

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COURT OF APPEAL  
CIVIL DIVISION

No. 6321/2005

BETWEEN:

**GLENN ALEXANDER THOMPSON  
and CHERYL MAREE THOMPSON**

Appellants

**- AND -**

**MACEDON RANGES SHIRE COUNCIL**

First Respondent

**- AND -**

**THE COLIBAN REGION WATER AUTHORITY**

Second Respondent

**OUTLINE OF SUBMISSIONS OF THE SECOND RESPONDENT  
FOR 5 SEPTEMBER 2008**

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Date of Document:	6 August 2008
Filed on behalf of:	The Second Respondent
Prepared by:	
<b>Mason Sier Turnbull</b>	Solicitor's Code: 6907
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1. By summons filed 23 July 2008, the Second Respondent seeks its costs of and incidental to the appeal, including costs of this application, on an indemnity basis.
2. In addition, the Second Respondent seeks an order that the moneys paid into Court by the Appellants in the sum of \$30,000 as security for the Second Respondent's costs of the appeal by order of the Court of Appeal on 5 September 2007 and any interest thereon be paid to the solicitors for the Second Respondent to be applied by them in part satisfaction of the Second Respondent's costs of and incidental to this appeal, including the costs of this application, hereby ordered upon the taxation or agreement between the

Appellants and the Second Respondent of those costs and in the event that the costs of the Second Respondent of and incidental to this appeal, including the costs of this application, as so taxed or agreed are less than the sum of \$30,000 and interest thereon to repay the balance of the sum of \$30,000 and the interest thereon to the Appellants.

3. The Second Respondent relies on the affidavit of Steven Mark Edward sworn on 22 July 2008 in support of its application and the following authorities in relation to the factors relevant to the exercise of the Court's discretion as to whether to award indemnity costs in a proceeding:

- (1) *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 at 401 (Fed C of A) per Woodward J;
- (2) *Rosniak v GIO* (1997) 41 NSWLR 608 at 616;
- (3) *Ugly Tribe Co Pty Ltd v Sikola*; [2001] VSC 189 at [7] per Harper J;
- (4) *Shepherd v National Mutual Life Association of Australasia Ltd* (SCVIC, 15 September 1994) per Hedigan J;
- (5) *Colgate Palmolive Co v Cussons Pty Ltd* (1993) 46 FCR 225 at 233-244.

4. The grounds for the award of indemnity costs arise from the matters set out in Mr. Edward's affidavit. They include:

- (1) The numerous allegations of fraud made and repeated throughout the appeal. The Appellants have made a large number of fraud allegations against the Respondent and its legal advisers and have claimed the fabrication of plans and the misuse of public office, which were determined to be unfounded by Justice Osborn on 29 November 2006 and Master Efthim on 15 May 2006 below: see Appeal Book Volume 10 at pages E1 to E27 and Appeal Book Volume 11 at pages I1 to I58.
- (2) Secondly, the proceedings and the appeal were in wilful disregard of the terms of settlement drawn in the County Court proceeding in relation to Tylden Road in 1988 and of the known law and facts whereby the Appellants knew that they had signed a settlement and

dishonoured the terms of the settlement: see Appeal Book Volume 4 at pages D424 to D426.

(3) Thirdly, the proceedings and the appeal were in defiance of Justice Beach's judgment in the Practice Court following the Appellants' advice to the Listing Master that they would discontinue the proceeding as the matter had been settled at mediation. The terms of settlement in relation to the Woodleigh Heights proceedings were enforced and upheld by Justice Beach in 1999 and solicitor and client costs were awarded: see Appeal Book Volume 8 at pages D1782 to D1790.

5. The Appellants sought to (1) re-agitate issues which were raised and resolved upon settlement of earlier proceedings between the parties and subject to releases in favour of the Respondents and (2) re-agitate the subject matter of the present claims which was so closely connected with the subject matter of the earlier proceedings that it was not open to the Appellants to bring on new claims and (3) agitate claims which were statute barred.
6. The procedural history is set out at paragraphs 3 to 18 of Mr Edward's affidavit. On 23 June 2008, without prior advice or explanation, the Appellants served on the Second Respondent a notice of discontinuance of the appeal. There has never been any explanation as to why the appeal was mounted, ongoing allegations of fraud propounded included to the Board of the Second Respondent, to Ministers of the State concerning the Second Respondent and then the appeal discontinued.
7. Order 64 rule 14(2) of Chapter 1 of the Supreme Court Rules states:

*Subject to paragraph (4), an appeal is discontinued when the appellant files a notice stating that the appeal is discontinued or, where the appeal is not wholly discontinued, stating the extent of the discontinuance, and on the same day serves a copy on each party to the appeal.*

8. Order 64 rule 14(3) provides that the appellant shall, unless the Court of Appeal otherwise orders, pay the costs of the respondent to the time of the discontinuance.

9. This application is made under Order 64 rule 14(4), which provides:

*Notwithstanding the discontinuance of an appeal under paragraph (2), the Court of Appeal may order that the appeal be not discontinued or **may make such order as to costs or otherwise as it thinks fit.***

[Emphasis added].

10. The Second Respondent also makes application under Order 79 rule 2(2) of Chapter 1 of the Supreme Court Rules seeking payment out of Court of the sum of \$30,000 paid into Court by the Appellants as security for the Second Respondent's costs (and any interest therein) in part satisfaction of the Second Respondent's costs. The relevant order provides that "money paid into court and any interest allocated or received in respect thereof shall not be paid out except by order of the Court."

