowledge, all information received from time to time which may have a material impact on the continuing conduct or resolution of the Court Proceedings.

64 Clause 5 provides:

5. Mr Savage and [Sitzler] agree they will not retain lawyers to act for them in the proceedings other than Norton Rose Australia without the prior written approval of Vermillion ...

65 Clause 10 provides:

10. When does this Deed begin to operate?

- 10.1 This Deed begins to operate as soon as it has been executed by both Mr Savage and Vermillion.
- 10.2 Vermillion agrees that [Sitzler] may execute this Deed by Mr Savage signing a counterpart of this Deed on behalf of [Sitzler].
- 10.3 If [Sitzler] does not formally execute this Deed then, if this Deed has been signed by Mr Savage on behalf of [Sitzler], this Deed operates as a deed poll in favour of [Sitzler].

66 In the Deed Poll, Vermillion agrees:

1. On or about 6 October 2011 Vermillion, Vincent Savage (Savage) and [Sitzler] executed an indemnity ...
4. Vermillion covenants that the indemnity is extended to cover Norton Rose Australia (NRA) for:
 - (a) any adverse costs order made against NRA or any NRA partner in the Court Proceedings, whether or not the costs relate to steps taken in the Court Proceedings before or after the date of this Deed Poll;
 - (b) any fees that NRA or any NRA partner pays to any counsel to advise and appear on behalf of NRA or any NRA partner in Court Proceedings, whether or not those fees are incurred before or after the date of this Deed Poll.

67 By letter dated 6 October 2011, Norton Rose on behalf of Sitzler, sent a copy of the loan agreement of 6 October 2011, the charge executed by Sitzler and Vermillion to Gibbins' solicitors.³⁰

68 On 7 October 2011, Norton Rose wrote to Gibbins' solicitors and reasserts its retainer is from Sitzler and notes that in the absence of a response on the issue of whether the Gibbins parties have a view that this proceeding should not be commenced, Norton

³⁰ Ibid, Exhibit VS23.

Rose will file the originating motion on behalf of Sitzler in this Court. This proceeding was commenced on 7 October 2011. Vincent Savage refers to this proceeding as the redemption proceeding on the basis that he and Sitzler wanted to redeem the mining tenements by finding out how much debt is secured against the mining tenements. Vincent Savage's evidence is that it was his aim to pay the debt so that Sitzler regained full control of those mining tenements.

69 By letter dated 11 October 2011, Gibbins' solicitors wrote to Norton Rose questioning its retainer:³¹

The commencement of proceedings by your firm on behalf of [Sitzler] has been done without the authority of the directors of [Sitzler] and is ultra vires. It has also been done in circumstances where your firm is acutely aware of the fact that the person who has been instructing your firm, Mr Vin Savage, has been dealing with Vermillion Pty Ltd with a view to acquiring for Vermillion Pty Ltd an interest in [Sitzler].

On 15 September 2011 in a letter to Norton Gledhill you asserted for the first time that you 'now' act for [Sitzler] on the basis of an authority purportedly conferred in the 2007 Heads of Agreement. Our client disputes that the Heads of Agreement confers an authority to commence proceedings on behalf of [Sitzler]. ... Clearly, prior to commencing the proceeding you had not taken the view that the 2007 Heads of Agreement permitted Mr Savage to authorise the bringing of an action on behalf of [Sitzler]. In the proceeding commenced by the liquidators of Peko in the Federal Court on 30 June 2011 in which you sought to act for Mr Savage, Mr Harvey who appeared for Mr Savage stated to the court on 19 July 2011 that he may need to make an application to bring a "derivative action on behalf of the company". We doubt that his reference to the company could have meant a company other than [Sitzler].

As the proceedings have been commenced without authority, it is clearly incompetent and ought to be withdrawn immediately.

...

A further letter sent to you on the same day, in response to your letter to Norton Gledhill dated 15 September 2011, stated,

As you are well aware we act on behalf of Gibbins' Investments Pty Ltd which holds 55% of the shares in [Sitzler]. We also act on behalf of William John Gibbins who is a Director of that company. We would be pleased if you would forward to us each and every document which allows you to assert that you act on behalf of Sitzler Savage Pty Ltd.

We did not receive a response to any of these letters and the fact that your client had no authority to bind [Sitzler] was not challenged.

³¹ Ibid.
SC:EB

At 9.18pm on Thursday 6 October 2011 we received an email from you, which for the first time alerted us and our client to a loan agreement and charge entered into between SSPL and Vermillion and requested our client's comments by 3pm the next day on a proposed action by [Sitzler] against Northern Mining, which you subsequently filed to commence the proceeding. As well as being ultra vires, the notice to our client was, in all the circumstances, unreasonable.

By our letter in response dated 7 October 2011 we politely requested you consider whether you should be acting on behalf of [Sitzler].

Moreover without any explanation as to the urgency of issuing the proceeding, the details of which had not been disclosed to our client, you commenced a proceeding on behalf of [Sitzler] without any authority to do so.

The matters set out above demonstrate that your client and your firm have:

- ignored our client's objections;
- failed to consult our client regarding the purported loan agreement which was prepared by your firm;
- failed to give our client any advice as to what action is proposed to be taken by [Sitzler] and why;
- failed to disclose to our client the legal costs which [Sitzler] would be incurring in respect of your fees and the legal action which has been commenced;
- failed to consider whether [Sitzler] has any capacity to service any debts which it will incur as a result of the loan agreement.

Vin Savage's authority to bind [Sitzler]

In our view, there is no proper basis upon which you can be satisfied that Mr Savage is authorised to give you instructions on behalf of [Sitzler]. The 2007 Heads of Agreement does nothing more than provide Mr Savage with the responsibility to manage the Peko project, which itself is defined in the document. On any interpretation, this does not confer any unfettered authority on Mr Savage to unilaterally incur substantial liabilities, deal with [Sitzler]'s assets or to commence proceedings on behalf of [Sitzler]. It is not unimportant to note that Mr Savage was not a party to the 2007 Heads of Agreement and was not a director of [Sitzler] or any other entities which are party to that agreement at the time those entities entered into the agreement. It is implausible that it could be said that the terms of the Heads of Agreement permit Mr Savage to enter into loan agreements and bring proceedings on behalf of the company without the approval of the directors.

70 By letter to Gibbins' solicitors dated 12 October 2011, Norton Rose says that it is seeking instructions in relation to the matters raised in the letter from Gibbins' solicitors dated 11 October 2011.³²

71 On 17 October 2011, Norton Rose replied to Gibbins' solicitors' letter dated 11 October 2011 reasserting its retainer from Sitzler.

72 On 24 October 2011, Northern Mining filed a summons seeking to stay this proceeding upon the basis that Sitzler had not given instructions to Norton Rose.

