

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION**

No 6321 of 2005

B E T W E E N

**GLENN ALEXANDER THOMPSON
& CHERYL MAREE THOMPSON**

Plaintiffs

and

MACEDON RANGES SHIRE COUNCIL

First Defendant

-and-

THE COLIBAN REGION WATER AUTHORITY

Second Defendant

**OUTLINE OF COST SUBMISSIONS OF THE SECOND DEFENDANT
FOR 29 NOVEMBER 2006**

Date of document: 29 November 2006

Filed on behalf of: the Second Defendant

Prepared by:

Arnold Dallas McPherson
Lawyers
337 Hargreaves Street
BENDIGO VIC 3550

Solicitor code:
DX 55054 Bendigo
Tel 5445 9200 Fax 5441 4424
Ref: Steven Edward

1. The Second Defendant seeks indemnity costs of the appeal and relies on the following authorities in relation to the relevant factors that the Court can take into account when exercising its discretion on 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.

2. The grounds for indemnity costs arising from this proceeding are threefold:

- (1) First, the numerous allegations of fraud made by the Plaintiffs. The Plaintiffs have made a large number of fraud allegations against the Defendants and have claimed the fabrication of plans and the misuse of public office, which were unfounded.
 - (2) Secondly, the terms of settlement drawn in the County Court proceeding in relation to Tylden Road in 1988 and the wilful disregard of the known law and facts whereby the Plaintiffs knew that they had signed a settlement and dishonoured the terms of the settlement.
 - (3) Thirdly, and importantly, the defiance of Justice Beach's judgment in the Practice Court of this Court in which the Plaintiffs indicated to the Listing Master that they would discontinue the proceeding as the matter had been settled at mediation. The terms were enforced and upheld by Justice Beach in the Practice Court in relation to the Woodleigh Heights proceedings in 1995 and solicitor and client costs were awarded.
3. The Plaintiffs have 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 Defendants 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 Plaintiffs to bring on new claims and (3) agitate claims which were statute barred.

Fraud allegations

4. In relation to Tylden Road, the Plaintiffs alleged against the Second Defendant 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
5. In relation to the Woodleigh Heights Land the Plaintiffs alleged that when the Second Defendant 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 Plaintiffs 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 Plaintiffs in relation to the provision of water to the Woodleigh Heights land amounting to misfeasance in public office.

6. In order to enlarge the time with which the Plaintiffs 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 Defendants.
7. The Plaintiffs alleged that there had been "a continuous course of conduct designed to conceal from him the true cause of loss and damage". The Plaintiffs alleged against the Defendants that they concealed the right of action by fraud. They alleged that there must be some consciousness of wrongdoing by the Defendants, which has been concealed from the Plaintiffs, 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".
8. During the course of oral argument on 1 November 2006 by Mr Thompson, the Plaintiffs made allegations of fraud against the Defendants 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. For example:

	Description	Transcript reference
1.	Conspiracy: to avoid s. 9 of the <i>Sale of Land Act</i> and the sealing by registrar.	105, line 7-10
2.	Conspiracy: to avoid s. 9 of the <i>Sale of Land Act</i>	119, line 7, 122, line 9

3.	Fraud of the Defendants	122, line 27
4.	Fraud: Mr Thompson claimed that he was "defrauded by these people" and that it was a "question of finding out what the correct fraud is".	125, line 25-26
5.	Fraud: Mr Thompson claimed that a fraud occurred that he did not know about and that the fraud was deliberate done for the purpose of avoiding laws of this state.	130, line 11
6.	Fraud & Conspiracy: His Honour noted that Mr Thompson was making an allegation of fraudulent conspiracy	131, line 21-22
7.	Fraudulent misrepresentation: of the Council and Water Board	133, line 25-26
8.	Fraudulent misrepresentation: They were released from nothing more than the fraud upon which the fraudulent misrepresentations upon which the previous proceeding was based.	134, line 20-22
9.	False Admissions: Lied to the Magistrates Court and false admissions in the County Court	159, line 25-28
10.	False Admissions: Four false admissions in the County Court now known to be false	159, line 9-12
11.	False Admissions: Mr Thompson claimed that he simply believed what the Defendants said in court and it was wrong, they lied	160, line 30

9. The Plaintiffs in Part 1 of their submissions made further allegations of fraud, conspiracy, deceit and perjury as set out below:

