

IN THE COUNTY COURT  
OF VICTORIA AT MELBOURNE

1988 NO. 880949

BETWEEN:

G.A. & C.M. THOMPSON

Plaintiffs

-and-

THE PRESIDENT, COUNCILLORS &  
RATEPAYERS OF THE SHIRE OF  
KYNETON

Firstnamed Defendant

-and-

THE KYNETON WATER BOARD  
(formerly) THE KYNETON SHIRE  
WATERWORKS TRUST

Secondnamed Defendant

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AMENDED STATEMENT OF CLAIM

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REF: 89065

IN THE COUNTY COURT  
OF VICTORIA AT MELBOURNE

1988 No. 880949

B E T W E E N

GLENN ALEXANDER THOMPSON and

CHERYL MARIE THOMPSON

Plaintiffs

- and -

THE PRESIDENT COUNCILLORS AND RATEPAYERS OF THE  
SHIRE OF KYNETON

Firstnamed Defendant

- and -

THE KYNETON WATER BOARD (formerly  
THE KYNETON SHIRE WATERWORKS TRUST)

Secondnamed Defendant

AMENDED STATEMENT OF CLAIM

1. The firstnamed Defendant is and was at all material times:
  - (a) a body corporate pursuant to the provisions of the Local Government Act 1958 (as amended) ("the LGA"); and
  - (b) capable of being sued in the said name.

2. The Kyneton Shire Waterworks Trust ("the KSWT") was at all material times prior to the creation of the secondnamed Defendant:

- (a) a body corporate pursuant to the provisions of the Water Act 1958 (as amended) ("the WA"); and
- (b) an Authority within the meaning of the WA.

3. The secondnamed Defendant is:

- (a) a body corporate pursuant to the provisions of the laws of the State of Victoria;
- (b) capable of being sued in the same name;
- (c) the successor in title of the KSWT, which upon its creation and pursuant to an Order made under s.8 of the Water and Sewerage Authorities (Restructuring) Act 1983 assumed all the land easements works property powers rights liabilities and obligations of KSWT.

4. In February and March 1980 a Mr K.R. Buchanan, as owner of a block of land situated in Tylden Road, Kyneton in the State of Victoria, lodged with the firstnamed Defendant in purported compliance with Section 569(1) of the LGA the following "Notices of Intention to Subdivide the Land:

- (a) Notice in the form of the Thirtieth Schedule to the LGA - dated 20 February 1980; and  
amended 11.6.91

(b) 4 notices in the form of the Thirtieth Schedule to the LGA - each dated 4 March 1980.

5. The land was at all material times -.

(a) the whole of Crown Allotment 129 and part of Crown Allotment 132 Parish of Lauriston;

(b) under the operation of the Transfer of Land Act 1958; and

(c) situated within the district of the firstnamed Defendant.

6. The land was not at any material time situated within:

(a) the urban district;

(b) the rural district-

of the secondnamed Defendant or of the KSWT.

7. On or about 20 February 1980 the firstnamed Defendant served the subdivider with a written notice of requirement pursuant to ss.569E(1) and 569E(1A) of the LGA ("the requirement") requiring him:

(a) to construct specified works, including roadworks, on the land; and

- (b) to give or cause to be given to the firstnamed Defendant a written statement from the KSWT that an agreement had been made for the provision of water supply to the land.

8. On 21 May 1980 the firstnamed Defendant sealed the following plans of subdivision provided by the subdivider:

- (a) Plan of Subdivision 79305/E;
- (b) Plan of Subdivision 79305/F;
- (c) Plan of Subdivision 79305/G;
- (d) Plan of Subdivision 79305/H;
- (e) Plan of Subdivision 79305/I;
- (f) Plan of Subdivision 79305/J;
- (g) Plan of Subdivision 79305/K.

*Amended 12.6.91*

9. In or about October 19<sup>80</sup>~~80~~ and at the request of the subdivider the Plaintiffs provided a signed requisition to the Manager of the Commercial Bank of Australia Ltd (as it then was) at Thomastown ("the Bank") for the issue to the firstnamed Defendant of a Bank Guarantee ("the first Bank Guarantee") to be available until cancelled for such sum or sums not exceeding in the aggregate the sum of \$25,000.00 which were or might become payable by the Plaintiffs to the firstnamed Defendant in connection with the subdivision of the land.