73 This proceeding was first returnable in this Court before Randall AsJ on 27 October 2011.

74 This proceeding was stayed on 27 October 2011. In 'Other Matters', Randall AsJ recorded:

1. But for the parties agreeing to costs reserved and the timetable of procedural steps, the Court would have been receptive to ordering costs against Norton Rose Australia.
2. The Court notes that notice of an application under s 237 of the *Corporations Act 2001*, (Cth) to be made by Vincent John Savage by 4 November 2011 will be given to William John Gibbins, Gibbins Investments Pty Ltd, Northern Mining Holdings Pty Ltd and Peko Rehabilitation Project Pty Ltd (controller appointed) (administrators appointed).
3. The Court notes that the stay ordered below operates until the application under s 237 of the *Corporations Act 2001* (Cth) is made by Mr Savage with respect to the plaintiff and is determined. An application to lift the stay after determination may be made on 7 days notice.

75 On 31 October 2011, Vermillion deposited \$50,000 into Norton Rose's trust account.

76 On 4 November 2011, Vincent Savage commenced an application under s 237 of the *Corporations Act* ('derivative action') in which he sought leave to continue this proceeding on behalf of Sitzler.

³² Ibid
SC:EB

77 On 8 November 2011, the derivative action was served on the registered office of Sitzler.

78 On 10 November 2011, the appeal by Vermillion in the Federal Court of Australia was heard and determined. The appeal was dismissed.

79 On 17 November 2011 Norton Rose wrote to Northern Mining's solicitors and Peko's solicitors, advising them of Vincent Savage's intention to discontinue the derivative action and the proceeding in this Court. The letter requested that they provide details of their respective clients' costs. The 17 November 2011 letter was copied to Gibbins' solicitors.³³

80 Vincent Savage's evidence is that upon learning of Vermillion's appeal being dismissed in the Federal Court he formed the view that it was likely that 100 per cent of the shareholding of Sitzler would now ultimately come to rest with Gibbins Investments and that in such circumstances Vermillion was unlikely to ever be registered as a shareholder of Sitzler, and he had to reconsider the position, and determined to discontinue the derivative action and this proceeding on behalf of Sitzler. Vincent Savage's reason for the discontinuance of the redemption proceeding is not 'an acknowledgement of [Northern Mining's] arguments regarding want of authority on my part to provide [Norton Rose] with instructions on behalf of [Sitzler]'.³⁴

Legal principles, discontinuance and withdrawal

81 Discontinuance is governed by r 25 of the *Supreme Court Rules*. Rule 25.02 provides:

25.02 Discontinuance or withdrawal of proceeding or claim

1. This rule applies only to a proceeding commenced by writ.
2. A plaintiff may discontinue a proceeding or withdraw any part of it –
 - (a) before the close of pleadings; or

³³ Ibid, at [102].

³⁴ Affidavit of Vincent Savage sworn 22 November 2011 at [101].

- (b) at any time, by leave of the Court or with the consent of all parties.

...

25.05 Costs

Where a proceeding, counterclaim or claim by third party notice is discontinued, or where part of a proceeding, counterclaim or third party notice is withdrawn, liability for costs shall be determined in accordance with Rule 63.15.

82 Rule 63.15 provides:

63.15 Discontinuance or withdrawal

Unless the Court otherwise orders, a party who discontinues or withdraws part of a proceeding, counterclaim or claim by third party notice shall pay the costs of the party to whom the discontinuance or withdrawal relates to the time of the discontinuance or withdrawal.

83 Rule 63.31 provides:

63.31 General basis

Except as provided by these Rules or any order of the Court, including the Costs Court, costs shall be taxed on a party and party basis.

84 Accordingly, where the discontinuance occurs as of right or by leave of the Court, the plaintiff or other party discontinuing must pay the costs of the other parties unless the Court otherwise orders; and the costs are to be determined on a party and party basis, unless the Court otherwise orders.

85 Although, Sitzler and Vincent Savage's application is for leave to discontinue, the present matter is in substance one about costs.

86 In *O'Neill v Mann*,³⁵ Finn J quoted with approval the following passage from *Covell Matthews & Partners v French Wools Ltd*:³⁶

[t]he court will, normally, at any rate, allow a plaintiff to discontinue if he wants to, provided no injustice will be caused to the defendant. It is not desirable that a plaintiff should be compelled to litigate against his will. The court should therefore grant leave, if it can, without injustice to the defendant, but in doing so should be careful to see that the defendant is not

³⁵ [2000] FCA 1680.

³⁶ [1977] 1 WLR 876.

deprived of some advantage which he has already gained in the litigation and should be ready to grant him adequate protection to ensure that any advantage he has gained is preserved.

87 In *O'Neill v Mann*, Finn J went on to say:³⁷

It properly can be said that there is an 'underlying policy' in the Rules that the discontinuing party should be liable for the other party's costs unless the court orders otherwise. But so various can be the reasons for, and circumstances of, discontinuance that that policy cannot safely be said to have hardened into a 'usual rule' where leave is granted such as exists where there has been a determination of a claim on its merits. The conduct of the parties in the matter and the reasons for the discontinuance can bear heavily on the exercise of the discretion as to costs. [Citation omitted].

88 In *Ferny Sky Pty Ltd v Capital Finance Australia*,³⁸ Whelan J at [25] set out the principles which he considered to be applicable to the case before him in relation to Rules 25.05 and 63.15:

- (1) Where neither party desires to proceed with litigation, the Court should facilitate the conclusion of the proceeding by making a costs order. In this context it is legitimate to take into account the desirability of encouraging reasonable conduct by parties to litigation which furthers the expeditious and cost-effective resolution of disputes.
- (2) In the absence of a trial on the merits it will usually not be appropriate for a court considering the issue of costs to determine the merits or to attempt to assess the likely outcome of a hypothetical trial. But in some cases, a judge may feel confident that one party was almost certain to have succeeded if the matter had been fully tried and, in such circumstances, the judge is justified in determining costs on that basis. In some cases, the discontinuance itself can be seen as an acknowledgment of likely or even certain defeat or as what has been described as a step amounting to 'effective surrender'. Cases where external events overtake a proceeding or render it futile are in a different category. Such cases are not relevant here.
- (3) It is appropriate to consider whether the plaintiff has acted reasonably in commencing or in continuing the proceeding and, in a particular case, the conduct of the defendant might also be relevant.
- (4) Under Rule 63.15 the Court may 'otherwise order' in respect of some or all of the costs. [Footnotes omitted].

89 Where a party seeks costs on an indemnity basis, it is seeking a departure from the usual course, which requires it to demonstrate the existence of special circumstances.

³⁷ [2000] FCA 1680, at [13].

³⁸ [2006] VSC 366.