	Description	Para Reference
12.	Vilification of Legal Representatives: The present applications by the Defendants are nothing more than "concoctions, fabrications without any basis in either fact, logic or law".	25
13.	Vilification of Legal Representatives: Mr Thompson sought to show that "Major General Garde and his junior and particularly his instructing solicitor Mr Edward, do not and cannot, hold a belief as to the truth of their submissions".	27
14.	Vilification of Legal Representatives: The Defendants are "locked into repeating the falsehoods which misled the Master".	28
15.	Vilification of Legal Representatives: The Defendants "cannot tell the truth before this Court and if the Defendants raise new falsehoods than I shall deal with them ad-lib as I read this submission".	29

16.	Vilification of Legal Representatives: The submissions of the Second Defendant "were simply false and misleading from top to bottom".	30(c)
17.	Vilification of Legal Representatives: The false affidavits of Mr Steven Mark Edward.	30(d)
18.	Vilification of Legal Representatives: Over the years Mr Thompson claims to have "come to expect these types of misrepresentations from legal professionals, particularly from the Major General".	30(e)
19.	Vilification of Legal Representatives: The misrepresentations of the Defendants and the failure of Mr Thompson's ex-Counsel.	31
20.	Fraudulent Concealment: The fraudulent concealment of the present rights of action by the Defendants.	33
21.	Fraudulent Concealment: The Defendants fraudulently concealed the facts.	40
22.	Fraud: acts done by the Defendants over the years are "so outrageous as to be beyond normal contemplation".	41
23.	Fraud: The hurdles are "a mirage created by the smoke and mirrors of the Defendants (sic) deceit both past and present".	42(f)
24.	Fraudulent Concealment to avoid the effect of s 9 of the <i>Sale of Land Act</i> .	42(g)
25.	Fraudulent Representations: intended to deceive and to fraudulently conceal the present right of action.	42(h)
26.	Fraudulent Concealment: concealing the truth by mounting sham defences and sham applications.	42(i)
27.	Fraudulent Concealment: did not raise defences which were known and available to them.	42(j)
28.	Conspiracy: to avoid s 9 of the <i>Sale of Land Act</i> and "primary fraud", "secondary fraud" and "predicating facts".	42(l)
29.	Primary Fraud: to avoid s 9 of the <i>Sale of Land Act</i>	42(n)
30.	Primary Fraud: to avoid s 9 of the <i>Sale of Land Act</i>	42(o)
31.	Secondary Fraud: facilitating missing services	42(p)
32.	Fraudulent Concealment: act of sealing the plans	42(q)
33.	Secondary Fraud: continuing concealment of the primary fraud and secondary frauds	42(r)
34.	Primary Fraud & Secondary Fraud: the root of the present rights of action and the consequential or dependant frauds	42(s)
35.	Primary Fraud: see paragraph 55(b) of Mr Thompson's Affidavit of 18 October 2005	42(t)
36.	Primary Fraud: in relation to the fabricated s 569E Notices	42(u)
37.	Primary Fraud: Woodleigh Heights see paragraph W10 of the Amended Statement of Claim	42(w)
38.	Primary Fraud: see paragraphs T7 and W8 of the Amended Statement of Claim to avoid s 9 of the <i>Sale of Land Act</i> .	42(y)
39.	Primary Fraud: allegation in respect of s 9 of the <i>Sale of Land Act</i> .	42(z)

