

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

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

**FIRST RESPONDENT'S OUTLINE OF SUBMISSIONS**

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- 1 Application by the first respondent for an order that the appellants pay the first respondent's costs of the appeal on an indemnity basis**
- 1.1 In these submissions, the first respondent and the second respondent are referred to as the "Council" and the "Water Authority" respectively. On 5 September 2007, this Court (Buchanan and Redlich JJA) ordered that the appellants provide security (in the amount of \$30,000.00) for the Council's costs of the appeal. This amount was paid into Court by the appellants on 4 October 2007. In his reasons for making the security order, Justice Buchanan observed that the "appeals face significant obstacles".
- 1.2 The appellants have wholly discontinued their appeal. By summons dated 5 June 2009, the Council seeks an order pursuant to Rule 64.14(4) that the appellants pay the Council's costs of the appeal, including the costs of this application, on an indemnity basis. Further, the Council seeks an order under Rule 79.02(2) that the amount of \$30,000.00 referred to in paragraph 1.2

above be applied towards the Council's costs of the appeal and this application.

1.3 The appeal was from the decision of Justice Osborn handed down on 29 November 2006. Justice Osborn found (as had Associate Justice Efthim below) that the appellants' claims (as plaintiffs) against the Council were statute barred and further that the claims made had been the subject of releases given in earlier proceedings between the parties. The ground upon which the Council seeks an order for indemnity costs in this application is that based on the findings of Justice Osborn, the appellants' appeal must have been regarded as being hopeless.

1.4 In seeking the orders in the summons, the Council relies upon the affidavit of Jacqueline Sue Partridge 4 June 2009 ("the Partridge affidavit").

**2 Before both Associate Justice Efthim and Justice Osborn the appellants'/plaintiffs' claims against the Council were summarily dismissed with an order that the appellants/plaintiffs pay the Council's costs on an indemnity basis.**

2.1 The procedural history of this matter is set out in paragraph 6 of the Partridge affidavit. In short, in May 2005, the appellants, as plaintiffs, issued proceedings against the Council (as first defendant) and the Water Authority (as second defendant) ("the 2005 proceeding"). The plaintiffs' claims related to two parcels of land, described as the "Tylden Road land" and 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 of sub-division in respect of those two 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.

2.2 By summons dated 23 September 2005, the Council sought summary judgement against the plaintiffs. The grounds were (a) that the plaintiffs were seeking to agitate issues that had been resolved by settlement in two earlier proceedings between the parties (b) that the plaintiffs were seeking to raise

claims which were open to the plaintiffs to raise in the earlier proceedings and (c) the plaintiffs' claims were statute barred.

- 2.3 The two earlier proceedings between the parties were a Victorian County Court proceeding commenced by the plaintiffs against the Council and the Water Authority in 1988 in respect of part of the Tylden Road land ("the prior Tylden Road proceeding") and a Victorian Supreme Court proceeding issued by the plaintiffs in 1995 against the Council and the Water Authority in respect of the Woodleigh Heights land ("the prior Woodleigh Heights proceeding").<sup>1</sup>
- 2.4 The Council's summary judgement application was heard over two days (14 and 15 November 2005) before Associate Justice Eftim (then Master Eftim). The plaintiffs were represented by Mr John Middleton QC (as he then was) and Mr Neil Adams of Counsel. On 15 May 2006, Associate Justice Eftim handed down his decision. He granted the summary judgement application on each of the grounds contended by the Council and further ordered that the plaintiffs pay the Council's costs on an indemnity basis.<sup>2</sup>
- 2.5 The plaintiffs' de novo appeal against the orders of Associate Justice Eftim was heard over two days (31 October and 1 November 2006) before Justice Osborn. The first plaintiff, Mr Thompson, appeared in person on behalf of the plaintiffs. Mr Thompson relied upon written submissions some 117 pages in length.<sup>3</sup>
- 2.6 In written reasons handed down on 29 November 2006, Justice Osborn found that the plaintiffs' claims were the subject of written releases contained in terms of settlement of earlier proceedings between the same parties and that the claims were statute barred. Justice Osborn outlined in paragraphs 101 and 102 (pages 28 and 29) of his reasons why the plaintiffs' claims in respect of both the Tylden Road land and the Woodleigh Heights land could not succeed. Justice Osborn ordered that the appeal be dismissed and that there be judgement for the Council (and the Water Authority).

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<sup>1</sup> For a discussion of these prior proceedings see [3] to [16] and [54] to [62] in respect of the prior Tylden Road proceedings and [17] to [21] and [63] to [81] in respect of the prior Woodleigh Heights proceeding, of Justice Osborn's reasons (exhibit "JSP-7" to the Partridge affidavit).

