

CONFIDENTIAL ITEMS 2003 – SEPTEMBER 2011

#	Date	Item Title	Confidential Order Details	Item being kept confidential - Agenda/ Attachment/ Minutes	Reason regarding retention or recommend-action to release	Resolution Regarding Action	Last Review Date	Next Review Date	Date Released
39	1 Feb 10	Morphett Street Stormwater Project & Related Contamination	Reason: (b) information the disclosure of which: (i) could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct, business, or to prejudice the commercial position of the council; and (ii) would, on balance be contrary to the public interest.	Discussion, reports, attachments and minutes	Revoked under delegation.	Extend Confidential Order to September 2017  The Chief Executive Officer be delegated the authority to revoke all or part of the order and directed to present a report containing the item for which the confidentiality has been revoked.	5 Sept 11	4 Sept 12	28/8/12



**QUESTIONS ARISING FROM COUNCIL MEETING (10 MINUTES)**  
NIL

**79 CONFIDENTIAL REPORTS**

**REPORT TITLE:** **CONFIDENTIAL ITEM - MORPHETT STREET STORMWATER PROJECT & RELATED CONTAMINATION**  
**DATE OF MEETING:** **1 FEBRUARY 2010**  
**AUTHOR:** **DAVID MORTON**  
**AUTHOR'S TITLE:** **MANAGER PROJECTS**  
**FILE NUMBER:** **44-070-011**  
**DEPARTMENT:** **GOVERNANCE & PROJECTS**  
**DEPARTMENT:** **BRIAN CLANCEY**  
**MANAGER:**

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Moved Councillor Zanker that Council:

1. pursuant to Section 90(2) and 90(3) of the Local Government Act 1999 orders that the public be excluded from attendance at the meeting to consider in confidence matters regarding:
  - (b) information the disclosure of which – could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct business, or to prejudice the commercial position of council; and would, on balance, be contrary to the public interest.
- and
- (i) information relating to actual litigation, or litigation that the council or council committee believes on reasonable grounds will take place, involving the council or an employee of the council;
2. determine that the Chief Executive Officer, General Manager Governance & Projects, General Manager Vision and Compliance, General Manager Services, Manager Projects, Manager Governance & Business Processes, and the Minute Secretary be permitted to remain in the room.

Seconded Councillor Irvine and CARRIED

Moved Councillor Irvine that Council:

3. note the response received from Botten Levinson on behalf of Gilbert Motors Pty Ltd.

4. authorise the Chief Executive Officer or nominee to instruct Thomson Playford Cutlers to issue on Council's behalf a letter to Gilbert Motors Pty Ltd (through their legal representative) to give notice of an intended claim by Council pursuant to Rule 33 of the Supreme Court Rules of South Australia and including an offer to settle the claim for \$400,280 (exclusive of GST).
5. note the update regarding the dispute between Council and Tonkin Consulting.
6. note that a further report will be provided to Council to enable consideration of possible further actions in relation to both Gilbert Motors Pty Ltd and Tonkin Consulting including the option of the commencement of formal legal action.
7. note the correction of dates as follows:
  - a) Page 180 – Background – "At its meeting 16 November 2009 Council resolved to";
  - b) Page 181 – Gilbert Motors – "... (attachment 1) dated 30 November 2009..."; and
  - c) Page 182 – second paragraph, last line "...resolution dated 16 November 2009."
8. Orders pursuant to Section 91(7),(8) and (9) of the LG Act 1999 that the discussion, reports, attachments and minutes relating to this item be kept confidential and that the revocation of confidentiality be delegated to the CEO to determine when there is no legal or commercial need for continued confidentiality, and that this order be reviewed every 12 months.

