HIGH COURT OF AUSTRALIA

Public Information Officer

6 August 2008

PETER HEARNE AND DAVID TIERNEY v JOAN STREET, ROSLYN ELIZABETH DWYER, MICHAEL JOHN HESSE, GLEN EIGHT PTY LIMITED, SUSAN HESSE, ROBERT SIMKIN, GLEN FREDERICK BILLINGTON AND FIONA BILLINGTON

Operators of Luna Park, the Sydney harbourside amusement park, were bound by an obligation not to use other parties' affidavits or witness statements other than for court proceedings and breaching that obligation was a contempt of court, the High Court of Australia held today.

Luna Park opened in 1935, closed in 1979 and re-opened in April 2004. Nearby residents were unhappy with noise, including music, loud speakers, mechanical noise and screams from people on the rides. Mr Hearne is managing director and chief executive of Luna Park Sydney Pty Ltd, the lessee and operator of Luna Park. Mr Tierney is a director of the parent company. On 5 April 2005 residents began noise nuisance proceedings in the New South Wales Supreme Court by filing a summons with supporting affidavits.

On 18 April, The Daily Telegraph newspaper published a story headed "The NUMBY* files". It said: "*NUMBY: Not Under My Balcony. The city cousin of the NIMBY (Not in My Backyard)". The story said "well-heeled" residents had "made some quirky, if not bizarre, claims". It cited affidavits which gave as reasons why Luna Park should be shut down disrupted violin lessons, entrapped Chinese herbal medicine fumes and smoking daughters. The residents' solicitors complained to Luna Park Sydney Pty Ltd about the release of residents' affidavits. The solicitors for Luna Park Sydney gave an unreserved apology from Luna Park Sydney. A 10-day trial was set down to begin on 31 October 2005.

Between July and October 2005, Mr Hearne and Mr Tierney had dealings with Tourism, Sport and Recreation Minister Sandra Nori in an attempt to have the NSW *Luna Park Site Act* amended to protect Luna Park from the noise nuisance proceedings and any future complaints. Both Mr Hearne and Mr Tierney emailed Ms Nori's staff sections of a resident's affidavit and an acoustic expert's noise impact report. The Luna Park Site Amendment (Noise Control) Bill, which was retrospective to 30 March 2004, was passed on 18 October 2005. The trial date was vacated. The residents amended their claim to allege breaches of the Commonwealth *Trade Practices Act* and the NSW *Crown Lands Act.*

On 15 March 2006, the residents filed notices of motion and statements of charge against Mr Hearne and Mr Tierney alleging they were in contempt of court by publishing extracts of the affidavit and the acoustic report in the emails to the Minister's office. Justice Ian Gzell dismissed the action, holding that they were not bound by such an obligation. The Court of Appeal, by majority, allowed appeals by the residents and found Mr Hearne and Mr Tierney guilty of contempt of court. It held that the obligation was binding on them personally as well as on the company. Mr Hearne and Mr Tierney appealed to the High Court.

The Court unanimously dismissed the appeal. It held that the "implied undertaking" not to disclose pre-trial documents to people not involved in the proceedings was a substantive legal obligation. The Court held that a party's servants or agents who were aware that documents had been prepared for legal proceedings were directly bound by this obligation, and the role Mr Hearne and Mr Tierney played meant they could be categorised as agents of Luna Park Sydney. There was also a jurisdictional issue. The NSW *Supreme Court Act* did not allow appeals from a Supreme Court judgment or order that a person had been found not to have committed criminal contempt. Mr Hearne and Mr Tierney argued that the charges against them were for criminal contempt and therefore the appeal to the Court of Appeal against Justice Gzell's dismissal of the contempt charges was incompetent. The High Court agreed with the Court of Appeal majority that the contempt proceedings were not punitive, so were civil rather than criminal, and therefore the appeal to the Court of Appeal was competent.

- *This statement is not intended to be a substitute for the reasons of the High Court or to be used in any later consideration of the Court's reasons.*

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