[2008] WASCA 186

JURISDICTION	**:**	SUPREME COURT OF WESTERN AUSTRALIA
TITLE OF COURT	**:**	THE COURT OF APPEAL (WA)
CITATION	**:**	GLEW -v- FRANK JASPER PTY LTD [2008] WASCA 186
CORAM	**:**	PULLIN JA NEWNES AJA
HEARD	**:**	15 AUGUST 2008
DELIVERED	**:**	15 AUGUST 2008
FILE NO/S	**:**	CACV 40 of 2008
BETWEEN	**:**	WAYNE KENNETH GLEW Appellant AND FRANK JASPER PTY LTD Respondent

ON APPEAL FROM:

Jurisdiction	**:**	SUPREME COURT OF WESTERN AUSTRALIA
Coram	**:**	MARTIN CJ
File No	**:**	CIV 2179 of 2007

Catchwords:

Practice and procedure - Application for indemnity costs - Appellant discontinued appeal - Unreasonable institution of appeal - Special costs order

Legislation:

Nil

Result:

Application for indemnity costs dismissed
Special costs order made

Category: B

Representation:

Counsel:

Appellant	:	In person
Respondent	:	Mr M A R Blundell

Solicitors:

Appellant	:	In person
Respondent	:	Solomon Brothers

Case(s) referred to in judgment(s):

Flotilla Nominees Pty Ltd v Western Australian Land Authority [2003] WASC 122(S); (2003) 28 WAR 95
Glew v Shire of Greenough [2006] WASCA 260
Shaw v McGinty [2006] WASCA 231
Unioil International Pty Ltd v Deloitte Touche Tohmatsu (No 2) (1997) 18 WAR 190

1 **PULLIN JA**: The respondent has brought an application for an order that the appellant pay the respondent's costs of the appeal on an indemnity basis following the discontinuance of the appeal by the appellant.

2 The events leading to the appeal were as follows.

3 The appellant was sued by the respondent in a Supreme Court action. An application was made by the respondent that the parties give discovery in those proceedings. This was heard by Chief Justice Martin on 15 April 2008 and before the order was made, the appellant made an oral application that the Chief Justice disqualify himself and submitted that the *Rules of the Supreme Court 1971* (WA) were 'contrary to the Constitution'.

4 On 29 April 2008 the appellant filed an appeal notice in this court against the dismissal of the oral application that the Chief Justice disqualify himself and perhaps also against the order for discovery. The grounds of appeal read:

> 1. Justice Martin was wrong in law and fact when he did not remove himself from the case when requested by me after it was revealed he had been employed by Solomon Brothers in a major case just prior to him becoming the Chief Justice. (Commonwealth Bank Vs RIDDOUT)
>
> 2. Justice Martin was wrong in law and fact when he showed bias toward Wayne Kenneth GLEW and Glew Technologies Pty Ltd.
>
> 3. Justice Martin showed bias when he rejected every application by the appellant.
>
> 4. Justice Martin showed bias when he approved every application from the Respondent.
>
> 5. Justice Martin showed bias when he stopped Wayne GLEW part way through stating his case and stated that paragraph 47 WASC 178/2000 Eastern Metropolitan Regional Council Vs the Four Seasons Construction Pty Ltd barred him from having any discretion in allowing Wayne GLEW to represent his Company Glew Technologies Pty Ltd.
>
> 6. Justice Martin showed bias when he stated that he could not go against a previous decision of one of his judges and did just that. (Decision in WASC 178/2000 the Judge exercised discretion and allowed the appellant to represent his company).

7. Justice Martin was wrong in law and fact when he breached Section 1337T of the Federal Incorporations Act 2001 when he used State Supreme Court Rules contrary to that Act.

8. Justice Martin showed bias when he refused Wayne Kenneth GLEW the right to represent his company.

9. Justice Martin was wrong in law and in fact when he ignored the Australian Constitution section 71 which states the Legislature can not give legislative authority to the judiciary.

10. Justice Martin was wrong in law and fact when he stated that he could use the Supreme Court Rules to stop Wayne Kenneth GLEW from representing his company contrary to the Federal Constitution.

11. Justice Martin was wrong in law and fact when he used the Supreme Court Rules as a law when section 71 and section 5 of the Federal Constitution stopped him from doing so.

12. Justice Martin was wrong in law and fact when he sat in the Supreme Court of Western Australia and represented himself as the Chief Justice of the Supreme Court of Western Australia knowing that to take up that position he had to swear allegiance to the Crown and that had had not done so. Contrary to the Federal Constitution and the Act of Settlement as in section 49 of that constitution.