Seconded Councillor Zanker and CARRIED

MEETING DECLARED CLOSED AT 8.05PM

\_\_\_\_\_  
MAYOR

\_\_\_\_\_  
DATE

**17. CONFIDENTIAL REPORTS**

**17.1 REPORT TITLE: CONFIDENTIAL ITEM - MORPHETT STREET STORMWATER PROJECT & RELATED CONTAMINATION**

**DATE OF MEETING: 1 FEBRUARY 2010**

**AUTHOR: DAVID MORTON**

**AUTHOR'S TITLE: MANAGER PROJECTS**

**REPRESENTORS: NIL**

**FILE NUMBER: 44-070-011**

**ATTACHMENTS:**

- 1. LETTER TO GILBERT MOTORS PTY LTD DATED 30 NOVEMBER 2009**
- 2. LETTER FROM BOTTEN LEVINSON DATED 18 JANUARY 2010**
- 3. SUMMARY MEMORANDUM FROM THOMSON PLAYFORD CUTLERS DATED 20 JANUARY 2010**
- 4. DRAFT LETTER TO BOTTEN LEVINSON**

**DEPARTMENT: GOVERNANCE & PROJECTS**

**DEPARTMENT: BRIAN CLANCEY**  
**MANAGER:**

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**PURPOSE**

To provide an update on progress regarding cost recovery initiatives relating to the stormwater infrastructure upgrade undertaken by Council in Morphett Street and seek authority to issue a letter to Gilbert Motors to give notice of an intended claim by Council pursuant to Rule 33 of the Supreme Court Rules of South Australia.

**RECOMMENDATION**

That Council:

1. pursuant to Section 90(2) and 90(3) of the Local Government Act 1999 orders that the public be excluded from attendance at the meeting to consider in confidence matters regarding:

- (b) information the disclosure of which –  
could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct business, or to prejudice the commercial position of council; and would, on balance, be contrary to the public interest.

And

- (i) information relating to actual litigation, or litigation that the council or council committee believes on reasonable grounds will take place, involving the council or an employee of the council;
2. determine that the Chief Executive Officer, General Manager Governance & Projects, General Manager Vision and Compliance, General Manager Services, Manager Projects; and the Minute Secretary be permitted to remain in the room.
  3. note the response received from Botten Levinson on behalf of Gilbert Motors Pty Ltd.
  4. authorise the Chief Executive Officer or nominee to instruct Thomson Playford Cutlers to issue on Council's behalf a letter to Gilbert Motors Pty Ltd (through their legal representative) to give notice of an intended claim by Council pursuant to Rule 33 of the Supreme Court Rules of South Australia and including an offer to settle the claim for \$400,280 (exclusive of GST).
  5. note the update regarding the dispute between Council and Tonkin Consulting.
  6. note that a further report will be provided to Council to enable consideration of possible further actions in relation to both Gilbert Motors Pty Ltd and Tonkin Consulting including the option of the commencement of formal legal action.
  7. Orders pursuant to Section 91(7),(8) and (9) of the LG Act 1999 that the discussion, reports, attachments and minutes relating to this item be kept confidential and that the revocation of confidentiality be delegated to the CEO to determine when there is no legal or commercial need for continued confidentiality, and that this order be reviewed every 12 months.
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## 1. BACKGROUND

At its meeting on 16 November 2009 Council resolved to:

