SUPREME COURT OF VICTORIA

COURT OF APPEAL

No 6321 of 2005

COLIBAN REGION WATER AUTHORITY — Applicant

v

GLENN ALEXANDER THOMPSON and CHERYL MAREE THOMPSON — Respondents

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JUDGES:	NEAVE JA and MANDIE AJA
WHERE HELD:	MELBOURNE
DATE OF HEARING:	5 September 2008
DATE OF JUDGMENT:	11 September 2008

APPEARANCES:	Counsel	Solicitors
For the Applicant	Mr G H Garde QC and Ms S A Burchell	Mason Sier Turnbull
For the Respondents	Mr G A Thompson in person	

NEAVE JA:

1 I agree with Mandie AJA, for the reasons he has stated, that the application for indemnity costs should be granted.

MANDIE AJA:

2 The Coliban Region Water Authority ('the Authority') was the second respondent to an appeal by Glenn Alexander Thompson and Cheryl Maree Thompson ('the appellants'). An 11 volume appeal book was prepared by the appellants and filed on 1 March 2008. On 29 May 2008 the appeal was fixed for hearing on 19 August 2008. However, on 23 June 2008, Isakow Lawyers commenced to act as solicitors for the appellants and filed a Notice of Change of Address for Service (from an address in New South Wales to their offices at 200 Queen Street, Melbourne). At the same time the solicitors for the appellants filed a Notice of Discontinuance of the whole of the appeal.

3 The Authority, by summons filed 23 July 2008, seeks an order that its costs of and incidental to the appeal, including the costs of this application, be paid by the appellants on an indemnity basis. The Authority also seeks an order that the money paid into Court by the appellants in the sum of $30,000 as security for the Authority's costs of the appeal and any interest thereon be paid to its solicitors (to the extent necessary) in satisfaction or part satisfaction of its costs.

4 On last Tuesday, 2 September 2008, the solicitors for the appellants purported to file a Notice of Ceasing to Act. However, pursuant to Rule 20.03(4)(b) of Chapter I of the Supreme Court Rules, the solicitors required leave of the Court of Appeal to file such a Notice of Ceasing to Act. At the hearing of the Authority's application, Mr Isakow appeared to seek that leave. The firstnamed appellant was present in person and wished to appear on his own behalf and a letter was produced from the secondnamed appellant confirming that the firstnamed appellant had complete conduct of the matter on her behalf. In those circumstances, Isakow Lawyers were given leave (nunc pro tunc) to file the said notice.

5 As a result of their discontinuance of the appeal, the appellants are obliged to pay the Authority's costs, unless the Court of Appeal otherwise orders.[1] The

6 Authority's application is made under Order 64 Rule 14(4) which provides that, notwithstanding the discontinuance of an appeal, the Court of Appeal may make such order as to costs or otherwise as it thinks fit.

7 The circumstances relied upon by the Authority in its application for indemnity costs are set out in an affidavit sworn 22 July 2008 by Steven Mark Edward, a solicitor in the employ of the solicitors acting for the Authority.

8 In the proceeding, which was commenced in May 2005, the appellants claimed damages against the Authority and the Macedon Ranges Shire Council (which was the first respondent to the appeal) on the basis of misfeasance in a public office involving a number of allegations of fraud, fabrication of plans of subdivision and other misconduct in respect of certain land in the Shire (described in the proceeding as 'the Tylden Road land' and the 'Woodleigh land').

9 The factual background leading up to the proceeding appealed from may be very briefly summarised as follows. The appellants had purchased the Tylden Road land which formed part of a subdivision that had been approved by the Council. The appellants became involved in a dispute with the Council and the Authority and involved in litigation in which they successfully defended certain claims made by the Council. The appellants then brought a proceeding in the County Court against the Council and the Authority to recover money that they had paid out for works carried out by the Council and the Authority . This proceeding was settled in 1991 and the appellants gave the respondents a release in consideration of $40,000 plus costs. The release related to 'all claims, suits and demands, whatsoever the subject matter of this proceeding'. The appellants also purchased, in 1979, certain allotments within the Woodleigh land and a dispute arose relating to the supply of water which

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1 Order 64 Rule 14(3).

resulted in a proceeding, in 1995, by the appellants against the Council and the Authority in which the appellants alleged that they had suffered a consequential loss upon a mortgagee sale in 1984. This proceeding was also settled (in 1999) and the appellants gave a release to the Council and the Authority in consideration of money paid to them.

10 Returning to the latest proceeding, in September 2005 the Authority made application to a Master for orders that it be summarily dismissed as an abuse of process on the grounds that:

- the appellants were seeking to re-agitate issues resolved upon settlement of the earlier proceedings between the parties and the subject of releases by the appellants to the Authority and to the Council
- The appellants were seeking to agitate issues so closely connected with the said earlier proceedings that it was not open to them to do so by virtue of principles of res judicata and Anshun estoppel
- the claims were statute barred pursuant to s 5 of the *Limitation of Actions Act 1958*.

