

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

No. 6321 of 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

AFFIDAVIT IN SUPPORT OF SUMMONS FOR INDEMNITY COSTS

Deponent: Jacqueline Sue Partridge

Date sworn: 4 June 2009

Filed on behalf of: The First Respondent

Prepared by:

Maddocks

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I, JACQUELINE SUE PARTRIDGE of 140 William Street, Melbourne, in the State of Victoria,
solicitor **MAKE OATH AND SAY** as follows:

A. Application by the first respondent for an indemnity costs order

1. I am a solicitor employed by Maddocks, the First Respondent's solicitors in this proceeding. Under the supervision of my principal I have the care and conduct of this matter. Except where otherwise stated, I make this Affidavit from my own knowledge. In this affidavit, I refer to the First Respondent as the "Council".

2. I make this Affidavit in support of the Council's application, by which it seeks orders that:

- (a) Pursuant to Order 64 rule 14(4) of the *Supreme Court Rules*, the Appellants pay the Council's costs of and incidental to the appeal, including the costs of this application on an indemnity basis.
- (b) Pursuant to Order 79 rule 2(2) of the *Supreme Court Rules*, the monies paid into Court by the Appellants in the sum of \$30,000 as security for the Council's costs of the appeal by Order of the Court of Appeal made 5 September 2007 and any interest thereon be paid to the solicitors for the Council to be applied by them in part satisfaction of the Council'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 Council of those costs. In the event that the costs of the Council 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, the balance of the sum of \$30,000 and the interest thereupon to be repaid to the Appellants.
- (c) Such further other order as the Court may think fit.

3. There were 11 volumes of documents comprising the Appeal Book in this matter. Rather than making reference to Appeal Book page numbers in this affidavit which would require all volumes of the Appeal Book to be in Court, I have exhibited to this affidavit the documents from the Appeal Book upon which the Council relies for the purposes of making this application.

4. The appellants discontinued their appeal in June 2008. The Council has sought to resolve the question of costs with the appellants so as to avoid the need to make this application. Those attempts to resolve the costs issue have been unsuccessful and accordingly, the Council has issued this application.

B. Grounds for seeking an indemnity costs order

5. The appeal was from the decision of Justice Osborn handed down on 29 November 2006. In summary, Justice Osborn found that the claims were statute barred and further that the claims sought to be made had been the subject of releases given in earlier proceedings between the appellants and the Council. The ground upon which the Council seeks indemnity costs is that based on the findings of Justice Osborn, the appellants' appeal had poor prospects of success.

C. Procedural History

6. I set out below a summary of the procedural steps taken in this matter from the commencement of the proceeding in 2006 to the appellants' discontinuance of their appeal in 2008:
- (a) **31 May 2005** – the appellants, as plaintiffs, issued proceedings against the Council (as first defendant) and The Coliban Region Water Authority (“**the Water Authority**”) (as second defendant). In this affidavit, I refer to this proceeding as the “**2005 proceeding**”. Two claims were made by the plaintiffs against the Council in the 2005 proceeding. The first claim related to parcels of land described as the “**Tylden Road land**”. The second claim related to parcels of land described as the “**Woodleigh Heights land**”. The primary allegation made against the Council in each claim was that the Council engaged in misfeasance in public office in relation to the sealing of plans in relation to sub-divisions concerning those parcels of land. The factual allegations made in the statement of claim related to events that were pleaded to have occurred in the early 1980's in respect of the Tylden Road land and during the period 1979 to 1989 in respect of the Woodleigh Heights land;

- (b) **23 September 2005** – the Council issued a summons seeking summary judgment against the plaintiffs. The grounds relied upon for seeking that order were as follows:
- (i) that the plaintiffs were seeking to agitate issues which were raised and resolved in earlier proceedings between the plaintiffs and the Council or resolved by settlement of the earlier proceedings;
 - (ii) the plaintiffs were seeking to raise claims which were open to the plaintiffs to raise in the earlier proceedings;
 - (iii) the plaintiffs claims were statute barred.
- (c) **14 & 15 November 2005** – the Council's summary judgment application was heard by Associate Justice Eftim (then Master Eftim) on 14 and 15 November 2005. A similar application was also made by the Water Authority which was heard at the same time. At the summary judgment hearing, the plaintiffs were represented by Mr John Middleton QC (as he then was) and Mr Neil Adams, of Counsel. The Council was represented by Mr Jim Delany SC and Mr Greg Ahern of Counsel. On 4 November 2005, the plaintiffs filed an amended statement of claim. Reference was made to the amended statement of claim at the summary judgment hearing. In support of its application for summary judgment, the Council relied upon an affidavit of Michelle Elizabeth Dixon of Maddocks sworn 23 September 2005. Associate Justice Eftim reserved his decision.
- (d) **15 May 2006** – Associate Justice Eftim handed down his reasons for decision on 15 May 2006. Associate Justice Eftim granted the summary application on each of the grounds relied upon the Council and on 19 May 2009, Associate Justice Eftim ordered that judgment be entered for the Council and further ordered that the plaintiffs pay the Council's costs on an indemnity basis;



