

1 HIS HONOUR: Yes.

2 MR GARDE: Your Honour on the last occasion we circulated our
3 outline of costs submission and there are set out in our
4 Paragraph 1 a number of authorities with which I don't
5 doubt Your Honour is more than familiar.

6 HIS HONOUR: Yes.

7 MR GARDE: In terms of the authorities that deal with the
8 discretion of the court in terms of the award of costs.
9 However additional to that in the local government or
10 town planning field one is reminded inevitably of
11 Thorn v. Wade - thank you very much, which I'll hand
12 around where the court is also concerned with allegation,
13 I think there was an allegation of fraud in that case.
14 Your Honour is doubtless well aware of the factual
15 backdrop, but at p.500 their Honours, Justices Kaye and
16 Marks said - this is little more than halfway down
17 dealing with the question of costs of the City of
18 Melbourne and the Wades, "The appellant's claims against
19 the Wades included allegations of fraudulent
20 misrepresentation. They failed to establish those
21 allegations. The courts have long so viewed the
22 seriousness of allegations of dishonesty as to compel an
23 unsuccessful plaintiff making the same to pay the costs
24 of the defendant against whom the allegations are made,
25 notwithstanding that the plaintiff might have succeeded
26 on other issues".

27 And then there are references to Parker v. McKenna
28 and Kerr on Fraud and Mistake and His Honour Justice
29 McGarvie agreed with the majority on the topic - I'll
30 withdraw that. His Honour Justice McGarvie took the view
31 that without the grant of leave the court could not

1 entertain the appeal against the order for costs and
2 accordingly expressed no view. So that was Thorn v. Wade
3 which we additionally refer to and the court there
4 helpfully refers to the decision - the well known text on
5 Fraud and Mistake of Kerr.

6 HIS HONOUR: Yes.

7 MR GARDE: And Kerr usefully has a chapter dealing with costs
8 and the discretion of the court in circumstances where
9 fraud is alleged and we note looking at the seventh
10 edition reprinted in 1994 that at p.682 the learned
11 authors say, "Costs being in the discretion of the court
12 it would be of little practical use to attempt the
13 classification of the very numerous decisions on the
14 subject. A few however of the more important and more
15 typical cases may be usefully referred to" and then in
16 the next paragraph it said, "The courts are anxious to
17 discover and discourage fraud in every shape and
18 therefore there is no rule more general with respect to
19 costs than that where relief is granted on the ground of
20 fraud. The relief if granted will be granted with costs
21 even against an infant".

22 And it's the next sentence that's significant here,
23 "But the courts are no less anxious to discourage loose
24 and unfounded charges of fraud and therefore a party
25 introducing them will be made to pay the costs occasioned
26 thereby though he may be successful in the action". So
27 even success in the action does not lead to any different
28 consequence the learned authors point out. In this case
29 of course there's no success in the action indeed the
30 application made by the defendants has been successful
31 below and here, but there are as I will come to in a

1 moment, numerous loose and unfounded charges of fraud.

2 And we further note that in Kerr at p.684, Parker v.
3 McKenna, the decision referred to in the Full Court is
4 here referred to in the last line at 684. "In Parker v.
5 McKenna where the plaintiff made elaborate charges of
6 fraud which proved to be unfounded" and I would
7 interpolate and we would submit here that there are in
8 this case numerous and elaborate charges of fraud, "The
9 court not only made him pay the costs of that part of the
10 case, but refused to allow him the costs even of the part
11 on which he succeeded. It was held that he had so mixed
12 up unfounded and reckless aspersions upon character with
13 the rest of the (indistinct) as to forfeit his title to
14 the costs which he otherwise would have been entitled to
15 receive". And at the end of that paragraph, "So also the
16 introduction of charges of fraud which are irrelevant and
17 cannot be tried is improper".