5 The appeal notice asserted that leave to appeal was not necessary. The *Supreme Court Act 1935* (WA) s 60(1)(f), of course, requires that an interlocutory decision, which the Chief Justice's decision was, required leave.

6 According to an affidavit of Mr Mark Blundell dated 12 June 2008, on 6 May 2008 the appellant spoke to Mr Blundell, the solicitor at Solomon Brothers handling the case for the respondent. The appellant said that the appeal 'stopped' the discovery order. Mr Blundell told him that it did not.

7 On 8 May 2008 the Court of Appeal registry office wrote to Mr Glew advising him that as the appeal was an interlocutory appeal, the appellant's case was due to be filed and served by 6 May 2008. On that day the appellant filed a document entitled 'Issues for Determination.'

8 On 13 May 2008 the Court of Appeal registrar wrote to the appellant advising him that the statement of issues received by the office had not been accepted for filing; what was required was an appellant's case.

9 On 15 May 2008 the respondent's solicitors sent an email to the appellant stating that the appeal stood no prospect of success and that maintaining the appeal invited an order for costs on an indemnity basis. The appellant then telephoned the respondent's solicitor and advised him that he was withdrawing the appeal.

10 On 23 May 2008 the appellant sent a letter to the registrar of the court annexing an unsigned discontinuance notice. A letter from the appellant to the registrar referred to the notice of respondent's intent from Solomon Brothers dated 5 May 2008 and read:

> I do note a scribble on the bottom being Sol B, above it is a reference to Mark Blundell and a reference number.

11 The letter went on to submit:

> Sol B is not a lawful signature and the document signed Sol B purporting to be a lawful document is not lawful ...
>
> I respectfully suggest that no application for costs based on this document could or should be considered by yourself or any other person to be lawful.

12 The respondent was provided with a signed discontinuance notice on 26 May 2008. In my opinion, the point about the signature on the documents, whether it be the signature of the solicitors for the respondent or the fact that there was a signed or unsigned notice of discontinuance, is not a factor which is relevant to the consideration of this application.

13 The respondent submits that an indemnity costs order should be made because the appeal was doomed to fail because a motive of the appellant in bringing the appeal was to gain a stay of the order for discovery and because the respondent's solicitors gave the appellant a warning that the appellant would fail and that the respondent would claim indemnity costs.

14 The usual costs order is one for party and party costs. An order for indemnity costs will only be made if there is some special or unusual feature in the case that justified departure from the ordinary practice. The court has jurisdiction to make an indemnity costs order whenever justice requires such an order: see ***Unioil International Pty Ltd v Deloitte Touche Tohmatsu (No 2)*** (1997) 18 WAR 190, 191.

15 Most indemnity costs orders involve circumstances where there has been some element of improper or at least unreasonable conduct on the part of the parties or their legal advisers. See the examples given in

Flotilla Nominees Pty Ltd v Western Australian Land Authority [2003] WASC 122(S); (2003) 28 WAR 95 [9]. If there has been improper or unreasonable conduct in the conduct of litigation, then an indemnity costs order may be made as a mark of disapproval on the part of the court about that conduct.

16 However, speaking generally, an indemnity costs order will not be made if the costs which would be recovered by an order for party and party costs or a special costs order would result in the recovery of the successful party's legal costs.

17 The submission which is made by the respondent is that there is a prospect that the respondent might on a party and party order only recover part of the costs incurred by the respondent. However, if a special costs order is made entitling the respondent to recover other work carried out other than the filing of the notice of respondent's intention, then those costs would be recoverable and such an order could be made on the basis that item 32 in the Supreme Court scale of costs is to apply on a party and party taxation.

18 There is nothing in the grounds of appeal to suggest that they had any merit. The last ground suggests that the appellant still wished to run an argument dismissed in other cases; see ***Glew v Shire of Greenough*** [2006] WASCA 260 and ***Shaw v McGinty*** [2006] WASCA 231. I also do infer that the appellant filed the notice of appeal thinking or hoping that it would result in an automatic stay of the order for discovery.

19 In those circumstances, it could be concluded that the conduct of the appellant in instituting the appeal and conducting the appeal could be characterised as unreasonable, if not improper, and that the grounds of appeal were doomed to fail. Although that might suggest that an indemnity costs order should be made, it has to be borne in mind that there was very little incurred by way of costs in relation to this appeal before a discontinuance notice was filed. The bringing of this application probably exceeds the costs which were incurred by the respondent up until that date, and so I would not be prepared to make an indemnity costs order. In lieu, I would be prepared to make a special costs order; namely, that item 32 of the Supreme Court scale of costs should apply to allow recovery of time reasonably spent but not covered by any other item in the scale, and I would so order.

20 **NEWNES AJA**: I agree with Pullin JA.