In *Macedon Ranges Shire Council v Thompson*,³⁹ the Court of Appeal cited the following passage from *Colgate Palmolive v Cussons*⁴⁰ regarding the discretion of the Court to award costs otherwise than on a party and party basis:

... [I]t is useful to note some of the circumstances which have been thought to warrant the exercise of the discretion. I (sic) instance the making of allegations of fraud knowing them to be false and the making of irrelevant allegations of fraud (both referred to by Woodward J in *Fountain* and also by Gummow J in *Thors v Weekes*; evidence of particular misconduct that causes loss of time to the Court and to other parties (French J in *Tetijo*); the fact that the proceedings were commenced or continued for some ulterior motive (Davies J in *Ragatta*) or in wilful disregard of known facts or clearly established law (Woodward J in *Fountain* and French JJ in *J-Corp*); the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions (Davies J in *Ragata*); an imprudent refusal of an offer to compromise (e.g. *Messiter v Hutchison*; *Maitland Hospital v Fisher (No 2)*; *Crisp v Kent* (SCNSW) (CA) 27 September 1997, unreported), and an award of costs on an indemnity basis against a contemnor (e.g. Megarry V-C in *EMI Records*). Other categories of cases are to be found in the reports. Yet others to arise in the future will have different features about them which may justify an order for costs on an indemnity basis. The question must always be whether the particular facts and circumstances of the case in question warrant the making of an order for payment of costs other than on a party and party basis. [Citations omitted].

90 It is appropriate to consider awarding indemnity costs whenever it appears that a party properly advised should have known that it 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 clearly established laws.⁴¹

Vincent Savage's submissions

91 Vincent Savage submits that he had authority to commence this proceeding for and on behalf of Sitzler on the basis that:

- (a) he was a director of Sitzler at the relevant time;
- (b) the 2007 Heads of Agreement imposed a responsibility upon him to manage the tenements. Vincent Savage's evidence is that he managed the tenements and made personal payments to ensure the tenements were properly maintained. Vincent

³⁹ [2009] VSCA 209, at [14].

⁴⁰ (1993) 118 ALR 248.

⁴¹ *Murdaca v Maisano* [2004] VSCA 123, at [40] per Nettle JA.

Savage was genuinely concerned to protect the only valuable asset of Sitzler, the tenements;

- (c) Vincent Savage could and did make an application to commence this proceeding nunc pro tunc under s 237 of the *Corporations Act*.

92 In relation to the construction of the Heads of Agreement 2007, the Court must first look at the construction of the 2006 variation deed. Vincent Savage/Sitzler submit that the effect of the 2006 variation deed was to grant new licences to Peko over the mining tenements on the terms set out in the 2006 variation deed (clause 9.2). The variation deed effectively terminated the pre-deed licence and new licences were put into place.

93 The variation deed (clause 11) effectively forced Sitzler to ensure licences were properly re-granted over the mining tenements to Peko, which enabled Peko to have a stream of income to pay out the Commonwealth of Australia by mining those mining tenements so that the debt was repaid by 2010 as set out in Schedule 1 of the Variation Deed.

94 In relation to the construction of the 2007 Heads of Agreement, Vincent Savage/Sitzler submit that clause 6 imposed a responsibility upon Vincent Savage to manage the mining tenements. Mr Savage's evidence is that he managed the mining tenements and, in fact, made personal payments to ensure that the mining tenements were properly maintained.⁴²

95 The decision by Sitzler and Vincent Savage to commence this proceeding must be understood in the context of what was happening at the relevant time. Notably, the four agreements which were the subject of the liquidator's proceeding was the sub-licensing of the tailings which William Gibbins and Vincent Savage consider are worth between \$60 million to \$100 million. The payment contemplated by Northern Mining to Peko's receiver and manager was in the range of \$7 million to \$8 million, significantly less than the estimated value which is before the Court.

⁴² Affidavit of Vincent Savage sworn 22 November 2011, at [62]-[63].

96 Vincent Savage's evidence is that a disturbing aspect of the four agreements, in particular the Off-Take agreement, was that William Gibbins, a director of Sitzler, who had a fiduciary duty to Sitzler, appeared to be part of an agreement which sought to sell the mining tenements, Sitzler's only asset, for significantly less than their value. Further, the Off-Take agreement provided a direct advantage to Gibbins Investments of which William Gibbins is a 50% owner, in that if Gibbins Investment acquired the 45% shares in Sitzler before the end date, Northern would purchase those shares for \$7.6 million. The evidence before the Court is that Vincent Savage only knew of the proposed four agreements by virtue of the liquidator's proceeding.

97 It is submitted on behalf of Sitzler/Vincent Savage that the net effect of the proposed four agreements pursuant to the liquidator's proceeding was to cause great concern for Vincent Savage given the potential benefit to the Gibbins parties.

98 Sitzler and Vincent Savage now submit that there were difficulties at the time of the liquidator's proceeding in convening a board meeting of Sitzler. Even though Peko's liquidators discontinued the liquidator's proceeding by 8 August 2011, Vincent Savage still had a concern to protect the mining tenements, which was Sitzler's one and only valuable asset.

99 Vincent Savage's evidence is that as a director of Sitzler, and given what had taken place in the liquidator's proceeding, he took the view that it was in the interests of all Sitzler's shareholders for Sitzler to regain control of the mining tenements. Vincent Savage proposed that Sitzler pay out Northern Mining's alleged debt, in order to redeem the mining tenements.⁴³

100 On Vincent Savage's instructions, on 6 September 2011 Norton Rose wrote to Northern Mining to determine the quantum of the claimed debt. Vincent Savage accepts that in the course of correspondence at this time, there is a dispute over Norton Rose's right to act on behalf of Sitzler and a dispute as to whether Vincent Savage had any right to instruct for or on behalf of Sitzler. However, Vincent Savage

⁴³ Ibid, at [57].

submits that there is no detail in the vast amount of correspondence before the Court about how much the debt is owed to Northern Mining so that it could be redeemed. Vincent Savage contends that he was stalemated by Northern Mining in that it took the line of attack that he had no authority to act for Sitzler and was not forthcoming with the information he required; that is, the amount of the debt owed by Peko to Northern Mining.

101 The parties accept the principle from *South Johnstone Mill Ltd v Dennis*,⁴⁴ in which Middleton J decided that on proper construction of ss 236 and 237 of the *Corporations Act 2001* (Cth), it is not a pre-condition to the jurisdiction of the Court that leave be sought prior to the institution of proceedings.

102 Vincent Savage submits that even if the Court finds that he had no authority to commence the proceeding because of the fiduciary obligations or pursuant to cl 6 of the 2007 Heads of Agreement, it was always open to him to seek leave nunc pro tunc, in the way he did in this proceeding by issuing proceedings after the matter was before Associate Justice Randall in October 2011.