18 Now one might just pause to consider the variety of
19 allegations made here by the plaintiffs and, including
20 allegations made against Mr Middleton and a wide range of
21 people. Virtually every practitioner involved in this
22 matter is the subject of some aspersion or other and we
23 note the pertinence therefore of the passage in Kerr.
24 "The plaintiff must in such case pay all the defendant's
25 costs incurred by reason of such charges as between
26 solicitor and client". So there Your Honour are some
27 extracts from Kerr and if I now turn back to our
28 submissions and go to Paragraph 2. It is the case that
29 the plaintiffs have seen fit to advance very numerous
30 allegations of fraud, fraudulent conspiracy, fraudulent
31 misrepresentation, false submissions, perjury. My

1 learned junior who collected the references in the table
2 which follows in our submissions has I note listed 81
3 different allegations of fraud or fraudulent concealment
4 or conspiracy or perjury or of deliberate misleading.

5 So we do submit in those circumstances and those 81
6 are derived from the written submissions if one goes to
7 what was said orally we'd have there listed 11 and
8 without attempting to, I might say identify every single
9 one but we've listed there from the transcript 11
10 different allegations of conspiracy, fraud, fraudulent
11 misrepresentation, false submissions so giving, be it
12 from the transcript or from written submissions, a net
13 total of some 92 allegations of that nature. So we do,
14 and I'll go to those in a moment, we do submit in
15 reliance on longstanding authority that this is a case
16 where an indemnity cost order is appropriate. It was
17 considered by the master to be appropriate having regard
18 to the circumstances that were before him and having
19 regard to the circumstances that have subsequently arisen
20 and the proceedings before Your Honour we submit that
21 it's highly appropriate that such an order should be made
22 showing amongst other things the court's displeasure at
23 the making of what are loose and repeated allegations
24 against not only the parties specifically but also legal
25 representatives including I might say and I'll come to
26 some specific references, allegations of perjury on the
27 part of our instructing solicitor and speaking as counsel
28 we take those sorts of allegations against an officer of
29 the court very seriously.

30 But the issue of fraud is additional to the matters
31 arising from the terms of settlement and here we have a

1 situation where there is no doubt that the proceedings in
2 the County Court in relation to Tilt v. Rode were settled
3 by terms of settlement drawn up between legal advisers,
4 as far back as 1988 and there is no doubt that the
5 plaintiffs were well aware of the settlement and that
6 they subsequently decided the terms of the settlement.
7 Then we have a situation in relation to Woodley Heights
8 Proceedings Your Honour where they were resolved in
9 mediation before Mr Galvin.

10 Subsequently we had the position where the
11 plaintiffs elected not to adhere to those terms of
12 settlement and that gave rise to proceedings in the
13 nature of specific performance before Mr Justice Beach.
14 I don't expect Your Honour has brought material and we
15 haven't alerted your staff to do so, but if I read
16 briefly from Exhibit SME2 Volume 4 to the affidavit of
17 Mr Edward - of 12 September 2005 that contains His
18 Honour's, that's Justice Beach's reasons for decision and
19 judgment given on 1 September 1999 and His Honour held in
20 his reasons at Paragraph 20, "In my opinion there is no
21 reason in this case why the plaintiff should not be held
22 to their agreement. Indeed if one has regard to the age
23 of the plaintiff's cause of action and the nature of the
24 plaintiff's allegations it is in my opinion high time
25 that the proceeding was finally laid to rest".

26 That judgment is found at Tab 96 and what took place
27 and this is Tab 99 is that Mr Thompson saw fit to write a
28 letter to Mr Steven Edward, our instructing solicitor.
29 The substance of it is as follows. "Dear Mr Edward", it
30 refers then to the proceeding involving our client
31 Colladan Water and it says, "As you are aware the grounds

1 of appeal were instantly obvious at the time of the
2 recent judgment. However I have in all the circumstances
3 elected not to appeal. Consequently I include herewith
4 by way of service notice of discontinuance". And the
5 next sentence reads, "I will however be pursuing aspects
6 of the fraud which was perpetrated by the defendants".

7 So even back in 1999 in that correspondence,
8 Mr Thompson foreshadowed his intent upon which he
9 subsequently undertook these proceedings as we apprehend
10 what took place that the few aspects of the fraud
11 regardless of the decision of Justice Beach and at the
12 same time electing not to appeal. We note also that
13 Justice Beach in his decision ordered costs on a
14 solicitor client basis which was then the appropriate
15 basis in 1999. So the proceedings that Your Honour has
16 had occasion to consider are proceedings which follow
17 upon those events surrounding the decision of Justice
18 Beach and what we submit is that in our sub-Paragraph 3
19 to Paragraph 2 on our p.2 is that essentially these
20 proceedings constitute defiance of the reason of decision
21 of Justice Beach and a deliberate intent to prosecute the
22 proceedings regardless of the decision of this court on
23 that occasion.