1. *pursuant to Section 90(2) and 90(3) of the Local Government Act 1999 orders that the public be excluded from attendance at the meeting to consider in confidence matters regarding:  
(b) information the disclosure of which –  
could reasonably be expected to confer a commercial advantage on a person with whom the council is conducting, or proposing to conduct business, or to prejudice the commercial position of council; and would, on balance, be contrary to the public interest.*  
And
  - (i) *information relating to actual litigation, or litigation that the council or council committee believes on reasonable grounds will take place, involving the council or an employee of the council;*
2. *determine that the Chief Executive Officer, General Manager Infrastructure & Projects, Acting General Manager Strategy, Development & Communities, General Manager Corporate, Manager Projects; and the Minute Secretary be permitted to remain in the room.*
3. *authorise the CEO to invite an offer for reimbursement of Council's costs from Gilbert Motors Pty Ltd and accept the offer subject to it being no less than \$400,280 (exclusive of GST) and if requested by Gilbert Motors Pty Ltd, with conditions that are limited to keeping the amount and parties to the agreement confidential and Council undertaking not to pursue any further costs in relation to the Morphet Street Stormwater Upgrade Project.*
4. *authorise the Chief Executive Officer, in liaison with the Mayor, to execute the documentation required to formalise an agreement with Gilbert Motors Pty Ltd for the reimbursement of costs subject to meeting the above requirements.*
5. *note that if an offer for cost reimbursement of less than \$400,280 (exclusive of GST) is made by Gilbert Motors Pty Ltd it will be brought back as a confidential item to a Council meeting for consideration.*
6. *advise Gilbert Motors Pty Ltd that Council has set a deadline of 18 January 2010 for an offer from Gilbert Motors Pty Ltd regarding Council's claim for cost reimbursement and will consider legal action following expiry of that deadline should an offer not be forthcoming from Gilbert Motors Pty Ltd by that time.*
7. *note that a further report will be provided to Council by 1 February 2010 when documentation has been executed between Council and Gilbert Motors Pty Ltd or failing receipt of an offer, and before the commencement of any formal legal action.*

8. *decide not to pursue cost recovery for the contamination found between Stephen and Hutchinson Streets (which represented approx 5% of the initial contamination found) on the basis that advice has been received from Coffey Environments there is insufficient information to prove the source of this contamination*
9. *Note that a further report will be provided to Council when further legal advice is received from Thomson Playford Cutlers regarding the dispute with Tonkin Consulting in relation to design services provided on this Project.*

#### Gilbert Motors

A letter from the CEO (attachment 1) dated 30 November 2009 was sent to Gilbert Motors advising of the Council's decision. The CEO offered to meet Mr Grant Gilbert of Gilbert Motors and personally visited Adelaide Hills Toyota to invite dialogue but this offer was not accepted. A letter was sent by Botten Levinson to the CEO on behalf of Gilbert Motors dated 18 January 2010 (attachment 2).

The letter from Botten Levinson declines to accept liability or make any offer to settle Council's claim of \$466,348.96 but advises that advice including that of Senior Counsel is being sought with a response expected in mid February 2010. Council's legal advisor is of the view that response is designed to further delay proceedings. Gilbert Motors has had several months to assess Council's claim without any meaningful response to date.

#### Tonkin Consulting

Council has previously been advised of communications between Council and Tonkin Consulting, most recently at the Council meeting held on 16 November 2009.

Council has indicated to Tonkin Consulting that the advice they provided to Council relating to the design and cost estimates for the relocation of infrastructure services was deficient and consequently Council has incurred losses (additional costs) that could have been avoided, being in the order of \$250,000.

Given the responses from Tonkin Consulting, Council has been investigating, via Thomson Playford Cutlers (Council's solicitors for this matter) the likelihood of a successful claim against Tonkin Consulting through a formal legal process.

## **2. DISCUSSION**

#### Gilbert Motors

Given the lack of any positive response from Gilbert Motors, advice was sought from Thomson Playford Cutlers on the expected steps and costs involved in taking legal action to pursue Council's claim for



reimbursement of its costs. An executive summary contains an overview of the required steps (attachment 3).

The steps outlined by Thomson Playford Cutlers commence with, a letter to Gilbert Motors Pty Ltd to give notice of an intended claim by Council pursuant to Rule 33 of the Supreme Court Rules of South Australia. This is an important first step as it requires the defendant to respond to the claim within 60 days and a total of 90 days must elapse after the notice before proceedings can be initiated. The letter includes an offer to settle the claim for a specified sum (\$400,280) which is consistent with amount set for negotiation in Council's resolution dated 16 November 2010.