103 Sitzler and Vincent Savage submit that a Court will normally allow a plaintiff to discontinue a proceeding provided no injustice is done to the defendant.⁴⁵

104 Sitzler now seeks to discontinue this proceeding. It has offered to pay the defendant's costs and that offer has been extended to the non-parties. There is no argument that Sitzler should be given leave to discontinue. Sitzler/Vincent Savage submit that the Court should exercise its discretion in the usual way and Sitzler should be ordered to pay the defendant and non-party Peko's costs up to 8 December 2011 and that the costs should be calculated on a party/party basis. As such, Sitzler can call upon Vermillion's indemnity.

⁴⁴ (2007) 163 FCR 343.

⁴⁵ *Covell Matthews & Partners v French Wools Ltd* [1977] 1 WLR 876, p 879; *O'Neill v Mann* [2000] FCA 1680 [11] per Finn J.

105 The defendants and the non-parties dispute this position and contend that Vincent
Savage and Norton Rose should pay the costs and that the costs should be on an
indemnity, or solicitor/client basis.

106 Sitzler and Vincent Savage submit that the Sitzler proposition, in relation to costs,
reflects the Court's usual course and thus, given the opposing parties' position, the
onus rests on them to convince the Court that the usual course should not be
followed.

107 Vincent Savage submits if costs are ordered against him, Northern Mining and the
non-parties must demonstrate that this proceeding was commenced or continued in
wilful disregard of established law if indemnity costs are to be ordered against
Vincent Savage.

Northern Mining's submissions

108 Northern Mining submits that Vincent Savage did not have authority to give
instructions on behalf of Sitzler and therefore Norton Rose did not have authority to
commence the proceeding in Sitzler's name.

109 Therefore, if Norton Rose did not have authority to commence this proceeding in
Sitzler's name it should be ordered to pay the costs of the proceeding and of this
application.

110 Northern Mining submits that the three bases upon which Sitzler and Vincent
Savage assert there is authority for Vincent Savage to act for Sitzler should be
rejected.

111 In relation to the first basis that Vincent Savage was a director of Sitzler, Northern
Mining submits that this is not supported by any authority and is raised for the first
time in written submissions. Further, Sitzler's constitution does not provide for one
director when there are two directors to institute proceedings and Vincent Savage
never had the consent of the other director, William Gibbins, to commence this
proceeding.

- 112 Northern Mining relies on the letters from Norton Rose to Peko's solicitors dated
15 and 18 July 2011.⁴⁶
- 113 The second basis asserted for Vincent Savage's authority to commence this
proceeding is cl 6 of the 2007 Heads of Agreement. This is rejected by Northern
Mining on the basis that on any proper construction, cl 6 does not provide a basis for
authority to commence proceedings in Sitzler's name.
- 114 Northern Mining submits that it is clear from the 2007 Heads of Agreement that the
'Project' was a project being conducted by Peko. Northern Mining relies on recital F
which defines the Project.
- 115 Northern Mining submits that it is clear from the terms of the 2007 Heads of
Agreement that Peko was to have the right to exploit the tailings, and that Sitzler did
not perform any active part in the conduct of the Project. Sitzler was simply the
entity that held the tenements. The Project was conducted by Peko. Peko had the
ability to exploit the tailings because Sitzler gave Peko the exclusive right pursuant
to the licence granted to it.
- 116 Clause 6 of the 2007 Heads of Agreement provides that Vincent Savage shall be
responsible for the management of financial matters in relation to the Project.
Northern Mining submits that clause 6 cannot constitute authority to commence a
proceeding in Sitzler's name, which was not conducting the Project, and would have
the consequence of bringing the Project to an end.
- 117 Northern Mining submits that agreement to Vincent Savage performing
administrative tasks in relation to the tenements, such as renewing the tenement or
paying fees, could not constitute an implied authority to commence this proceeding.
- 118 Northern Mining submits that as Norton Rose and Vincent Savage knew or ought to
have known that they did not have authority to bring this proceeding in Sitzler's

⁴⁶ Affidavit of Vincent Savage sworn 22 November 2011, Exhibit VS15.

name, they should be liable for the costs of this proceeding and the costs should be ordered on an indemnity basis.

Gibbins parties' submissions

119 The Gibbins parties submit that the costs of this proceeding should be paid by Vincent Savage and Norton Rose on the basis that the proceeding was commenced in circumstances where Sitzler could not give instructions.

120 They rely on the letter dated 15 July 2011 from Norton Rose to Peko's solicitors in which Norton Rose confirms they act for Vincent Savage and that "due to a deadlock with the other director of [Sitzler], our client [Vincent Savage] is presently unable to cause [Sitzler] to give us instructions."⁴⁷

121 The Gibbins parties submit that the evidence discloses that this proceeding was brought at the behest of Vermillion and that for the purpose of this proceeding, Vincent Savage and Norton Rose sought and obtained an indemnity from Vermillion in relation to their liability costs.

122 It is submitted that the indemnity is only explicable on the basis that Vincent Savage and Norton Rose recognise that this proceeding was being instituted in circumstances where there was a deadlock and therefore no authority.

123 In support of the submission that the 2007 Heads of Agreement did not confer authority on Vincent Savage to commence this proceeding the Gibbins parties note the following:

- (a) The definition of the "Project" in Recital F is not a Sitzler project but a Peko project;
- (b) clause 6 confers authority on three people, John Savage, Vincent Savage and William Gibbins and their responsibility is constrained by the definition of the "Project" in Recital F;
- (c) Vincent Savage became a director of Sitzler on 8 July 2008, after the 2007 Heads of Agreement;

⁴⁷ Ibid, Exhibit VS-15.

- (d) clause 6 cannot confer authority on Vincent Savage to institute a proceeding when he was not a party of the 2007 Heads of Agreement and not a director at the relevant time;
- (e) there is no evidence before the Court conferring authority on Vincent Savage to unilaterally bring proceedings in Sitzler's name. Clause 6 gives Vincent Savage authority to carry out administrative tasks in relation to the Project and no more.

124 The Gibbins parties submit that the terms of the Vermillion indemnity confirm that the indemnity only applied if Vincent Savage commenced a proceeding to determine the amount owed by Northern Mining, that is the relief which Sitzler seeks in this proceeding. The indemnity and the deed poll protect Vincent Savage and Norton Rose from adverse costs orders.⁴⁸

125 This proceeding was issued shortly after the execution of the loan agreement, charge and indemnity. The indemnity gives Vermillion significant control over the proceeding, including discontinuance.⁴⁹

126 The Gibbins parties submit that Norton Rose was aware this proceeding was commenced and maintained without the authority of Sitzler's board members.

127 Prior to and since this proceeding was commenced, Vincent Savage and Norton Rose have been on notice from solicitors acting for Northern Mining, Peko's liquidators and the Gibbins parties that the proceeding was commenced without authority.⁵⁰

128 The Gibbins parties submit that in circumstances where correspondence from July 2011 between the various parties raised the issue of Vincent Savage's authority and Norton Rose's instructions to bring these proceedings and to act on behalf of Sitzler, together with the loan agreement, charge, indemnity, deed poll and the actual commencement of this proceeding; the Court should not accept that Vincent Savage had authority to commence this proceeding based on the 2007 Heads of Agreement.

