DISTRICT COURT OF SOUTH AUSTRALIA

(Civil: Appeal Against a Master's Decision)

CITY OF BURNSIDE v JACOBSEN

[2012] SADC 55

Judgment of His Honour Judge Lovell

27 April 2012

DEFAMATION - DAMAGES

Appeal against a decision of a Master. Interpretation of s 39 of the Local Government Act 1999. Whether s 39 can found claim for indemnity. Whether third party statement of claim should be struck out as it disclosed no cause of action.

Held: Appeal allowed. Third party statement of claim struck out.

Local Government Act 1999 (SA) ss 39, 80; *Acts Interpretation Act 1915 (SA)* s 22(1); *State Bank of South Australia Act 1983 (SA)* s 29; *Crown Proceedings Act 1992 (SA)* s 10(1)(b)(i); *District Court Civil Rules 2006 (SA)* r 104; *District Court Act 1991 (SA)* s 43, referred to.

House v The King (1936) 55 CLR 499; *Mullett v Gabriel* (1989) 52 SASR 330; *Mac Audio & Acoustical Consultants Pty Ltd v Eddy & Anor* [1999] SASC 443; *Lucke v Cleary & Ors* [2009] SADC 137; *Jewel River Pty Ltd v Captured Pty Ltd* [2009] SADC 2; *Bennett v WMC (Olympic Dam Corporation) Pty Ltd & Ors* [2008] SADC 42; *Rahmani v Heng* [2010] SADC 81; *McLean v DID Piling Pty Ltd* [2010] SASC 33; *R v Ironside* (2009) 104 SASR 54; *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249; *Saraswati v R* (1991) 172 CLR 1; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; *Barrett and Ors v State of South Australia* (1994) 63 SASR 208; *State of South Australia v Kubicki* (1987) 46 SASR 282; *State of South Australia and Anor v Barrett and Ors* Unreported, Supreme Court of South Australia, S4650, 8 July 1994; *Bell v The State of Western Australia* [2004] WASCA 205; *Roberts v Bass* (2002) 212 CLR 1; *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords* (1996-97) 188 CLR 241; *South Australian Govt Financing Authority v Bank of New Zealand* [2000] SASC 264, considered.

On Appeal from DISTRICT COURT OF SOUTH AUSTRALIA (MASTER NORMAN) NO 59 OF 2011

Third Party/Appellant: CITY OF BURNSIDE Counsel: MR A HARRIS QC WITH HIM MR C WELLINGTON - Solicitor: WALLMANS LAWYERS

Defendant/Respondent: JIM JACOBSEN Counsel: MR P QUINN - Solicitor: ANDERSONS SOLICITORS

Hearing Date/s: 12/10/2011, 03/02/2012

File No/s: DCCIV-09-930

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CITY OF BURNSIDE v JACOBSEN
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Background

1 In 2008 Mr Jacobsen was a member of the Burnside Council. It is apparent that in 2008 there was disharmony amongst the Burnside councillors. This appeal relates to a proceeding brought by five members of the Council against Mr Jacobsen for defamation. It is alleged that between September 2008 and April 2009 he made various defamatory statements and published pamphlets containing defamatory material.

2 On 6 April 2011, Mr Jacobsen filed a third party statement of claim against the City of Burnside alleging that, if he is held liable to the plaintiffs, he is entitled to an indemnity from the City of Burnside pursuant to s 39 of the *Local Government Act 1999* (SA) (the Act).

3 The City of Burnside (the appellant) made application to a Master of this Court seeking to strike-out the third party statement of claim pursuant to rule 104 of the *District Court Civil Rules 2006* (hereafter referred to as DCR) on the ground that it did not disclose a reasonable cause of action. Mr Jacobsen (the respondent) resisted the application. On 2 August 2011 the learned Master dismissed the application. The City of Burnside has appealed that decision.