11 In May 2006 the Master gave summary judgment against the appellants in favour of the Authority and the Council and ordered that the appellants pay costs on an indemnity basis.

12 The appellants appealed to a Judge and their appeal was dismissed by the Judge on 29 November 2006.[2] On 7 December 2006 the Judge ordered that the appellants pay costs on an indemnity basis. The firstnamed appellant had appeared in person before the Judge.

13 In his reasons for judgment, the Judge concluded, in relation to the Tylden Road land, that the appellants' claim could not succeed because, inter alia, it was the

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2 *Thompson v Macedon Ranges Shire Council & Anor* [2006] VSC 458.

subject of a release upon settlement of the County Court proceedings and because the relevant limitation period had expired at a time when the appellants were already aware of all of the facts necessary to found their claim of misfeasance in public office (or such facts were ascertainable upon the exercise of reasonable diligence). Thus, there was no arguable basis for the appellants' contention that there had been any relevant concealment of facts by the respondents. The Judge further concluded, in relation to the Woodleigh land, inter alia, that their claim was barred by the full and complete release that they had given in the terms of settlement in the Supreme Court proceeding and that there was no arguable basis on which the limitation defence could be avoided. This is a bare summary which does not do justice to the full and detailed analysis contained in the 57 page reasons for judgment.

14 It was the appellants' appeal from this decision of the Judge that has now been discontinued.

15 In their Notice of Appeal, the appellants made many allegations of fraud, fraudulent concealment, fraudulent misrepresentation and false evidence against the Authority and the Council and further made allegations of misconduct and prejudice by the Judge. In an outline of submissions dated 22 August 2007, in opposition to the respondents' application for security for costs, the appellants repeated and elaborated upon their allegations of fraud and misconduct and added allegations of serious misconduct by various of the legal representatives involved in the proceeding before the Master and before the Judge.

16 The Authority submits, on the basis of the matters set out in Mr Edward's affidavit that an order for indemnity costs should be made. The Authority relies principally upon the following matters:

- The numerous and repeated allegations of fraud made by the appellants against the Authority and its legal advisors that were determined to be unfounded by the Master and the Judge

- The bringing of the proceedings and the appeal in wilful disregard of the terms of settlement relating to the Tylden Road land reached in the County Court proceeding

- The bringing of the proceeding and the appeal in disregard of the terms of settlement (entered into after a mediation) in relation to the proceeding concerned with the Woodleigh land, which terms of settlement were the subject of orders for specific performance by the Supreme Court.[3]

17 The firstnamed appellant (Mr Thompson) has provided to the Court an affidavit, sworn 3 September 2008, that, as its heading suggests, comprises both an affidavit and his submission in reply to the Authority's application for indemnity costs. Mr Thompson adopted the contents of his affidavit as comprising his submission in opposition to the Authority's application.

18 In Mr Thompson's affidavit, he says that he denies that the appellants' allegations of fraud identified in the Authority's submissions are 'unfounded' and that 'I require this Court to adjudicate'. He goes on to say that he does not seek to 'prove or disprove' these allegations but merely to show, in answer to the Authority's submissions, that they are not unfounded.

19 Mr Thompson's affidavit is 44 pages in length and there are also a number of substantial exhibits.

20 In my opinion, it is inappropriate for this Court on a costs application to determine whether or not the said allegations of fraud were unfounded or not, subject to two important qualifications.

21 The first qualification is that if the Judge, in the decision appealed from, found that some allegations of fraud were unfounded, that is a matter that this Court might take into account on the costs application. The appellants, having abandoned their appeal from his judgment, are not entitled to agitate issues either of fact or law that

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3 See *Thompson v Macedon Ranges Shire Council* [1999] VSC 338.

were determined by the Judge. Once the appeal has been abandoned, it is inappropriate for the Court of Appeal to investigate the validity of matters that were raised by the appellants in their appeal.

22 The second qualification is that this Court may, but not must, have regard to any unfounded allegations of a scandalous nature made in relation to the Court itself.

23 In any event, I would not pay any regard to the Authority's contentions that unfounded allegations of fraud were made by the appellants or either of them against the respondents and their legal representatives unless the Judge so found.

24 Further, although Mr Thompson says in his affidavit that this hearing is 'not intended by me to be a quasi appeal', a number of matters canvassed by him are matters that could only be raised by him on the appeal that has been abandoned.