⁴⁸ Ibid, Exhibit VS29, Clause 1.1 of the indemnity and the deed poll.

⁴⁹ Ibid, Exhibit VS29, Clauses 3, 5 and 10.

⁵⁰ Affidavit of John William Gibbins sworn 25 October 2011, Exhibit WJG-13, WJG-18.

129 The Gibbins parties also note that despite being provided an opportunity to bring an application for derivative relief on behalf of the members of Sitzler Savage on a number of occasions in 2011, Vincent Savage decided not to press for that relief. The Gibbins parties submit that the Court should reject Vincent Savage's submission that he brought the proceeding to act in the best interests of all shareholders as it is contradicted by his failure to disclose the loan agreement, charge and indemnity to William Gibbins. The Gibbins parties submit that the only fact that altered Vincent Savage's position is the Full Federal Court's judgment dismissing Vermillion's appeal.

130 The Gibbins parties submit that viewed objectively, Vincent Savage has been opposed to the Savage estate obtaining in excess of \$7.6 million from the sale of its shares to Northern Mining (Hardy Brothers), instead preferring to support Vermillion's attempts to acquire the shares for \$3.5 million and that this cannot be viewed as conduct in the interests of Sitzler's shareholders.

131 The Gibbins parties observe and rely on what was said by Merkel J in *Johnson Tiles Pty Ltd v Esso Australia*:⁵¹

Accordingly, I propose to order that Slater & Gordon and Maurice Blackburn Cashman pay Esso's taxed costs of and incidental to the Notice of Motion. As those costs should be costs which the firms of solicitors, rather than their clients or group members, are liable I also propose to direct that no part of those costs be charged directly or indirectly to the representative parties or to any group members.

132 The Gibbins parties submit that Vincent Savage should be personally liable for costs against them on the basis that:

- (a) the proceeding was commenced without authority and therefore costs should be borne by Vincent Savage who caused the proceeding to be instituted;
- (b) the costs of the proceeding ought not be visited on its shareholders or creditors;
- (c) the proceeding was conducted for the benefit of a stranger to the proceeding, Vermillion; and

⁵¹ [1999] FCA 133 at [44].

(d) this proceeding was unreasonably commenced.

133 The Gibbins parties also submit that pursuant to r 63.23(1)(c) there is a power to award costs against a solicitor. It is noted that this is a power to be exercised sparingly and with caution.⁵²

134 The Gibbins parties submit that Norton Rose were aware of the fact they had no authority to commence this proceeding on behalf of Sitzler and that by reason of the loan agreement and indemnity, which Norton Rose drafted, they knew that the proceeding was undertaken for the benefit of Vermillion.

135 The Gibbins parties submit that they are entitled to their costs pursuant to r 63.01(1) which defines a party “as including”:

(a) a person not a party to a proceeding by or to whom costs in respect of the proceeding are payable by or under any Act or these Rules or any order of the Court.

Peko’s submissions

136 Peko submits that Vincent Savage and Norton Rose did not have authority and instructions to commence this proceeding on behalf of Sitzler and that they should pay the costs of the proceeding on a solicitor-client basis.

137 Peko relies on clause 84 of Sitzler’s Constitution which vests management and control of the business and affairs of Sitzler in its directors and clause 88 which permits delegation of powers by the directors.⁵³

138 Peko rejects Vincent Savage’s submissions that clause 6 of the 2007 Heads of Agreement conferred authority on him to commence this proceeding.

139 Peko submits that the word “project” as defined in recital F means that clause 6 made Vincent Savage responsible as Peko’s agent, not as Sitzler’s agent.

140 Peko submits that there was no authority given by Sitzler to Vincent Savage relating to the tenements, let alone authority to commence proceedings.

⁵² *UTSA Pty Ltd (in liq) v Ultra Tune Australia Pty Ltd* [2004] VSC 105, at [37].

⁵³ Affidavit of Vincent Savage 22 November 2011, Exhibit VS22.

141 Peko submits that Vincent Savage knew that he did not have authority to commence proceedings in Sitzler's name. The letter of Norton Rose dated 15 July 2011 acknowledges that Vincent Savage did not have authority to commence proceedings.

142 Peko submits that Vincent Savage was acting for Vermillion and that this is demonstrated by the fact that Vermillion paid Vincent Savage \$50,000 to intervene in the liquidators' proceedings. Peko contends that the evidence supports a finding that Vermillion wanted to terminate the licence which was Peko's asset so that the tenements would revert to Sitzler and therefore Vermillion could use them if it succeeded in obtaining the estate's share in Sitzler by succeeding in Vermillion's appeal.

143 Peko submits that the only party that had standing to challenge the licence was its grantor, Sitzler.

144 Peko submits that this is a case where Vincent Savage and his solicitors, Norton Rose, instituted proceedings for Vermillion despite warnings from the other parties, and that a solicitor-client costs order would reflect the abuse of process perpetrated by Vincent Savage and Norton Rose.

Submissions on behalf of Norton Rose Australia

145 Norton Rose submits that the Court should not depart from the usual practise and order anyone but the party discontinuing, Sitzler, to pay the costs of the other party. Norton Rose submits that Sitzler has been indemnified against costs orders such as those contemplated in this proceeding by Vermillion. Sitzler will not have to use its own assets to meet a costs order. The indemnity completely indemnifies Sitzler and is supported by the sum of \$50,000 lodged in the trust account of Norton Rose.⁵⁴

146 Norton Rose submits that it had authority to commence these proceedings in Sitzler's name because Vincent Savage had authority to speak on behalf of Sitzler in relation to this matter, or at least the position was an arguable position at the time.

⁵⁴ Affidavit of David Porter sworn 7 December 2011.

147 Norton Rose submits that Vincent Savage's authority to instruct Norton Rose to commence these proceedings is derived from two separate sources:

1. the 2007 Heads of Agreement, which makes Vincent Savage responsible for management of the project and financial matters;
2. the fact that Vincent Savage had been in control of activities relating to the extracting of minerals from tailings for some years with the knowledge of all directors including William Gibbins, amounted to Vincent Savage being appointed as de facto manager of Sitzler's mining tenements pursuant to clause 88 of Sitzler's Constitution.

148 Norton Rose submits that reliance by Norton Rose and Vincent Savage on those two sources of authority cannot be said to have been unreasonable or in wilful disregard of known facts or established law.

149 Norton Rose relies on the fact that it was open to Vincent Savage to apply under s 237 of the *Corporations Act* for leave to commence this proceeding as a derivative action.

150 Norton Rose submits that this is an ordinary case of a plaintiff which has a good prima facie cause of action seeking to discontinue because the commercial point has ceased to exist and accordingly the ordinary orders ought follow.