10. In or about October 1980 the Bank issued the firstnamed Defendant with the first Bank Guarantee for the sum and for the purpose aforesaid.

11. In the premises, the firstnamed Defendant was obliged to hold and/or use the first Bank Guarantee in accordance with law and more particularly, in accordance with the provisions of section 569E of the LGA, and the firstnamed Defendant thereby impliedly warranted to the Plaintiffs ("the first warranty") that:

(a) in relation to the subdivision of the land it would act at all material times in accordance with law; and

(b) it would -

(i) request the Bank for payment upon the first Bank Guarantee of; and

(ii) accept from the Bank pursuant to the first Bank Guarantee -

only such sum or sums not exceeding in the aggregate the sum of \$25,000.00 -

(1) as were or might become lawfully expended by it upon the lawful construction by it of any new street road lane or passage on the land in

connection with the  
subdivision of the land; and

(2) in respect of which it -

(21) was or might become  
lawfully entitled to  
accept payment; or

(22) was lawfully entitled  
to accept security -

from the Plaintiffs pursuant  
to a lawful requirement made  
upon them in connection with  
the subdivision of the land.

#### PARTICULARS

The first warranty is to be implied from  
the Plaintiff's provision and the  
firstnamed Defendant's acceptance of the  
first Bank Guarantee, from the need to give  
business efficacy to the relationship  
between the parties and by law.

12. In December 1980 the Plaintiffs became the owners or  
became entitled to become registered proprietors of  
15 of the 18 allotments comprising the land.
13. In or about March 1983 the Plaintiffs sold their  
interest in the said 15 allotments.

14. Between about February 1983 and March 1984 the firstnamed Defendant caused a road ("the road") to be constructed on the land in connection with the subdivision of the land and in purported pursuance of the provisions of s.569(1)(b) of the LGA.
15. On 10 December 1982 the firstnamed Defendant requested the Westpac Banking Corporation Ltd ("Westpac"), as successor in title to the Bank, for payment upon the first Bank Guarantee of the sum of \$25,000.00 in connection with the construction of the road.

PARTICULARS

This request was in writing and is contained in a letter dated 10 December 1982, a copy of which may be inspected at the offices of the Plaintiffs' solicitor by appointment.

16. On or about 12 January 1983 the firstnamed Defendant accepted from Westpac, as agent for the Plaintiffs, the sum of \$25,000.00 in connection with the construction of the road and in purported pursuance of the request and of the first Bank Guarantee.
17. The Plaintiffs have reimbursed Westpac with the sum of \$25,000.00 so paid by it as their agent to the



firstnamed Defendant at the firstnamed Defendant's request.

18. On or about 19 November 1980 the firstnamed Defendant withdrew the requirement on the land within the meaning of s.569E(3)(ca), and on or about 24 November 1980 it notified the Registrar of Titles pursuant to s.569E(3)(d) that the subdivider had complied with the conditions of the requirement.

PARTICULARS

Both the minutes of the firstnamed Defendant's meeting dated 19 November 1980<sup>30</sup> *amended 12.6.91* and the notification to the Titles Office are in writing. Copies may be inspected at the offices of the Plaintiffs' solicitor by appointment.

19. On about 28 November 1980 the Registrar approved the plans of subdivision of the land by making the necessary endorsements of approval in conformity with s.569E(3)(e) of the LGA and s.97 of the Transfer of Land Act 1938.