- (e) **23 May 2006** – the plaintiffs issued a notice of appeal from the decision of Associate Justice Eftim;
- (f) **31 October 2006 and 1 November 2006** – the plaintiffs' de novo appeal was heard before Justice Osborn on 31 October 2006 and 1 November 2006. At that hearing the first plaintiff ("**Mr Thompson**") appeared in person on behalf of the plaintiffs. Mr Delany SC and Mr Ahern appeared on behalf of the Council. Justice Osborn reserved his decision;
- (g) **29 November 2006** – Justice Osborn handed down his reasons for decision. In short, Justice Osborn found that the plaintiffs' claims were the subject of releases contained in terms of settlement of earlier proceedings between the same parties and that the claims were statute barred. On 29 November 2006, Justice Osborn ordered that the appeal be dismissed and that there be judgment for the Council (and the Water Authority) and that the question of costs be adjourned to 7 December 2009;
- (h) **7 December 2006** – Submissions on costs were made before Justice Osborn. The first plaintiff appeared in person on behalf of the plaintiffs. Mr Ahern appeared on behalf of the Council. Justice Osborn made an order that plaintiffs pay the Council's costs of the appeal on an indemnity basis holding that the appeal by the plaintiffs was so unreasonable as to warrant an order for indemnity costs;
- (i) **21 December 2006** – The plaintiffs appealed against the orders made by Justice Osborn;
- (j) **15 June 2007** – the Council issued a summons seeking security for the Council's costs of the appeal;

- (k) **5 September 2007** – The Council's application was heard before Justices Buchanan and Redlich. The first plaintiff, now first appellant, Mr Thompson, appeared in person on behalf of the appellants. Mr Ahern appeared on behalf of the Council. A similar application was made by the Water Authority which was heard on the same day. The Court of Appeal (Buchanan and Redlich JJA) ordered that the appellants provide security for the costs of the appeal of the respondents, being in each case the amount of \$30,000.00;
- (l) **4 October 2007** – the appellants paid the amount of \$60,000.00 into Court as security for the respondents' costs of the appeal;
- (m) **28 May 2008** – the solicitors for the Council, Maddocks, received a letter from Isakow Lawyers advising that they had been retained by the appellants to act on their behalf in the appeal. In that letter Isakow Lawyers advise that Mr Ian Waller SC and Mr louie Hawas of Counsel had been retained to act on behalf of the appellants in the appeal;
- (n) **29 May 2008** – the parties were informed by way of letter from Associate Justice Lansdowne (then Master Lansdowne) that the appeal had been fixed for hearing on 19 August 2008;
- (o) **23 June 2008** – the appellants filed a notice of discontinuance discontinuing the whole of their appeal;
- (p) **23 July 2008** – the Water Authority filed an application seeking an order that the appellants pay the Water Authority's costs on an indemnity basis;
- (q) **2 September 2008** – the appellants' lawyers filed a notice of ceasing to act;
- (r) **5 September 2008** – the Court of Appeal heard the Water Authority's application for an indemnity costs order. Mr Thompson appeared in person on behalf of the appellants;

- (s) **11 September 2008** – The Court of Appeal ordered (Neave JA and Mandie AJA) that the appellants pay the Water Authority's costs of the appeal, including the costs of the application, on an indemnity basis;
- (t) **July 2008 to 2 September 2008** – the Council had without prejudice discussions with the appellants, through their lawyers, in relation to the costs of the appeal. No agreement was reached between the appellants and the Council in relation to the costs of the appeal or the release of monies held as security for costs;
- (u) **July 2008 to December 2008** – the Council sought recovery from the appellants of its costs of the proceedings before Associate Justice Eftim and Justice Osborn.
- (v) **16 January 2009** – the appellants paid the Council's costs of the hearings before Associate Justice Eftim and Justice Osborn.