151 Norton Rose submits that Sitzler ought to get its costs of this application from the opposing parties on the basis that the other parties were aware of the existence of the indemnity from Vermillion and that Sitzler would be indemnified in respect of any such costs and its own costs by Vermillion and that this application has been made necessary by the unreasonable attitudes of the other parties and intervenors.

Decision

152 The issue before the Court is whether the usual orders on discontinuance should be made. That is, whether Sitzler should pay the costs in this proceeding of Northern Mining and the non parties or have special circumstances been established justifying departing from that course.

153 The opposing parties submit that Vincent Savage did not have authority to instruct Norton Rose to commence this proceeding on behalf of Sitzler and Norton Rose knew or ought to have known that Vincent Savage did not have authority and should not have commenced this proceeding in Sitzler's name.

154 Mr Brett QC on behalf of Norton Rose submits that the Court should not be asked to determine whether Vincent Savage had authority to commence this proceeding as it would need a full trial to determine such issues.

155 I do not accept this submission. The Court has the power to order a non-party to pay costs. Section 24(1) of the *Supreme Court Act 1986* (Vic) reads:

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 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.

156 Vincent Savage has put extensive evidence before the Court setting out the relevant background facts which he says support the contention that he had authority to commence these proceedings on behalf of Sitzler. Submissions and the evidence filed on behalf of Vincent Savage as well as the other parties do not sit comfortably with the assertion that this Court does not and should not consider whether Vincent Savage had authority to commence this proceeding.

157 This general discretion to order a non-party to pay costs must be exercised in accordance with Order 63 of the Rules.

158 The principles about ordering costs against a non-party have been recently discussed in this Court by Croft J in *Manderson M & F Consulting v Incitec Pivot Ltd (No 3)*.⁵⁵ Croft J provides a summary of the cases and the principles developed in relation to non-party costs orders, which I gratefully adopt. Of particular assistance is Croft J's reference to the New South Wales Court of Appeal decision of *FMP Constructions Pty*

⁵⁵ [2011] VSC 441, at [20] – [31].

... The principle established in *Knight v FP Special Assets* cannot be limited to the specific circumstances of the case, the joint judgment having expressed a conclusion in more general terms ... It is clear that the categories of case which may attract the exercise of the power are by no means closed, nor should they be. Nevertheless, the requirements of justice should not be allowed to expand an exception to the general rule, so as to undermine the rule itself. What is significant from the survey of the cases in which orders have been made against non-parties is that they tend to satisfy at least some if not a majority, of the following criteria:

- (a) the unsuccessful party ... was the moving party and not the defendant;
- (b) the source of the funds for litigation was the non-party or its principal;
- (c) the conduct of the litigation was unreasonable or improper;
- (d) the non-party or its principal, had an interest (not necessarily financial) which was equal to or greater than that of the party or, if financial, was a substantial interest, and
- (e) the unsuccessful party was insolvent or could otherwise be described as a person of straw.

...

The criteria identified in *Knight v FP Special Assets* should not ultimately be treated as separate and independent factors. Each requires an evaluative assessment of factors which clearly tend to interact. Nor should it be forgotten that the power is only to be exercised in exceptional cases. In many cases involving individuals in superior courts the parties may lack the resources to meet the costs of the litigation if unsuccessful. Similarly, there will frequently be a non-party, be it a company officer or solicitor, who will be active in the conduct of the litigation and who will obtain some direct or indirect financial benefit from its success ... Careful attention is required to the conduct of the parties said to be involved in the litigation and the nature of the “interest” in its outcome or subject-matter.

159 The underlying principle is that costs orders against a non-party are “exceptional” and ought be made only if appropriate and in the interests of justice.

160 The principles about ordering costs against a solicitor who commences proceedings without instructions have recently been discussed by Judd J in *Bray v Dye (No 2)*:⁵⁷

The “principle” is that legal practitioners, usually the solicitors, who have

⁵⁶ [2005] NCWCA 311.

⁵⁷ [2010] VSC 152 at [67].

improperly put forward a person as a plaintiff, are to be substituted for that plaintiff and must pay the costs that the plaintiff has been ordered to pay to the defendants.

161 The accepted way to challenge the solicitor's retainer is by summons in the proceeding and that the party, or in this case the parties challenging authority, have the burden of proof. In *Doulaveras v Daher*, Campbell JA (with whom Giles and Macfarlane JA agreed) said:⁵⁸

[133] It has been accepted in this Court that a challenge to retainer is not a matter of defence to be disposed of at trial [footnotes omitted]. It has likewise been accepted that the appropriate way of bringing a challenge to retainer is by a substantive motion to have proceedings stayed, brought as soon as the party aggrieved becomes aware of the matter.

...

[160] Further, when a challenge to the retainer a solicitor is made, the onus of proving that the solicitor lacks authority lies on the party who asserts that lack of authority [footnotes omitted].

162 The defendant and non parties have issued summonses challenging Norton Rose's retainer to commence this proceeding in Sitzler's name.

Did Vincent Savage have the authority to commence proceedings on behalf of Sitzler and did Norton Rose Australia have instructions to commence these proceedings on behalf of Sitzler?

163 As discussed, Vincent Savage submits that there are three bases upon which he had authority to commence this proceeding:

- (a) that he was a director of Sitzler at the relevant time;
- (b) clause 6 of the 2007 Heads of Agreement; and
- (c) the fact that Vincent Savage could and did make an application to commence this proceeding nunc pro tunc pursuant to s 237 of the *Corporations Act*.

164 In relation to the first basis, that Vincent Savage was a director at all relevant times, the evidence confirms that Sitzler had two directors at all relevant times, Vincent Savage and William Gibbins. Clause 84 of Sitzler's Constitution vests management

⁵⁸ (2009) 253 ALR 627.

of Sitzler in its directors and clause 88 permits delegation of powers by the directors.

165 There is no evidence before the Court demonstrating a delegation by William Gibbins to Vincent Savage to institute proceedings in Sitzler's name. Further, it is clear from the correspondence that Vincent Savage and Norton Rose were aware that the second director, William Gibbins, did not at any stage delegate any authority to Vincent Savage to commence this proceeding.

166 In relation to the second basis, Vincent Savage and Norton Rose contend that clause 6 of the 2007 Heads of Agreement conferred on Vincent Savage the authority to take action on behalf of Sitzler if there was something that had to be done to protect the financial interests of Sitzler and submit that a proper reading of the reference to the "project" in the 2007 Heads of Agreement is the project of extracting minerals from the tailings, not necessarily by Peko. The extracting happened to be carried out by Peko in 2007 but was not always to be the case. It is submitted that clause 9.6 of the 2007 Heads of Agreement in which the licence to Peko was to end when the Debt to the Commonwealth was repaid, made the licence granted to Peko of limited duration.