20. In the premises, the firstnamed Defendant was not entitled to retain and/or call up the first Bank Guarantee either pursuant to s.569E, or at all, for the following reasons:

(a) that it failed to comply properly or at all with the provisions of s.569 and s.569E, in that:

(i) there was no or no proper or sufficient notices given by the subdivider, pursuant to s.569(1) of the 1964;

(ii) the plans of subdivision sealed by the firstnamed Defendant in relation to the land contravened:

(A) s.569A(1)(a) in that each of them did not show at all, or distinctly all allotments into which the land was to be subdivided marked with distinct numbers or symbols;

(B) s.569A(1)(c) in that plans 79305E, 79305F, 79305G, and 79305H did not show at all or showed distinctly all new streets, roads, lanes or passages proposed to be made or laid out;

(iii) the firstnamed Defendant did not serve or cause to be served on the subdivider any, or any proper or

sufficient "requirements" within the meaning of s.569E(3)(b);

- (iv) the firstnamed Defendant did not retain copies of any or all of the purported "requirements", nor did it keep at all or sufficiently, at its offices (or anywhere else) an up to date summary in writing of all actions taken pursuant to s.569E in respect of the requirements - thus contravening s.569E(3)(c);
- (v) the purported "requirements" had been withdrawn by the firstnamed Defendant within the meaning of s.569E(3)(ca);
- (vi) that in contravention of s.569E(3)(d) the firstnamed Defendant caused to be lodged with the office of Titles a statement to the effect that the purported "requirement" or "requirements" had been complied with by the owner, when such requirement or requirements had not been complied with and the firstnamed Defendant

knew that such requirement or requirements had not been complied with;

(b) there was no other valid and/or enforceable basis or ground upon which the firstnamed Defendant could retain and/or call up the first Bank Guarantee.

21. Further or alternatively, by reason of the matters detailed in paragraph 20 hereof, the request of the firstnamed Defendant detailed in paragraph 15 hereof was:

- (a) contrary to law; and/or
- (b) wrongful and in breach of the first warranty; and/or
- (c) negligent and in breach of a duty owed by it to the Plaintiffs.

22. Further or alternatively, by reason of the matters detailed in paragraph 20 hereof, the acceptance by the firstnamed Defendant of the sum of \$25,000.00 as detailed in paragraph 16 hereof was:

- (a) contrary to law; and/or
- (b) wrongful and in breach of the first warranty; and/or
- (c) negligent and in breach of a duty owed by it to the Plaintiffs.

23. Further or alternatively, in or about November 1982 the Plaintiffs informed the firstnamed Defendant that they intended forthwith to cancel the first Bank Guarantee.

24. In order to induce the Plaintiffs not to cancel the first Bank Guarantee the firstnamed Defendant threatened that it would sue the Plaintiffs if the first Bank Guarantee was cancelled and represented to the Plaintiffs ("the first representation"), and in consideration of their not doing so warranted ("the second warranty") that:

(a) in accepting the first Bank Guarantee and in relation to the subdivision of the land it had acted and would act at all material times in accordance with law; and

(b) it would -

(i) request the Bank for payment upon the first Bank Guarantee of; and

(ii) accept from the Bank pursuant to the first Bank Guarantee -

only such sum or sums not exceeding in the aggregate the sum of \$25,000.00 -

(1) as were or might become lawfully expended by it upon the lawful construction by it of any new street road lane

or passage on the land in connection with the subdivision of the land; and

(2) in respect of which it -

(21) was or might become lawfully entitled to accept payment; or

(22) was lawfully entitled to accept security -

from the Plaintiffs pursuant to a lawful requirement made upon them in connection with the subdivision of the land.

#### PARTICULARS

The threat was oral. The first representation and the second warranty were partly oral and partly to be implied. Insofar as they were oral they were contained in telephone conversations between the firstnamed Plaintiff and Mr S.G. Porter on behalf of the firstnamed Defendant in or about November 1982 to the effect alleged. Insofar as they are to be implied, they are to be implied by the Plaintiffs' action in refraining from cancelling the first Bank Guarantee, from the need to give business efficacy to the relationship between the parties and by law.

25. At the time it caused the first representation to be made, the firstnamed Defendant intended that the Plaintiffs would rely thereon and it well knew or ought to have known that the Plaintiffs would rely thereon.
26. In the premises the firstnamed Defendant was under a duty to take care in the making of the first representation to the Plaintiffs.
27. Acting on the faith and truth of the first representation and the second warranty and induced thereby the Plaintiffs did not cancel the first Bank Guarantee.
28. The Plaintiffs have since discovered and the fact is that, by reason of the matters detailed in paragraph 20 hereof, the first representation was untrue and made in breach of the said duty to take care and the second warranty was broken.
29. By reason of the matters aforesaid the Plaintiffs have suffered loss and damage.