Specifying an offer to settle the claim pursuant to Rule 33 does not preclude agreeing a lesser amount should Council wish to do so in the future nor does it lock Council into proceeding with litigation.

#### Tonkin Consulting

Council has recently received further advice from Thomson Playford Cutlers which is still preliminary in nature and quite lengthy.

The preliminary advice is qualified by various assumptions made by Thomson Playford Cutlers and indicates that "council does have legitimate causes of action to pursue against Tonkin".

Council has been asked to provide some further information to Thomson Playford Cutlers and is now in the process of doing this, including clarification/validation of matters that go right back to the negotiation of funding arrangements with the four land owners which occurred in 2007.

A further report will be provided to a future council meeting on receipt of the further advice from Thomson Playford Cutlers. At that point the likelihood of a successful claim against Tonkin Consulting through a formal legal process (should Council decide to pursue such action) should be far clearer, inclusive of risks and cost estimates.

#### POLICY IMPLICATIONS

##### **1. Budget**

The Stormwater Project was completed in the 08/09 financial year and extra costs were absorbed by Council in that year. The expected cost of legal action is outlined in the letter from Thomson Playford Cutlers and budget implications will be considered in the next report to Council if legal action is recommended.

##### **2. Legal**

Thomson Playford Cutlers has been appointed as Council's legal advisor.

The EPA has a statutory role regarding any remediation of the contamination source and issues such as monitoring groundwater impacts.

**3. Staffing/Work Plans**

The matter continues to have a significant impact on Council's project management resources.

**4. Environmental**

Arrangements have already been put in place to ensure the implementation of OH&S and Public Safety Management Plans for any work in the affected parts of Morphett St and Walker St. ETSA Utilities has also been advised of the issue given the undergrounding of power lines being undertaken in Walker Street.

There is no risk to public health if the required safe work procedures are followed.

**5. Social**

See above

**6. Strategic Plans**

Not applicable.

**7. Risk Assessment**

A risk assessment will be undertaken including obtaining counsel's opinion on the strength of Council's case.

**8. Asset Management**

Not applicable.

**COMMUNITY CONSULTATION**

**1. Customer Needs Analysis**

Not applicable.

**2. Promotion/Communications**

It is recommended that negotiations continue to be kept confidential at this point.

Attachment 1 to Item 17.1



## THE DISTRICT COUNCIL OF MOUNT BARKER

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44/070/011

Facsimile: (08) 8391-7200

web site: [www.dcmibarker.sa.gov.au](http://www.dcmibarker.sa.gov.au)

Reference:

30 November 2009

Mr Grant Gilbert  
Gilbert Motors Pty Ltd  
57-26 Adelaide Road  
Mount Barker SA 5251

### WITHOUT PREJUDICE

Dear Grant

**Re: Morphett Street Stormwater Upgrade – Claim for Reimbursement of Council Costs Incurred Due to Contamination – Confidential**

A Confidential Report was provided to the Council meeting on 16 November 2009. The report included a copy of the letter from Thomson Playford Cutlers sent to Levinson Botten on 6 November 2009 (attached) detailing Council's claim for reimbursement of costs incurred due to the presence of contamination as well as copies of the Soil and Groundwater letters provided to Council by the EPA.

Council is firmly of the view that the community should not bear the cost to Council of contamination for which the source has been identified. The cost impact was very significant for the stormwater upgrade.

Council resolved that unless an acceptable offer has been received by Council from Gilbert Motors for Council's cost reimbursement by 18 January 2010, Council will assess it options for cost recovery via more formal avenues.

Council has decided to maintain the confidential status of this matter at present to facilitate negotiations for prompt resolution. Further, Council has authorised me to invite and accept an offer (within certain parameters) from Gilbert Motors.

I am required to provide a report to a Council meeting as to the status of the matter by 1 February 2010.

