IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION
PROPERTY LIST

Not Restricted

S ECI 2020 03378

WARWICK ALEXANDER MANDERSON — Plaintiff

v

BENJAMIN GEORGE HARRISON SMITH — First Defendant

- and -

RACHAEL LOUISE SMITH — Second Defendant

JUDGE:	Efthim AsJ
WHERE HELD:	Melbourne
DATE OF HEARING:	Pursuant to written submissions as to costs filed by the parties
DATE OF JUDGMENT:	24 August 2021
CASE MAY BE CITED AS:	Manderson v Smith & Anor

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr P R Best	Raven & Associates Lawyers
For the Defendants	Mr M D Townsend	Kings Lawyers

HIS HONOUR:

1 The plaintiff, Warwick Alexander Manderson, applied for a mandatory injunction compelling the defendants, Benjamin George Harrison Smith and Rachael Louise Smith, to remove at their cost a fence constructed on their land which the plaintiff asserted was in breach of a restrictive covenant. In the alternative, the plaintiff sought damages but only to the extent a mandatory injunction was not granted.

2 On 2 July 2021 I found that the restriction properly construed was never intended to prevent or control the construction of boundary fencing, and to the degree the fence was in the hatched area, such incursion was *de minimis*.

3 On that day, the plaintiff conceded an order for standard costs. The defendants foreshadowed an application for indemnity costs in reliance upon offers of compromise. Submissions have now been filed.

4 The defendants seek in the alternative the following orders:

- the plaintiff pay the costs of the application on an indemnity basis from 20 September 2020 (the date of the defendants' first of three offers of compromise);
- the plaintiff pay the costs on an indemnity basis from 5 November 2020 (the date of the second offer of compromise);
- the plaintiff pay the defendants' costs on an indemnity basis from 18 January 2021 (the date of the third offer of compromise); or
- the plaintiff pay the defendants' costs fixed at $100,000 (the defendants' preferred position).

5 On 18 September 2020, the defendants' solicitor wrote to the plaintiff's solicitor on a without prejudice basis and offered to bear their own costs if the plaintiff agreed to withdraw the application with no order as to costs. The first offer explained that:

a) Manderson had misconstrued the purpose of the Covenant;

b) the Restriction, properly construed, was never intended to prevent or control the construction of boundary fencing; and

c) boundary fencing is ubiquitous on and around the land burdened by the Restriction and can even be found on Manderson's own land:

4. The Plaintiff should accept the Offer for the following reasons:

   a) You have misconstrued the purpose of Restriction 2 under registered covenant PS412071 E (Restriction) by focusing on the meaning of particular words in the Restriction rather than inquiring as to its underlying purpose.

   b) The Restriction, properly construed, was never intended to prevent or control the construction of boundary fencing, as indicated by:

      1) the findings in *Manderson v Wright* [2016] VSC 677 (at [45]-[51]) that the purpose of the Restriction was to protect vegetation via the imposition of building envelopes;

      2) the Restriction appearing under the heading "House siting policy" in the Neighbourhood Design Plan; and

      3) the absence of any other indication that the estate subject to the Restriction was or is to operate without fencing.

   c) Consistent with this, boundary fencing is ubiquitous on and around the land burdened by the Restriction and can even be found on boundaries to your own client's land. If this matter runs to a hearing, my client will argue that your client does not come to Court with clean hands and has rested on his rights in taking no action in relation to other fencing in the estate.

   d) You have provided nothing to suggest it can even be established that the subject fence is within the hatched area on the Neighbourhood Design Plan.

   e) In any event, any vegetation removed to construct the subject fence was di minimis.

   f) Finally, we reserve our right to argue that the Supreme Court has no jurisdiction to enforce the restriction as a property right as your client is endeavouring to do, and that your client's rights of enforcement (such as they are) should, in the first instance, be made via section 114 of the Planning and Environment Act 1987.

5. This Offer is open for acceptance until midnight on 6 October 2020 (15 days) after which, it shall lapse and be withdrawn.

6. Should this Offer not be accepted, and your clients gain an outcome that is not more favourable than this Offer in the Proceedings, this letter will be produced in support of an application being made that your clients pay my clients' costs on an indemnity basis (or alternatively on a standard basis)

from the date of this letter, in accordance with the principles in *Calderbank v Calderbank* [1975] 3 ALL ER 333 and *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority {No 2}* (2005) 13 VR 435.