24 Then Your Honour we highlight in our Paragraph 3
25 that what the plaintiffs are essentially seeking to do is
26 to re-agitate issues which were raised and resolved by
27 settlement of the earlier proceedings. To re-agitate
28 subject matter which is so closely connected with the
29 subject matter of the earlier proceedings that it could
30 not possibly be open to the plaintiffs to bring the
31 claims and of course (indistinct) to agitate claims which

1 are statute (indistinct).

2 In terms of the fraud allegations Your Honour we've
3 listed those extensively and I don't propose to go
4 through them all by any means and Your Honour we're aware
5 that you've heard them or read them, but if I turn to p.4
6 of our written outline we note that transcript p.122
7 Line 27 that we see the statement made by Mr Thompson in
8 addressing the court at that reference, "This proceeding
9 is based entirely on the fraud of the defendants. There
10 is in fact no subject other than the fraud of the
11 defendants in this previous proceeding". At 125 at Line
12 23 in response to a discussion with Your Honour he says,
13 "The reason why it's an entirely new set of facts is that
14 I now find that, you see sir here one way or the other I
15 was defrauded by these people. It's become a question of
16 finding out what the correct fraud was".

17 At p.130 Line 11 Mr Thompson says, "No sir what I
18 tried to tell you was that there was in fact the fraud
19 (indistinct) that I did not know about. That the fraud
20 was deliberate, it was done for the purpose of avoiding
21 the laws of this state and I became a victim of it. I
22 did not know of those fraud". If I turn over to p.133
23 Line 22 Mr Thompson says, "Chiefly it was sold on the
24 fraudulent representation that it did not have water.
25 The basis of this proceeding is that it did have water.
26 That was the fundamental misrepresentation of the council
27 and the water board upon which this action was brought".
28 And then at p.134 Line 20 Mr Thompson says, "They were
29 released from nothing more than the fraud upon which the
30 fraudulent misrepresentations upon which the previous
31 proceeding was based".

1 Then at p.159 of the transcript at Line 12, "They
2 lied to the magistrate and they made four times false
3 submissions in the County Court". Then at Line 27 on
4 p.159, "I now know that they lied to the magistrate. The
5 evidence of Justice Kaye was wrong and they in addition
6 to that made four false submissions in the County Court.
7 I believed them. Why should I not? I now know that they
8 were false and I can't see how I could have believed
9 otherwise". And at Transcript 160 Line 29 in a
10 discussion with Your Honour Mr Thompson says, "I simply
11 believe what they said in court sir and it was wrong.
12 They lied".

13 They are some of the statements made on transcript
14 and when we look at Mr Thompson's written submissions I
15 would refer only to some of the references that we have
16 set out at p.4 of those submissions, Paragraphs 27 and 28
17 are to be highlighted. At Paragraph 28 Mr Thompson says,
18 "The reason for this is the defendants are locked into
19 repeating the falsehoods which misled the master and it
20 goes to the cost submission which I shall be making at
21 the end of this submission". And then at 29, p.5, "The
22 one certainty is the defendants cannot tell the truth
23 before this court and if the defendants raise new
24 falsehoods then I shall deal with them ad lib as I read
25 this submission". Then at p.6 at Paragraph 30D
26 Mr Thompson says, "As I will shortly show the remaining
27 submissions of the defendants were false. They must have
28 been known to be false at the time they were made. As I
29 will also show the submission of the second defendant was
30 characterised by the false affidavits of Mr Steven Mark
31 Edward" and that's an allegation of falsity against our

1 instructor in swearing affidavits that's repeated on a
2 number of occasions.