The Appeal

4 The third party/appellant exercises its rights to appeal pursuant to s 43 of the *District Court Act 1991.* That states:

> **43—Right of Appeal**
>
> (1) A party to an action may, in accordance with the rules of the appellate court, appeal against any judgment given in the action.
>
> (2) The appeal lies—
>
> (a) in the case of a judgment given by a Master or the Court constituted of a Master—to the Court constituted of a Judge.

5 DCR 286 governs the hearing of the appeal.

6 It states as follows:

> **286** (1) An appeal is to be by way of rehearing (unless the law under which the appeal is brought provides to the contrary).
>
> (2) Subject to any limitation on its powers arising apart from these rules, the Court may determine an appeal as the justice of the case requires despite the failure of parties to the appeal to raise relevant grounds of appeal, or to state grounds of appeal appropriately, in the notice of appeal.

(3) Subject to any limitation on its powers arising apart from these rules, the Court may—

(a) draw inferences of fact from evidence taken at the original hearing and, in its discretion, hear further evidence on a question of fact;

(b) amend or set aside the judgment subject to the appeal and give any judgment that the justice of the case requires;

(c) remit the case or part of the case for rehearing or reconsideration;

(d) make orders for the costs of the appeal.

7 Appeals were previously governed by *District Court (Criminal and Miscellaneous) Rules 1992* rule 97.01. Under that rule the judge was to exercise his or her own discretion without regard to the manner in which it was exercised in the decision, order or direction appealed against.

8 That direction is not to be found in the new rule.

9 The appeal is by way of rehearing and not by way of rehearing *de novo*. It is an appeal against the exercise of the discretion by the learned Master. In my view it is necessary, in order to succeed in an appeal against an exercise of discretion, to show that an error has been made in its exercise. It is not sufficient that the Appellate Court might have exercised its discretion to reach a contrary view: *House v The King*,[1] *Mullett v Gabriel*[2] and *Mac Audio & Acoustical Consultants Pty Ltd v Eddy & Anor*.[3] Thus in the case before me, I am not at liberty to exercise my discretion in preference to that of the learned Master, unless and until the latter is shown to have been flawed in its exercise. I note other Judges of this Court have adopted the same approach.[4]

Issues

10 As mentioned, the plaintiffs are suing Mr Jacobsen (the defendant) for defamation. In his defence, Mr Jacobsen has pleaded many grounds of defence such as justification and qualified privilege amongst others. He also pleads s 39 of the Act.

11 Relevantly paragraph 27 of the defence states:

Section 39 of the *Local Government Act*

27. In answer to the whole of the plaintiffs' claims the defendant says that he was at all material times a member of the Burnside Council engaged in honest acts in the exercise, performance or discharge, or purported exercise, performance or

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1 (1936) 55 CLR 499.
2 (1989) 52 SASR 330.
3 [1999] SASC 443.
4 *Lucke v Cleary & Ors* [2009] SADC 137; *Jewel River Pty Ltd v Captured Pty Ltd* [2009] SADC 2; *Bennett v WMC (Olympic Dam Corporation) Pty Ltd & Ors* [2008] SADC 4; *Rahmani v Heng* [2010] SADC 81*: see also McLean v DID Piling Pty Ltd* [2010] SASC 33 at [19]-[23].

discharge, of his or the Council's powers, functions or duties under the Local Government Act or other Acts and the defendant relies upon the immunity provided to him by s 39 of the Local Government Act 1999 ("LGA").

Particulars of powers, functions and duties under the LGA

28. The defendant says the powers, functions or duties relevant to the conduct complained of included those specified in s 59 of the LGA which meant that, as a member of the governing body of council, the defendant was under a duty to:

28.1 participate in the deliberations and civic activities of the Council;

28.2 to keep the Council's objectives and policies under review and to ensure that they are appropriate and effective;

28.3 to keep the Council's resource allocation, expenditure and activities, and the efficiency and effectiveness of its service delivery, under review;

28.4 to represent the interests of residents and ratepayers, to provide community leadership and guidance, and to facilitate communication between the community and the Council; and

28.5 the defendant also relies on sections 60 and 62 of the LGA.

