IN THE FEDERAL COURT OF AUSTRALIA
QUEENSLAND DISTRICT REGISTRY No: QUD380 of 2007

FRIPPERY PTY LTD
First Applicant

MERVYN MEYER THOMAS
Second Applicant

PAMELA ANN THOMAS
Third Applicant

CAROL JEANETTE BOOTH
First Respondent

ENVIRONMENTAL DEFENDERS OFFICE (QLD) INC.
Second Respondent

JO-ANNE BRAGG
Third Respondent

LARISSA WATERS
Fourth Respondent

SECOND, THIRD AND FOUTH RESPONDENTS' OUTLINE OF ARGUMENT FOR SUMMARY DISMISSAL

1. The second, third and fourth respondents move on their Notice of Motion for summary dismissal of the proceedings under O 20, r 5 of the *Federal Court Rules* on the basis that:

   (a) the proceeding is frivolous and vexatious; and

   (b) the proceeding is an abuse of process of the Court.

The Queensland court proceedings

2. These proceedings are a backdoor attempt to re-agitate issues that were litigated and determined in the Queensland Planning and Environment Court and Court of Appeal. In summary that litigation involved the following four decisions ("the Queensland court proceedings"):

   (a) In *Booth v Frippery Pty Ltd & Ors* [2005] QPEC 095, Judge Pack dismissed an application brought by Dr Booth against Frippery Pty Ltd, Merv Thomas and Pamela Thomas in the Planning and Environment Court at Townsville to restrain

FILED ON BEHALF OF THE
SECOND, THIRD AND FOURTH
RESPONDENTS

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Reference: JRM:LLN:81272

an offence under s 173D of the *Nature Conservation Act* 1992 (Qld). Dr Booth alleged that an electric grid system operated on "Edenvale", a lychee fruit farm in North Queensland owned by Frippery Pty Ltd (which Merv and Pamela Thomas are the directors and shareholders), contravened s 88 of the *Nature Conservation Act* 1992 (Qld). Dr Booth obtained some of the evidence of the offences by entering the respondents' fruit orchard without their consent. Objection was taken to the evidence in the proceedings but it was held to be admissible. No costs were awarded as, with limited exceptions, proceedings in the Planning and Environment Court are subject to an "own costs" rule.[1]

(b) In *Booth v Frippery Pty Ltd & Ors* [2006] 2 Qd R 210; [2006] QCA 74; [2006] QPELR 534, the Queensland Court of Appeal (Williams JA, Holmes and McMurdo JJ) allowed an appeal by Dr Booth against Judge Pack's decision and remitted the proceedings to the Planning and Environment Court to be re-heared by a different judge. Frippery Pty Ltd and Merv and Pamela Thomas were ordered to pay Dr Booth's costs of the appeal; however, these costs were indemnified by the Appeal Costs Fund.

(c) In *Booth v Frippery Pty Ltd & Ors* [2007] QPEC 99, Judge Robin granted the application brought by Dr Booth and ordered the electric grids be dismantled. No costs were awarded to Dr Booth due to the Planning and Environment Court's "own costs" rule.

(d) In *Frippery Pty Ltd & Ors v Booth* (unreported, Queensland Court of Appeal No. 123/08, 15 and 25 February 2008), Frippery Pty Ltd and Merv and Pamela Thomas appealed against Judge Robin's decision; however, this appeal was struck out after the applicants failed to comply with the Court of Appeal's directions. Costs were awarded against the applicants.

Abuse of process

3. The proceedings in this Court are an abuse of process as they involve matters that are *res judicata* or subject to issue estoppel or Anshun estoppel.[2] Significantly, the judgment which the applicants seek to obtain in the present action is one which would contradict the judgment which has been entered in the Queensland court proceedings.[3] While the Application refers to various pieces of Commonwealth and Queensland legislation as the basis for the claim, the Details of the Claim and the material facts set out in the Statement of Claim make it clear that the true purpose of the litigation is to re-agitate issues that were litigated and determined in the Queensland court proceedings concerning the legality of the applicants' conduct in constructing and operating an electric grid system on their property to protect their lychee crop from flying-foxes.

