

1 MR DELANY: But we haven't, we haven't brought this application  
2 on the basis the pleading is defective or that the cause  
3 of action - because Mr - it's actually the individual  
4 rather than the council if there was a misfeasance, he  
5 can't attack the council. We haven't really relied on  
6 that point. We've said in our outline that if you're  
7 going to plead misfeasance in public office, you've got  
8 to identify the public officer.

9 HIS HONOUR: Yes.

10 MR DELANY: And there would have to be an argument here that it  
11 was Mr Porter and not - - -

12 HIS HONOUR: That's what Mr Thompson's note seems to say.

13 MR DELANY: Yes.

14 HIS HONOUR: Mr Porter acted without any authority of the  
15 council or of - as I understand it.

16 MR DELANY: Yes. But the pleading is difficult Your Honour to  
17 - we've taken the view, we could have brought a pleading  
18 summons and had an argument about whether it discloses a  
19 cause of action and so on. We could have put a lot of  
20 energy into that and Your Honour we decided that wasn't  
21 the most expeditious way of dealing with the case.

22 HIS HONOUR: Yes.

23 MR DELANY: Now if the case were to proceed and we say it  
24 shouldn't but if it were to proceed then that's probably  
25 an argument that we'll have, we would have to have. Or  
26 it is an argument we'd have to have about the pleading  
27 but for the moment we haven't embarked on that.

28 HIS HONOUR: Well the only reason I raise it is if you're  
29 right, and what has to be concealed is the existence of  
30 the cause of action, in a sense that begs the question,  
31 what the cause of action is - - -

1 MR DELANY: Well - - -

2 HIS HONOUR: But I may be - - -

3 MR DELANY: Well we've assumed that the cause of action is  
4 there.

5 HIS HONOUR: Yes. As pleaded.

6 MR DELANY: Well, as pleaded, or in the affidavits.

7 HIS HONOUR: Yes.

8 MR DELANY: So really taken the view - - -

9 HIS HONOUR: The complaint is that made in the affidavits?

10 MR DELANY: Yes.

11 HIS HONOUR: Yes, I understand.

12 MR DELANY: So we - so that's the way we've approached it. Now  
13 if we go to Paragraph 99 of the outline, where we refer  
14 to a decision in Hamilton - I think Your Honour has the  
15 folder of cases.

16 HIS HONOUR: Yes.

17 MR DELANY: I'm told that this case is at Tab 10 of the folder.

18 HIS HONOUR: Yes.

19 MR DELANY: And this is a decision of Justice McLelland and the  
20 case involved - arose in the context of directors  
21 concealing a contract from - former directors concealing  
22 a contract - the existence of a contract from the  
23 company, and at Point 2 of the headnote, "the  
24 postponement of the limitation bar under the Limitation  
25 Act 1969 s.51B ... (reads) ... or moral turpitude". And  
26 the - if I take Your Honour to p.385 at the foot of the  
27 page His Honour says, in the last paragraph, third lines,  
28 "It's forever contended the cause or causes of action  
29 were fraudulently concealed ... (reads) ... and so on of  
30 their breaches of duty". And then over to the next page,  
31 386, Paragraph B, "It's been submitted on behalf of the