#### **Fraud allegations**

11. In relation to Tylden Road, the Appellants alleged against the Second Respondent that it received a bank guarantee for road construction the sum of \$11,500 in the knowledge that it had no authority to do so and with reckless disregard as to the existence of lawful authority which is a result of misfeasance in public office: see Appeal Book Volume 1 at pages A1 to A41.

12. In relation to the Woodleigh Heights Land the Appellants alleged that when the Second Respondent entered into the January 1982 agreement with Woodleigh Heights Developments Pty Limited it acted unlawfully and with reckless disregard to the existence of any power under s 307AA(2) of the *Water Act* and with reckless disregard to the allotment owners in the cluster subdivision. The Appellants alleged that the Defendants made representations to them and to Australian Guarantee Corporation Limited that were false and made with the intention of causing harm to the Appellants in relation to the provision of water to the Woodleigh Heights land amounting to misfeasance in public office.

13. In order to enlarge the time with which the Appellants could commence proceedings, they relied on s 27(b) of the *Limitations of Actions Act 1958*, which requires proof that the right of action had been concealed by the fraud of the Respondents.
14. The Appellants alleged that there had been "a continuous course of conduct designed to conceal from him the true cause of loss and damage". The Appellants alleged against the Respondents that they concealed the right of action by fraud. They alleged that there must be some consciousness of wrongdoing by the Respondents, which has been concealed from the Appellants, and if there has been concealment "there must be a consciousness that what is being done is wrong or that to take advantage of the relevant situation involves wrongdoing".
15. By Notice of Appeal dated 21 December 2006, the Appellants made allegations of fraud against the Respondents which (a) were made knowing the allegation of fraud to be false or irrelevant to the issues in dispute (b) were made with an ulterior motive (c) amounted to misconduct causing loss of time and inconvenience to parties and the Court (d) was a proceeding in wilful disregard of known facts or established law and (e) involved the making of wild and contumelious allegations: see *Shepherd* at p 5-6 and Appeal Book Volume 11 at K1 to K14.
16. The examples of allegations of false admissions, concealment of fraud, fraudulent representations, fraud of the Respondents and misconduct by Justice Osborn are set out in table form and deposed to at paragraph 21 of Mr Edward's affidavit.
17. Further, the Appellants' outline of submissions dated 22 August 2007 in opposition to the Respondents' application for security for costs heard on 5 September 2007 made further allegations of fraud, fraudulent concealment, vilification of the Court and legal representatives, alleged misconduct by Justice Osborn, mala fides, fabrication, fabrication of court orders by his Honour. Examples are set out and deposed to at paragraph 24 of Mr Edward's affidavit: see Exhibit "SME-64".

18. By letter dated 28 October 2007, the Appellants wrote directly to the Respondents' board members, the Ministers for Water and Local Government and the Respondents' solicitors about the conduct of the litigation. The Appellants made allegations of fraud and misconduct predominantly directed at the Respondents and appears predominantly to be a vilification exercise of the Respondents' counsel and instructing solicitors. The Appellants made further allegations as summarised at paragraph 28 of Mr Edward's Affidavit: see Exhibit "SME-65".

19. In the Appellants' directions summons dated 12 February 2008, the Appellants again make allegations of fraud against the Respondents and vilification of legal representatives. The examples are set out and deposed to at paragraph 28 of Mr Edward's Affidavit: see Exhibit "SME-66".

#### **Terms of Settlement**

20. In relation to the second issue, the County Court proceedings in 1988 in relation to Tylden Road were settled and the Woodleigh Heights land was settled in mediation in 1999 and the terms were specifically enforced by Justice Beach.

21. The Appellants in issuing the present appeal and persisting in making submissions of unfounded allegations of fraud and vilification of the Court and legal representatives have shown a contumelious disregard for the Court. There has been a lack of bona fides in bringing this matter to the Court coupled with (1) the long delay in issuing the proceedings (2) issuing it out of time (3) the lack of justification in issuing the proceeding (4) the terms of the settlement (5) the Practice Court judgment (6) the known facts of the case (7) the spurious allegations of fraud (8) the defiance of the settlement and the Justice Beach judgment and in all the circumstances, it is submitted that the Court should exercise its discretion and order that the Appellants pay the Second Respondent's costs on an indemnity basis.

22. Further, it is submitted that in seeking to make allegations of fraud against the Second Respondent, that alone elevates the costs to an indemnity level.

## **Conclusion**

23. The Second Respondent contends that the Court should make the following orders:

- (1) Pursuant to Order 64 rule 14(4) of Chapter 1 of the Supreme Court Rules, the Appellants pay the Second Respondent's costs of and incidental to the appeal, including costs of this application, on an indemnity basis.
- (2) Pursuant to Order 79 rule 2(2) of Chapter 1 of the Supreme Court Rules, the moneys paid into Court by the Appellants in the sum of \$30,000 as security for the Second Respondent's costs of the appeal by order of the Court of Appeal on 5 September 2007 and any interest thereon be paid to the solicitors for the Second Respondent to be applied by them in part satisfaction of the Second Respondent's costs of and incidental to this appeal, including the costs of this application, hereby ordered upon the taxation or agreement between the Appellants and the Second Respondent of those costs and in the event that the costs of the Second Respondent of and incidental to this appeal, including the costs of this application, as so taxed or agreed are less than the sum of \$30,000 and interest thereon to repay the balance of the sum of \$30,000 and the interest thereon to the Appellants.

**Greg Garde**

**Sharon Burchell**  
Counsel for the Second Respondent

Dated: 5 August 2008