29. The defendant in making the statements complained was honestly acting in the exercise, performance or discharge, or purported exercise, performance or discharge of the duties pleaded in paragraph 28 above.

12 Section 39 is therefore pleaded as an answer to the whole of the plaintiffs' claims. Interestingly the defendant himself pleads, in paragraph 27 of the defence, that s 39 provides an "immunity".

13 The defendant (respondent on the appeal) issued a third party notice joining the Council. It asserted as a cause of action that s 39 of the Act provides an "indemnity".

14 The defendant filed a third party statement of claim on 6 April 2011.

15 Relevantly it states:

3. In answer to the whole of the plaintiffs' claims the defendant has pleaded the protection afforded to him under s 39 of the Local Government Act 1999. Under that section the defendant is entitled to be indemnified by the third party, the City of Burnside ("the Council") and brings these third party proceedings for that purpose.

Section 39 of the Local Government Act

4. The defendant says that he was at all material times a member of the Council engaged in honest acts in the exercise, performance or discharge, or purported exercise, performance or discharge, of his or the Council's powers, functions or duties under the Local Government Act or other Acts and the defendant relies upon the immunity provided to him by s 39 of the Local Government Act 1999 ("LGA").

5. (not relevant)

6. (not relevant)

7. The defendant in making the statements complained of by the plaintiffs was honestly acting in the exercise, performance or discharge, or purported exercise, performance or discharge of the duties pleaded in paragraph 5 above.

8. In the event that the defendant is held liable to the plaintiffs or any of them he seeks an indemnity from the Council pursuant to section 39 of the LGA which provides that any liability that would, but for that section, attach to the defendant, attaches instead to the Council.

9. The Council has refused the defendant's repeated requests to be indemnified under that section and has brought these third party proceedings so as to obtain the benefit of that section.

The rules of court provide a third party procedure for a defendant to join in the action any person whom the defendant claims relief related to the plaintiff's claim. It was not disputed that a defendant may claim against a third party for "indemnity". The third party (the appellant) argues that no cause of action based on an "indemnity" arises between it and the respondent on a proper interpretation of s 39 of the Act. The respondent argues that properly interpreted s 39 does provide an indemnity sufficient to found a cause of action (or at least that such an interpretation is arguable).

A question on the appeal is the proper construction of s 39 of the Act.

Principles of Construction

16 In *R v Ironside*[5] Gray J identified a "number of pertinent principles of statutory construction."[6]

17 The adoption of a purposive construction is the usual or general approach to be taken to issues of statutory construction. Such an approach is also prescribed by s 22(1) of the *Acts Interpretation Act 1915* (SA).

18 A search for the grammatical meaning still constitutes a starting point but if the grammatical meaning of a provision does not give effect to the purpose of the legislation, the grammatical meaning cannot prevail. Such an interpretation must give way to the construction which will promote the purpose or object of the Act.[7]

19 All words in a statute must prima facie be given some meaning and effect.[8]

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[5] (2009) 104 SASR 54.
[6] (2009) 104 SASR 54 at [116].
[7] *Palgo Holdings Pty Ltd v Gowans* (2005) 221 CLR 249.
[8] *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355.

20 Context, as an aid to statutory construction, is important. The meanings of words in legislation are not derived by taking each word in isolation and construing it as if it existed in a vacuum. A word normally takes its meaning from the surrounding context. Isolating a word and affording it meaning is a discredited approach to interpretation.[9]

21 In many cases, the grammatical or literal meaning of a statutory provision will give effect to the purpose of the legislation and therefore the literal and the purposive approach should produce the same result.[10]

22 A statute should be construed on the prima facie basis that its provisions are intended to give effect to harmonious goals. Where conflict appears to arise it must be alleviated, as far as possible, by adjusting the meaning of the competing provisions to achieve the result which will best give effect to the purpose and language of those provisions while maintaining the unity of all the statutory provisions.[11]

23 Thus s 39 stands to be construed in the context of the Act as a whole having regard to whatever may be discerned to be the underlying legislative intent.