3 Then at p.8 Paragraph 42F Mr Thompson says in the
4 second half of 42F, "However as will be seen each of
5 these hurdles is a mirage created by the smoke and
6 mirrors of the defendant's deceit both past and present".
7 42G, "It can be shown that the concealment of those facts
8 was overt and fraudulent and done for the purpose of
9 concealing the facts of and the fact of a conspiracy to
10 enable the developer Buchanan to avoid the effect of s.9.
11 Concealment may have also been for the purposes of
12 avoiding criminal prosecution". And Your Honour there
13 really are too many of these sorts of allegations for me
14 to seek to read them all. But I will at p.20 refer to
15 one more that was directed at our instructor at 55I, "A
16 little later in the submission I will show that Mr Steven
17 Mark Edward, solicitor for the second defendant lied on
18 affidavit in regard to how he came by this document".

19 It's pointed out to me at p.22 appropriately at I
20 which is a little over halfway down the page on p.22,
21 "The scheme relied upon a bargain between thieves so to
22 speak. The bargain being between Buchanan and the
23 defendants". At the foot of 21 in 58B the statement is
24 made, "Although styled misfeasance in the present amended
25 statement of claim, the fact is that the things
26 complained of are fraudulent in nature and the
27 concealment of the facts constituting the present causes
28 of action specifically, fraudulent". You can see at the
29 top of p.22, "My family and I were the subject of four
30 related frauds at the hands of two statutory authorities,
31 the defendants. Even the suggestion that this sort of

1 thing would occur invokes incredulity. The further
2 suggestion of fraudulent conspiracy faces me in the
3 category of ridiculous and ridicule conspiracy theorists
4 however the facts once detailed and known speak for
5 themselves".

6 And refer to perhaps just one or two more. At p.49
7 Your Honour will see that the plaintiff says at C, "In
8 addition I had a further trifecta. The previously
9 mentioned trifecta could not occur by chance. ...
10 (reads) ... directed at my family and I at the behest of
11 Buchanan and/or Palmer, Stevens and Rennick" who Your
12 Honour will recall are the solicitors. And then at p.50
13 Paragraph 71 under the heading of "The defendants have
14 retained and continued to enjoy the benefits of their
15 fraud", in (indistinct) there are references to the
16 primary fraud, the secondary fraud and conspiracy and in
17 B, "By concealing the fraud of perjury" - sorry, "By
18 concealing the fraud by perjury, false submissions, false
19 affidavits and committing the secondary frauds and by
20 avoiding ... (reads) ... an income stream from the
21 product of their frauds".

22 The final one Your Honour that I'll mention at this
23 point on p.51 F at the bottom of the page, "The
24 concealment was fraudulent and whilst for the purpose of
25 amongst other things, concealing dishonest fraudulent and
26 illegal activities, avoiding legal repercussions,
27 avoiding possible criminal proceedings, profit,
28 concealing the fact or and the facts of the secondary
29 frauds which were directed specifically at the plaintiffs
30 bringing false proceedings in the Magistrates' Court,
31 concealing perjury and falsification of evidence in the

1 Magistrates' and Supreme Courts, concealing false
2 submissions in the previous Tilt v. Rode proceedings and
3 avoiding these present proceedings" so they are the
4 nature and style of the allegations made and of course
5 Your Honour in Your Honour's reasons for decision at
6 Paragraphs 130, 131 and subsequently examine and consider
7 the allegations made of fraudulent misleading and of
8 fraud and Your Honour held in Paragraph 130 for example
9 that, "Secondly the voluntary disclosure of the documents
10 upon which he now relies is demonstrating the true course
11 of events cannot be characterised as fraudulent. Such
12 documents were disclosed first by discovery and secondly
13 by personal delivery".

14 And Your Honour then earlier in that paragraph
15 referred to the fraudulent - the allegations of
16 fraudulent misleading. "As for the facts of the matter"
17 and Your Honour (indistinct), "I do not accept this for
18 reasons I have already stated". And again I won't read
19 more, but there are clear findings in Your Honour's
20 reasons for decision that it was the position that the
21 plaintiffs knew of the facts throughout and as a
22 consequence of the Tilt v. Rode County Court proceedings
23 and discovery and examination of the book of pleadings,
24 far from there being a case of fraud on the part of the
25 defendants, the true situation is known to the plaintiffs
26 as the documentation makes clear and the allegation of
27 fraud that they have repeatedly made are in our
28 respectful submission without any conceivable foundation
29 whatsoever.