7. These costs may be in excess of $10,000.

8. In view of the matters set out above and the facts and circumstances known today, your client will know, or should know, that his application is hopeless and that given my clients' offer to pay their own costs to date, your client will be acting unreasonably in declining to accept the Offer.

6 On 4 November 2020, the defendants' solicitor wrote to the plaintiff's solicitor making essentially the same offer of compromise. Unlike the first offer, it was not without prejudice. It was an open offer.

7 On 18 January 2021, the defendants' solicitor wrote to the plaintiff's solicitor, making essentially the same offer on a without prejudice basis. The third offer explained that:

a) Manderson had misconstrued the purpose of the Covenant;

b) the Restriction, properly construed, was never intended to prevent or control the construction of boundary fencing; and

c) there is no indication that the subdivision was to be developed without boundary fencing. Indeed, the Subdivision Permit expressly refers at condition [14] to the fencing of the Council Reserve:

4. The Plaintiff should accept the Offer for the following reasons:

a) he has misconstrued the purpose of Restriction 2 under registered covenant PS412071 E (Restriction) by focusing on the meaning of particular words in the Restriction rather than inquiring as to its underlying purpose of the Covenant – this is contrary to basic principles of construing a restrictive covenant;

b) The Restriction, properly construed, was never intended to prevent or control the construction of boundary fencing. This is supported by reference to the following:

1) the Restriction appears under the heading "House siting policy" in the Approved Neighbourhood Design Plan pursuant to Planning Permit 1057/97 (Neighbourhood Design Plan), which self-evidently is directed towards the siting of a house rather than boundary fencing; and

2) there is no indication in any of the following:

a) Certificate of Title Volume 10469 Fol 011;

b) Planning Permit 1057/97 dated 19 January 1998 (Subdivision Permit);

c) PS412071E; or

d) the Neighbourhood Design Plan-

that the subdivision was to be developed without boundary fencing. Indeed, the Subdivision Permit expressly refers at condition [14] to the fencing of the Council Reserve; and

3) Emerton J in Manderson v Wright [2016] VSC 677 (at [45]-[51]) concluded that the purpose of the Restriction was to protect vegetation via the imposition of building envelopes;

c) within Warranbeen Court and can be found on boundaries to the Plaintiff's own land;

d) the Plaintiff has not provided any evidence that the subject fence is in (as distinct from along, or outside) the area hatched on the Neighbourhood Design Plan; and

e) in relation to the protection of vegetation, the Defendants have undertaken significant vegetation enhancement works on their property, including weed removal and replanting of native trees, plants and understorey vegetation and have arranged to plant six Coastal Moonah trees in the Warrenbeen Court road reserve in June 2021, in cooperation with the City of Greater Geelong.

5. From the evidence in the Proceedings, it is now apparent that the Plaintiff does not object to fencing *per se*, but has appointed himself the arbiter of what sort of fencing should be approved in Warrenbeen Court. Rob Milner, for instance, has simply assumed that a contravention of the Covenant has occurred2 and his evidence reads as though the Proceedings are a planning application before the Victorian Civil and Administrative Tribunal for the design of a fence. Yet, whether your client likes it or not, the City of Greater Geelong Planning Scheme does not give him the right to review any application for a fence in Warrenbeen Court, and a planning permit for the Defendants' front fence was issued on its planning and environmental merits on 6 May 2020.

6. Your client is therefore endeavouring to use the Proceedings to bully his neighbours into removing a fence not to his liking.

7. The incoherence of this argument is obvious for he relies on the definition of 'building' in the *Planning and Environment Act 1987* to claim that the Defendant's fence is a building and therefore

breaches the Restriction, but ignores the fact that by this definition every other fence in Warrenbeen Court is a building too. Either a fence contravenes the Covenant or it doesn't.

8. To be clear, the Restriction does not provide your client or any other owner of land within Warrenbeen Court a right to bring injunctive proceedings in this Court whenever a fence design is not to his or her liking.

9. This Offer is open for acceptance for 28 days after which, it shall lapse and be withdrawn.

10. Should this Offer not be accepted, and your clients gain an outcome that is not more favourable than this Offer in the Proceedings, this letter will be produced in support of an application being made that your clients pay the Defendants' costs on an indemnity basis (or alternatively on a standard basis) from the date of this letter, in accordance with the principles in *Calderbank v Calderbank* [1975] 3 ALL ER 333 and *Hazeldene's Chicken Farm Pty Ltd v Victorian WorkCover Authority {No 2}* (2005) 13 VR 435.