4. Central to the material facts alleged in the Statement of Claim, at paragraph 21 of the Statement of Claim the applicants allege that they developed an electric grid system for their farm "known as the Mark VII, which successfully repels flying foxes without killing them." That issue was at the heart of the Queensland court proceedings. Robin QC DCJ determined that the Mark VII resulted in death and injury of flying foxes.[4]

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[1] Under s 4.1.23 of the *Integrated Planning Act* 1997 (Qld).
[2] *Port of Melbourne Authority v Anshun Pty Ltd (No 2)* (1981) 147 CLR 589 at 596-598.
[3] *Port of Melbourne Authority v Anshun Pty Ltd (No 2)* (1981) 147 CLR 589 at 596 [16].
[4] *Booth v Frippery Pty Ltd & Ors* [2007] QPEC 99 at [26]-[27], [32] and [36]

The appeal against this decision has been dismissed for failing to comply with the Court of Appeal's directions. Consequently, the applicants are estopped from re-agitating this central issue.

5. Similarly, the applicants allege, at paragraphs 22-25 and 29-32 of the Statement of Claim, that there was not sufficient evidence to establish they had committed an offence against s 88 of the *Nature Conservation Act* 1992 (Qld) and that the defence in s 88(3) of that Act operated in their favour to avoid liability under that Act. Again, these issues were determined by Robin QC DCJ and the applicants are estopped from re-agitating them. The legality of the operation of the applicants' electric grid system is a matter that is *res judicata*.

6. A purpose or, perhaps, *the* purpose of the Application appears to be to resist an order for costs made by the Court of Appeal. The Application seeks interlocutory relief "[That] each of the Respondents, jointly and severally be prohibited from seeking any payment from the applicants pending the hearing of this matter at trial." It appears from the Chronology of this matter and correspondence annexed to the affidavit of Jo-Anne Bragg, that filing of the Application on 12 November 2007 was in response to a Statutory Demand for payment of the costs awarded by the Court of Appeal being served upon the applicants. The award of costs by the Court of Appeal is a matter that is subject either to issue estoppel or is *res judicata*.

7. In addition to the central aspects of the proceedings in this Court that are subject to issue estoppel or are *res judicata*, the matters raised by the applicants to prevent the respondents from continuing with the Queensland court proceedings are issues that the applicants, exercising reasonable diligence, might have brought forward as defences to the Queensland Court proceedings but did not, and it is an abuse of process to raise them at this very late stage in separate proceedings.[5] The allegations in the "Particulars of Duress and Extortion" set out in the Statement of Claim, that the orders sought by the first respondent in the proceedings in the Planning and Environment Court amounts to duress and extortion, are issues that the applicants, exercising reasonable diligence, might have brought forward as defences to the Queensland Court proceedings but did not. The applicants might even have raised any defences arising under federal laws in the Queensland court proceedings as the Planning and Environment Court[6] is vested with federal jurisdiction by s 39 of the *Judiciary Act* 1903 (Cth).

Frivolous and vexatious

8. In addition to being an abuse of process due to issue estoppel and Anshun estoppel, the proceedings are frivolous and vexatious. This is a case where there is no real question of law or fact to be determined[7] and the applicants have no reasonable prospect of successfully prosecuting the proceeding.[8]

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[5] *Port of Melbourne Authority v Anshun Pty Ltd (No 2)* (1981) 147 CLR 589 at 597-598.

[6] The Planning and Environment Court is established under Ch 4 of the *Integrated Planning Act* 1997 (Qld). Additional State jurisdiction is conferred on the Court by various legislation, including s 173D of the *Nature Conservation Act* 1992 (Qld), under which the Queensland court proceedings were commenced.

[7] *Dey v Victorian Railway Commissioners* (1949) 78 CLR 62 at 91.

[8] Section 31A of the *Federal Court of Australia Act* 1976 (Cth). It is no longer necessary that the Court consider a proceeding is hopeless or bound to fail: s 31A(3). Cf. *Duncan v Lipscombe Child Care Services Inc* [2006] FCA 458 at [6] (Heerey J).

9. The application is frivolous as it has no arguable foundation and has no prospects of success.[9] The references in the application to various pieces of Commonwealth and Queensland legislation are confusing but the allegations that appear to be made by the applicants are as follows: [10]

   (a) **Sections 39B(1) of the *Judiciary Act* 1903 (Cth)** – orders for certiorari and prohibition are sought against the third and fourth respondents who are alleged to be officers of the Commonwealth because their employer, the second respondent, receives part of its funding as a community legal centre from the Commonwealth.

   (b) **Sections 39B(1) of the *Judiciary Act* 1903 (Cth)** – matter arising under a law made by the Commonwealth Parliament, namely the *Criminal Code* 1995 (Cth) and the *Trade Practices Act* 1974 (Cth) (TPA).