30 Your Honour there is also Part 2 of the plaintiff's
31 submissions as to which there are more allegations of a

1 wide ranging nature which are made. Your Honour should
2 view in our respectful submission allegations made
3 against legal practitioners not least the allegations
4 made against Mr Middleton, now a judge of the Federal
5 Court, seriously in that officers of the court carry on
6 and discharge their responsibilities, their
7 responsibilities to the court. Their responsibilities to
8 their own clients, one might make the observation that no
9 one could have done more for the Thompson than was done
10 below on the part of senior counsel. The fact that
11 senior counsel did not see fit to press allegations of
12 the type now strenuously pressed reflect credit on the
13 part of senior counsel and not the reverse and we note
14 the serious way in which allegations have been made
15 against all legal practitioners, I think it's fair to say
16 certainly most and Your Honour should in our respectful
17 submission not treat those sorts of allegations lightly.

18 Your Honour there are in our community two places
19 where absolute privilege exists. There is of course the
20 floor of Parliament and there is this court, but when a
21 party exercises the privilege that you have to make
22 allegations particularly allegations of fraud or
23 allegations of conspiracy and those allegations are found
24 to be without foundation there is particularly good
25 reason why indemnity costs order ought to be paid. There
26 is and should be as it were virtually a price to be paid
27 if you wish to engage in conduct of this sort and one
28 might have reason to think that one of the reasons we
29 have an appeal where a very large part of the written
30 submission which are clearly carefully prepared over a
31 long period of time are directed at allegations of this

1 nature is because the plaintiffs seek the benefit of the
2 privilege which this court affords to make allegations of
3 that nature.

4 In those circumstances it's our submission that
5 there ought to be an indemnity cost order related to the
6 appeal and the proceeding before Your Honour. Those are
7 the submissions that we would put and - yes my attention
8 is drawn to the reasons for decision in Fountain Selected
9 Meats of Justice Woodward and they are referred to in our
10 submissions and there Sir Edward Woodward said "I believe
11 that it's appropriate to consider awarding solicitor
12 client or indemnity costs whenever it appears that an
13 action has been commenced or continued in circumstances
14 where the applicant properly advised should have known
15 that he had no chance of success. In such cases the
16 action must be presumed to have been commenced or
17 continued for some ulterior motive or because of some
18 wilful disregard of the known facts or the clearly
19 established law. Such cases are fortunately rare, but
20 when they occur the court will need to consider how it
21 should exercise its unfettered discretion".

22 So that is a pertinent passage in our submission and
23 if ever there was a case Your Honour where there were
24 wild and (indistinct) allegations of fraud, this is it.
25 If the court pleases.

26 HIS HONOUR: Yes.

27 MR AHERN: Your Honour I'll be brief. The first respondent
28 supports and accepts and adopts these submissions made by
29 Mr Garde on behalf of the second defendant. The
30 allegations that are listed, the fraudulent allegations,
31 conspiracy allegations, bargain between thieves, that's

1 been listed, apply to the first defendant as well as to
2 the second defendant as you'll note from the transcript
3 of the first defendant's submissions. There's just one
4 additional point that the first defendant wishes to raise
5 is that an issue that's taken into account in considering
6 indemnity costs is whether the plaintiff has been
7 forewarned of the matters as to why their case will fail
8 and if I could hand up to Your Honour the decision of the
9 New South Wales Supreme Court and a copy of exhibit MED5
10 to the affidavit of Michelle Vixen sworn 23 September
11 2005.

12 First of all Your Honour if I could take the
13 decision of Justice Loveday in Hurstville, the decision
14 in 1991 24 NSW Law Reports. The purpose of taking you to
15 this case Your Honour is to draw your attention to the
16 observations made on p.733, Paragraph F. His Honour
17 Justice Loveday states there that Fountain, which is the
18 decision that Mr Garde just took you before he just sat
19 down, "Fountain was recently followed in an order for
20 indemnity costs made in favour of the plaintiff by
21 Justice Hunt in Blackburn in the state of New South
22 Wales. In respect of a cross claim which the defendant
23 should have known had no chance of success. In that case
24 however the defendant had been warned by the plaintiff
25 that there was no basis for the cross claim and that
26 indemnity costs would be sought. Notwithstanding this
27 warning and notwithstanding views expressed by Justice
28 Hunt the defendant had continued to press the cross
29 claim".