With this further information to hand, I invite you to provide your response to our particularisation of costs which was sent you on 6 November 2009 at your request.

I would be happy to meet with you and discuss the matter and can be contacted on 0419 817 799.

Yours sincerely

Andrew Stuart  
Chief Executive

Attachment



Thomson  
Playford  
Cutlers

ALB - Adelaide Law Firm of the Year 2009

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Our Ref: 2959794

Your Ref:

6 November 2009

[jal@bllawyers.com.au](mailto:jal@bllawyers.com.au)

James Levinson  
Botten Levinson  
140 South Terrace  
ADELAIDE SA 5000

Dear James

**Mt Barker Stormwater works - Morphett Street - Confidential and Without Prejudice**

I refer to our without prejudice discussions at our client's offices on 2 November 2009.

You invited our client to particularise its claim in respect of the additional costs associated with the stormwater and PLEC projects as a result of contamination which our client asserts emanated from your client's property.

I confirm that our client's staff intend to report (as a confidential item) on the outcome of discussions to date at the Council meeting on 16 November 2009. In a separate report (which will not be confidential) to the same meeting our client will also provide the Council with copies of the Soil and Groundwater Consulting Reports which have been obtained from the EPA Public Register.

We set out below particulars of our client's losses which we say arise wholly and solely as a result of hydrocarbon contamination on Morphett Street which it had no prior knowledge of and which we say emanated from your client's property. (Costs and losses which are claimable under the Walker Street Deed will be formulated separately).

As we indicated in our discussions, we would expect that your client will wish to review the costs which have been listed; we believe however that there is little room for argument in respect of costs which are obviously attributable to contamination. As you know, the ultimate cost of disposal of contaminated waste depends to a large extent on transport logistics and gate fees. Initially our client dealt with Southern Waste in 2008 when there was no cheaper alternative location for licenced disposal. However, our client subsequently put considerable effort into negotiating with the Adelaide Hills Regional Waste Management Authority to use its facility and secured significantly lower disposal costs as a result of that change. This solution required extensive liaison with the EPA to secure its approval including accommodation works at the Hartley site. We estimate that the resulting cost savings were in the order of \$400,000 to \$500,000.



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The various categories of costs (all exclusive of GST) can be described as follows:

**Financial year 2007/2008 – Morphett Street**

Southern Waste Disposal Costs	\$60,139.27
Coffey Environments Pty Ltd	\$43,623.68
Legal fees	<u>\$5,937.00</u>
<b>TOTAL</b>	<b><u>\$109,699.95</u></b>
Less 5% attributed to other contamination	\$5,485.00
<b>Claim for 2007/2008</b>	<b>\$104,214.95</b>

**Financial Year 2008/2009 – Morphett Street**

Coffey Environments Pty Ltd	\$50,012.22
Adelaide Hills Waste Management	\$106,403.48
Southern Waste Disposal Costs	\$17,150.71
Thomson Playford Cutlers	\$19,679.00
Gayler Professional Engineering Pty Ltd	\$28,313.28
Harradine Contracting Pty Ltd	\$15,670.32
Salaries – Mr I Powell	\$29,392.00
Salaries – Mr A Stuart, Mr B Clancey and Mr D Morton	\$25,039.00
ADCIV Contract Variation	\$60,837.00
Interest on the outstanding monies	\$11,637.00
<b>TOTAL</b>	<b><u>\$362,134.01</u></b>

We offer the following comments by way of explanation of some of these costs.

1. Coffey Environments

Coffey Environments provided advice to our client solely in respect of the contamination. They were not involved in the original scope of works for the stormwater works therefore it is our contention that all of the costs associated with the use of Coffey Environments Pty Ltd can be attributed to the contamination.

2. Discount of 5% attributed to other contamination for the 2007/2008 year

A small amount of contaminated material was found between Stephen St and Hutchison St and not related to your client's site. This amounted to 35m<sup>3</sup> compared to 660m<sup>3</sup> related to



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your client's site in 2008. A pro rata discount has therefore been applied to the 2007/2008 claim.

