

IN THE COUNTY COURT
OF VICTORIA
AT MELBOURNE

NO.

BETWEEN:

GLENN ALEXANDER THOMPSON and
CHERYL MAREE THOMPSON

Plaintiffs

- and -

THE PRESIDENT COUNCILORS AND RATEPAYERS
OF THE SHIRE OF KYNETON

Firstnamed Defendant

- and -

THE KYNETON WATERBOARD
(formerly THE KYNETON SHIRE WATERWORKS TRUST)

Secondnamed Defendant

BOOK OF PLEADINGS

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.
1. (a) The Firstnamed Defendant admits each and every allegation contained in paragraph 1.
- (b) The Secondnamed Defendant does not plead to paragraph 1 as it makes no allegation against it.

SC 2. The Kyneton Shire Waterworks Trust ('the KSWT') was at all material times prior to the creation of the second-named 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.

AD 2. (a) The Firstnamed Defendant does not plead to paragraph 2 of the Statement of Claim as it makes no allegation against it.

- (b) The Secondnamed Defendant admits each and every allegation contained in paragraph 2.

SC 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 said 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 the KSWT.

AD 3. (a) The Firstnamed Defendant does not plead to paragraph 3 as it contains no allegation against it.

- (b) The Secondnamed Defendant admits each and every allegation contained in paragraph 3.

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THE KYNETON WATERBOARD
(formerly THE KYNETON SHIRE WATERWORKS TRUST)

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BOOK OF PLEADINGS

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.
1. (a) The Firstnamed Defendant admits each and every allegation contained in paragraph 1.
- (b) The Secondnamed Defendant does not plead to paragraph 1 as it makes no allegation against it.

SC 2. The Kyneton Shire Waterworks Trust ('the KSWT') was at all material times prior to the creation of the second-named 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.

AD 2. (a) The Firstnamed Defendant does not plead to paragraph 2 of the Statement of Claim as it makes no allegation against it.

- (b) The Secondnamed Defendant admits each and every allegation contained in paragraph 2.

SC 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 said 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 the KSWT.

AD 3. (a) The Firstnamed Defendant does not plead to paragraph 3 as it contains no allegation against it.

- (b) The Secondnamed Defendant admits each and every allegation contained in paragraph 3.

SC 4. On about 12 February 1980 a Mr K.R.Buchanan ('the subdivider') lodged with the firstnamed Defendant notices in the form of the Thirtieth Schedule to the LGA of intention to subdivide into 18 residential allotments a block of residential land owned by him and situated in Tylden Road, Kyneton in the State of Victoria ('the land').

AD 4. (a) Insofar as it contains any allegation against it the Firstnamed Defendant admits each and every allegation contained in paragraph 4.

(b) The Secondnamed Defendant does not plead to paragraph 4 as it contains no allegations against.

SC 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.

5. Insofar as it contains any allegation against them the First and Secondnamed Defendants admit each and every allegation contained in paragraph 5.

SC 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.

AD

6. (a) The Firstnamed Defendant does not plead to paragraph 6 as it contains no allegation against it.

(b) The Secondnamed Defendant admits each and every allegation contained in paragraph 6.

SC 7. On or about 20 February 1980 the firstnamed Defendant served the subdivider with a written notice of requirement pursuant to ss.569E(1) & 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.

AD 7. (a) The Firstnamed Defendant admits each and every allegation contained in paragraph 7.

(b) The Secondnamed Defendant admits each and every allegation contained in paragraph 7.

SC 8. On or about 21 May 1980 the firstnamed Defendant sealed the various plans of subdivision provided by the subdivider in relation to the land with endorsements that a requirement under s.569E(1A) had been made.

AD 8. (a) The Firstnamed Defendant admits each and every allegation contained in paragraph 8.

(b) The Secondnamed Defendant does not plead to paragraph 8 as it contains no allegation against it.

SC 9. In or about October 1980 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 which were or might become payable by the Plaintiffs to the firstnamed Defendant in connection with the subdivision of the land.

FD 9. (a) The Firstnamed Defendant admits each and every allegation contained in paragraph 9 and says further that the Guarantees provided by the Plaintiffs were provided as agents for the owner.

(b) The Secondnamed Defendant does not plead to paragraph 9 as it contains no allegations against it.

SC 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.

D 10. (a) The Firstnamed Defendant admits each and every allegation contained in paragraph 10.

(b) The Secondnamed Defendant does not plead to paragraph 10 as it contains no allegation against it.

SC 11. In consideration of the provision to it of the first Bank Guarantee the firstnamed Defendant 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:

(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 subdivison 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.

AD 11. (a) Save that the Firstnamed Defendant admits the guarantee it denies each and every allegation contained in paragraph 11.

F) (b) The Secondnamed Defendant does not plead to paragraph 11 as it contains no allegation against it.

SC 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.

AD 12. The First and Secondnamed Defendants do not plead to paragraph 12 as it contains no allegations against them.

SC 13. In or about March 1983 the Plaintiffs sold their interest in the said 15 allotments.

B 13. The First and Secondnamed Defendants do not plead to paragraph 13 as it contains no allegations against them.

SC 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.569E(1)(b) of the LGA.

AD 14. (a) The Firstnamed Defendant admits each and every allegation contained in paragraph 14.

(b) The Secondnamed Defendant does not plead to paragraph 14 as it contains no allegation against it.

SC 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 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.

AD 15. (a) The Firstnamed Defendant admits each and every allegation contained in paragraph 15.

(b) The Secondnamed Defendant does not plead to paragraph 15 as it contains no allegation against it.

SC 16. On or about 12 January 1983 the firstnamed Defendant accepted from Westpac, as agent for the Plaintiffs, the sum of \$25,000 in connection with the construction of the road and in purported pursuance of the request and of the first Bank Guarantee.

AD 16. (a) The Firstnamed Defendant admits each and every allegation contained in paragraph 16.

(b) The Secondnamed Defendant does not plead to paragraph 16 as it contains no allegation against it.

SC 17. The Plaintiffs have reimbursed Westpac with the sum of \$25,000 so paid by it as their agent to the firstnamed Defendant at the firstnamed Defendant's request.

AD 17. The First and Secondnamed Defendants do not plead to paragraph 17 as it contains no allegations against them.

SC 18. On or about 19 November 1980 the firstnamed Defendant lifted the requirement on the land 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 and the notification to the Titles Office are in writing. Copies may be inspected at the offices of the Plaintiffs' solicitor by appointment.

AD 18. (a) The Firstnamed Defendant admits each and every allegation contained in paragraph 18.

(b) The Secondnamed Defendant does not plead to paragraph 18 as it contains no allegation against it.

SC 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 1958.

AD 19. The First and Secondnamed Defendants do not plead to paragraph 19 as it contains no allegations against them.

SC 20. In the premises:

- Indefinite*
9/
- (a) no additional or substituted requirement could lawfully be made (pursuant to s.569E of the LGA or otherwise) on the Plaintiffs or any other person(s) in relation to the construction of the road on the land;
- 5/9
(b) there was no requirement on the land at any material time when the Plaintiffs were the owners of any part of the land within the meaning of s.569E(1) of the LGA;
- 5/6
(c) the Plaintiffs were not at any material time the owners of any part of the land from whom the firstnamed Defendant was lawfully entitled to accept any payment (pursuant to s.569E of the LGA or otherwise) in relation to the construction of the road on the land;
- Grand A.*
5/6
(d) the Plaintiffs were not at any material time persons who could lawfully provide or from whom the firstnamed Defendant could lawfully accept security for the cost of construction of the road on the land;
- (e) the firstnamed Defendant had no power lawfully to construct the road on the land;
- (f) the firstnamed Defendant did not act in accordance with law in relation to the subdivision of the land and the construction of the road; and
- (g) the firstnamed Defendant was not at any material time lawfully entitled to:
- (i) request; or
 - (ii) accept from;
- the Plaintiffs the sum of \$25,000 or any other sum in connection with the subdivision of the land or the construction of the road.

AD 20. (a) The Firstnamed Defendant dies each and every allegation contained in paragraph 20.

(b) The Secondnamed Defendant does not plead to paragraph 20 as it contains no allegation against it.

SC

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.

AD 21. (a) The Firstnamed Defendant denies each and every allegation contained in paragraph 21.

(b) The Secondnamed Defendant does not plead to paragraph 21 as it contains no allegation against it.

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 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.

AD 22. (a) The Firstnamed Defendant denies each and every allegation contained in paragraph 22.

(b) The Secondnamed Defendant does not plead to paragraph 22 as it contains no allegation against it.

SC 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.

AD 23. (a) Insofar as it contains any allegations against it the Firstnamed Defendant denies each and every allegation contained in paragraph 23.

(b) The Secondnamed Defendant does not plead to paragraph 23 as it contains no allegation against it.

SG 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:

- (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.

AD 24. (a) The Firstnamed Defendant denies each and every allegation contained in paragraph 24.

(b) The Secondnamed Defendant does not plead to paragraph 24 as it contains no allegation against it.

SC 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.

C) AD 25. (a) The Firstnamed Defendant denies each and every allegation contained in paragraph 25.

(b) The Secondnamed Defendant does not plead to paragraph 25 as it contains no allegation against it.

SC 26. In the premises the firstnamed Defendant was under a duty to take care in the making of the first representation to the Plaintiffs..

F) AD 26. (a) The Firstnamed Defendant denies each and every allegation contained in paragraph 26.

(b) The Secondnamed Defendant does not plead to paragraph 26 as it contains no allegation against it.

SC 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.

AD 27. (a) The Firstnamed Defendant denies each and every allegation contained in paragraph 27.

(b) The Secondnamed Defendant does not plead to paragraph 27 as it contains no allegations against it.

SC 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.

AD 28. (a) Insofar as it contains any allegations against it the Firstnamed Defendant denies each and every allegation contained in paragraph 28.

(b) The Secondnamed Defendant does not plead to paragraph 28 as it contains no allegation against it.

SC 29. By reason of the matters aforesaid the Plaintiffs have suffered loss and damage.

PARTICULARS

(a) The sum of \$25,000.

(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.

AD 29. (a) The Firstnamed Defendant denies each and every allegation contained in paragraph 29.

(b) The Secondnamed Defendant does not plead to paragraph 29 as it contains no allegation against it.

SC 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 has wholly failed; and

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

AD 30. (a) The Firstnamed Defendant denies each and every allegation contained in paragraph 30.

(b) The Secondnamed Defendant does not plead to paragraph 30 as it contains no allegation against it.

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

(a) the sum of \$25,000 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.

AD 31. (a) The Firstnamed Defendant denies each and every allegation contained in paragraph 31.

(b) The Secondnamed Defendant does not plead to paragraph 31 as it contains no allegation against it.

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

(a) the sum of \$25,000 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.

AD 32. (a) The Firstnamed Defendant denies each and every allegation contained in paragraph 32.

(b) The Secondnamed Defendant does not plead to paragraph 32 as it contains no allegation against it.

SC 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 which were or might become payable by the Plaintiffs to the secondnamed Defendant in connection with the subdivision of the land.