11. In view of the matters set out above and the facts and circumstances known today, the Plaintiff will be acting unreasonably in declining to accept the Offer.

8 The defendants rely on Rule 26.08 of the *Supreme Court (General Civil Procedure) Rules 2015* (Vic) ('the Rules') to seek costs in their favour. Rule 26.08(4) provides:

> **Costs consequences of failure to accept**
>
> (4) Where an offer of compromise is made by a defendant and the plaintiff unreasonably fails to accept the offer and the claim to which the offer relates is dismissed or judgment on the claim is entered in favour of the defendant, then unless the Court otherwise orders—
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> (a) the defendant shall be entitled to an order against the plaintiff for the defendant's costs in respect of the claim until 11.00 a.m. on the second business day after the offer was made, taxed on the ordinarily applicable basis; and
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> (b) the defendant shall be entitled to an order against the plaintiff in respect of the defendant's costs after the time referred to in paragraph (a) taxed on an indemnity basis.

9 Rule 63.16 of the Rules also provides that:

> **Offer of compromise**
>
> Where an offer of compromise is served and the offer has not been accepted at the time of verdict or judgment, liability for costs shall be determined in accordance with Rule 26.08.

10 In *Defteros v Google Inc (Costs)*,[1] John Dixon J referred to and followed *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority No 2* ('*Hazeldene's Chicken Farm*')[2] when considering whether an offer was unreasonably rejected. His Honour said:

> On 15 February 2017, Google Australia wrote to the plaintiff offering to consent to the discontinuance of the proceeding, with the parties to walk away each bearing their own costs. At that time, Google Australia had incurred costs in considering the claim being made against it, preparing a summons and supporting affidavit and in correspondence with the plaintiff. Google Australia also stated that unless the plaintiff discontinued the proceeding against it, it would seek indemnity costs if successful on its application. The offer remained open until 24 February 2017.
>
> The offer was not accepted and the matter proceeded to hearing. The plaintiff took no issue with these factual matters. A settlement offer that involved compromise by Google Australia of its entitlements was made and refused and the third matter was established.
>
> The key question was whether it was not unreasonable for the plaintiff to have rejected Google Australia's offer. On this final matter Google Australia bears the onus to establish that the plaintiff acted unreasonably.
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> In *Hazeldene's Chicken Farm Pty Ltd v Victorian Workcover Authority No 2*, the Court of Appeal stated that a court considering a submission that the rejection of a Calderbank offer was unreasonable should ordinarily have regard at least to the following matters:
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> (a) the stage of the proceeding at which the offer was received;
>
> (b) the time allowed to the offeree to consider the offer
>
> (c) the extent of the compromise offered;
>
> (d) the offeree's prospects of success, assessed as at the date of the offer;
>
> (e) the clarity with which the terms of the offer were expressed;
>
> (f) whether the offer foreshadowed an application for an indemnity costs in the event of the offeree's rejecting it.[3]

11 In relation to the first offer of compromise, the defendants submit that assessing the first offer of compromise against the criteria in *Hazeldene's Chicken Farm*:

– it was made at an appropriate stage in the Proceedings—bearing in mind that the Plaintiff should not have commenced the proceedings until he was confident the Proceedings would succeed. This was not a case that turned on

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1 [2017] VSC 189.
2 [2005] VSCA 298.
3 *Defteros v Google Inc (Costs)* [2017] VSC 189 [6]–[9].

discovered documents;

- it involved a genuine element of compromise given that by the time the application was made $14,025 in costs had been incurred;

> Kings Lawyers professional fees for the period 17 June 2020 when we received a letter of demand from Raven and Associates through to 24 August 2020 when the writ was served amounts to 130 units. 13 hours at $550 per hour totalling $7150. In addition if we add your professional fees of $6875, the total fees amount to $14,025.

- it allowed 15 days to respond, which was more than sufficient time in the circumstances;

- it set out clearly the Plaintiff's prospects of success and that the Proceedings would fail;

- it foreshadowed an application for indemnity costs:

> In view of the matters set out above and the facts and circumstances known today, your client will know, or should know, that his application is hopeless and that given my clients' offer to pay their own costs to date, and your client will be acting unreasonably in declining to accept the Offer.