   (c) **Section 139.2 of the *Criminal Code* 1995 (Cth)** – criminal offence of making "an unwarranted demand with menaces of another person" by a Commonwealth public official.[11]

   (d) **Sections 45D(1)(b) and 82 of the *Trade Practices Act* 1974 (Cth)** – the applicants allege the respondents have engaged in some sort of secondary boycott by undertaking the Queensland court proceedings. It appears that the applicants' claim for compensatory damages of $1,000,000 and punitive damages of $1,000,000 against the respondents relates principally to this cause of action.

   (e) **Section 13 of the *Summary Offences Act* 1989 (Qld) [sic 2005]** – summary criminal offence for unlawfully entering farmland. The applicants alleged that the first respondent's actions entering their lychee orchard to gather evidence for the Queensland court proceedings constituted a criminal offence.[12]

   (f) **Section 39(1) of the *Fair Trading Act* 1989 (Qld)** – while there is no explanation or clarification of this issue in the Statement of Claim, the allegation appears to be that the second respondent is a supplier of legal services and has engaged in conduct that is unconscionable.

   (g) **Sections 359B and 359E of the *Criminal Code* (Qld)** – criminal offences for unlawful stalking. The applicants allege that the first respondent's investigation of the activities on their farm amounted to unlawful stalking.[13]

10. In so far as proceedings concern the second, third and fourth respondents, the applicants' case rests on an allegation that by undertaking the normal work of

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[9] *Piepkorn v Caroma Industries Ltd* [2002] FCAFC 37 at [17] and [19]; *D'Angiolillo v ASIC* [2003] FCA 665 at [14] (Hely J).

[10] Note, while the application refers to O 54A of the *Federal Court Rules*, this Order simply deals with the form of applications under s 39B of the *Judiciary Act* and is not a separate cause of action.

[11] There is no dispute between the parties that the second respondent is "partially financed by the Commonwealth as a community legal aid centre for environmental matters" as stated in paragraph 6 of the Statement of Claim. Consequently, the third and fourth respondents appear to be "Commonwealth public officials" within the extended definition of this term in the Schedule (Dictionary) of the *Criminal Code* as the second respondent is a service provider of community legal services under a Commonwealth contract.

[12] This ground attempts to raise a matter already agitated in the Queensland court proceedings: see *Booth v Frippery Pty Ltd & Ors* [2007] QPEC 099 at [54]-[55] (Robin QC DCJ).

[13] These allegations were raised in unsuccessful contempt proceedings brought by the applicants against the first respondent in the proceedings in the Planning and Environment Court: see *Booth v Frippery Pty Ltd & Ors* [2007] QPEC 99 at [55] and footnote 8 (Robin QC DCJ).

solicitors for the first respondent in the Queensland court proceedings, the second, third and fourth respondents are liable for criminal and civil sanctions. These allegations are frivolous as they have no arguable foundation and no prospects of success.

11. So far the proceedings concern criminal offences, the Court is not vested with jurisdiction over Commonwealth or State criminal laws. This is not a matter over which the Court in civil proceedings should exercise its accrued jurisdiction under s 32 of the *Federal Court Act 1976.*[14]

12. The Court may also infer the proceedings are vexatious, in the sense that they were brought to harass and intimidate the first respondent and her solicitors at a time when judgment at the re-trial of the Queensland court proceedings was reserved. The proceedings were commenced on 12 November 2007, two days before Judge Robin delivered judgment in the re-trial.[15] The claims for compensatory damages of $1,000,000 and punitive damages of $1,000,000 against the respondents have no foundation and appear to be an unsubtle attempt to intimidate the first respondent and her solicitors from continuing the litigation in the Queensland courts.

Costs

13. The second, third and fourth respondents seek costs on an indemnity basis. The action has been commenced and continued in circumstances where the applicants, properly advised, should have known that they had no chance of success.[16] The applicants have proceeded in willful disregard of clearly established law.[17]

Conclusion

14. The proceedings are frivolous, vexatious and an abuse of process. They should be dismissed and costs awarded on an indemnity basis.

Dr Chris McGrath
Counsel for the second, third and fourth respondents
9 April 2008

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[14] Noting that the exercise of the accrued jurisdiction under s 32 is discretionary not mandatory, provided that very good reasons need to be shown why a court which could resolve the whole matter should refuse or fail to do so: *Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457 at 475-476 per Barwick CJ.

[15] *Booth v Frippery Pty Ltd & Ors* [2007] QPEC 99 (Robin QC DCJ), delivered 14 November 2007. See generally the Chronology filed by the second, third and fourth respondents.

[16] *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 at 401.

[17] *Colgate-Palmolive Pty Ltd v Cussons Pty Ltd* (1993) 46 FCR 225 at 232-234.