40.	Secondary Fraud: or "dependant frauds".	42(bb)
41.	Fraud: the Terms of Settlement were compromised by the fraud and deceit of the Defendants	42(dd)
42.	Vilification of Legal Representatives: The Master was "misled and deceived by a combination of careless and negligent submissions, classic obfuscation and damn lies".	42(hh)
43.	Vilification of Legal Representatives: Mr Steven Mark Edward "lied on Affidavit".	55(i)
44.	Fraud & Fraudulent Concealment	58(b)
45.	Fraud: the Plaintiffs the subject of four related frauds at the hands of two statutory authorities.	58(c)
46.	Fraudulent Conspiracy:	58(d)
47.	Primary Fraud & Conspiracy: to avoid s 9 of the <i>Sale of Land Act</i>	58(e)
48.	Conspiracy: facilitate to unlawful sale of allotments.	58(f)
49.	Conspiracy: bargain between Buchanan and the Defendants	58(i)
50.	Conspiracy: between Buchanan and the Defendants	58(m)
51.	Collusion & Fraud: between Buchanan and the Defendants	58(o)
52.	Collusion & Fraud: between Buchanan and the Defendants	58(p)
53.	Fraud	58(q)
54.	Secondary Fraud: falsely representing that a s 569E Notice of Requirement had been served.	58(r)
55.	Fraud: no possibility of the Defendants or their respective officers holding a belief that what they were doing was anything other than unlawful or fraudulent.	58(t)
56.	Secondary Fraud: the Defendants "plainly knew full well"	58(u)
57.	Primary Fraud: the Defendants and their officers and their solicitors knew of the primary fraud and that no lawful s 569E Notice had been served.	58(v)
58.	Primary Fraud: the Defendants and their officers and their solicitors knew of the primary fraud that the private reticulation system	58(w)
59.	Conspiracy: to avoid s 9 of the <i>Sale of Land Act</i>	58(aa)
60.	Primary Fraud: to avoid s 9 of the <i>Sale of Land Act</i>	58(bb)
61.	Fraud: Defendants have retained and continue to enjoy the benefit of the frauds	58(cc)
62.	Conspiracy: state of mind to avoid s 9 of the <i>Sale of Land Act</i>	61(g)
63.	Conspiracy: between Buchanan and the Defendants to avoid s 9 of the <i>Sale of Land Act</i>	62(g)
64.	Conspiracy	63(b)
65.	Conspiracy to defeat the laws of the state of Victoria	63(c)
66.	Conspiracy: for the purpose of providing profit and benefit to the conspirators	63(d)
67.	Fraudulent Concealment: to avoid s 9 of the <i>Sale of</i>	63(i)

	<i>Land Act</i>	
68.	False Admissions & Fraudulent Concealment: concealment of cause of action,	67(j) to (n)
69.	Fraudulent Concealment: concealment of the conspiracy to avoid s 9 of the <i>Sale of Land Act</i>	68(a)
70.	Fraudulent Concealment: Fraudulent representations and concealment for the purpose of avoiding potential criminal charges.	68(l), (iv), (q), (t), (x), (y)
71.	False Admissions: perjury, false affidavits, false admissions which concealed the conspiracy to avoid s 9 of the <i>Sale of Land Act</i> .	70(c)(ii), (iii), (f)
72.	Fraud: concealing the fraud by perjury, false affidavits, false admissions, committing "secondary frauds" and by avoiding proceedings and judgment.	71(a), (b), (c)
73.	Concealment of Fraud	73(f)
74.	Concealment of Fraud	73(g)(ii), (2)(a), (b), (c)
75.	Fraud & Fraudulent Concealment:	74(c), (i), (ii)
76.	Fraud	74(f)
77.	Fraud	74(g)

10. In Part 2 of their submissions, the Plaintiffs made allegations of fraud and misconduct predominantly directed at their former counsel. However, Part B of the Plaintiffs' submissions appears predominantly to be a vilification exercise of counsel, instructing solicitor, Mr Delany SC, Mr Ahern and Mr Thompson's former counsel. The Plaintiffs made further allegations as summarised in their conclusion in paragraph 20.

	Description	Para Reference
78.	Fraud & Conspiracy	20(b)
79.	Concealment of Fraud	20(c)
80.	Vilification of Legal Representatives: the Defendants resorted to deception and deliberately misled the Master.	20(d)
81.	Fraudulent Concealment: the Defendants concealed the rights of action.	20(e)

Terms of Settlement

11. 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.

12. By letter dated 20 September 1999, following the Practice Court hearing Mr Thompson informed the Second Defendant's solicitors that he would be pursuing the Defendants on aspects of fraud: see Document 99. The Plaintiffs in issuing the present proceeding have made good their threat uttered in 1999 and 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 Plaintiffs pay the Second Defendant's costs on an indemnity basis.

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

Conclusion

14. The Second Defendant contends that the Court should make the following orders:

- (1) The appeal from the order of Master Efthim be dismissed.
- (2) The Plaintiffs pay the Second Defendant's costs of and incidental to the proceeding and of and incidental to this application on an indemnity basis.

Greg Garde

Sharon Burchell
Counsel for the Second Defendant

Dated: 29 November 2006