- the substance of the Smiths' contentions were sufficiently clear for a reasonable assessment of the prospects of success on the application. Manderson persisted with the application notwithstanding that he had been told why he had misconstrued the covenant and that his application was likely to fail.

12 In relation to the second offer of compromise, the defendants submit that the ultimate outcome is not more favourable than what the plaintiff would have received. If the plaintiff had accepted this offer of compromise, he would have avoided adverse costs orders against him.

13 In relation to the third offer, the defendants submit that when comparing this offer against the criteria of *Hazeldene's Chicken Farm*:

- it was made at an appropriate stage in the Proceedings, whereby evidence had been filed and served and several interlocutory steps had been taken;

- it involved a genuine element of compromise given that by the time the application was made $33,997.50 in costs had been incurred:

> Legal fees including counsels fees and disbursements for the period 17 June 2020 when we received a letter of demand from Raven and Associates through to 18 January 2021 when the Third Offer was made

amount to $$33,997.50.

- it allowed 28 days to respond, which was well in excess of sufficient time in the circumstances;
- it set out clearly why the Proceedings would fail; and
- it foreshadowed an application for indemnity costs.

14 The defendants' preferred alternative is that costs should be fixed at $100,000. They submit that costs to date are $122,113.70. They note that the plaintiff was himself the beneficiary of such an order in *Manderson v Wright (Costs)*.[4]

15 The defendants also submit that under this proposal, they will lose more than $20,000 in costs over a fence that costs less than half as much to construct.

16 The plaintiff submits that his rejection of each offer was not unreasonable in the circumstances at each instance. He asserts that it is critical to bear in mind that, at trial, the defendants failed on the following issues:

- they asserted that the purpose of the restrictions and the Neighbourhood Design Plan was not to protect endangered native vegetation;
- they asserted that restriction 2 and the Neighbourhood Design Plan were not intended to prevent the construction of fencing and the fence was not in breach of the restrictions;
- they did not, until their amended submissions filed on 10 May 2021, specifically draw a distinction between a boundary line and the hatched area on the Neighbourhood Design Plan;
- they asserted, until their amended submissions filed on 10 May 2021, that the fence did not in any respect breach the restrictions and the Neighbourhood Design Plan; and
- they did not assert, until their amended submissions filed on 10 May 2021, that any breach of the restrictions and the Neighbourhood Design Plan was *de minimis*.

17 The plaintiff also submits that, with respect to his prospects of success as at the date

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4 [2018] VSC 177.

of offer:

- the Plaintiff could determine that it had a reasonable prospect of success in the Court determining (as it did) that the purpose of the covenant was to protect endangered woodland by the limitation of development to the building envelopes as that had been the determination in *Manderson v Wright*,[5] per Emerton J (as her Honour then was), on the identically-drafted Neighbourhood Design Plan;
- the plaintiff could determine that it had a reasonable prospect of success in the Court determining that the Neighbourhood Design Plan should be strictly construed as her Honour had stated in *Manderson v Wright*: "the building envelopes, as the only protective measure for the Moonah woodland, should be strictly enforced";[6]
- the plaintiff could determine that it had a reasonable prospect of success in the Court determining (as it did) that "building" in the Neighbourhood Design Plan included the fence as in *Manderson v Wright*.[7] Emerton J accepted that the definition of "building" in the *Planning and Environment Act 1987* applied to define "building" in the Neighbourhood Design Plan and that definition included a "fence";
- at the time of the offers no survey had been conducted of Lot 3;
- but in any case it was reasonably open to the plaintiff and the Court to construe the Neighbourhood Design Plan as extending the hatched (prohibited) area to and including the boundary of the lot; and
- no issue of *de minimis* (which was not raised until long after the offers were made) arose as it was reasonably open to conclude that if the Neighbourhood Design Plan included the boundary then the fence was in contravention of restriction 2 and the Neighbourhood Design Plan.