7. The Council did not make its application for an indemnity costs order at the same time as the application made by the Water Authority. The Council elected to pursue alternative avenues and entered into discussions with the appellants, through their lawyers, Isakow lawyers. No resolution was reached with the appellants as to the payment of the Council's costs of the appeal. The Council's preference was that Mr Ahern settle the materials for this application and appear on its behalf given that he had acted in this matter on behalf of Council in each step of the proceedings since they commenced in May 2005. Mr Ahern was briefed in March 2009. The timing of the issuing of this application was in light of his other commitments.

D. Documents referred to in paragraph 6 above

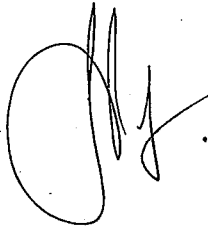
8. Now produced and shown to me and marked respectively as "JSP-1 to JSP-18" are true copies of the following documents, being the documents referred to in paragraph 6 above:

- (a) **"JSP – 1"** – the statement of claim dated 31 May 2005 referred to in paragraph 6(a) above;
- (b) **"JSP – 2"** – the Council's summons dated 23 September 2005 referred to in paragraph 6(b) above;
- (c) **"JSP – 3"** – the plaintiff's amended statement of claim filed on 4 November 2005 referred to in paragraph 6(c) above;
- (d) **"JSP – 4"** – the affidavit of Michelle Dixon sworn 23 September 2005 referred to in paragraph 6(c) above;
- (e) **"JSP – 5"** – the reasons for decision of Master Efthim (as he then was) dated 15 May 2006 and the order of Master Efthim made 19 May 2006 referred to in paragraph 6(d) above;
- (f) **"JSP – 6"** – the plaintiffs' notice of appeal from the decision of Associate Justice Efthim referred to in paragraph 6(e) above;
- (g) **"JSP-7"** – the reasons for decision of Justice Osborn dated 29 November 2006 and the order made by Justice Osborn on 29 November 2006, referred to in paragraph 6(g) above;
- (h) **"JSP-8"** – the costs order made by Justice Osborn referred to in paragraph 6(h) above;
- (i) **"JSP – 9"** – the plaintiffs' notice of appeal referred to in paragraph 6(i) above;
- (j) **"JSP – 10"** – the Council's summons dated 15 June 2007 seeking security for the Council's costs of the appeal, referred to in paragraph 6(j) above;
- (k) **"JSP – 11"** – the reasons for decision of the Court of Appeal in relation to the Council's summons dated 15 June 2007 and the security for costs order, referred to in paragraph 6(k) above;
- (l) **"JSP – 12"** – the certificate of receipt from the Senior Master's office in relation to the amount of \$60,000.00 paid into Court by the appellants, being the amount referred to in paragraph 6(l) above;
- (m) **"JSP – 13"** – the letter from Isakow Lawyers dated 28 May 2008 referred to in paragraph 6(m) above;

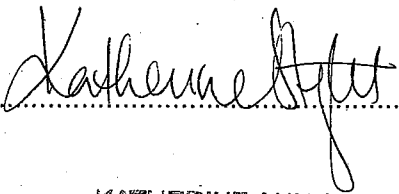
- (n) "JSP – 14" – the letter from Associate Justice Lansdowne (then Master Lansdowne) dated 29 May 2008 referred to in paragraph 6(n) above;
- (o) "JSP – 15" – the appellants' notice of discontinuance dated 23 June 2008 referred to in paragraph 6(o) above;
- (p) "JSP – 16" – the Water Authority's summons filed 23 July 2008 seeking an indemnity costs order, referred to in paragraph 6(p) above;
- (q) "JSP – 17" – the notice of ceasing to act of the appellants' lawyers dated 2 September 2008 referred to in paragraph 6(q) above;
- (r) "JSP – 18" – the reasons for decision of the Court of Appeal handed down on 11 September 2008 referred to in paragraph 6(s) above.

SWORN at Melbourne
 in the State of Victoria
 this 4th day of June 2009

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Before me:



KATHERINE ANN STYLES
 140 William St Melbourne 3000
 An Australian Legal Practitioner
 within the meaning of the
 Legal Profession Act 2004.