PARTICULARS

- (a) The sum of \$25,000.00.

(b) Interest incurred by the Plaintiffs at the account of the Bank as a consequence of the said unlawful/wrongful/negligent request for and acceptance of the said sum. Full particulars will be provided before the hearing and determination of this action.

(c) Consequential losses sustained by the Plaintiffs as a result of the sale of the 15 allotments, the sale of which was forced by the firstnamed Defendant's wrongful request for and acceptance of the said sum. Full particulars will be provided prior to the hearing and determination of this action.

30. Further or alternatively, by reason of the matters detailed in paragraph 20 hereof -

(a) the consideration for the payment by the Plaintiffs to the firstnamed Defendant through the agency of Westpac of the sum of \$25,000.00 has wholly failed; and

(b) in the premises the firstnamed Defendant has had and received the said sum to the use of the Plaintiffs.

31. Further or alternatively, by reason of the matters detailed in paragraph 20 hereof -



(a) the sum of \$25,000.00 was paid by Westpac as agent for the Plaintiffs and received by the firstnamed Defendant in purported discharge of a demand made contrary to law and under colour of an office; and

(b) in the premises the firstnamed Defendant has had and received the said sum to the use of the Plaintiffs.

32. Further or alternatively, by reason of the matters detailed in paragraph 20 hereof -

(a) the sum of \$25,000.00 was paid by Westpac as agent for the Plaintiffs and received by the firstnamed Defendant under a mistake; and

(b) in the premises the firstnamed Defendant has had and received the said sum to the use of the Plaintiffs.

33. Further or alternatively, in or about October 1980 and at the request of the subdivider the Plaintiffs provided a signed requisition to the manager of the Bank for the issue to the secondnamed Defendant of a Bank Guarantee ("the second Bank Guarantee") to be available until cancelled for such sum or sums not exceeding in the aggregate the sum of \$11,500.00 which were or might become payable by the Plaintiffs

to the secondnamed Defendant in connection with the subdivision of the land.

34. In or about October 1980 the Bank issued the secondnamed Defendant with the second Bank Guarantee for the sum and for the purpose aforesaid.

35. In consideration of the issue of the second Bank Guarantee the secondnamed Defendant impliedly warranted to the Plaintiffs ("the third warranty") that:

(a) in relation to the subdivision of the land it would act at all material times in accordance with law; and

(b) it would -

(i) request the Bank for payment upon the second Bank Guarantee of; and

(ii) accept from the Bank pursuant to the second Bank Guarantee -

only such sum or sums not exceeding in the aggregate the sum of \$11,500.00 -

(1) as were or might become lawfully expended by it upon the lawful construction by it of any new street road lane or passage on the land in

- connection with the  
subdivision of the land; and  
(2) in respect of which it -  
(21) was or might become  
lawfully entitled to  
accept payment; or  
(22) was lawfully entitled  
to accept security -  
from the Plaintiffs.

PARTICULARS

*amended*  
*(2.8.91)*  
The third warranty is to be implied from  
the Plaintiff's provision and the  
~~Firstnamed~~ <sup>Secondnamed</sup> Defendant's acceptance of the  
second Bank Guarantee, from the need to  
give business efficacy to the relationship  
between the parties and by law.

36. Between February 1983 and March 1984 the secondnamed  
Defendant caused a water main ("the main") to be  
constructed on the land in connection with the  
subdivision of the land and in purported pursuance  
of the provisions of the WA.
37. On 10 December 1982 the secondnamed Defendant  
requested Westpac, as successor in title to the  
Bank, for payment upon the second Bank Guarantee of

the sum of \$11,500.00 in connection with the construction of the main.

PARTICULARS

This request was in writing and is contained in a letter dated 10 December 1982, a copy of which may be inspected at the offices of the Plaintiffs' solicitor by appointment.