Construction of the Section

24 The third party claim against the Council asserts as a cause of action that s 39 of the Act provides the basis for an "indemnity".

25 There were a number of grounds of appeal put forward but essentially it was argued that the learned Master incorrectly interpreted s 39 of the Act.

26 Section 39 provides:

> 39 - Protection of Members
>
> (1) No civil liability attaches to a member of a council for an honest act or omission in the exercise, performance or discharge, or purported exercise, performance or discharge, of the member's or council's powers, functions or duties under this or other Act.
>
> (2) A liability that would, but for this section, attach to a member of council attaches instead to the council.

27 Section 39 of the Act has not been the subject of judicial determination before this case. Other cases have dealt with similarly worded provisions but each case has been determined against the background of the act containing the relevant provision. Thus other cases are of limited assistance.

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[9] *Palgo Holdings v Gowans* (2005) 221 CLR 249.

[10] *Saraswati v R* (1991) 172 CLR 1.

[11] *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR at 381.

28 Section 29 of the *State Bank of South Australia Act 1983* contains a similar, but not identical, provision.

29 That section provides:

> (1) No liability attaches to a Director or other officer of the Bank for an act or omission done or made, in good faith, and in carrying out, or purporting to carry out, the duties of his office.
>
> (2) Any liability that would, but for subs (1), attach to a Director or other officer of the Bank shall attach instead to the Bank.

30 Perry J interpreted that section as extinguishing "any liability on a director or other officer of the bank". Subsection (2) of s 29 effected a "transfer of liability which otherwise might attach to a director, to the bank".[12]

31 On appeal to the Full Court, although the Court was dealing with the question of the onus of proof, the section was referred to as a "shield"[13] and as one which excluded liability.[14] It was held that the section assumes that liability can be established but that the section itself creates some "special grounds of excuse, justification or exculpation."

32 In the *State of South Australia v Kubicki*[15] the Full Court considered the question of the meaning of s 19a of the *Police Regulation Act* as amended by the *Police Regulation Act Amendment Act 1981*. The amending Act inserted a new section in the principal Act as follows:

> 19a. The following section is inserted after the heading to Pt VI of the principal Act:
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> 51a. (1) A member of the police force shall not incur any civil liability for an act or omission done or made in good faith in the exercise or discharge, or purported exercise or discharge, of any powers, functions, duties or responsibilities conferred or imposed upon him by any provision of this or any other Act (whenever enacted) or by law.
>
> (2) A liability that would, but for subsection (1), lie against a member of the police force shall lie against the Crown.

33 The Full Court considered the interpretation of that section in conjunction with s 10(1)(b)(i) of the *Crown Proceedings Act 1992* (SA). Jacobs J (with whom the other two members of the Court agreed) said:

> The words "purported exercise" in subs (1) are important, for they recognise that there may be an excess or abuse of power albeit in good faith. Of greater importance is subs (2), although to speak of a "liability lying against" a member of the police force or the Crown strikes me as somewhat inelegant. I am disposed to think that in the context the word "liability" should be understood to mean "cause of action", and that the tenor and

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[12] *State of South Australia and Anor v Barrett and Ors* Unreported, Supreme Court of South Australia, S4650, 8 July 1994.
[13] *Barrett and Ors v State of South Australia* (1994) 63 SASR 208 at 210 per Millhouse J.
[14] *Barrett and Ors v State of South Australia* (1994) 63 SASR 208 at 221 per Duggan J.
[15] (1987) 46 SASR 282.

> purpose of the section as a whole is simply to say that in future, in a case to which the section applies, the cause of action shall lie against the Crown to the exclusion of the police officer.