AD 33. (a) The Firstnamed Defendant does not plead to paragraph 33 as it contains no allegation against.

(b) The Secondnamed Defendant admits each and every allegation contained in paragraph 9 and says further that the Guarantees provided by the Plaintiffs were provided as agents for the owner.

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

AD 34. (a) The Firstnamed Defendant does not plead to paragraph 34 as it contains no allegation against it.

(b) The Secondnamed Defendant admits each and every allegation contained in paragraph 34.

SC 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:

(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 third warranty is to be implied from the Plaintiffs' provision and the secondnamed Defendant's acceptance of the second Bank Guarantee, from the need to give business efficacy to the relationship between the parties and by law.

AD 35. (a) The Firstnamed Defendant does not plead to paragraph 35 as it contains no allegation against it.

(b) Save that the Secondnamed Defendant admits the existence of the guarantee it otherwise denies each and every allegation contained in paragraph 35.

SC 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.

AD. 36. (a) The Firstnamed Defendant does not plead to paragraph 36 as it contains no allegation against it.

(b) The Secondnamed Defendant admits each and every allegation contained in paragraph 36.

SC 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 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.

AD 37. (a) The Firstnamed Defendant does not plead to paragraph 37 as it contains no allegation against it.

(b) The Secondnamed Defendant admits each and every allegation contained in paragraph 37.

SC 38. On or about 12 January 1983 the secondnamed Defendant accepted from Westpac, as agent for the Plaintiffs, the sum of \$11,500 in connection with the construction of the main and in purported pursuance of the request and of the second Bank Guarantee.

AD 38. (a) The Firstnamed Defendant does not plead to paragraph 38 as it contains no allegation against it.

(b) The Secondnamed Defendant admits each and every allegation contained in paragraph 38.

SC 39. The Plaintiffs have reimbursed Westpac with the sum of \$11,500 so paid by it as their agent to the secondnamed Defendant at the secondnamed Defendant's request.

AD 39. (a) The Firstnamed Defendant does not plead to paragraph 39 as it contains no allegation against it.

(b) Insofar as it contains any allegations against it the Secondnamed Defendant does not admit each and every allegation contained in paragraph 39.

SC 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.

AD 40. (a) The Firstnamed Defendant does not plead to paragraph 40 as it contains no allegation against it.

(b) The Secondnamed Defendant does not admit each and every allegation contained in paragraph 40.

AD 41. (a) The Firstnamed Defendant does not admit each and every allegation contained in paragraph 40.

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

AD 41. (a) The Firstnamed Defendant does not plead to paragraph 41 as it contains no allegation against it.

(b) Insofar as it contains any allegations against it the Secondnamed Defendant denies each and every allegation contained in paragraph 41.

SC 42. In the premises:

- (a) no additional or substituted requirement could lawfully be made on the Plaintiffs in relation to the construction of the main on the land;
- (b) the Plaintiffs were not at any material time the owners of any part of the land 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) 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 or any other sum in connection with the subdivision of the land or the construction of the main.

42. (a) The Firstnamed Defendant does not plead to paragraph 42 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 42.

SC 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:

- (i) contrary to law; and/or
- (ii) wrongful and in breach of the third warranty; and/or
- (iii) negligent and in breach of a duty owed by it to

AD 43. (a) The Firstnamed Defendant does not plead to paragraph 43 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 43.

SC 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 as detailed in paragraph 38 hereof was:

- (i) contrary to law; and/or
- (ii) wrongful and in breach of the third warranty; and/or
- (iii) negligent and in breach of a duty owed by it to the Plaintiffs.

AD 44. (a) The Firstnamed Defendant does not plead to paragraph 44 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 44.

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.

AD 45. (a) The Firstnamed Defendant does not plead to paragraph 45 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 45.

SC 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 and the construction of works thereon 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:

(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 secondnamed 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.

AD 46. (a) The Firstnamed Defendant does not plead to paragraph 46 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 46.

SC 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.

AD 47. (a) The Firstnamed Defendant does not plead to paragraph 47 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 47.

SC 48. In the premises the secondnamed Defendant was under a duty to take care in the making of the second representation to the Plaintiffs.

AD 48. (a) The Firstnamed Defendant does not plead to paragraph 48 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 48.

SC 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.

AD 49. (a) The Firstnamed Defendant does not plead to paragraph 49 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 49.

SC 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.

AD 50. (a) The Firstnamed Defendant does not plead to paragraph 50 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 50.

SC 51. By reason of the matters aforesaid the Plaintiffs have suffered loss and damage.

PARTICULARS

- (a) The sum of \$11,500.
- (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 prior to 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.

AD 51. (a) Insofar as it contains any allegations against it the Firstnamed Defendant denies each and every allegation contained in paragraph 51.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 51.

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

AD 52. (a) The Firstnamed Defendant does not plead to paragraph 52 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 52.

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

(a) the sum of \$11,500 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.

AD 53. (a) The Firstnamed Defendant does not plead to paragraph 53 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 53.

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

(a) the sum of \$11,500 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.

AD 54. (a) The Firstnamed Defendant does not plead to paragraph 54 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 54.

AD 55. Further, by reasons of the facts set out in paragraph 9 and 10 of the Statement of Claim the Firstnamed and Secondnamed Defendants carried out works to the land referred to in paragraph 5 of the Statement of Claim and in so doing acted to their financial detriment.

PARTICULARS
=====

Between October 1982 and September 1984:

- (i) the Firstnamed Defendant constructed a road upon the land at a cost to it of \$28,708.
- (ii) the Secondnamed Defendant between August and November 1981 constructed a water mains to the land at a cost to it of \$6,658.71.

AD 56. In the premises referred to in paragraph 55 hereof the Plaintiffs are estopped from denying the validity of the guarantee given by them to the Defendants.

AD 57. Further, and alternatively to paragraph 56 the Defendants carried out, at their cost, sundry works to the land referred to in paragraphs 14 and 36 of the Statement of Claim in circumstances where the Plaintiffs received a substantial benefit in circumstances where it would be unconscionable for the Plaintiff to retain such benefit.

Between October 1982 and September 1984:

- (i) the Firstnamed Defendant constructed a road upon the land at a cost to it of \$28,708.
- (ii) the Secondnamed Defendant between August and November 1981 constructed a water mains to the land at a cost to it of \$6,658.71.

1

Notice by person
proposing to lay
out street, &c., on
or to subdivide
private property.
S. 569
substituted by
No. 6975 s. 22.
Non-application
of subdivision to
sales to Crown,
&c.
Para. (b)
substituted by
No. 7485 s. 33
(a).

Thirtieth
Schedule.

Plan.

569. (1) Where in the case of any land to which this subdivision applies any person intends—

- (a) to make or lay out on such land any new street road lane or passage whether the same respectively is to be dedicated to the public as a highway or not; or
- (b) to subdivide such land into two or more parts otherwise than by the sale transfer or conveyance of one or more parts of the land to the Crown or to any person on behalf of the Crown or to any public statutory body constituted under any law of the State or the Commonwealth—

such person shall—

- (c) give notice of his intention to the council in writing in the form of the Thirtieth Schedule; and
- (d) submit to the council a plan and a copy thereof which copy

shall be retained by the council and also as many additional copies thereof as for the purposes of reference to statutory authorities the council thinks necessary.

In this matter, Parkvalley P/L (Buckingham Family Co) intended to subdivide the subject land into 18 Residential allotments.

- 41 Parkvalley Pty.Ltd. to subdivide Part Crown Portion 132, Trentham Road, P/Lauriston into Eighteen, 1.2ha. lots and Six 0.3ha industrial lots. Deferred from 19/9/79. Report received from the Country Roads Board.

Crs. Goodman) That the application be approved subject to:
Rothe)

*(COUNCIL MINUTES, Oct 1979, Discussed Doc C1)
(BUSHING PLANNING PERMIT)*

I, Arthur Buchanan or his Company owned the land at this time and the Owners Certification on the application was not filled in.

DATED the 18th day of Sept. 1979

Signature of Applicant *A. Buchanan*
Telephone No. *762 2175*

OWNER'S CERTIFICATION

Where the applicant is not the owner the concurrence of the owner shall be evidenced by his executing the following:

I/We _____ of _____
(the owner(s) of the above described land hereby concur in the above application.

Dated the _____ day of _____ 19 ____

Signature of owner(s) _____

Witness _____

of _____

* Delete whichever is inapplicable.
† Insert direction: northern, southern &c., or northerly, southerly &c., as appropriate.

*PART
(Doc C1)*

On 12th FEB 1980 BUCHANAN LODGED A NOTICE
TO THE EFFECT OF THE TARIFF SCHEDULE OF
THE U.G.A.

NOTICE AND REQUEST

I/We ... HARRIS ... LTD
of ... WHITEHOUSE RD ... Box Hill ...

HEREBY GIVE NOTICE of my/our intention to layout a road, street, lane or
passage to and subdivide land into allotments.

1. Situation of Land
... 125 ... 132 ... 138 ...
 2. Name and Address of Registered Proprietor of Land
... 3757 ...
 3. The Interest of that Person in the Land
... 3757 ...
 4. Particulars of any Sale to Him of the Land
...
 5. Consent of Registered Proprietor of the Land
* ...
- A plan with the required particulars, set out thereon, together with a
copy of such plan to be retained by the Council and the fee of \$88
are submitted herewith and I/We request the Council to cause the
said plan to be sealed with the seal of the Municipality.

DATED this ... day of ... 1980

Signature (s) ...

To the Municipal Clerk,

SUBJECT ...

THE ENGINEERS REPORT TO COUNCIL OF 24/2/80
REFERRED THE Plans TO COUNCIL AND RECOMMENDED
THAT "REQUIREMENTS BE SERVED"

8. SUBDIVISION REQUIREMENTS.

Recommend requirement be served under Section 569E (1) & (1A)
on the following plans of subdivision.

- (a) 16 lot plan of subdivision (3 acres).
Crown Portion 129 and Part Crown Portion 132,
Parish of Lauriston. Trentham Road.
Owner: K. R. Buchanan.

THE COUNCIL RESOLVED TO ADOPT THE RECOMMENDATION

3. SUBDIVISION REQUIREMENTS:

Crs. Rothe) That the recommendations of the Engineer as set out in
Goodman) Item 8(a) and 8(b) be adopted and the appropriate notices
be served on the subdivider.

CARRIED.

THE NOTICES OF REQUIREMENT WERE NOT SERVED
AT THIS TIME

HAVING LODGED A THIRTIETH SCHEDULE NOTICE
AND THE REGISTRAR OF TITLES HAD NOT YET
APPROVED THE PLANS THE ALLOTMENTICOULD
NOT BE SENT.

9. (1) Where a notice of intention to subdivide land into
allotments in the form of the Thirtieth Schedule to the Local
Government Act 1958 has been given (whether before or after the
commencement of this Act) or where in respect of any land such
a notice is required to be given no person shall sell any such
allotment unless the land is under the operation of the Transfer
of Land Act 1958 and the allotment is an allotment on a plan of
subdivision approved by the Registrar pursuant to section
ninety-seven of that Act.