38. On or about 12 January 1983 the secondnamed Defendant accepted from Westpac, as agent for the Plaintiffs, the sum of \$11,500.00 in connection with the construction of the main and in purported pursuance of the request and of the ~~first~~ <sup>second</sup> Bank <sup>Guaranteed</sup> 12.6.91 Guarantee.
39. The Plaintiffs have reimbursed Westpac with the sum of \$11,500.00 so paid by it as their agent to the secondnamed Defendant at the secondnamed Defendant's request.
40. There was not at any time an agreement in existence between the secondnamed Defendant and the Plaintiffs or between the secondnamed Defendant and the subdivider in relation to the construction of the main.

41. Further the plans for the main were not approved as required by the provisions of the WA prior to the commencement of construction or at all.

42. In the premises the secondnamed Defendant was not entitled to retain and/or call up the second Bank Guarantee either pursuant to the provisions of the LGA, the WA, or at all, for the following reasons:

- (a) that there was no agreement in existence between the secondnamed Defendant and the Plaintiffs, or between the secondnamed Defendant and the subdivider in relation to the construction of the main, pursuant to s.307AA (2);
- (aa) that there were no plans approved by the Governor-in-Council empowering the secondnamed Defendant to carry out the construction of the main pursuant to s.307(1)(h);
- (aaa) that any purported requirement served pursuant to s.569E was withdrawn and no additional or substituted requirement could thereafter be lawfully made on the Plaintiffs pursuant to s.569E or at all;

- (b) the Plaintiffs were not at any material time, persons from whom the secondnamed Defendant was lawfully entitled to accept any payment (pursuant to s.307AA of the WA or otherwise) in relation to the construction of the main on the land;
- (c) that as there was no agreement in existence pursuant to s.307AA of the WA (as aforesaid) the Plaintiffs were not at any material time persons who could lawfully provide or from whom the secondnamed Defendant could lawfully accept security for the cost of construction of the main on the land;
- (d) the secondnamed Defendant had no power lawfully to construct the main on the land;
- (e) the secondnamed Defendant did not act in accordance with law in relation to the subdivision of the land and the construction of the main; and
- (f) the secondnamed Defendant was not at any material time lawfully entitled to:
  - (i) request; or
  - (ii) accept from -

the Plaintiffs the sum of \$11,500.00 or any other sum in connection with the subdivision of the land or the construction of the main.

43. Further or alternatively, by reason of the matters detailed in paragraph 42 hereof, the request of the secondnamed Defendant detailed in paragraph 37 hereof was -
- (a) contrary to law; and/or
  - (b) wrongful and in breach of the third warranty; and/or
  - (c) negligent and in breach of a duty owed by it to the Plaintiffs.
44. Further or alternatively, by reason of the matters detailed in paragraph 42 hereof, the acceptance by the secondnamed Defendant of the sum of \$11,500.00 as detailed in paragraph 38 hereof was:
- (a) contrary to law; and/or
  - (b) wrongful and in breach of the third warranty; and/or
  - (c) negligent and in breach of a duty owed by it to the Plaintiffs.
45. Further or alternatively, in or about November 1982 the Plaintiffs informed the secondnamed Defendant that they intended forthwith to cancel the second Bank Guarantee.

46. In order to induce the Plaintiffs not to cancel the second Bank Guarantee the secondnamed Defendant threatened that it would sue the Plaintiffs if the second Bank Guarantee was cancelled and represented to the Plaintiffs ("the second representation"), and in consideration of their not doing so warranted ("the fourth warranty") that:

(a) in accepting the second Bank Guarantee and in relation to the subdivision of the land it had acted and would act at all material times in accordance with law; and

(b) it would -

(i) request the Bank for payment upon the second Bank Guarantee of; and

(ii) accept from the Bank pursuant to the second Bank Guarantee -

only such sum or sums not exceeding in the aggregate the sum of \$11,500.00 -

(1) as were or might become lawfully expended by it upon the lawful construction by it of any new works on the land in connection with the subdivision of the land; and

(2) in respect of which it -



(21) was or might become  
lawfully entitled to  
accept payment; or

(22) was lawfully entitled  
to accept security -  
from the Plaintiffs.