34 In *Bell v The State of Western Australia*[16] the Western Australian Court of Appeal had to consider the interpretation of s 124 of the *Western Australian Marine Act 1982* (WA). That section provided:

> No liability shall attach to the Minister, the chief executive officer or any other official of the Department, or to any person acting with the authority or on the direction of the Minister or the chief executive officer in good faith and in the exercise or purported exercise of a power or in the discharge or purported discharge of a duty under this Act.

35 In the context of that Act in question the Court of Appeal held that the section creates an immunity from liability not an immunity from action.

36 The authorities mentioned are, of course, of assistance but the answer to the question in this case must be derived from the language of the section in the context of this Act.

37 The respondent argued and the learned Master accepted, at least as being arguable, that when interpreting s 39 the proper starting point was to consider the meaning of the words "a liability" s 39(2) before turning to s 39(1). Thus it was argued that the phrase "civil liability" took its meaning from s 39(2).

38 The respondent argued that the words "a liability" in s 39(2) mean any liability. It was submitted that "a liability", on that interpretation, could include a member's liability for his legal costs of defending any legal claim. Thus, it was argued, that such liability "attaches instead to the Council" and therefore, the member is entitled to an indemnity from the Council for the legal costs of defending any liability claim.

39 I reject those arguments. I can see no reason why, when interpreting s 39, the starting point should be s 39(2). Section 39(1) should be the starting point. It states "No civil liability attaches ..." Section 39(2) then says "A liability that would, but for this section, attach to a member ..."

40 The phrase "a liability" in s 39(2) takes its meaning from s 39(1).

41 The "liability" referred to in s 39(2) refers to the "civil liability" in s 39(1), not any liability. In my view "civil liability" should be interpreted as meaning a "cause of action". That is, the cause of action attaches to the Council to the exclusion of Mr Jacobsen if the preconditions of s 39(1) are met. Taken in context s 39 creates an immunity from "civil liability" not an immunity from action.

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[16] [2004] WASCA 205.

42 Section 39(2) creates a form of vicarious liability of the Council. Without s 39(2) a plaintiff would otherwise be without a remedy for a "civil liability". The Council is in my opinion only made vicariously liable for an "act or omission in the exercise, performance or discharge, or purported discharge, of the member's or Council's powers, functions or duties" under this Act. The liability which attaches to the Council is the liability to which the immunity created by s 39(1) applies.

43 The section assumes that liability can be established but that the section itself creates some "special grounds of excuse, justification or exculpation." The section creates an immunity not an indemnity.

44 The respondent argued that even if "civil liability' meant a cause of action, such an interpretation still "left open" the argument that it includes costs. He argued that a civil liability invariably includes a remedy being sought and costs. Thus he argued an "indemnity for costs" was still left to be argued.

45 I reject that argument. The section transfers liability for the cause of action to the Council if the preconditions of s 39(1) are met. A defendant in those circumstances would be entitled to his costs as against the plaintiff not the Council (if it were a defendant). A defendant such as Mr Jacobsen would not necessarily be entitled to indemnity costs against the plaintiffs (he may, depending on other matters). It is not open in my view to say that the Council would have to pay indemnity costs where no such liability would ordinarily lie against the plaintiffs.

46 In my opinion, as submitted by Mr Harris QC for the Council, the purpose of the section is to create an immunity from civil liability in members where they have committed an honest act or omission in the exercise of their powers, duties and functions for which, had the immunity not existed, they would otherwise have been liable to a person who suffers loss or damage from that act or omission. The Council is not so immunised. A liability of the defendant for the solicitor/client proportion of his costs or for interlocutory costs orders in favour of the plaintiff is not a "civil liability" for an act or omission in the exercise, performance or discharge or purported exercise, performance or discharge of the member's or Council's powers, functions or duties under this section. It cannot therefore be "liability" that attaches to the Council under s 39(2).

47 The section deals with the question of liability as between the plaintiff and the defendant and, in the context of this case, liability potentially between the plaintiffs and the Council (as a potential defendant). It is not dealing with the question of the Council as a third party, that is, regulating the proceedings between the defendant in this matter and the Council.