(2) Any agreement for sale entered into in contravention of
the last preceding sub-section shall be absolutely void and of no
effect and any person who has paid any money under such agreement
shall be entitled to recover the same.

THREE OR MORE
Sale of subdivided
land to be
prohibited
before plan
approved by
Registrar.
1963 BY 7052

(SHE OF LAND ACT)

5

NOTWITHSTANDING THAT IT WAS ILLEGAL
BUCHANAN HAD SOLD AT LEAST TWO OF THE
Allotments. (NOTICES OF DISPOSITION OPPOSITE)

IN ORDER TO AVOID THE PROVISIONS OF SECTION 9
OF THE SALE OF LAND ACT WHICH AT THAT TIME
PREVENTED THE SALE OF ALLOTMENTS ON SUBDIVISION
OF MORE THAN TWO ALLOTMENTS (etc) BUCHANAN
THEN LODGED SEVEN SEPERATE PLANS WHICH WERE
CONTRIVED TO CREATE SEVERAL SUBDIVISIONS
OF TWO LOTS EACH

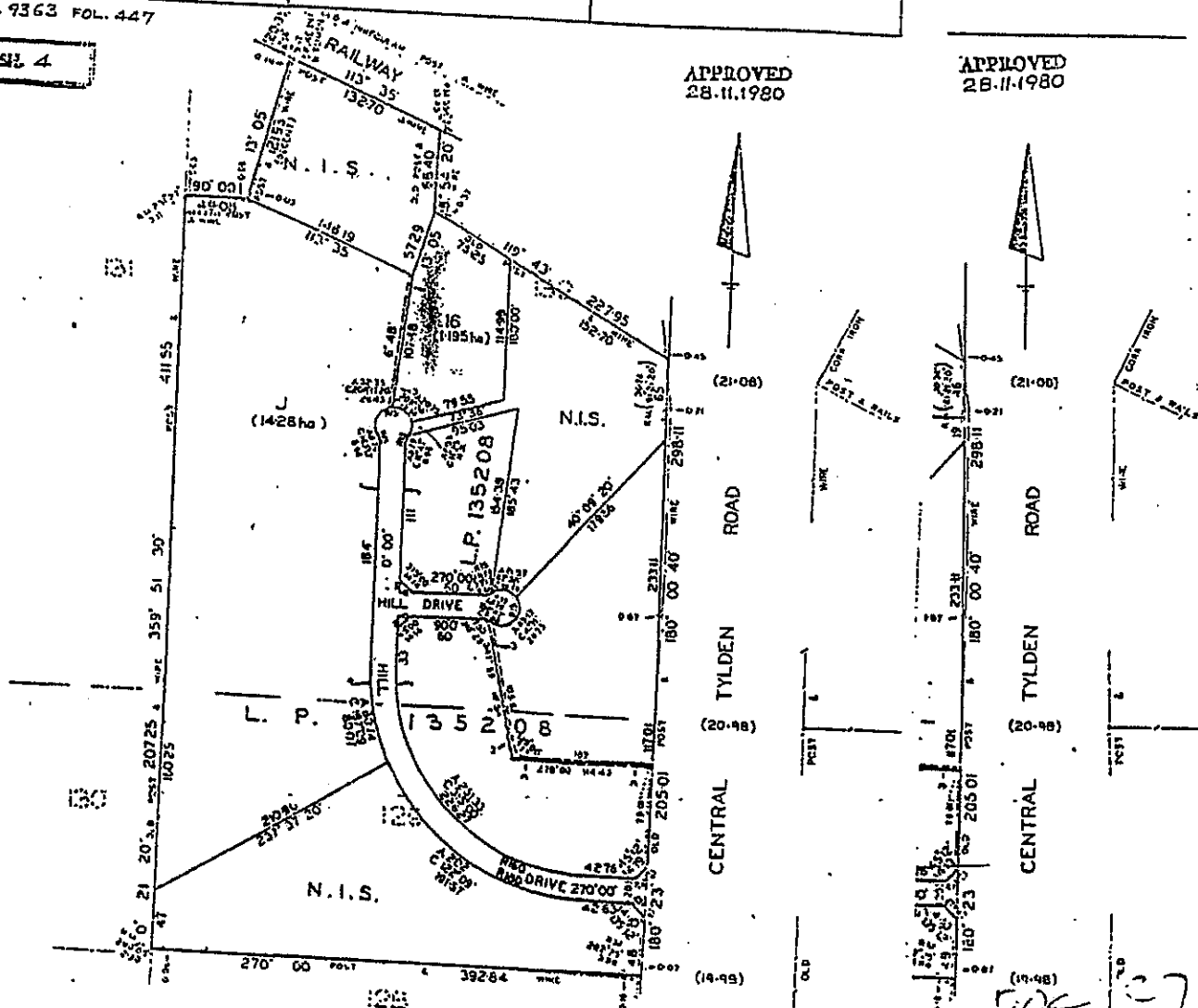
N OF SUBDIVISION OF:		SHOWING CARRIAGEWAY & DRAINAGE	ENCLOSURE MAP	CHANGES & OTHER NOTATIONS
PART OF CROWN PORTION 132 & 129			GREEN DRAINAGE	
PARISH: LAURISTON COUNTY: DALHOUSIE			R.M.'S & ROADWIDTHS ARE NOT SHOWN TO SCALE. R.M.'S ARE 0.7 METRE LONG G.I. PIPES UNLESS OTHERWISE SHOWN	DRAINAGE VIDE PS 135202 ROADWIDTHS ARE NOT SHOWN TO SCALE. RE 0.7 METRE LONG G.I. PIPES UNLESS OTHERWISE SHOWN

VOL. 9363 FOL. 447

THO 514

APPROVED
28.11.1980

APPROVED
28.11.1980



10. E. M. M. - 11

D-319-

Buchanan Lodged 30th Schedule notices in relation to these new. Continued plan

(6)

The New Notices are dated 4/3/80 which is also the date which the notices of deposit are given as the date of possession passing to the new Purchasers.

Local Government Act 1958

Thirtieth Schedule

NOTICE AND REQUEST

C6
C6

James H. H. & Co. (Aust.) Pty. Ltd.
282 Whitehorse Road, Box Hill. Vic. 3128

HEREBY GIVE NOTICE of my/our intention to layout a road, street, lane or passage to and subdivide land into allotments.

1. Situation of Land

.. Crown Portion 129, 1 Part C.P. 132, Parish - Lauriston
.. County - Bulshough, Volume 8909, folio 538

2. Name and Address of Registered Proprietor of Land

.. J. H. Buchanan & J. H. Buchanan

.. 1, Yea Road, Hummavale, 3757

3. The Interest of that Person in the Land

.. Owners

4. Particulars of any Sale to Him of the Land

5. Consent of Registered Proprietor of the Land

A plan with the required particulars set out thereon, together with a copy of such plan to be retained by the Council and the fee of \$44... are submitted herewith and I/We request the Council to cause the said plan to be sealed with the seal of the Municipality.

DATED this ... day of March, 1980.

Signature (s) ... John E. Wall ...

... B. Buchanan

To the Municipal Clerk,
Shire of LYNETON.

Not Plan submitted
5 sections
1. dules all
to this

The Council served a separate Notice of requirements in relation to each of the CONTINUED PLANS which were numbered 79305 E / 79305 K

The Notices of requirements were dated 20/2/80 But served by registered mail of 6/3/80 i.e. 2 days after the Continued plans were lodged.

SHIRE OF KYNEDON
NOTICE OF REQUIREMENT UNDER SECTION 569E(1) & (1A) OF THE LOCAL GOVERNMENT ACT 1958.

TO: Mr. R. Buchanan,
1 Yon Road.,
HUMEVALE, 3757.

Whereas you are the owner of all that piece of land being Crown Portion 129 and Part Crown Portion 132, Parish of Lauriston of which a notice in or to the effect of the thirtieth Schedule to the Local Government Act 1958, together with plan of subdivision Reference No. 79305/P referred to therein was lodged with the Council of the Shire of Kyneton on the 12th February, 1980.

Now therefore take note:-

- (1) That the said Council pursuant to Section 569E(1) of the said Act requires you to construct to the stage specified below (viz. Part Construction) the whole of all new drains, channels, streets, roads, lanes and passages shown on the said plan of subdivision which after the sealing of the said plan the Council would be authorised to make or construct within the meaning of Division 10 of Part XIX or within the meaning of Section 651 of the said Act to the satisfaction of Council in accordance with plans and specifications approved by Council.

"Part Construction" shall mean the full construction of all roads, streets, lanes and passageway pavements, (sealed 5.5 width) roadside furniture, associated drainage, drainage of all properties including legal and proper outfall drainage.

- (2) That the said Council pursuant to Section 569E (1A) of the said Act REQUIRES you to give or cause to be given to the said Council a written statement or statements from the Kyneton Shire Waterworks Trust that an agreement or agreements have been entered into with this authority for the provision of Water supply to the subdivision.

The Common Seal of the Ratepayers of the Shire of Kyneton, 1980 in presence of:-

.....J. N. L. DRECH
.....M. HARPER
.....S. G. PORTER

Australia Post
Certified Mail Posting Receipt
TO BE COMPLETED BY THE SENDER
Name and Address
James A Harris & Associates P/L
882 Whitahorse Road,
BOX HILL, VIC. 3122.
SENT: 06th March, 1980
If you require a RETURN RECEIPT (extra fee payable) write the words "RR" in the box on the back of the envelope. Stamp the return receipt in the box on the back of the envelope. Complete it and attach it to the back of the envelope.
See us for conditions and details of our service.
PAT120

This is a true & correct copy,

Alan Kuzh

Alan Kuzh

PLANNING OFFICER,
SHIRE OF KYNEDON.

Australia Post
Certified Mail Posting Receipt
TO BE COMPLETED BY THE SENDER
Name and Address
Mr. K. R. Buchanan,
1 Yon Road.,
HUMEVALE, VIC. 3757.
SENT: 06th March, 1980
If you require a RETURN RECEIPT (extra fee payable) write the words "RR" in the box on the back of the envelope. Stamp the return receipt in the box on the back of the envelope. Complete it and attach it to the back of the envelope.
See us for conditions and details of our service.
PAT120

(8)

Although Buchanan thought he had exploited a loophole in the law he had in fact broken the law because as it was his clear intention to subdivide the land into 18 allotments he was bound to give one 30th schedule notice and one plan showing all allotments.

Notice by person proposing to lay out street, &c., on or to subdivide private property.

S. 569 substituted by No. 6975 a. 21.

Non-application of subdivision to sales to Crown, &c.

Para. (b) substituted by No. 7495 a. 33 (a).

Thirtieth Schedule.

Plan.

