

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COURT OF APPEAL**

No 6321 of 2005

B E T W E E N

**GLENN ALEXANDER THOMPSON
& 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

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Filed on behalf of: the Second Respondent

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1. By a summons filed 9 July 2007 the Second Respondent seeks an order for security for costs against the Appellants in the amount of \$58,136.80 or such other amount as may be determined by the Court.
2. In seeking these orders, the Second Respondent relies upon:
 - (1) the Affidavit of Melanie Jane Crow sworn on 21 June 2007; and
 - (2) the Affidavit of Steven Mark Edward sworn on 6 July 2007.
3. The grounds for the security for costs order sought include:
 - (1) the appeal is an abuse of process, vexatious and has no prospects of success¹;
 - (2) the Appellants reside out of the jurisdiction and there is an insufficiency of assets;

¹ *Knight v Beyond Properties Pty Ltd* [2005] FCA 764; *Chang v Comcare Australia* [1999] FCA 1677 and *Morris v Handley* [2000] NSWSC 957.

- (3) the Appellants have failed to perform earlier terms of settlement;
 - (4) there are outstanding costs orders due and owing by the Appellants to the Second Respondent;
 - (5) the Appellants have committed an act of bankruptcy; and
 - (6) the Appellants have failed or refused to offer appropriate security following the demands made by the Second Respondent.
4. The evidence principally relied on by the Second Respondent in support of the grounds is contained in paragraphs 7 to 54 of the Affidavit of Steven Mark Edward sworn on 6 July 2007.

5. The Second Respondent strongly relies upon the reasons for decision of Master Effthim in *Thompson & Anor v Macedon Ranges Shire Council & Anor* dated 15 May 2006 and Osborn J dated 29 November 2006 cited as *Thompson & Anor v Macedon Ranges Shire Council & Anor* [2006] VSC 458 in which the Respondents' applications for summary judgment were successful in the first instance and upheld on appeal. The merits of the Appellants' claim have already been comprehensively considered and found wanting at two levels within the Court.

The Appeal is an Abuse of Process, Vexatious and has no prospect of success

6. The claims made by the Appellants are clearly the subject of executed releases as to which see paragraphs [101] to [103] and [175] to [179] of the reasons of Justice Osborn. Accord and satisfaction have already been provided as to the Tylden Road and Woodleigh Heights claims.
7. The Appellants seek to re-agitate issues that were resolved in settlement in prior proceedings in the County Court as to the land in Tylden Road and the Supreme Court as to the Woodleigh Heights land: see paragraphs 7.1 to 7.3 of the Affidavit of Steven Mark Edward.
8. Further, all claims are statute barred under s. 5 of the *Limitations of Actions Act 1958* (Vic): see paragraphs [108] to [143] and [164] to [174] of Justice Osborn's reasons and paragraphs 7.4 to 7.6 of the Affidavit of Steven Mark Edward. In addition, the doctrines of estoppel by record and Anshun estoppel apply in these proceedings: see paragraph 7.7 of the Affidavit of Steven Mark

Edward. Justice Osborn found it unnecessary to determine this matter - see paragraph [183] of His Honour's reasons.

9. In view of the earlier litigation, it is submitted that these proceedings, and even more so this appeal, are an abuse of process of the Court and vexatious.

Insufficient Assets

10. The Appellants reside in New South Wales and own the vacant block of land more particularly described as Lot 1 on Plan of Subdivision 134684 in Certificate of Title Volume 9408 Folio 064: see paragraph 10 of the Affidavit of Steven Mark Edward. The Appellants refer to this land in the particulars subjoined to paragraph 1A of the Amended Statement of Claim.

11. The Certificate of Title being Exhibit "SME-25" notes that this land is encumbered by a mortgage which was registered on the Title to the Commercial Bank of Australia Limited (now Westpac Bank Corporation) on 4 September 1981. A Warrant of Seizure and Sale was returned by the Deputy Sheriff unsatisfied in relation to this property with the notation that the Bailiffs were unable to find any personal or real estate on which to make levy.

Impecuniosity of Appellants

12. In the Affidavit of Glenn Thompson sworn on 18 October 2005, the First Appellant stated that his current financial circumstances were 'limited', and were 'fully committed to providing for 'himself, his ex-wife and his daughter - see paragraphs 7 to 9.