48 Read in context, the section is dealing with who may be found liable on a cause of action, not who pays the costs of defending the action.

49 Further, if the defendant succeeds in establishing the immunity he will be successful in obtaining his costs of defending the action as against the plaintiffs in any event. Section 39 cannot be read in my view to cover in some way the "solicitor/client" contractual costs (with his legal advisers) by way of indemnity.

50 If the defendant satisfies the conditions in s 39(1) he will succeed in obtaining the benefit of the immunity. If he does so, no issue on a third party claim arises. If he is unable to establish the conditions in s 39(1) he will not succeed in obtaining the benefit of the immunity. Again, no issue would arise on a third party claim.

51 I agree with the submission of Mr Harris QC for the appellant that the present case is not one where the remedy sought by the defendant is one of contribution or indemnity, because the establishment of the preconditions to immunity under s 39 mean that there will never be a liability of the defendant for which he would be entitled to an indemnity.

52 The Council has not been joined as a defendant. No doubt the plaintiffs have their reasons for that. The Council, as third party, has no interest in whether the defendant establishes the preconditions of s 39 or not. It is not arguable that as a third party it bears the onus of establishing that the defendant does not meet the conditions set out in s 39. The evidence at trial either establishes that he is entitled to the immunity or it does not.

53 The argument of the Council on the interpretation of s 39 is supported by s 80 and the other associated insurance provisions in the Act.

54 Section 80 states:

80—Insurance of members

A Council must take out a policy of insurance insuring every member of the Council, and a spouse, domestic partner or another person who may be accompanying a member of the council, against risks associated with the performance or discharge of official functions or duties by members.

55 This provision is not insuring members of the Council against a potential action against them. It is clearly intended to insure them against risks to them for example, personal injury suffered while attending to their functions. It is not, as suggested by the respondent, a section requiring insurance to indemnify them for negligent acts that they may commit.

56 Given my finding, that properly interpreted, s 39 creates an immunity not an indemnity, the question of evidence being required to determine this question simply does not arise. It is a case of statutory construction. The defendant either establishes the immunity or he does not. In either case there is no indemnity.

57 I do not have to decide the question of the onus of proof other than to say clearly there is no onus, in this matter, on the Council. I note in passing the decision of *Barrett v State of South Australia*[17] where the Full Court clearly stated that in relation to s 29 of the *State Bank of South Australia Act (1983),* the onus of establishing the facts giving rise to the "shield" lay on the defendants.

58 Given that the section creates an immunity rather than an indemnity, the rest of the defendant's arguments fall away. However, as they were argued I will briefly deal with them.

59 The respondent pointed to the defence filed by the third party where it was pleaded that "the Third Party cannot determine whether, and therefore does not admit that, the Defendant is entitled to the benefit of section 39 of the *Local Government Act 1999*".

60 It was argued that as the third party itself could not determine whether the defendant was entitled to the benefit of s 39 of the Act, this was fatal to the application as it was a "matter for evidence". I reject that submission.

61 The third party is simply stating that it does not know whether Mr Jacobsen will obtain the benefit of the immunity or not. That is unremarkable. In one sense, as the case is pleaded, the third party does not care. If Mr Jacobsen satisfies the criteria in s 39 and obtains the benefit of the immunity, liability would attach to the Council. However, the Council has not been joined as a defendant by the plaintiffs. The case against Mr Jacobsen would fail and thus the entire action (as currently pleaded), would fail.

62 If Mr Jacobsen does not satisfy the criteria set out in s 39, the Council again has no liability to the plaintiff. Whether the defendant can meet the criteria is a matter for evidence at trial but that cannot and does not affect the proper construction of s 39.