569. (1) Where in the case of any land to which this subdivision applies any person intends—

- (a) to make or lay out on such land any new street road lane or passage whether the same respectively is to be dedicated to the public as a highway or not; or
- (b) to subdivide such land into two or more parts otherwise than by the sale transfer or conveyance of one or more parts of the land to the Crown or to any person on behalf of the Crown or to any public statutory body constituted under any law of the State or the Commonwealth—

such person shall—

- (c) give notice of his intention to the council in writing in the form of the Thirtieth Schedule; and
- (d) submit to the council a plan and a copy thereof which copy

1958

Local Government

No. 6299

349

shall be retained by the council and also as many additional copies thereof as for the purposes of reference to statutory authorities the council thinks necessary.

Particulars to be set out on plan. S. 569A inserted by No. 6975 a. 21.

569A. (1) The plan submitted to the council shall show distinctly delineated thereon—

- (a) all allotments into which the land is to be subdivided marked with distinct numbers or symbols;
- (b) all streets roads lanes or passages made or laid out on such land or abutting thereon and the names of such streets or roads;
- (c) all new streets roads lanes or passages proposed to be made or laid out on such land together with the extent (if any) to be proposed to round off the

NOT ONE OF THE PLANS SUBMITTED

Comply

(9)

Notwithstanding the unlawful Sale of the 2 Allotments Buchanan was unable to realise the proceeds due to:-

1962

Sale of Land

No. 6975

11

(5) Any question as to the sufficiency of any instrument of mortgage tendered pursuant to this section shall in the absence of agreement between the parties be determined by an arbitrator.

Sale of land subdivided into not more than two allotments.

8A. (1) Where—

(a) a notice of intention to subdivide land into not more than two allotments in the form of the Thirtieth Schedule to the *Local Government Act 1958* has been given (whether before or after the commencement of the *Sale of Land (Amendment) Act 1969*); or

S. 8A inserted by
No. 7858 s. 2.

(b) in respect of any land such a notice is required to be given—
and neither of the allotments has been sold before the said commencement, no person shall sell either of those allotments before a plan of subdivision on which each of the allotments is shown as an allotment has been sealed with the seal of the municipality and, where any part of the land is under the operation of the *Transfer of Land Act 1958*, the plan has been approved by the Registrar pursuant to section 97 of that Act unless the contract provides that the deposit and all other moneys payable by the purchaser are to be paid to a solicitor or to a licensed estate agent who shall be named or specified in the contract to be held by the solicitor or licensed estate agent on trust for the purchaser until the plan has been so sealed and, where any part of the land is under the operation of the *Transfer of Land Act 1958*, so approved.

And even though the plans were not yet sealed a notice of Requirement had been served therefore:-

Ss. (3) amended
by No. 8531 s. 3
(b) (i).

Para. (a)
amended by No.
8531 s. 3 (b) (ii).

(3) Where pursuant to this section the council requires the full construction or part construction of any street road lane or passage or any payment security or undertaking to be made or given in respect thereof or the provision of works of water supply sewerage or drainage the following provisions shall have effect:—

(a) The council shall cause an endorsement to be made on the plan before it is sealed to the effect that a requirement has been made under sub-section (1) or sub-section (1A) of this section;

569 E
(3)

L. G. F.

and

Para. (d)
amended by
Nos. 7852 s. 3 (d),
(c); 7272 s. 6 (d)
(ii).

Para. (e)
substituted by
No. 7852 s. 3 (d),
amended by
Nos. 7272 s. 6
(d) (iv), 9512 s. 2
(i).

(d) When every requirement has been either complied with by the owner or withdrawn by the council the council shall cause to be lodged in the Office of Titles a statement to that effect and a minute of that statement shall thereupon be endorsed on the plan;

(e) The Registrar of Titles shall not approve the plan until a statement as required by the last preceding paragraph or a statement by the Planning Appeals Board that the requirement has been satisfied has been lodged in the Office

569 E
(3)

L. G. F.

Buchanan therefore approached the Council.

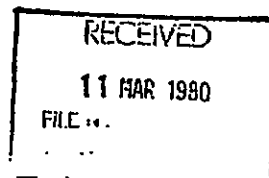
K. R. & Y. R. Buchanan
EDGECOMBE ROAD, KYNETON, 3444

Office:
1 YEA ROAD, HUMEVALE, 3757. PHONE 776 2878. KYNETON OFFICE (054) 22 1631

7th March, 1980.

Mr. G. Wilson,
Shire Engineer,
Shire of Kyneton,
Shire Offices,
KYNETON. 3444

COPY



Dear Sir,

Re: Tylden Road Subdivision

I am enclosing a cheque for \$376.00 which brings the total paid to \$464.00.

Would you treat the industrial and residential plans separately with regard to requirements.

There is a water requirement on the 1.2 ha lots of \$12,593.00 plus \$200 levy per lot which includes the cost of supplying water to the industrial lots.

There is no sewerage requirement on the 1.2 ha allotments, however there is on the industrial lots but no details have been given because Garlick & Stewart have not finalized details. The road cost will be approximately \$13,000.00.

Would it be possible for approval to be given at the next Council meeting to accept Bank Guarantees, so that the requirements on the subdivision may be lifted.

Yours faithfully,

Ken Buchanan

K.R. BUCHANAN

To which Council replied :-

7th May, 1920.

Mr. H. Buchanan,
1 Yea Road,
HUMWALE. VIC. 3757.

COPY

(11)
Doc
C10

Dear Sir,

RE: PLAN OF SUBDIVISIONS CROWN PORTION 129 AND PART CROWN PORTION 132,
PARENT LOTS.

Council would be prepared to seal the plans of subdivision without a requirement placed thereon if a Bank Guarantee to the value of \$25,000 is lodged to cover road construction costs.

Yours faithfully,

G. J. WILSON
SHIRE ENGINEER

COPY ONLY.

Which is an intention to Breach

366

1958

Local Government

No. 6299

provisions of section five hundred and seventy of this Act, cause the construction to be carried out in accordance with the plans and specifications submitted to the council by him or on his behalf.

Sec. (3) amended
by No. 8531 s. 3
(b) (i).

(3) Where pursuant to this section the council requires the full construction or part construction of any street road lane or passage or any payment security or undertaking to be made or given in respect thereof or the provision of works of water supply sewerage or drainage the following provisions shall have effect:—

Para. (a)
amended by No.
8531 s. 3 (b) (ii).

(a) The council shall cause an endorsement to be made on the plan before it is sealed to the effect that a requirement has been made under sub-section (1) or sub-section (1A) of this section;

569 E
(3)(a)

12

Mr Buchanan however, who was unable
to pay his Petrol Account at my
Service Station at this time
did not lodge a Guarantee.
The Council Therefore:-

21/5/80

02)
21)

ENGINEER'S REPORT:

18-lot Plan of Subdivision (Industrial lots) Lauriston Reservoir Road
Part Crown Portion 132, Parish Lauriston.

Crs. Pearce) That the plan reference 79305/B be signed and
Salisbury) the seal attached subject to a requirement under
Sub-section (1A) of Section 569E of the Local
Government Act.

CARRIED.

(b) Crs. Rollinson) That the plan reference 79305/C be signed and the
Pearce) seal attached subject to a requirement under Sub-section
(1A) of Section 569E of the Local Government Act.

CARRIED.

(c) Crs. Pearce) That the plan reference 79305/D be signed and the
Salisbury) seal attached subject to a requirement under Sub-section
(1A) of Section 569E of the Local Government Act.

CARRIED.

2. 18-lot plan of subdivision three (3) acre residential.
Trencham Road - Hill Drive.
Crown Portion 129 and Part Crown Portion 132,
Parish Lauriston.

(a) Crs. Roche) That the plan reference 79305/E be signed and the
Hickey) seal attached subject to a requirement under Sub-section
(1) and (1A) of Section 569E of the Local Government Act.

CARRIED.

(b) Crs. Pearce) That the plan reference 79305/F be signed and the
Rollinson) seal attached subject to a requirement under Sub-section
(1) and (1A) of Section 569E of the Local Government Act.

CARRIED.

(c) Crs. Rollinson) That the plan reference 79305/G be signed and the
Salisbury) seal attached subject to a requirement under Sub-section
(1) and (1A) of Section 569E of the Local Government Act.

CARRIED.

(d) Crs. Pearce) That the plan reference 79305/H be signed and the
Salisbury) seal attached subject to a requirement under Sub-section
(1) and (1A) of Section 569E of the Local Government Act.

CARRIED.

(e) Crs. Rollinson) That the plan reference 79305/I be signed and the
Pearce) seal attached subject to a requirement under Sub-section
(1) and (1A) of Section 569E of the Local Government Act.

CARRIED.

(f) Crs. Salisbury) That the plan reference 79305/J be signed and the seal
Pearce) attached subject to a requirement under Sub-section
(1) and (1A) of Section 569E of the Local Government Act.

CARRIED.

(g) Crs. Pearce) That the plan reference 79305/K be signed and the
Rollinson) seal attached subject to a requirement under Sub-section
(1) and (1A) of Section 569E of the Local Government Act.

CARRIED.

Crs. Roche) That the Engineer's Report and Addendum be received
Goodman) and adopted.

CARRIED.

18

(13)

Mr Buchanan therefore was unable to realise the funds from his uncompleted sales.

Mr Buchanan was still unable to pay his petrol account at M. J. Service Station.
I was not concerned as Buchanan was clearly wealthy - merely having a liquidity problem.

In or about September/October 1980 Mr Buchanan approached me with a proposition which was -

A/ He would purchase from me 10 blocks of land on the Woodleigh Heights Estate at Kyneton as he wanted to develop a Retirement Village.

B/ I was to purchase the unsold lots on the Tylster R^d Subdivision (The Subject Subdivision).

C/ He was required to build the roads etc on the Tylster R^d land and was going to use the money realised from the sale of the other lots already sold to construct the roads.

D/ He was required to lodge a guarantee with the council which would be released as soon as the roads etc were constructed.

E/ I was to lodge the Guarantee.

F/ Palmer Stevens & Renwick would handle all the transactions for us.

(14)
I Agreed and Did Lodge the
Guarantees.

I Subsequently Purchased 15 of the 18
Allotments on the Tyliden R^o Subdivision

Buchanan Failed to Purchase the 10
allotments on the Woodleigh Heights Estate
from me.

AT THE TIME OF PROVIDING THE GUARANTEE
I HAD THE REASONABLE EXPECTATION THAT
THE COUNCIL AND WATER TRUST
WOULD ONLY ACCEPT THE GUARANTEES
IN RELATION TO A LEGALLY ENFORCEABLE
AGREEMENT BETWEEN THEMSELVES AND
BUCHANAN OR A LEGAL REQUIREMENT
UPON BUCHANAN.

BUT SIMPLY IT DID NOT EVEN CROSS MY MIND
THAT MY GUARANTEE WAS TO BE USED TO
LET BUCHANAN OFF THE HOOK SO TO SPEAK

I SIMPLY THOUGHT THAT THE GUARANTEE
WAS REQUIRED IN THE NORMAL COURSE
OF EVENTS AND THAT IT WOULD BE
RELEASED WHEN BUCHANAN SATISFIED
WHATEVER LEGAL OBLIGATIONS HE HAD.

AS IT TURNED OUT I NOW KNOW THE COUNCIL
RELEASED BUCHANAN FROM HIS OBLIGATION
AND THAT EFFECTIVELY THERE WAS
THEN NOTHING TO GUARANTEE.