25 Mr Thompson's affidavit contained numerous allegations in relation to the Judge and to his judgment. For example, it is said that the judgment sets out reasons introduced without notice and flying in the face of the facts and the law and that the proceeding before him was a 'Kangaroo Court'. It is further alleged by Mr Thompson that the said reasons were 'fabricated'. These and similar allegations are assertions only and must be regarded as both unfounded and scandalous but whether it is necessary to have regard to them is another matter. Substantial material is then set out in Mr Thompson's affidavit both seeking to raise arguments as to what took place at or in relation to the hearing before the Judge and seeking to deal with the factual and legal issues that were before him. The appeal having been abandoned, all of these matters must be disregarded. There are also a number of allegations and contentions as to what occurred before the Master - these are irrelevant because the appeal before the Judge was a re-hearing. They are also irrelevant in any event because the appeal from the Judge was abandoned.

26 Finally, Mr Thompson expresses dissatisfaction with the processes of the Supreme Court of Victoria as experienced by him and concludes that 'this is not the

place to seek justice'. As a result, he says that he 'determined to stop throwing money away ...' He deposes that

> I decided to abandon the Appeal in favour of going public with the complete story of what has occurred over the years including in this Court and to actively campaign to expose deception, incompetence and dishonestly (sic) in this Court and particularly expose Barristers who mislead the Court .. I do not apologise for abandoning the Appeal.

He concludes, inter alia, by saying 'no costs should be awarded at all at this time'.

27 In *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd*[4], Woodward J said:[5]

> I believe that it is appropriate to consider awarding "solicitor and client" or "indemnity" costs, whenever it appears that an action has been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law.

28 In *Colgate Palmolive Co v Cussons Pty Ltd*[6], Sheppard J said:[7]

> In consequence of the settled practice which exists, the Court ought not usually make an order for the payment of costs on some basis other than the party and party basis. The circumstances of the case must be such as to warrant the Court in departing from the usual course. That has been the view of all judges dealing with applications for payment of costs on the indemnity or some other basis whether here or in England. The tests have been variously put. The Court of Appeal in Andrews v Barnes ... said the Court had a general and discretionary power to award costs as between solicitor and client "as and when the justice of the case might so require". Woodward J in Fountain Selected Meats appears to have adopted what was said by Brandon LJ (as he was) in Preston v Preston ... namely, there should be some special or unusual feature in the case to justify the Court in departing from the ordinary practice. Most judges dealing with the problem have resolved the particular case before them by dealing with the circumstances of that case and finding in it the presence or absence of factors which would be capable, if they existed, of warranting a departure from the usual rule. But as French J said ... in Tetijo, "The categories in which the discretion may be exercised are not closed". Davies J expressed ... similar views in Ragata ...

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4 (1988) 81 ALR 397.

5 (1988) 81 ALR 397, 401.

6 (1993) 46 FCR 225.

7 (1993) 46 FCR 225, 233-4.

> Notwithstanding the fact that that is so, it is useful to note some of the circumstances which have been thought to warrant the exercise of the discretion. I 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 Ragata) or in wilful disregard of known facts or clearly established law (Woodward J in Fountain and French J 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... and an award of costs on an indemnity basis against a contemnor ... 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 the 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.
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> *(citations and some case references omitted)*

29 In *Shepherd v National Mutual Life Association of Australasia Ltd*[8], Hedigan J stated:

> The key circumstance is that there has to be some special feature or circumstance to justify departure from the normal practice. It would be of little utility to seek to add to or define the class of such features and circumstances other than to say they must be such as to warrant a departure. Examples derivable from the cases include
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> (i) an allegation of fraud knowing it to be false or irrelevant to the issues between the parties;
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> (ii) some ulterior motive for making the allegation;
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> (iii) misconduct causing a loss of time, inconvenience to the parties in the Court;
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> (iv) proceeding in wilful disregard of known facts or established law;
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> (v) the making of wild and contumelious allegations.

30 In my opinion an order for indemnity costs is called for in the present matter simply because the appeal must be regarded as having been hopeless. As the judgment appealed from demonstrates, the claims made by the appellants in the proceeding were the subject of full and complete releases contained in terms of

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8 Unreported, Supreme Court of Victoria, 15 November 1994, Hedigan J.

settlement of earlier proceedings. In addition, the claims were statute barred and, as the judge found, the appellants were aware of all of the relevant facts within the limitation periods. As I have said, having abandoned the appeal, the appellants cannot seek to contradict the judicial determinations that led to the summary judgment in the Trial Division.

31 I find it unnecessary to consider whether, as the Authority submits, indemnity costs should be ordered because of the allegations as to fraud made by the appellants that were held by the Judge to be unfounded. Nor is it necessary to take into account any unfounded and scandalous allegations made in relation to the Court itself. It is sufficient to determine the application upon the basis that the appeal was hopeless.

32 In my opinion, the appellants should be ordered to pay the costs (including any reserved costs) of the Authority of and incidental to the appeal and of this application, on an indemnity basis. It should be further ordered that the money paid into Court by the appellants as security for costs be paid out to the solicitors for the Authority in satisfaction or part satisfaction (as the case may be) of the costs so ordered to be paid and to the extent (if any) that the amount in Court exceeds the costs so ordered to be paid, that the balance remaining be paid out to the appellants.

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