63 Leaving aside the position as pleaded by the Council, Mr Quinn further argued that whether or not the conduct of the defendant satisfied s 39(1) was a matter for evidence and argument and could not be determined on the pleadings. That is correct but as already stated that does not affect the interpretation of s 39. However, Mr Quinn further argued that it was for the Council to plead and prove that the member's conduct was dishonest if it wished to deprive the defendant of the benefit of the section. Again I reject that argument.

64 The Council has no interest in whether Mr Jacobsen succeeds or not in obtaining the protection of the immunity provided by s 39 of the Act. At the risk of repeating myself, if he does, no liability attaches to Mr Jacobsen and therefore the third party notice becomes irrelevant. If he does not, then again the third party notice has no role to play.

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[17] (1994) 63 SASR 208.

65 In my view there is no need to consider as between Mr Jacobsen and the Council the question of "malice" and the onus of proof. I do not need to consider the question raised in *Roberts v Bass*.[18] As mentioned earlier, I consider it is likely, at trial that it would be for the defendant to bring himself within the terms of s 39. Even if I am wrong about that, on my interpretation of s 39 such a matter is between the plaintiffs and the defendant not the third party and the defendant for the reasons expressed earlier.

66 The learned Master found:

> [80] Reading s 39 as a whole, once the member satisfies the elements of sub-s (1), a liability which were otherwise have attached to him, attaches to the Council by operation of sub-s (2). I reject in these circumstances its contention that s 39 merely provides a member with "immunity". The terms of the section operate not merely as an <u>immunity</u> from civil liability, but as an <u>indemnity</u> of a member falling within s 39(1).
>
> [81] This is because the Council is bound to indemnify the member from any liability which might arise as a consequence of civil proceedings.

67 With respect I disagree for the reasons set out. In my view the section does not operate to provide an "indemnity". If the preconditions are met, liability attaches to the Council. The case against Mr Jacobsen would be dismissed due to the operation of s 39. It would not be a case where the plaintiffs would be able to obtain judgment against both Mr Jacobsen and the Council if the Council had been joined as a defendant.

Exercise of the discretion

DCR 104

68 In my view the learned Master fell into error in relation to his interpretation of s 39. That interpretation led him to the conclusion that the defendant's position is at least arguable. In my view he decided that question based on an incorrect interpretation of s 39. I must therefore consider the application of DCR 104 afresh.

69 In *Esanda Finance Corporation Ltd v Peat Marwick Hungerfords*[19] the High Court made comment about the test which is to be applied in regard to a strike out application. Gummow J said at 293:-

> The strike-out application was made under the summary procedure provided in r 46.18 of the Supreme Court Rules 1987 (SA). It was accepted that this procedure should be reserved for a plain case, in accordance with the principles identified in *General Steel Industries Inc v Commissioner for Railways (NSW)*.

70 And McHugh J said at 271:-

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[18] (2002) 212 CLR 1.

[19] (1996-97) 188 CLR 241.

> The power to strike out pleadings under r 46.18 cannot be exercised unless 'the case of the plaintiff is so clearly untenable that it cannot possibly succeed.' In *General Steel*, Barwick CJ warned that the power to strike out a pleading must be sparingly exercised; the mere fact that the plaintiff's prospects of success are slim is not enough to strike out a pleading.

71 While the case was dealing with the old South Australian rules, the principles apply to DCR 104. These principles were not disputed by either party.

72 Is the defendant/respondent's position on the interpretation of s 39 of the Act so "clearly untenable that it cannot succeed"?

73 I accept that the power to strike out a pleading as disclosing no reasonable cause of action should only be exercised in clear and obvious cases.[20] However, this is one of those cases.

74 The defendant cannot improve his position by amending his third party statement of claim. No factual finding can alter the interpretation of s 39. The interpretation of s 39 of the Act is a matter of law and I have come to the conclusion that the arguments of the defendant are simply not tenable.

75 I allow the appeal.

76 I will hear the parties on the form of the order and the question of costs.

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[20] *South Australian Govt Financing Authority v Bank of New Zealand* [2000] SASC 264.