3. Gayler Professional Engineering Pty Ltd:

Is the cost of Mr Bill Henderson who was appointed as Project Manager to coordinate measures needed to resume the contract including negotiations with the contractor, the Adelaide Hills Regional Waste Management Authority and the EPA. Mr Henderson was unable to complete this role due to ill health.

4. Salaries – Mr I Powell

The salary costs of Mr Powell were attributed to the project when he took over Mr Henderson's Project Management role.

5. Salaries – Mr A Stuart, Mr B Clancey and Mr D Morton

These costs relate to time spent by senior staff including preparation of Council reports, liaison with Thomson Playford Cutlers, meetings and negotiation with the EPA. This time impost severely impacted on other Council projects.

6. Harradine Contracting Pty Ltd:

Relates to the cost of removal of waste which did not meet the requirements of the Adelaide Hills Regional Waste Management Authority's licence at Hartley to Southern Waste for disposal.

7. In respect of our legal fees, we have removed those amounts relating to the Walker Street negotiations. All of our costs are attributable to the impact of contamination on the project.

8. We note that there was a variation from ADCIV of \$60,837.00. This cost relates only to the extra contract cost of managing the impact of contamination and is documented. Clearly the discovery of the contamination formed the basis for a valid variation.

9. Interest on the outstanding monies has been calculated using the Local Government Finance Association interest rate (Council's cost of funds) and amounts to \$11,637 at time of writing.

During our meeting we indicated that we believed your client would be able to make an assessment of some of these costs in the short term. In this regard we draw your attention to our letters of 17 December 2008 and 7 January 2009 when we provided you with extensive background data relating to the original scope of works. The only change since that time is that the costs which were estimated at that time are now actual.

**The total of our client's claim relating to the impact of contamination which emanated from your client's property on the Morphett St Stormwater Upgrade is therefore \$466,348.96 (exclusive of GST) (Morphett Street Costs). This amount excludes costs claimable under the Walker Street Deed which will be formulated separately.**

Our client also requires agreement to the following:

- That your client will remove the source of vapour contamination affecting our client's land as soon as is practical and in accordance with EPA requirements.



- That documentation and information related to the contamination, investigation and remediation of your client's site be provided direct to Council and in a timely manner.

Our Client reserves its rights to seek compensation for any future costs and/or losses which are incurred by Council and arise as a result of hydrocarbon contamination which has emanated from your client's property.

We confirm that any offer which your client makes in respect of the Morphet Street Costs will be forwarded to Council for consideration at a Council Meeting as a Confidential Item.

Our instructions are to continue discussions with your client in the short term. Given that 9 months or so have passed since our client completed the project and almost a year since you were provided with the estimated costs of managing the contamination impact, it is Council's intention at its meeting on 16 November 2009 to set a reasonable time frame (which will be communicated to you) within which an agreement must be reached in relation to the Morphet Street Costs.

In the event that this time-frame is not achieved or an agreement cannot be reached with your client, our client intends to consider its options to pursue the causes of action which are available to it for recovery of the Morphet Street Costs.

We look forward to hearing from you.

Yours sincerely

**Fraser Bell**

Partner

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bottenlevinson

Attachment 2 to Item 17.1

development & environment lawyers

Our ref: JAL/kp/208430-20L.doc

18 January 2010

**Mr Andrew Stuart  
Chief Executive Officer  
District Council Mount Barker  
PO Box 54  
MOUNT BARKER SA 5251**

**CONFIDENTIAL AND WITHOUT PREJUDICE**

Dear Andrew

### Morphett Street – Claim for reimbursement of costs

Thank you for your letter of 30 November 2009 addressed to our client.

I note that you are required to report to the Council on the status of your claim on 1 February. You have therefore asked for a response from our client by today.