(15)
AS I NOW KNOW THE COUNCIL AND WATER
TRUST ACCEPTED THE GUARANTEES FOR
THE PURPOSE OF GIVING EFFECT TO THE
UNKNOWN INTENTION INDICATED IN COUNCIL
LETTER OF 7/5/80 WHICH WAS AN
INTENTION TO ACT IN BREACH OF
569E(3)(a) OF THE L.G.A.

THE COUNCIL AND WATER TRUST
RELEASED BUCHANAN FROM HIS LAWFUL
OBLIGATIONS AND IN DOING SO PLACED
MY ^{OR} GUARANTEES AT RISK.

IN ORDER TO GIVE EFFECT TO THEIR INTENTION
THE COUNCIL "LIED" TO THE REGISTRAR
OF TITLES.

The Registrar of Titles,
283 Queen Street.,
MELBOURNE. VIC. 3000.

24th November, 1980.

Dear Sir,

Plan of Subdivision 2 lots. Part Crown Portion 129 and Part Crown Portion 132,
Parish of Lauriston. Surveyors Reference No. 79305/G. Plan Sealed 21st May, 1980.

Notice is given that the subdivider K. R. & Y. R. Buchanan, has complied with
the conditions of the requirement placed on the above plans pursuant to Section
569E 1 and 1A of the Local Government Act 1958.

Yours faithfully,

S. G. NORTON
SENIOR SECRETARY

(Doc - c15)

11
It is the aim of Informing the registrar
of titles the Council knew the
representation to be false.

INTERROGATORY

9. Look at paragraph 18 of the 'Plaintiffs' Statement of Claim and state:

(a) what the conditions of the requirement therein referred to were;

(b) whether each of the conditions therein referred to had been complied with in any and if so what way in or about -

(i) September 1980;

(ii) October 1980;

(iii) November 1980;

(iv) some other and if so what date in 1980 -

by the sub-divider therein referred to;

(c) whether each of the conditions therein referred to were not complied with in any and if so what way.

COUNCIL'S ANSWER

9. In answer to Interrogatory 9:

4.

(a) The requirements of Section 569E of the Local Government Act 1958;

(b) No;

(c) At a later stage the conditions were complied with by the Firstnamed Defendant.

(17)

THE COUNCIL HOWEVER ALWAYS INTENDED
 "THAT THE REQUIREMENTS WERE
 SECRETLY STILL ON FOOT"

8. A plan of subdivision must be sealed or rejected by a council within 100 days of its submission to the council. A council will no longer be able to hold up the sealing of the plan until roads are made but the power to require full or part construction of roads is continued. However, the plan must be sealed before the requirement is carried out so that the subdivider can proceed with his application to have the plan registered by the Registrar of Titles. The council's position will be protected by providing that the Registrar of Titles is not to register the plan until the requirement has been carried out.

(HANSARD [ASSEMBLY] 1962)
 Page 1058

9. Where complex problems have arisen under the existing laws which cannot be solved by application of the standards provisions of the Bill, provision is made for the parties to apply to an arbitrator who will be able to make whatever orders he thinks necessary to sort out the complications.

Mr. Rylah.

BUT WITHOUT AUTHORITY OF LAW.

Para. (d)
 amended by
 No. 7052 s. 3
 (c); 7272 s. 8 (d)
 (iii).

(d) When every requirement has been either complied with by the owner or withdrawn by the council the council shall cause to be lodged in the Office of Titles a statement to that effect and a minute of that statement shall thereupon be endorsed on the plan;

Para. (e)
 substituted by
 No. 7052 s. 3 (d),
 amended by
 No. 7272 s. 6
 (d) (iv), 9512 s. 2
 (i).

(e) The Registrar of Titles shall not approve the plan until a statement as required by the last preceding paragraph or a statement by the Planning Appeals Board that the requirement has been satisfied has been lodged in the Office of Titles;

569 E
 (3)

L.G.F

of the subsection. Consequently, upon the plan of subdivision having been approved by the Registrar of Titles Mr Buchanan was released from any statutory obligation to carry out street construction or waterworks under the terms of the requirement.

4/JO/E2
 Thomson

(Judgment of R 235 1987 - Page 9)

I have been unable to locate any evidence of any further communication with Buchanan until 3/6/81 when the Engineers report of the Kyneton Waterworks Trust relates

age 6
W13) "Mr Buchanan who has expressed the wish that these works be delayed for approximately six months"

Whereupon the Trust resolved:-

3. TENDERS

Commr Jenkins) That the Report be received and the
Fielding) subdividers be advised of the costs involved and permission to proceed be requested.

CARRIED.

After which:-

- 6 -

KYNETON SHIRE WATERWORKS TRUST

(19)

1st July, 1981.

Engineer's Report Contd...

The abattoirs Road and Johnson Court works are ready to proceed but the other two are subject to approval by the subdivider has not yet replied to the Trust on this matter but consider that he is likely to request a delay in implementing these works. We see no point in proceeding with the Hill Drive works but the Lauriston Road main will provide an adequate fire service to the Sawmill which is considered important from the point of view of protection of the town. We therefore recommend that the Trust give consideration to constructing these works using alternate finance if necessary such as Headworks contributions, which could be recouped at a future date.

(PAGE 2 DOC W 14)

119

SUBSEQUENTLY IN THE SECRETARY'S REPORT TO THE TRUST OF 7TH APRIL 1982 THE TRUST IN COMMUNICATION WITH BUCHANAN MADE SPECIFIC REFERENCE TO MY GUARANTEE

PARKVALLEY PTY. LTD. - SUPER LOT SUBDIVISIONS

1. Reduce \$27,369-00 guarantee to \$10,000-00 covering Castles Crescent and High Level Area augmentation.
2. Retain \$11,500 re G.A&C.M. Thompson Subdivision - Trentham Road.
3. Supply Bank guarantee \$8361-00. Construction of mains to super-lots and security for consolidation of Lot 1 and Lot M.
4. Cash payments: (i) Engineering and Administration Ref3. \$1254-00
(ii) Non-refundable Cont. Super-lots \$24000-00
(iii) Pay Lauriston Road main. \$5000-00
5. Sign agreement included in Clause re Non refundable contribution \$12,000-00 Lot 6 and units in excess of 50.

Buchanan has submitted the following arrangements :-

- | | <u>Bank</u>
<u>Guarantee</u> | <u>Cash</u> |
|------------------------------|---------------------------------|-------------|
| 1. Agree - Reduce Guarantee. | | |
| 2. Agree - No action. | | |

(DOC W15)

.../5

NOTE :- DESPITE SPECIFIC REQUEST THE WATER BOARD HAS REFUSED TO DISCLOSE THE CORRESPONDENCE REFERRED TO AND RELATED TO THIS MINUTE

5. Copy of all correspondence and or documents relating to item 2 of the matters referred to in the secretary's report of the Kyneton Shire of Waterworks Trust dated 7th April 1982 under the heading "Parkvalley Pty. Ltd. - super lot subdivision" including any and all preceding and subsequent related communications and documentation.

My Schedule

My Schedule
Kyneton
Reply

You will note that documents no. 5 in your schedule have not been included in our supplementary Affidavit. In our view these documents are not relevant to these proceedings

20

(IN APRIL OF 1982 I DISCOVERED BUCHANAN WAS INVOLVED IN FRAUDULENT LAND TRANSACTIONS. AND FURTHER THAT GRAEME BOLTON OF THE FIRM PALMER STEVENS & RENNICK HAD ACTED FOR BUCHANAN IN THESE SALES

THE FIRM PALMER STEVENS & RENNICK AND IN PARTICULAR GRAEME BOLTON WERE ALSO SOLICITORS FOR THE WATER TRUST

() IN AT LEAST ONE OF THESE TRANSACTIONS THE PROPERTY INVOLVED NAMELY LOT 10 OF SECS 1134 WHICH HAD BEEN FRAUDULENTLY SOLD TWICE WAS BEING RATED TWICE BY COUNCIL

AFTER DISCOVERING THE FRAUDULENT ACTIVITIES OF BUCHANAN & PALMER STEVENS & RENNICK I HAD RESOLVED TO REPORT THE LITTLE I DID KNOW AT THE TIME TO THE POLICE

() BUCHANAN AT THIS TIME THREATENED ME WITH VIOLENCE AND ALSO THREATENED TO BANKRUPT ME IF I DID SO - I DID.

(NOTE! - GRAEME BOLTON AND THE JOINT SHIRE WATER TRUST SECRETARY WERE CLOSE PERSONAL FRIENDS WHO LUNCHEDED TOGETHER ALMOST DAILY)

21
WITHIN DAYS OF BUCHANANS THREAT THE
FOLLOWING LETTER ARRIVED (DOC C17)

All communications
to be addressed to the Secretary

Council meets on the
third Wednesday each month



SHIRE OF KYNETON

TELEPHONE 22 1433

SHIRE HALL
MOLLISON STREET
KYNETON 3444

12th May, 1982.

G.A. & C.M. Thompson,
4 James Street,
WHITTLESEA, VIC.

3757.

Dear Sir, .

Pt 132 Parish Lauriston - Trentham Road

Council are concerned about the delay in completing the works of the above subdivision.

I understand from the rate records that at least two of the lots have been sold and the owners have inquired of Council when the works will be completed.

It is considered that the watermain should be laid forthwith and the roadworks commenced immediately.

I would be pleased to have notice of your intention prior to the Council meeting on the 19th May, 1982.

Yours faithfully,


S.G. PORTER
SHIRE SECRETARY

I NOW KNOW THAT THIS LETTER WAS SENT
PURELY ON THE INITIATIVE OF PORTER
THERE IS NO MINUTE OF COUNCIL EXPRESSING
CONCERN

PARAGRAPH TWO IS FALSE AND AT THE TIME
OF WRITING PORTER KNEW HE WAS LYING
AND HAS SINCE ADMITTED SO

PARAGRAPH THREE WAS FALSE - NO ONE EXCEPT
POSSIBLY PORTER CONSIDERED THE WORKS
SHOULD BE DONE.

RATE RECORDS SHOWED 17 LOTS WERE SOLD SOME

20
PARAGRAPH FOUR WAS UNREASONABLE
ALTHOUGH THE LETTER IS DATED
12/5/82 IT WAS NOT POSTED ON THAT DAY
IT WAS RECEIVED AT MY HOME ADDRESS
ON 18/5/82

IN ANY EVENT THE 7 DAYS BETWEEN THE
DATE OF THE LETTER AND THE DATE
SET (19/5/82) WAS CLEARLY INADEQUATE
AND WAS KNOWN TO BE INADEQUATE
AS IN ORDER FOR ANYTHING TO BE
CONSIDERED BY COUNCIL IT MUST BE
PLACED UPON THE AGENDA AND THE
PRACTICE AT KINGTON IS TO DELIVER
THE AGENDA TO COUNCILLORS SOME DAYS
BEFORE A COUNCIL MEETING

AT THE TIME OF RECEIVING THE LETTER
I DID NOT QUESTION ITS VALIDITY AS
I KNEW THAT THE PURCHASER OF LOTS
6 and 16 WORKED AT PALMER STEVENS
AND RENNICK.