PARTICULARS

The threat was oral. The second representation and the fourth warranty were partly oral and partly to be implied. Insofar as they were oral they were contained in telephone conversations between the firstnamed Plaintiff and Mr S.G. Porter on behalf of the firstnamed Defendant in or about November 1982 to the effect alleged. Insofar as they are to be implied, they are to be implied by the Plaintiffs' action in refraining from cancelling the second Bank Guarantee, from the need to give business efficacy to the relationship between the parties and by law.

47.

At the time it caused the second representation to be made the secondnamed Defendant intended that the Plaintiffs would rely thereon and it well knew or ought to have known that the Plaintiffs would rely thereon.

48. In the premises the secondnamed Defendant was under a duty to take care in the making of the second representation to the Plaintiffs.
49. Acting on the faith and truth of the second representation and the fourth warranty and induced thereby the Plaintiffs did not cancel the second Bank Guarantee.
50. The Plaintiffs have since discovered and the fact is that, by reason of the matters detailed in paragraph 42 hereof, the second representation was untrue and made in breach of the said duty to take care and the fourth warranty was broken.
51. By reason of the matters aforesaid the Plaintiffs have suffered loss and damage.

PARTICULARS

- (a) The sum of \$11,500.00.
- (b) Interest incurred by the Plaintiffs at the account of the Bank as a consequence of the said unlawful/wrongful/negligent request for and acceptance of the said sum. Full particulars will be provided before the hearing and determination of this action.

- (c) Consequential losses sustained by the Plaintiffs as a result of the sale of the 15 allotments, the sale of which was forced by the secondnamed Defendant's wrongful request for and acceptance of the said sum. Full particulars will be provided prior to the hearing and determination of this action.

52. Further or alternatively, by reason of the matters detailed in paragraph 42 hereof -

- (a) the consideration for the payment by the Plaintiffs to the secondnamed Defendant through the agency of Westpac of the sum of \$11,500.00 has wholly failed; and
- (b) in the premises the secondnamed Defendant has had and received the said sum to the use of the Plaintiffs.

53. Further or alternatively, by reason of the matters detailed in paragraph 42 hereof -

- (a) the sum of \$11,500.00 was paid by Westpac as agent for the Plaintiffs and received by the secondnamed Defendant in purported discharge of a demand made contrary to law and under colour of an office; and

- (b) in the premises the secondnamed Defendant has had and received the said sum to the use of the Plaintiffs.

54. Further or alternatively, by reason of the matters detailed in paragraph 42 hereof -

- (a) the sum of \$11,500.00 was paid by Westpac as agent for the Plaintiffs and received by the secondnamed Defendant under a mistake; and

- (b) in the premises the secondnamed Defendant has had and received the said sum to the use of the Plaintiffs.

55. Further or alternatively, if the secondnamed Defendant was entitled to retain and/or call up the second Bank Guarantee (which is expressly denied), it was only entitled to retain and expend such portion of the said sum of \$11,500.00 as was necessarily incurred in constructing the main.

56. The cost of constructing the mains was \$6,658.71, thus entitling the Plaintiffs to be reimbursed the sum of \$4,841.29.

57. The secondnamed Defendant has failed and refused and continues to fail and refuse to reimburse the Plaintiffs the sum of \$4,841.29 or any part thereof.

AND THE PLAINTIFFS CLAIM AGAINST THE FIRSTNAMED DEFENDANT

- A. Damages not exceeding \$68,500;
- B. Alternatively the sum of \$25,000.00;
- C. Interest pursuant to Statute;
- D. Costs.

AND THE PLAINTIFFS CLAIM AGAINST THE SECONDNAMED DEFENDANT

- E. Damages not exceeding \$31,500.00;
- F. Alternatively, the sum of \$11,500.00;
- G. Interest pursuant to Statute;
- I. Costs.

DATED the 13<sup>th</sup> day of May. 1991.

PETER POWER

.....  
*Francis Tiernan*  
FRANCIS TIERNAN