We have held various meetings and engaged in relatively generalised correspondence with your staff and your solicitors, Thomson Playford Cutlers ("TPC") since 2008. However it was not until the letter of 6 November 2009 that your claim has been particularised.

It has recently been suggested to our client that the Council may also be pursuing a claim against the Council's consultants for some of the \$466,348.96 claimed against our client. I would be grateful if you could confirm whether or not this is the case. Of course if proceedings eventuate then it is likely that such other parties will be joined in defence of the claim. Patently it will have bearing on the amount of money claimed by the Council against our client.

Our client does not accept the sum of \$466,348.96 even if our client were liable. Nonetheless in an endeavour to resolve the matter our client is giving due consideration to what presently appears to be a somewhat ambit claim. As such our client has instructed us to seek advice from the appropriate experts and from senior counsel on the defence of the claim. We are awaiting that advice and cannot therefore respond to your letter in any further detail. I anticipate however that once the relevant parties have returned from leave and finalised their advice that we will be in a position to respond by mid February.

Yours faithfully

**James Levinson**  
**BOTTEN LEVINSON**  
Mob: 0407 050 080  
jal@bllawyers.com.au

<sup>1</sup> See, e.g., *United States v. Gurnea*, 401 F.2d 1008, 1011 (9th Cir. 1968) (quoting *United States v. Gurnea*, 357 F.2d 1008, 1011 (9th Cir. 1965)).

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Thomson  
Playford  
Cutlers

Attachment 3 to Item 17.1

<b>Memorandum</b>	
From:	Fraser Bell and Sam Nunan
To:	David Morton
Date:	20 January 2010
Subject:	Mt Barker Council re Gilbert
Matter No:	2959794
<b>Subject to Legal and Professional Privilege</b>	

### Summary of suggested strategies

Thomson Playford Cutlers suggest the following strategy in order to try and force Gilbert Motors into a position where it will negotiate or defend the claim.

- (a) Issue a pre-action action settlement offer to Gilbert Motors which allows 60 days for a response.
- (b) During that 60 day period:
  - (i) Consider the strength of each of the causes of action which are available to Counsel. This will involve seeking an opinion from Counsel after providing all relevant documents to Counsel. We do not suggest Senior Counsel unless and until Gilbert retains senior Counsel
  - (ii) Meet with the nominated experts (other than Coffey Partners) to determine the extent to which it can be demonstrated that the pollution that is the subject of the cause of action escape from Gilbert Motors Pty Ltd.
  - (iii) Review the claim for compensation particularly in terms of the various amounts that have been claimed to ensure that a realistic estimate has been made of the best case scenario in terms of compensation. This component will involve an assessment of the claim in conjunction with discussions with ourselves and Council staff.
- (c) Issue proceedings in the appropriate Court based on the best cause of action.
- (d) Prepare the case on the basis that mediation is the most appropriate method to resolve the dispute. If Gilbert Motors Pty Ltd is not prepared to mediate then Council needs to proceed to trial in order to try and put Gilbert Motors Pty Ltd in a position where it sees the futility of defending the case and the sense in seeking of a negotiated outcome.

It is important for Council to realise that this memorandum is highly confidential and contains sensitive information about the strategy for proceeding with litigation. Accordingly, the suggested strategy and the advice which follows should be treated as a **highly confidential document**.

**Attachment 4 to Item 17.1**

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Our Ref: 2959794

Your Ref:

20 January 2010

[jal@bllawyers.com.au](mailto:jal@bllawyers.com.au)Mr James Levinson  
Botten Levinson

Dear James

**Mt Barker Stormwater works - Morphet Street - Offer of Settlement**

We refer to our previous correspondence in this matter.

As you know, we act for the District Council of Mount Barker (**Council**). This letter serves as notice of an intended claim against your client, Gilbert Motors Pty Ltd (**Gilbert Motors**) and is given pursuant to Rule 33 of the Supreme Court Rules of South Australia 2006.