I TOOK PARAGRAPH TWO OF THE LETTER AT
FACE VALUE BECAUSE I MERELY ASSUMED
PALMER STEVENS AND RENNICK WERE
GIVING EFFECT TO BUCHANAN'S THREAT
TO BANKRUPT ME.

(23)

UPON RECEIPT OF THE LETTER I TELEPHONED PORTER WHO ADVISED HIM.

A/ BUCHANAN WAS RESPONSIBLE FOR THE WORKS.

B/ THAT I HAD DISCOVERED THAT BUCHANAN AND PALMER STEVENS AND RERNICK WERE INVOLVED IN DISHONEST LAND DEALS AND HAD MADE THREATS AGAINST ME AND THAT THE OWNERS WHO HAD COMPLAINED HAD NO RIGHT TO DO SO AND HAD CLEARLY COMPLAIN TO GIVE EFFECT TO THE THREATS WHICH HAD BEEN MADE

C/ I COULD NOT GIVE ANY UNDERTAKINGS AND HAD NO INTENTION OF CARRYING OUT THE WORK AND COULD NOT ANYWAY AS I HAD NO PLANS OR KNOWLEDGE OF THESE THINGS.

PORTER ADVISED.

AS I HAD PURCHASED THE LAND I WAS RESPONSIBLE AND THAT COUNCIL HAD THE AUTHORITY TO FORCE ME TO CARRY OUT THE WORK AND IF I DID NOT THEN COUNCIL WOULD CALL UPON MY GUARANTEES AND DO THE WORK THEMSELVES.

I ACCEPTED PORTERS ADVICE AND CONSIDERED THAT I HAD BEEN HAD BY BUCHANAN. AGAIN.

THE NEXT RELEVANT EVENT OCCURRED
WHEN THE WATER TRUST PASSED THE
FOLLOWING RESOLUTION.

(214)

General Business Contd...

2nd June, 1982.

CENTENARY DINNER

Comm Fielding) That a Dinner be held to celebrate the Centenary of
Jenkins) of the Trust. Cost to be borne by those attending
with exception of the Minister of Water Supply,
Chairman and Comm Harper to arrange.

CARRIED.

(DDC
W16)

TRENTON ROAD SUBDIVISION L.P. 1346A4

Comm Jenkins) That notice be given to the subdivider that the gain
Hamilton) in this subdivision should be constructed forthwith.
failure to give a firm undertaking by the 14th July,
1982 will result in the Trust undertaking the works
at his cost.

CARRIED.

MEETING CLOSED

CONFIRMED THIS 14TH DAY OF JULY 1982

Chairman
CHAIRMAN

THIS ~~MINUTE~~ WAS DECISION COMES ONLY 8
WEEKS AFTER THE RESOLUTION OF 7TH APRIL
1982 (Details of which the Trust has Refused to
discuss) which resolved to take no
action.

THIS RESOLUTION RESOLVES ~~to~~ "NOTICE BE
GIVEN TO THE SUBDIVIDER"

IN ALL PREVIOUS MINUTES, DOCUMENTS AND
CORRESPONDENCE "THE OWNER" and OR
"THE SUBDIVIDER" HAS BEEN SPECIFICALLY
BUCHANAN

125
HOWEVER ON THIS OCCASION MR PORTER
DIRECTED THE LETTER TO MYSELF.

London Air Waterworks Trust

TELEPHONE 77 1432
S. G. PORTER
Secretary & Treasurer

SHIRE HALL
KYNES
3444

W 17
C 33

(doc
W17)

4th June, 1932.

S. A. & C. M. Thomson,
21 James Street,
WYTTLESEA, VIC. 3757.

Dear Sir/Madam,

L.P. No. 134684

The Trust are concerned that a number of the allotments in this subdivision have been sold and no indication of when construction will take place has been received.

The Trust consider it should proceed forthwith and now gives notice if work is not commenced by the 1st July 1932 or a satisfactory assurance given, it will require lodgement of the £11000 in cash and undertake the construction itself.

Yours faithfully,


S.G. PORTER
TRUST SECRETARY

UPON RECEIPT OF THIS LETTER I AGAIN HAD
A DISCUSSION WITH PORTER IN IDENTICAL
TERMS TO THAT WHEN I DISCUSSED COUNCILS
LETTER WITH HIM.

(25A) (H)
Subsequently Received the Following 2 Letters.

Kyneton Shire Waterworks Trust

TELEPHONE 22 140
S. G. PORTER
Secretary & Treasurer

SHIRE HALL W 19
KYNETO.
3444

8th October, 1982.

Doc. W 19
C.A. & C.M. Thompson,
4 James Street,
WHITTLESEA, VIC. 3757.

Dear Sir,

Subdivision - Pt. Section 132
Parish of Lauriston

I am awaiting your advice of your intention in regard to this subdivision.

If you fail to reply and give a firm acceptable undertaking to the Trust before Thursday 5th November, 1982 it is its intention to call in the guarantee and undertake the work.

Yours faithfully,

S.G. Porter
S.G. PORTER
SECRETARY

All communications
to be addressed to the Secretary

Council meets on the
third Wednesday each month



SHIRE OF KYNETON

TELEPHONE 22 140
SHIRE HALL
MOLLISON STREET
KYNETON 3444

4th November, 1982.

Doc. C 18
G. A. & C. M. Thompson,
4 James Street.,
WHITTLESEA, VIC. 3757.

Dear Sir,

RE: PART 132, PARISH OF LAURISTON - TRENTHAM ROAD.

Further to our letter of the 12th May, 1982 re completion of road works on the above subdivision it is requested that you advise of your intentions in this matter prior to the 17th November, 1982 at which time Council will consider the construction of the road thereby utilising the Bank Guarantee available to it.

Yours faithfully,

S.G. Porter
S. G. PORTER
SHIRE SECRETARY

(25 B)

Upon receipt of each of these letters I again spoke to Porter.

Again Porter advised that both Council and the Water Trust had the Authority to force me to carry out the works and in my default carrying out the works themselves at my cost.

Subsequently on 4/11/82 The Water Trust Resolved:

Comm. Jenkins)
Harper)

That C.A. & C.M. Thompson be advised that the Trust intend to proceed to call the Bank Guarantee to pay for the installation of the water main to serve their approved subdivision in Part of Section 132 in the Parish Lauriston.

W2

CARRIED

On 17/11/82 the Council resolved:

SUBDIVISION - SOUTH KYNETON:

Work not carried out on subdivision.

Recommendation: That Council take the Bank Guarantee up and construct the roads.

Crx. Hinneberg)
Pearce)

That the recommendation be adopted.

CARRIED.

(Doc 219)

Subsequently I received the following
Two telegrams -

(26)

12 Communications
for reference to the Secretary

General notes on the
road widening and road



SHIRE OF KYNETON

TELEPHONE 22 1433

SHIRE HALL
MOLLISON STREET
KYNETON 3444

(82)

(DOC C20)

C25

G.A. & C.M. Thompson,
4 James Street,
WHITTLESEA. 3757.

Dear Sir/Madam,

I refer to previous correspondence in regard to the construction of the road on subdivision being part Crown Part 129, 132, Parish of Lauriston.

Council has resolved that its rights under the bank guarantee be exercised and a demand for payment will be made on the bank for the full \$25,000-00.

The work will be commenced shortly and any adjustment made on completion.

Yours faithfully,

S.G. PORTER
SHIRE SECRETARY.

Kyneton Shire Waterworks Trust

TELEPHONE 22 1433

S. G. PORTER
Secretary & Treasurer

SHIRE HALL
KYNETON
3444

W21

(DOC)
W21

19th November, 1982

G.A. & C.M. Thompson,
4 James Street,
WHITTLESEA. 3757.

Dear Sir/Madam,

I refer to previous correspondence in regard to the construction of the watermain on the subdivision Part Crown Portion 129, 132 Parish of Lauriston.

The Trust has resolved to exercise its rights under the bank guarantee and a demand for payment will be made on the bank for the full \$11,500-00.

The work will be commenced shortly and any adjustment made on completion.

Yours faithfully,

S.G. PORTER
SECRETARY.

Upon receipt of these letters ~~on~~ I again spoke to Porter and informed him.

A/ That if the guarantees were called upon I would be forced to sell the land.

B/ That I considered both Buchanan and Greame Bolton of Palmer Stevens and Rennie to be dishonest and that the complaints received by council were dishonest and the people involved had no right to complain and that the complaints were designed to give effect to the threat made by Buchanan.

C/ That the people who had complained were employees of Palmer Stevens and Rennie and would know of the fraudulent transaction and threats against me.

D/ That I intended to speak to the people who had complained and get them to withdraw their complaints.

E/ That I found myself in this position due to the dishonesty of Buchanan and Palmer Stevens & Rennie and that I WOULD CANCEL THE GUARANTEES.

(28)

In Reply Porter stated to the effect:-

- 1/ My problems were no concern of Council
- 2/ That above in fact never was any complaint and that he had made a mistake.
- 3/ That construction of the roads and waterworks was my responsibility and that Council had the right to force me to construct the roads or otherwise construct the works at my cost.
- 4/ That if I cancelled the guarantees council would sue me and if necessary sell my land to recover the costs.

At the time I accepted and relied upon the advice of Porter and did not cancel the Bank Guarantees.

On Each Previous Occasion I had informed Porter that these people had no right to complain - it was only when I told him I would approach them that he admitted there was in fact no complaint.

(29)

I NOW KNOW THAT PORTER DELIBERATELY LIED TO
ME

IN MY OPINION IT IS INCONCEIVABLE THAT A SHIRE
/ WATERBOARD SECRETARY OF SOME MANY YEARS
STANDING WAS NOT AWARE OF THE FACTS IN
THIS MATTER.

THE SPECIFIC LIES WERE

1/ That other owners had complained & upon receipt
of each letter I had spoken with Porter and
advised him of the relationship of these people
with Palmer Stevens & Rennie and that they
had no right to complain.

It was not until I advised Porter that I
would approach them to have them
withdraw the complaint that he admitted
there was no complaint.

I subsequently learned that these other owners
had no knowledge of Buchanans dealing
and both of them testified in
Bendys Magistrate Court that they
had not approached or complained to
Council or at all.

(30)

2/ AT ALL TIMES PORTER ~~NEW~~ KNEW THERE WAS NO WATER SUPPLY AGREEMENT IN PLACE AND THEREFORE NO MEANS OF FORCING MYSELF OR ANYONE ELSE TO CONSTRUCT THE WATERWORKS

~~IN THE ABSENCE OF AN AGREEMENT UNDER SECTION 307A OF THE WATER ACT OR~~

DURING THE SEVERAL DISCUSSIONS WITH PORTER HE NEVER SUGGESTED OR MADE REFERENCE TO AN AGREEMENT AS CLEARLY ANY SUCH REFERENCE WOULD CLEARLY INVITE THE QUERY AS TO THE TERMS OF THE AGREEMENT AND WHO THE PARTIES WERE.