30 Now in this case Your Honour before the applications
31 were issued in September last year and heard before

1 Master Efthim, a letter was sent to the plaintiff's
2 solicitors which is Exhibit MED5. That letter was dated
3 1 August 2005. That letter dealt on p.3 and onwards as
4 to why it was considered by the first defendant that the
5 claim was bound to fail and the various heads were
6 statute barred, (indistinct) estoppel and the release of
7 the council by the plaintiffs and that it was the
8 agitation of matters that had been previously raised.
9 Now whilst Your Honour didn't deal expressly with
10 (indistinct) or refer to it at the end, but not in any
11 conclusive way, the matters outlined in this letter were
12 the reasons that were ultimately adopted by Master Efthim
13 and for the most part adopted by Your Honour. The
14 plaintiff had been forewarned that this proceeding had no
15 prospects of success, but continued in any event.

16 HIS HONOUR: Yes.

17 MR AHERN: If Your Honour pleases.

18 HIS HONOUR: Mr Thompson.

19 MR THOMPSON: Your Honour I have prepared a submission which
20 I'll hand out shortly.

21 HIS HONOUR: Yes.

22 MR THOMPSON: Since Your Honour's judgment was handed down I've
23 been extraordinarily busy and unfortunately I only had a
24 couple of hours yesterday to prepare this. It's been
25 prepared rather hurriedly and as I've set out in this,
26 however I hear everything that's been said today. Now
27 the decision of the court was fundamentally based upon a
28 concept that I had previous knowledge of things
29 complained of. Now the problem for - one of the major
30 problems and I've appended relevant stuff here, is that
31 in relation to Woodley Heights in particularly the

1 defendants, that's jointly, made contrary submissions to
2 a separate court and it was on those submissions that
3 were made to a previous court back in 1988 that I relied.

4 They then contradicted those, what they previously
5 - pardon me, I'm sorry I'm terribly nervous. What they
6 previously submitted to a previous court, they
7 contradicted before Your Honour at the time of the
8 hearing and Your Honour has relied upon that material.
9 Now this submission that I've made is not intended to
10 offend or anything like that, it's merely - the way it's
11 set out it's - I had such little time and I'm sorry I'm
12 so nervous. And Your Honour I'd prefer not to read
13 (indistinct) because I am very very nervous.

14 HIS HONOUR: What do you want me to do Mr Thompson? This is
15 fairly detailed again is it?

16 MR THOMPSON: Sir, nowhere near as detailed as I would wish
17 because sir I only had a couple of hours yesterday to do
18 it.

19 HIS HONOUR: Yes.

20 MR THOMPSON: Had I had time it would have been far more
21 detailed.

22 HIS HONOUR: Yes well I'm going to leave the Bench till half
23 past ten and read it carefully and then I'll come back
24 and you can consider what you want to add to it.

25 MR THOMPSON: Thank you Your Honour.

26 (Short adjournment.)

27 HIS HONOUR: Yes Mr Thompson is there anything else you wish to
28 say?

29 MR THOMPSON: No Your Honour. I've set out my brief thoughts
30 there.

31 HIS HONOUR: Yes, thank you. Mr Garde it seems to me that the

1 plaintiff's cost submission is essentially to the effect
2 that my decision was wrong and I don't require you to
3 respond to that submission.

4 MR GARDE: Your Honour please.

5 (RULING FOLLOWS)

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1 MR GARDE: Your Honour will I take it also be dismissing the
2 proceeding and we would also seek that the award of costs
3 include the cost of transcript. I don't know whether
4 that's necessary, but it might need clarification later.
5 HIS HONOUR: Yes. I'll order firstly that the appeal be
6 dismissed. Secondly that there be judgment for the
7 defendants and thirdly that the plaintiffs pay the
8 defendants costs of the proceeding including the costs of
9 the appeal on an indemnity basis. Now Mr Garde I can't
10 see that it's necessary to make an order with respect to
11 transcript.
12 MR GARDE: Yes.
13 HIS HONOUR: Those orders appear satisfactory in form to you?
14 MR GARDE: They are Your Honour.
15 MR AHERN: Yes Your Honour.
16 HIS HONOUR: We'll adjourn sine die.
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