We are instructed that our client will issue a claim against Gilbert Motors in the Supreme Court of South Australia in 90 days unless this matter can be resolved prior to that date.

**Particulars of claim**

Your client is the registered proprietor of allotment 100 in Deposited Plan 68805 in the area of Mount Barker in the Hundred of Macclesfield (your client's land). Also known as the BP site on the corner of Adelaide Road and Morphet Street Mount Barker.

Our client intends to commence a claim against Gilbert Motors for losses suffered by Council as a result of the migration of hydrocarbon contamination onto our client's land, in particular Morphet Street, which we say emanated from your client's property as a result of your client's failure to properly maintain the equipment owned and/or operated by it and your client's failure to prevent the migration of the contamination onto our client's land. Our client's claim will assert that as a result of your client's actions and inaction, our client's land was contaminated and thereby caused our client loss.

The claim will be for losses our client suffered as a result of the contamination due to the impact of the contamination on certain stormwater and construction works and the remediation necessary to complete those works which our client undertook in Morphet Street, Mount Barker.

The stormwater works were undertaken without any notice of the contamination. As a result our client incurred additional costs in carrying out their works and remediating its land and our client thereby suffered loss as a result of the contamination. Your client was aware of the relevant stormwater works as your client was one of a number of property owners who provided a cost



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contribution to the relevant works. As such, your client was aware of the nature and extent of the relevant works and, to the extent that your client was or ought to have been aware of the contamination, your client was aware of the potential impact of the contamination on our client's land and the cost of carrying out those stormwater works.

#### **Council's loss**

Our client's claim includes costs it has incurred in identifying, investigating and remediating the contamination in, on and under Morphett Street, Mount Barker. These costs are described as follows:

#### **Financial year 2007/2008 – Morphett Street**

Southern Waste Disposal Costs	\$60,139.27
Coffey Environments Pty Ltd	\$43,623.68
Legal fees	<u>\$5,937.00</u>

**\$109,699.95**

Less 5% attributed to other contamination	\$5,485.00
---	------------

#### **Claim for 2007/2008**

**\$104,214.95**

#### **Financial Year 2008/2009 – Morphett Street**

Coffey Environments Pty Ltd	\$50,012.22
Adelaide Hills Waste Management	\$106,403.48
Southern Waste Disposal Costs	\$17,150.71
Thomson Playford Cutlers	\$19,679.00
Gayler Professional Engineering Pty Ltd	\$26,313.28
Harradine Contracting Pty Ltd	\$15,670.32
Salaries – Mr I Powell	\$29,392.00
Salaries – Mr A Stuart, Mr B Clancey and Mr D Morton	\$25,039.00
ADCIV Contract Variation	\$60,837.00



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Interest on the outstanding monies	\$11,637.00
<b>Claim for 2008/2009</b>	<b>362,134.01</b>
<b>TOTAL</b>	<b><u>\$466,348.96</u></b>

**Settlement Offer**

For the purposes of Rule 33, our client is prepared to compromise this claim and accept \$[insert amount] in settlement of its claim, subject to the following:

1. That your client will remove the source of vapour contamination affecting our client's land as soon as is practical and in accordance with EPA requirements; and
2. That documentation and information relating to the contamination, investigation and remediation of your client's site be provided direct to Council and in a timely manner.

Our client's reserves its rights to seek compensation for any future costs or losses which are incurred by Council and arise as a result of hydrocarbon contamination which has emanated from your client's property.

You client is required to respond within 60 days of receipt of this notice. If the dispute is not resolved within 90 days of service of this notice, our client will initiate proceedings to recover its loss and damage and your client will be liable for costs and interest in accordance with the rules.

Our client has previously forwarded to you all relevant expert reports in its possession.

Our client otherwise reserves all its rights in respect of the matters outlined above.

Yours sincerely

**Fraser Bell**

Partner

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