DURING EACH DISCUSSION PORTER MAINTAINED THAT THE WATER BOARD COULD IMPOSE AND HAD THE LAWFULL RIGHT TO IMPOSE RESPONSIBILITY FOR CONSTRUCTION OF THE WATER MAIN ON THE OWNER AND AS I HAD PURCHASED THE LAND I WAS NOW RESPONSIBLE AND IS BUCHANAN HAD SOLD HE WAS NO LONGER RESPONSIBLE.

IT IS IMPOSSIBLE FOR ANY ONE WITH EVEN A CASUARY KNOWLEDGE OF THE REGISTRATION TO MAKE THE REPRESENTATIONS MADE BY PORTER HE SIMPLY LIED

3/ AT ALL TIMES PORTER KNEW THE COUNCIL REQUIREMENTS HAD BEEN LIFTED.

4/ AT ALL TIMES PORTER KNEW THAT AS THE REQUIREMENTS HAD BEEN LIFTED BUCHANAN WAS NO LONGER RESPONSIBLE. ~~AND~~ HAD NOT BEEN RESPONSIBLE SINCE COUNCIL HAD FALSELY ADVISED THE REGISTRAR OF TITLES THAT

The Registrar of Titles,
263 Queen Street,
MELBOURNE. VIC. 3000.

24th November, 1980.

Dear Sir,

Plan of Subdivision 2 lots. Part Crown Portion 129 and Part Crown Portion 132,
Parish of Lauriston. Surveyors Reference No. 79305/G. Plan Sealed 21st May, 1980.

Notice is given that the subdivider K. R. & Y. R. Buchanan, has complied with the conditions of the requirement placed on the above plans pursuant to Section 569E 1 and 1A of the Local Government Act 1958.

Yours faithfully,

S. G. PORTER
SIR, REGISTRAR

AS A RESULT:-

Consequently, upon the plan of subdivision having been approved by the Registrar of Titles Mr Buchanan was released from any statutory obligation to carry out street construction or waterworks under the terms of the requirement.

PORTER.

4/JO/E2
Thomson

9

JUDGMENT

PORTER HOWEVER LIED TO ME AND MAINTAINING THAT RESPONSIBILITY TO CONSTRUCT WAS ON FOOT AND HAD PASSED TO ME ALONG WITH OWNERSHIP OF THE LAND.

204

3

I HOWEVER ACCEPTED PORTERS
REPRESENTATIONS AND DID NOT
CANCEL MY GUARANTEES

HAD I DONE SO I NOW KNOW THE COUNCIL
COULD NOT HAVE SUED ME.

THEY SAID TO ME THAT I
HAD BEEN SUED BY THE COUNCIL
AND THAT I HAD TO PAY
THEY SAID TO ME THAT I
HAD BEEN SUED BY THE COUNCIL
AND THAT I HAD TO PAY

(C1)

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.

1. (a) The Firstnamed Defendant admits each and every allegation contained in paragraph 1.

(b) The Secondnamed Defendant does not plead to paragraph 1 as it makes no allegation against it.

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.

2. (a) The Firstnamed Defendant does not plead to paragraph 2 of the Statement of Claim as it makes no allegation against it.

(b) The Secondnamed Defendant admits each and every allegation contained in paragraph 2.

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 said 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 the KSWT.

3. (a) The Firstnamed Defendant does not plead to paragraph 3 as it contains no allegation against it.

(b) The Secondnamed Defendant admits each and every allegation contained in paragraph 3.

4. On about 12 February 1980 a Mr K.R.Buchanan ('the subdivider') lodged with the firstnamed Defendant notices in the form of the Thirtieth Schedule to the LGA of intention to subdivide into 18 residential allotments a block of residential land owned by him and situated in Tylden Road, Kyneton in the State of Victoria ('the land').

4. (a) Insofar as it contains any allegation against it the Firstnamed Defendant admits each and every allegation contained in paragraph 4.

(b) The Secondnamed Defendant does not plead to paragraph 4 as it contains no allegations against.

This claim was derived from the evidence of the Shire Engineer given at the Bendigo Magistrates court.

1/235
D105

(b) On the 12th day of February 1980 Mr Buchanan lodged several plans of subdivision together with Notice to the effect of The Thirtieth Schedule pursuant to S.569(1)

(d)
o:q
PV 15
235
(10)

(a) ☒ I admit the allegations contained in sub-paragraphs (a) and (b) of paragraph 7 thereof:

Discovering however indicates that councils
evidence at Berdoo was false.

Discovery reveals that the "relevant" 30th
schedule studios were dated 4th of March 1951

Part 1 of 1 Section 10

COPY AND REQUEST

١٧٩٩

812 Shithorse road, Fox Hill. Vic. 3128

.....
 HENRY GIVE NOTICE of my/our intention to lay out a road, street, lane or
 passage to and subdivide land into allotments.

- ## 1. Situation of land

.. Crown. Portion. 129. 1. Part. C. P. 132. Parish. r. Lauriston

.. County - Bullock. Volume 8909. Folio 538.

2. Name and Address of Registered Proprietor of land

... Buchanan & Co. Buchanan

...1. Zeu. kod, Hum. value 3757

1. The Interest of that Person in the Land
Owners

Pygmy

4. Particulars of any Sale to him of the Land

5. *Consent of Registered Proprietor of the Land*

.....
 a plan with the required particulars set out thereon, together with a
 copy of such plan to be retained by the Council and the fee of \$4.44
 be submitted herewith and I/we request the Council to cause the
 said plan to be sealed with the seal of the Municipality.

DATED this ... day of ... month of March, 1950.
Signature (s) *Ed E. Hall*

Signature (s) John E. Walsh L.S.

to the Municipal Clerk,
City of Lynette.

Nett Plan submitted
in 5 sections
with schedules all
-tical to this

(C5)

The note on the bottom of the previous doc is incorrect as the plans were in fact 7 in number. This error however is explained and continued in document designed in defendants Supplementary Affidavit doc no 2.

All communications
to be addressed to the Secretary
Council meet on the
second Wed of each month



TELEPHONE 22443
SHIRE HALL
MOLLISSON STREET
KYNETON 3444

COPIES OF THIS LETTER SENT TO: SHIRE OF KYNETON

C. R. S.,
K. S. W. T.
S. E. C.
Telecom.
Gas and Fuel.
S. R. W. S. C. - Armadale and Golden Square.
I. R. McKenzie.

21 April, 1950.

Dear Sir,

RE: Plan of subdivision - reference No: 79305.

Attached hereto please find copy of proposed subdivision of land for your consideration.

LOCATION: . . . 129 and 130 . . . 131, Parish Lauriston -
Central Tully road.

OWNER:

Would you please advise as soon as possible any matters your Authority may desire considered in connection with this subdivision.

When replying kindly quote the name of owner, street and/or location.

Yours faithfully,

G. J. Wilson

G. J. WILSON
SHIRE ENGINEER

79305 G, H, I, J, K.

IDENTICAL

This was in addition to those noted
plan 79305 E and 79305 F. which appear
to have been overlooked

(CB)

I think it is significant that Mr Wilson did not even produce a 30th Schedule notice at the Berdugo magistrates court.

To have done so would have shown that the "Notice of Requirement" predated the 30th schedule notice which is impossible.

The 30th schedule notice of his intention to subdivide the land given by Mr Buchanan to the Council was not in evidence before the Magistrate. Nevertheless, in both the engineer's reports to the Council dated 20 February 1980 and 21 May 1980 and the notice of requirement, Mr Buchanan is referred to as owner.

(Fudgeant O/R 235 1987 Page 6)

(27)

SC 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.

AD

5. Insofar as it contains any allegation against them the First and Secondnamed Defendants admit each and every allegation contained in paragraph 5.

SC 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.

0 6. (a) The Firstnamed Defendant does not plead to paragraph 6 as it contains no allegation against it.

(b) The Secondnamed Defendant admits each and every allegation contained in paragraph 6.

- (CS)
- SC 7. On or about 20 February 1980 the firstnamed Defendant served the subdivider with a written notice of requirement pursuant to ss.569E(1) & 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.

- AD 7. (a) The Firstnamed Defendant admits each and every allegation contained in paragraph 7.
- (b) The Secondnamed Defendant admits each and every allegation contained in paragraph 7.

SHIRE OF KYNETON

NOTICE OF REQUIREMENT UNDER SECTION 569E(1) & (1A) OF THE LOCAL GOVERNMENT ACT 1958.

TO: Mr. R. Buchanan,
Rural Road,
MURTELLA 3757.

Whereas you are the owner of all that piece of land being Crown Portion 129 and Part Crown Portion 132, Parish of Lauriston of which a notice in or to the effect of the thirtieth Schedule to the Local Government Act 1958, together with plan of subdivision Reference No. 79305/F referred to therein was lodged with the Council of the Shire of Kyneton on the 12th February, 1980.

Now therefore take note:-

- (1) That the said Council pursuant to Section 569E(1) of the said Act requires you to construct to the stage specified below (viz. Part Construction) the whole of all new drains, channels, streets, roads, lanes and passages shown on the said plan of subdivision which after the sealing of the said plan the Council would be authorised to make or construct within the meaning of Division 10 of Part XIX or within the meaning of Section 651 of the said Act to the satisfaction of Council in accordance with plans and specifications approved by Council.
- "Part Construction" shall mean the full construction of all roads, streets, lanes and passageway pavements, (sealed 5.5 width) roadside furniture, associated drainage, drainage of all properties including legal and proper outfall drainage.
- (2) That the said Council pursuant to Section 569E (1A) of the said Act REQUIRES you to give or cause to be given to the said Council a written statement or statements from the said Shire Waterworks Trust that an agreement or agreements have been entered into with this Authority for the provision of water supply to all the land described in the said plan of subdivision.

The Common Seal of the President, and Ratepayers of the SHIRE OF KYNETON hereto affixed this 20th day of February, 1980 in pursuance of a Resolution of the Council and in the presence of:-

.....T. N. L. GORDON.....PRESIDENT.
.....M. HARRIS.....COUNCILLOR.
.....S. C. FORTER.....SECRETARY.

(C9)

8. On or about 21 May 1980 the firstnamed Defendant sealed the various plans of subdivision provided by the subdivider in relation to the land with endorsements that a requirement under s.569E(1A) had been made.

AD 8. (a) The Firstnamed Defendant admits each and every allegation contained in paragraph 8.

(b) The Secondnamed Defendant does not plead to paragraph 8 as it contains no allegation against it.

RECOMMENDATION FOR SEALING:

Plans are submitted for sealing; all necessary fees and approvals received. *COUNCIL MINUTES 24/8/1.* Reservoir Road

Plan of subdivision (Industrial lots).
Lauriston Reservoir Road.
Part Crown Portion 132, Parish of Lauriston.

Owner: K. R. & Y. R. Buchanan.

This plan has been submitted in three parts and a requirement has been served upon the owner in respect of supply of water and sewerage.