13. In his Outline of Submissions before Justice Osborn, the First Appellant stated that he was impecunious: see paragraphs 44 to 45 of the Affidavit of Steven Mark Edward.

Failure to perform earlier terms of settlement

14. The Appellants have in the case of the prior Woodleigh Heights proceeding, refused to perform their obligations under terms of settlement. On 1 September 1999, Justice Beach ordered that the terms of settlement be specifically performed: see paragraph 12 of the Affidavit of Steven Mark Edward.

Outstanding Costs orders

15. The Appellants have four outstanding costs orders which are due and owing to the Second Respondent as follows:

(1) Cost orders made by Justice Beach on 1 September 1999 in proceedings 7966 of 1996 taxed in the sum of \$15,693.90: see paragraphs 13 to 20 of the Affidavit of Steven Mark Edward.

(2) Cost orders made by Master Efthim on 19 May 2006 in proceeding 6321 of 2005 taxed in the sum of \$155,987.05: see paragraphs 21 to 26 of the Affidavit of Steven Mark Edward.

(3) Cost orders made by Master Efthim on 31 August 2006 in these proceedings taxed in the sum of \$3,967.10: see paragraphs 27 to 30 of the Affidavit of Steven Mark Edward.

(4) Cost orders made by Justice Osborn on 7 December 2006 in these proceedings taxed in the sum of \$72,591.06: see paragraphs 36 to 39 of the Affidavit of Steven Mark Edward.

16. It may fairly be observed that the Appellants seek to assert their rights to bring numerous proceedings in the Court, but do not meet their responsibilities when their proceedings are found to be misconceived or devoid of merit. To date, despite all demands, the Appellants have paid nothing in reduction of the abovementioned costs orders.

Act of Bankruptcy

17. On 25 January 2007, the Second Respondent's solicitors issued a Warrant of Seizure and Sale in the Supreme Court in respect of the costs orders made by Master Efthim on 19 May 2006 in the sum of \$155,987.05. On 26 February 2007, the Sheriff's Office returned the Warrant unsatisfied: see paragraphs 41 to 43 of the Affidavit of Steven Mark Edward. Pursuant to s. 40(1)(d)(ii) of the *Bankruptcy Act 1966* (Cth), a Warrant of Seizure and Sale that has been returned to Court marked as unsatisfied amounts to an act of bankruptcy.

ASIC Search

18. The First Appellant incorporated a publicly listed company called Thompson Couplings Limited (ACN 001054093). According to the Offer Information Statement at page 26 [Exhibit "SME-55"], in the year to 31 December 2005, the First Appellant provided an interest free loan in the sum of \$83,000 to the company. As noted above, only 2 months previously, the First Appellant deposed to the fact that his current financial circumstances were "limited" and were "fully committed to providing for" himself, his ex-wife and daughter: see paragraphs 46 to 49 of the Affidavit of Steven Mark Edward.

Demand and Refusal to provide security

19. On 29 March 2007, the Second Respondent's solicitors, sent a letter to the Appellants requesting the Appellant's agreement to provide security for costs: see paragraph 50 of the Affidavit of Steven Mark Edward.

20. By letter dated 2 April 2007, the First Appellant proposed to undertake to provide \$100,000 security to cover both Respondents' costs of the appeal by 15 June 2007. On 2 April 2007, all parties signed proposed consent orders to that effect. On 10 April 2007, the Court indicated that the proposed consent orders had not been made. On 28 May 2007, at the directions hearing before Master Cain, the First Appellant stated that he consented to provide security on 2 April 2007 to "buy time" to arrange for his "counsel of choice" to appear: see paragraphs 51 to 54 of the Affidavit of Steven Mark Edward. The Appellants reneged. Since the Appellants were able to delay the proceeding, security is now not forthcoming from the Appellants.

Quantum of Security

21. The Second Respondent relies on the affidavit of Melanie Jane Crow and paragraphs 4-6 of the affidavit of Steven Mark Edward in support of the quantum of security for costs sought in this application.

Conclusion

22. The Second Respondent contends that the matters set out above demonstrate special circumstances and justify the ordering of security for the Second Respondent's costs. It is submitted that the Court should make the orders sought in its summons filed on 9 July 2007.

Greg Garde

Sharon Burchell
Counsel for the Second Respondent

Dated: 24 July 2007