<sup>2</sup> See [6(d)] of the Partridge affidavit and exhibit "JSP-5" to that affidavit.

<sup>3</sup> See [89] of Justice Osborn's reasons (exhibit "JSP-7" to the Partridge affidavit).

- 2.7 Both before Associate Justice Eftim and Justice Osborn, the appellants sought to rely on section 27(b) of the *Limitations of Actions Act* 1958 in an endeavour to postpone the 6 year limitation period applicable to the tort of misfeasance in public office. This section provides that if the right of action is concealed by fraud then the relevant limitation period does not begin to run until the fraud has been discovered.
- 2.8 The first plaintiff claimed that relevant facts were fraudulently concealed from him until August 2000 and that the 6 year limitation period ran from that date. That argument was rejected by both Associate Justice Eftim and Justice Osborn, both finding that there was neither concealment nor fraud on the part of either the Council or the Water Authority and that the relevant documents containing the alleged "concealed facts" had been discovered by the Council in the prior Tylden Road proceeding.<sup>4</sup>
- 2.9 Justice Osborn's opinion that there was no basis for the appellants making the claims was also revealed in His Honour's reasons (handed down on 7 December 2006) for granting an indemnity costs order to the respondents. In short compass, those reasons were as follows<sup>5</sup>:
- (a) that the action had been commenced or continued in circumstances where the appellants properly advised should have known that they had no chance of success and that accordingly, the action must be presumed to have been commenced for some ulterior motive or because of some wilful disregard of the known facts or the clearly established law;
  - (b) that the 2005 proceeding was in large part brought in breach of terms of settlement relating to two previous proceedings;
  - (c) that the appellants had failed to make out an arguable case with respect to a number of allegations of fraud and in particular fraudulent concealment of material facts;
  - (d) that the conduct of the appeal was marked by extended vilification of the opposing parties and more particularly their legal representatives

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<sup>4</sup> See [34] to [62] of Master Eftim's reasons for decision (exhibit "JSP-5") and [94], [95], [108] to [144] and [164] to [174] of Justice Osborn's reasons (exhibit "JSP-7").

<sup>5</sup> See exhibit "JSP-8".

and by vilification of counsel who previously represented the appellants;

- (e) that the appeal was bought in the face of the reasons of Master Efthim which identified such fundamental problems with the appellants case that they put the appellants on plain warning that there was no sensible basis for the appeal;
- (f) that when the above was considered the making of the appeal was unreasonable.

### 3 Indemnity costs – applicable principles

- 3.1 In *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd*<sup>6</sup>, Woodward J on the question of indemnity costs stated the following:<sup>7</sup>

*"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."*

- 3.2 Further, as to the instances in which indemnity costs had been ordered, Sheppard J stated the following in *Colgate Palmolive v Cussons*<sup>8</sup>:

*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*

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<sup>6</sup> (1988) 81 ALR 397

<sup>7</sup> (1988) 81 ALR 397 at 401

<sup>8</sup> (1993) 46 FCR 225 at 233

*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.....But as French J said (at p8) in Tetijo, 'The categories in which the discretion may be exercised are not closed'. Davies J expressed (at p6) similar views in Ragata (supra).*

*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... evidence of particular misconduct that causes loss of time to the Court and to other parties...the fact that the proceedings were commenced or continued for some ulterior motive....or in wilful disregard of known facts or clearly established law... the making of allegations which ought never to have been made or the undue prolongation of a case by groundless contentions..."*

- 3.3 See also similar observations made by Hedigan J in *Shepherd v National Mutual Life Association of Australasia Ltd*<sup>9</sup>, Ashley J (as he then was) in *Guss v Geelong Building Society (in liq)* [2001] VSC 288, Batt J (as he then was) in *Regal Life Insurance Ltd v Pacific Financial Resources Pty Ltd*, (Unreported, Supreme Court of Victoria, Batt J, 16 December 1994) and Loveday J in *Hurstville Municipal Council v Connor and Another* (1991) 24 NSWLR 724.
- 3.4 It is contended that the present case is one that warrants the making of an indemnity costs order. Given the findings of Justice Osborn that the claims made were the subject of full and complete releases and the finding that the claims were statute barred the appeal must have been regarded as being one that was hopeless.<sup>10</sup>

Dated: 15 June 2009

G. J. Ahern

*Maddocks*

Maddocks  
Solicitors for the first respondent

<sup>9</sup> Unreported, Supreme Court of Victoria, 15 November 1994, Hedigan J.

<sup>10</sup> See reasons of Neave JA and Mandie AJA at [30] in *Coliban v Thompson*, (Unreported, Supreme Court of Victoria, Neave JA and Mandie AJA, 11 September 2008)