18 Turning to the offers of compromise individually, the plaintiff submits that:

- with regard to the first offer:
  - the defendants have not established that it was unreasonable to refuse

5 [2016] VSC 677 [46].
6 Ibid [51].
7 Ibid [53].

the offer;

- it was made too early in that a defence had not yet been filed and no discovery had taken place;
- the defendants made assertions in the offer upon which they were unsuccessful at trial;
- it failed to clearly and unequivocally assert that a distinction was to be drawn between a fence constructed in whole or part on the boundary line of the lot and a fence constructed in whole or part on the hatched area on the Neighbourhood Design Plan; and
- it failed to assert that it was unreasonable to accept the offer on the ground that the fence constructed on the hatched area was *de minimis* but asserted that the removal of vegetation surrounding the fence was *de minimis*;

- with regard to the second offer:
  - the defendants did not state any grounds on which it should be accepted;
  - the only change between the first and second offers was that the defendants had filed a defence by the time of making the second offer; and
  - the defence did not raise issues which were decisive at trial;

and

- with regard to the third offer:
  - at the time the offer was made the defendants had not filed amended submissions;
  - it made assertions upon which the defendants were unsuccessful at trial, namely that the plaintiff had misconstrued the purpose of the restrictions and Neighbourhood Design Plan, and that the latter two were not intended to prevent the construction of fencing and the fence was not in breach of the restrictions;
  - it asserted that the fence was not a "building";
  - it failed to clearly and unequivocally assert that a distinction was to be drawn between a fence constructed in whole or part on the boundary

line of the lot and a fence constructed in whole or part on the hatched area on the Neighbourhood Design Plan;

– it failed to assert that it was unreasonable to accept the offer on the ground that the fence constructed on the hatched area was *de minimis* and no mention of the principle of *de minimis* is made in the offer.

19 With regard to the defendants' submission of a gross costs order the plaintiff finally submits that:

– the proceeding was not complex and concluded within a day;

– the defendants' submissions and affidavit provide no justification for a gross order for costs other than it would be more convenient and less expensive to the defendants;

– the defendants assert in their submissions on costs that a gross order was made in *Manderson v Wright (Costs)* as apparent justification for the making of a gross order in this case. The submission is a *non sequitur* as the determination of costs in one case cannot be the basis of determination in another. In any case, John Dixon J rejected the application for a gross costs order in that case at [23] to [26];

– the Court cannot be satisfied that an appropriate sum may be determined fairly between the parties on the materials available;

– the last invoice includes costs for the application for indemnity costs where it does not follow that if an order is made for indemnity costs for the proceeding an indemnity order would be made for the application for costs; and

– the Court cannot be sure that the approach taken to calculate the amount is logical, fair and reasonable, and the order would be unfair to the plaintiff who is entitled to negotiate a final sum on a taxable bill in default of agreement.

20 In reply, the defendants submit that:

– the plaintiff commenced the proceedings in the knowledge that his own fence was inside the hatched area of the title to his own land;

– the plaintiff commenced the proceedings knowing, or being in a position to know that the defendants' fence was only six metres into the hatched area of the defendants' land;

– the plaintiff was on notice that he would be called upon to prove this element of his case from the first Calderbank offer made by the defendants and he took

no action to determine the disputed fence relative to the title boundary until the surveyor was engaged, which was after evidence closed;

- in contrast, the defendants have come to the Court with clean hands and have obtained all necessary council permission to construct the fence;
- the defendants have prepared their case as cost effectively as possibly, relying on correspondence, common documents, drawing and photos rather than calling third party experts or consultants; and
- Ms Smith's careful recitation of events demonstrates the care with which the defendants approached the fence construction.

21 In my view, indemnity costs should be awarded to the defendants from the date of the first offer of compromise. The plaintiff commenced the proceedings knowing that he had a fence on his own property encroached the boundary line by a much greater distance than the defendants' fence and knowing that all other residents had fences. He should also have known that the defendants' fence was at best only six centimetres over the boundary line.

22 The first offer of compromise should have been accepted and, in my view, it was unreasonable that it was not. The defendants have come to the Court with clean hands, they obtained a permit from the local council to erect the fence. It is clear from the evidence of Ms Smith that the defendants were concerned about the native flora. They were put to a great deal of expense in defending this claim which they should never have had to do.

23 As to the gross costs order, I note that the defendants are prepared to accept $100,000. I will not make this order primarily because the plaintiff objects to this offer. It wishes to have the costs taxed and it should have the right to do so. The Costs Court will determine what is appropriate. The defendants may wish to make another Calderbank offer. If the plaintiff does not beat the Calderbank offer then he can pay the costs of the taxation.