167 Further, Vincent Savage and Norton Rose contend that clause 6 gave Vincent Savage responsibility for the Project's management and financial matters. Mr Brett QC submits that the events which have transpired leading in effect to agreements entered into by Northern Mining have led to the entire economic value of the tailings being transferred from Sitzler and Peko to Northern Mining. Northern Mining now has the right to exploit the tenements, it is the assignee of the debt that was owed by the Commonwealth. So, as a matter of standing, the tenements remain operated and controlled for the benefit of Northern Mining. The latter facts are financial matters and they directly concern Sitzler.

168 It is submitted that as a result of clause 6 of the 2007 Heads of Agreement, Vincent Savage has always been responsible for the managing of the tenements and that he has taken every administrative step, usually at his own expense, that the tenements

remain in good stead and registered in Sitzler's name.⁵⁹

169 I do not accept the submission that the fact that Vincent Savage performed administrative tasks in relation to the tenements, such as renewing the tenements or paying fees, constituted an implied authority to commence this proceeding. Pursuant to clauses 84 and 88 of Sitzler's constitution both directors were vested with the power to control and manage Sitzler's business affairs. There was no conferment of this power from William Gibbins to Vincent Savage. Even if Vincent Savage used his own resources to perform administrative tasks in relation to the tenements, this cannot then provide him with implied authority to commence this proceeding. The evidence highlights that Vincent Savage and William Gibbins had opposing financial interests in relation to the Sitzler shares. The decision to institute this proceeding was influenced by, if not at the instigation of, Vermillion.

170 The surrounding circumstances, including the Vermillion loan, charge and indemnity do not support Vincent Savage's assertion that this proceeding was part of his role of looking after the tenements' administrative affairs.

171 I consider that Vincent Savage and Norton Rose's lack of authority to commence this proceeding is put beyond doubt by the indemnity and deed poll which affords protection to Vincent Savage and Norton Rose against any personal liability for costs.

172 I am not satisfied that the construction of clause 6 of the 2007 Heads of Agreement conferred on Vincent Savage authority to commence this proceeding. The definition in recital F of the 2007 Heads of Agreement provides that Vincent Savage shall be responsible for the "management and financial matters in relation to that project". That project was the project of extracting minerals from the tailings at the tenements by Peko. He was Peko's agent for the purpose of clause 6.

173 The evidence before the Court is that neither Sitzler nor Peko is a subsidiary or

⁵⁹ Affidavit of Vincent Savage sworn 22 November 2011, at [62].

parent of the other. They do have the same underlying shareholding and William Gibbins and Vincent Savage are directors of both companies. Vincent Savage only became a director of Sitzler in August 2008 after the 2007 Heads of Agreement were entered into. Sitzler owns the tenements. Peko was incorporated to exploit the tenements and was the operating company which extracted gold, copper et cetera from the tailings on the tenements.

174 Sitzler's only role in relation to the Project was as the holder of the tenements, the licences were granted to Peko. In the 21 November 2003 Research and Developmental Concessional Loan Agreement, the Commonwealth advanced moneys to Peko for the Project. Peko used the funds advanced and had licences which gave it the right to extract the benefit of the tailings.

175 The 2006 variation deed provides in recital B that the Commonwealth is the lender, the company borrower is Peko. Recital B provides:

Under the Loan Agreement, the Commonwealth agreed to advance \$3,268,910 to [Peko] for the purpose of partly financing its project to commercialise mineral process technologies related to the recovery of cobalt, copper and magnetite from tailings (the project).

176 Pursuant to the 2007 Heads of Agreement, Gibbins Investments advanced further capital for the Project.⁶⁰

177 Thus, as at 2007, in light of the agreements in place, Sitzler was the holder of the tenement, Peko had licences from Sitzler to undertake the Project and Peko took the commercial risk to fund the Project and borrowed money from the Commonwealth and others and the licences were to continue until the debt to the Commonwealth was repaid.

178 The Project was not something in which Sitzler was performing an active role. Sitzler was not managing the Project or the Project's financial matters.

⁶⁰ Ibid, Exhibit VS9, Recital H.

179 On 8 February 2008, Peko executed a charge over its assets to the Commonwealth, including the licences over the tenements. Sitzler did not grant any security to the Commonwealth, as it was not the operator of the Project, Peko was. Peko was the borrower, when Peko defaulted in its obligations to the Commonwealth, the Commonwealth appointed a receiver under its charge. Peko was placed into liquidation and is now in administration pursuant to a DOCA.

180 The proper construction of clause 6 and the background circumstances surrounding the 2007 Heads of Agreement does not support the construction of clause 6 submitted by Vincent Savage and Norton Rose. I do not consider that clause 6 of the 2007 Heads of Agreement gave Vincent Savage express or implied authority to commence this proceeding.

181 I do not accept that Vincent Savage's role as a director or clause 6 of the 2007 Heads of Agreement conferred authority on him to commence this proceeding in Sitzler's name.

182 The third basis of Vincent Savage's authority to commence this proceeding is that, in any event, an application pursuant to s 237 of the *Corporations Act* would remedy the fact that the proceeding was brought without proper authority. An application was made after the proceeding was commenced and the parties agree that this can be done. However, the application was discontinued. It is not a matter for the Court to speculate whether this application would have been successful. The fact remains that the application was discontinued and thus at the time of this application Vincent Savage did not have authority to commence a proceeding in Sitzler's name.

Should Vincent Savage and Norton Rose Australia pay the costs of Northern Mining, Peko (in liquidation) and the Gibbins' parties of this proceeding?

183 If I am satisfied that the proceeding was commenced without proper authority, then it follows that it was improperly commenced and gives rise to the discretion to award costs against a non party.

184 In exercising the Court's discretion to award costs, it is appropriate to consider

whether Vincent Savage and Norton Rose acted reasonably in commencing or continuing the proceedings. The conduct of the defendant might also be relevant.⁶¹

185 As at July 2011, Vincent Savage and Norton Rose knew that Sitzler was prevented from giving instructions because of the deadlock between the directors, Vincent Savage and William Gibbins.⁶²

186 The evidence is unequivocal that from 15 September 2011, Vincent Savage and Norton Rose were on notice that Norton Rose's retainer to act for Sitzler was disputed. Norton Rose queried their own retainer in July 2011 when the deadlock between Sitzler's directors is identified. The evidence confirms that Vincent Savage and Norton Rose proceeded to issue this proceeding in the knowledge that the authority to do so was under serious doubt. There is no evidence from Norton Rose before the Court. The evidence before the Court is that Vincent Savage and Norton Rose obtained indemnities to cover themselves from any adverse costs orders in this proceeding. The source of the funds for the litigation were from Vermillion.

187 I consider that the evidence supports a conclusion that the proceeding was brought at the behest of Vermillion. Vermillion has had an interest in acquiring the mining tenements. It initially tried to become a shareholder in Sitzler and failed following the determination in the Federal Court of the pre-emptive rights dispute. Then there was the loan agreement and charge executed by Vermillion and Vincent Savage. It was a pre condition of any right to draw down funds under the loan agreement that there was written confirmation of, or that a court had determined, the amount to be paid to Northern Mining to discharge the debt and thereby obtain the mining tenements.⁶³

188 The indemnity given by Vermillion to Vincent Savage was only engaged if Vincent Savage commenced this proceeding to determine the amount owed by Northern Mining.

⁶¹ *Ferny Sky Pty Ltd v Capital Finance Australia* [2006] VSC 366 at [25].

⁶² *Ibid*, Exhibit VS-15.

⁶³ Affidavit of Vincent Savage sworn 22 December 2011, Exhibit VS-27 – Schedule 1, cl 5.

189 I do not accept that Vincent Savage brought this proceeding in the interests of the members of Sitzler. Vincent Savage and Sitzler could not independently afford to commence and maintain this proceeding.

190 Despite the 30 June 2011 Federal Court proceeding being discontinued in early August 2011, Vincent Savage had three months in which to commence a derivative action but instead chose to commence this proceeding in Sitzler's name in circumstances where there was a serious challenge to his authority to commence this proceeding. Norton Rose accepted instructions to commence these proceedings and commenced the proceeding in full knowledge of these matters.

191 It is submitted on behalf of Vincent Savage and Norton Rose that Northern Mining's conduct alongside that of the Gibbins parties and Peko's liquidators was to effectively negotiate deals which would strip Sitzler of its one and only valuable asset, the tenements. This is not supported by the evidence before the Court. At paragraph 55 of the judgment of Gordon J in the Federal Court proceeding, she notes that Vincent Savage and Vermillion were actively aware of the Commonwealth negotiations with Northern Mining and Vermillion. William Gibbins' evidence is that a meeting occurred in March 2011 between the Commonwealth, Vermillion, Vincent Savage, Gibbins Investments and Northern Mining in respect of an assignment of the Commonwealth debt. This can be contrasted to the dealings which Vincent Savage, assisted by Norton Rose purportedly on behalf of Sitzler had with Vermillion. These include the preparation and execution of the loan agreement which was not disclosed to the majority shareholder at the time or the other director of Sitzler until after their execution; Mr Gibbins was never invited to attend any meeting and/or discussion in relation to the loan, charge or indemnity until after their execution. William Gibbins' approval of these transactions was never sought by Vincent Savage or his solicitors Norton Rose who purported to act for Sitzler.

192 In the circumstances of this case I do not consider Vincent Savage had a reasonable basis to believe he had authority or that Norton Rose had a reasonable basis to believe that Vincent Savage had authority to give instructions to commence this

proceeding.

193 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.⁶⁴

194 In *Bray v Dye (No. 2)*,⁶⁵ Judd J cited with approval the following passage from Justice Kekewich’s judgment in *Geilinger v Gibbs*:⁶⁶

The utmost that can be said against Messrs Williams & Neville in their character of solicitors is that they trusted overmuch to the plaintiff Hallet, whom I suppose had good reason for trusting, and that they did not, under the circumstances, take the extreme care which ought to be taken in joining a co-plaintiff with him; in other words there is nothing to be said against them professionally. It seems to me to be clear that they acted without authority in joining Geilinger as plaintiff, and the real question is whether they thereby rendered themselves liable to the defendants for costs.

...

It being therefore established that this action was, so far as Geilinger is concerned, brought wholly without his authority, the way is cleared for the main question which is whether the solicitors for Geilinger ought to pay the defendant’s costs. I take it that there is no question that if Geilinger having been made plaintiff, was in any way liable, he would have a remedy against his solicitors who acted for him. That is recognised in all cases. But the question is whether the defendants have a right as against the solicitors to make them pay, and that depends on what is called more than once in *Fricke v Van Gruten* “the principle” of the cases on the subject.

...

The result is that the principle now established is not that the plaintiff has necessarily to pay the costs, but that the solicitors who have improperly made him plaintiff are to be substituted for him. As was said by Rigby LJ in *Fricke v Van Gruten* the solicitor “having put forward Mr Wella as one of the persons to pay the costs ordered to be paid by the plaintiffs, he must be substituted for Mr Wella, and must pay the costs which Mr Wella has been ordered to pay to the defendants.” So in this case, Messrs Williams and Neville having put forward Geilinger as one of the persons who ought to pay the costs of the defendants, and having no authority to do that, must be substituted for him and made liable to indemnify the defendants.

195 In relation to Norton Rose it is imperative that solicitors observe the professional

⁶⁴ *Colgate Palmolive v Cousins Pty Ltd* [1993] FCA 536.

⁶⁵ [2010] VSC 152 at [66].

⁶⁶ [1897] 1 Ch 479.

requirement and obligation to the Court not to institute or conduct litigation without authority. To take such a step will result in an order that the solicitor pay the costs on an indemnity basis⁶⁷.

196 Vincent Savage was aware that he did not have William Gibbins' authority or consent to commence this proceeding. Quite the contrary is evident. No real notice was given to William Gibbins about the proceeding, loan, charge or indemnity. I consider Vincent Savage's conduct of the litigation in these circumstances was unreasonable. The fact that the litigation was commenced after indemnities were put in place for Vincent Savage and Norton Rose's costs of this proceeding and any adverse costs order casts serious doubt over any contention that either of Vincent Savage or his solicitors believed there was authority to institute this proceeding for Sitzler. Sitzler did not have the funds and Vincent Savage's evidence is that he was not in a position to fund the litigation. The source for the litigation here was from an interested third party, Vermillion. Vincent Savage could have brought the derivative action first but chose not to. I consider that justice may very simply be done by substituting for the wrongly joined plaintiff, Sitzler, with those who are responsible for the wrong, Vincent Savage and Norton Rose. Vincent Savage and Norton Rose have improperly exposed Sitzler to the risks of a costs order and allowed that to materialise into reality.

197 I consider that Vincent Savage and Norton Rose commenced this proceeding knowing that there was no authority to do so. This must amount to a wilful disregard by both parties of the law.

198 If justice is to be done, the circumstances require that these costs be paid on an indemnity basis.

⁶⁷ *Bray v Dye* [2010] VSC 152 at [61]; *McKewins Hairdressing & Beauty Supplies Pty Ltd v Deputy Commissioner of Taxation* (2000) 74 ALJR 1000, at 1003 [16].

199 Having sought submissions in relation to the extent of costs attributable to the conduct of Vincent Savage and Norton Rose, the parties accepted that that was not necessary.

200 Accordingly, I make the following orders:

1. This proceeding be dismissed.
2. Costs of the defendant, Northern Mining; and the non-parties Peko (in liquidation); William Gibbins and Gibbins Investments Pty Ltd are to be paid by Vincent Savage and Norton Rose on an indemnity basis.