Recommendation:

That the following plans be sealed with an endorsement placed thereon stating that a requirement under Subsection (1A) of Section 569E of the Local Government Act 1958 has been made by Council in respect to these plans of subdivision.

1) Reference: 79305/B.
2 Lots. (1 & B).

2) Reference: 79305/C.
2 lots (2 & C).

3) Reference: 79305/D.
4 lots (3, 4, 5 & 6).

Plan of subdivision. 3 acre residential.
Road - Hill Drive.

Part Crown Portion 129 and Part Crown Portion 132, Parish of Lauriston.
Owner: K. R. & Y. R. Buchanan.

This plan has been submitted in seven parts and a requirement has been served upon the owner in respect of water supply and part street construction.

Recommend that plans be sealed with an endorsement placed thereon stating that a requirement under Subsection (1) and (1A) of Section 569E of the Local Government Act 1958 has been made by Council in respect to these plans.

Reference: 79305/E.
2 Lots (1 & E).

Reference: 79305/F.
2 lots (7 & F).

Reference: 79305/G.
2 Lots (8 & G).

Reference: 79305/H.
2 Lots (5 & H).

Reference: 79305/I.
2 Lots (6 & I).

Reference: 79305/J.
2 Lots (16 & J).

Reference: 79305/K.
11 lots.

CARRIED.

on

IED.

ED.

ED.

ED.

ED.

ED.

ED.

ED.

ED.

(90c)
(e11)

C10

SC 9. In or about October 1980 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 which were or might become payable by the Plaintiffs to the firstnamed Defendant in connection with the subdivision of the land.

AD

9. (a) The Firstnamed Defendant admits each and every allegation contained in paragraph 9 and says further that the Guarantees provided by the Plaintiffs were provided as agents for the owner.
- (b) The Secondnamed Defendant does not plead to paragraph 9 as it contains no allegations against it.

5. Give the usual particulars of:

- (a) the agency referred to in paragraph 9(a) of the Defendant's Amended Defence;
- INTERROGATORY 5

3.

5. In answer to Interrogatory 5:

- (a) The agency is partly written partly to be implied. Insofar as it was written it is contained in a letter from the Plaintiff to the Defendant dated 23 October 1980 a copy of which is in the possession of the Firstnamed Defendant and may be inspected on appointment. Insofar as it was to be implied it was to be implied by from the fact that the Plaintiffs provided the bank guarantee;

LETTER
OVER L88F

23rd October, 1930.

The Secretary,
Shire of Kyneton,
Shire Hall,
KYNETON, VIC., 3444.

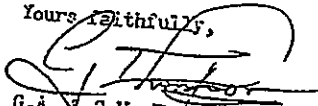
Doc
C13

Dear Sir,

Please find enclosed Bank Guarantee for subdivision of
K.R. & T.R. Buchanan at Tylden Road, Kyneton.
This subdivision is now a joint venture between ourselves
and K.R. & T.R. Buchanan. Mr Ken Buchanan is still managing the
subdivision for the partnership.

131
19/11

Yours faithfully,


G.A. C.M. Thompson.

Forwarding bank guarantee for
\$2500 covering road construction
on undivided subdivision
CP137 of Kyneton.

Rec. Engineer to recommend.

THAT IT WAS ALWAYS THE INTENTION
OF BOTH BUCHANAN AND THE COUNCIL
TO ACT UNLAWFULLY THERE WAS
NO AGENCY FOR UNLAWFUL PURPOSES

THE ACCEPTANCE OF THIS GUARANTEE
BY COUNCIL GAVE EFFECT TO
AN UNLAWFUL AGREEMENT BETWEEN
BUCHANAN AND THE COUNCIL

C/2

MR. BUCHANAN HAD ILLEGALLY SOLD
2 OF THE LOTS AND HAD BEEN ABLE TO
DO SO AS THIS COUNCIL WAS PREPARED
TO ACCEPT PLANS OF SUBDIVISION
CONTRIVED IN SUCH A MANNER AS TO
APPEAR TO BE TWO LOT SUBDIVISIONS

HAVING ILLEGALLY SOLD MR. BUCHANAN WAS
UNABLE TO RECOVER THE FUNDS FROM THESE
SALES DUE TO

1962

Sale of Land

No. 6975

11

(5) Any question as to the sufficiency of any instrument of mortgage
tendered pursuant to this section shall in the absence of agreement
between the parties be determined by an arbitrator.

Sale of land subdivided into not more than two allotments.

8A. (1) Where—

(a) a notice of intention to subdivide land into not more than
two allotments in the form of the Thirtieth Schedule to the
Local Government Act 1958 has been given (whether before
or after the commencement of the *Sale of Land*
(Amendment) Act 1969); or

S. 8A inserted by
No. 7898 s. 2.

(b) in respect of any land such a notice is required to be given—
and neither of the allotments has been sold before the said
commencement, no person shall sell either of those allotments before
a plan of subdivision on which each of the allotments is shown as an
allotment has been sealed with the seal of the municipality and, where
any part of the land is under the operation of the *Transfer of Land Act*
1958, the plan has been approved by the Registrar pursuant to section
97 of that Act unless the contract provides that the deposit and all other
moneys payable by the purchaser are to be paid to a solicitor or to a
licensed estate agent who shall be named or specified in the contract to
be held by the solicitor or licensed estate agent on trust for the purchaser
until the plan has been so sealed and, where any part of the land is
under the operation of the *Transfer of Land Act 1958*, so approved.

AND WHERE A REQUIREMENT EFFECTS
THE PLAN

Para. (d)
amended by
Nos. 7052 s. 3
(c); 7272 s. 6 (d)
(1).

Para. (e)
substituted by
No. 7052 s. 3 (d),
amended by
Nos. 7272 s. 6
(d) (iv), 9512 s. 2
(1).

(d) When every requirement has been either complied with by
the owner or withdrawn by the council the council shall
cause to be lodged in the Office of Titles a statement to that
effect and a minute of that statement shall thereupon be
endorsed on the plan;

(e) The Registrar of Titles shall not approve the plan until a
statement as required by the last preceding paragraph or a
statement by the Planning Appeals Board that the
requirement has been satisfied has been lodged in the Office
of Titles.

5569E
3
6.5.6

MR. BUCHANAN THEREFORE INITIALLY
APPROVED COUNCIL

K. R. & Y. R. Buchanan

EDGECOMBE ROAD, KYNETON, 3444

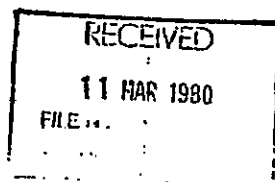
Office:

1 YEA ROAD, HUMEVALE, 3757 PHONE 716 2578 KYNETON OFFICE (054) 22 1631

7th March, 1980.

Mr. G. Wilson,
Shire Engineer,
Shire of Kyneton,
Shire Offices,
KYNETON. 3444

COPY



Dear Sir,

Re: Tylden Road Subdivision

I am enclosing a cheque for \$376.00 which brings the total paid to \$464.00.

Would you treat the industrial and residential plans separately with regard to requirements.

There is a water requirement on the 1.2 ha lots of \$12,593.00 plus \$200 levy per lot which includes the cost of supplying water to the industrial lots.

There is no sewerage requirement on the 1.2 ha allotments, however there is on the industrial lots but no details have been given because Garlick & Stewart have not finalized details. The road cost will be approximately \$13,000.00.

Would it be possible for approval to be given at the next Council meeting to accept Bank Guarantees, so that the requirements on the subdivision may be lifted.

Yours faithfully,

Ken Buchanan

K.R. BUCHANAN

THE APPROVAL WAS MADE AFTER THE
NOTICES OF REQUIREMENT WERE
SERVED

BUT BEFORE THE PLANS WERE SETTLED

COUNCIL REPLIED.

7th May, 1930.

Mr. R. Buchanan,
1 Yea Road,
HUMEVALE. VIC. 3757.

COPY

Dear Sir,

RE: PLAN OF SUBDIVISIONS CROWN PORTION 129 AND PART CROWN PORTION 132,
PARISH EMUPURTY.

Council would be prepared to seal the plans of subdivision without a requirement placed thereon if a Bank Guarantee to the value of 325,000 is lodged to cover road construction costs.

Yours faithfully,

COPY ONLY.

G. J. WILSON
SHIRE ENGINEER

WICH IN BREACH OF

366

1958

Local Government

No. 6299

provisions of section five hundred and seventy of this Act, cause the construction to be carried out in accordance with the plans and specifications submitted to the council by him or on his behalf.

Sec. (3) amended
by No. 8531 s. 3
(b) (i).

(3) Where pursuant to this section the council requires the full construction or part construction of any street road lane or passage or any payment security or undertaking to be made or given in respect thereof or the provision of works of water supply sewerage or drainage the following provisions shall have effect:—

Para. (a)
amended by No.
8531 s. 3 (b) (ii).

(a) The council shall cause an endorsement to be made on the plan before it is sealed to the effect that a requirement has been made under sub-section (1) or sub-section (1A) of this section;

THE MR BUCHANAN DID NOT LODGE A
GUARANTEE AT THIS TIME AND THE
PLANS WERE SEALED BY COUNCIL ON 21/5/30
WITH REQUIREMENTS ENDORSED THEREON

SUBSEQUENTLY UPON RECEIVING MY
GUARANTEE I DID NOT HAVE EFFECT TO
THE ORIGINAL INTENT BY LYING TO THE
REGISTERAR OF TITLE

ALTHOUGH THE REQUIREMENTS WERE NOT
COMPLIED WITH.

9. Look at paragraph 18 of the 'Plaintiffs' Statement
of Claim and state:

(a) what the conditions of the requirement therein
referred to were;

(b) whether each of the conditions therein referred
to had been complied with in any and if so
what way in or about -

(i) September 1980;

(ii) October 1980;

(iii) November 1980;

(iv) some other and if so what date in
1980 -

by the sub-divider therein referred to;

(c) whether each of the conditions therein referred
to were not complied with in any and if so
what way.

4.

(a) The requirements of Section 569E of the Local
Government Act 1958;

(b) No;

(c) At a later stage the conditions were complied
with by the Firstnamed Defendant.

INTERROGATORY
9 ON COUNCIL

EPH

(C16)

THE COUNCIL ADVISED THE REGISTRAR OF TITLES

The Registrar of Titles,
263 Queen Street.,
MELBOURNE. VIC. 3000.

24th November, 1980.

Dear Sir,

Plan of Subdivision 2 lots. Part Crown Portion 129 and Part Crown Portion 132,
Parish of Lauriston. Surveyors Reference No. 79305/G. Plan Sealed 21st May, 1980.

Notice is given that the subdivider K. R. & Y. R. Buchanan, has complied with
the conditions of the requirement placed on the above plans pursuant to Section
569E 1 and 1A of the Local Government Act 1958.

Yours faithfully,

S. G. PORTER
SENIOR SECRETARY

(DOC C15)

WHEREUPON THE REGISTRAR OF TITLES APPROVED
THE PLANS AND MR. BUCHANAN WAS ABLE TO
COMPLETE HIS ILLEGAL SALES.

THERE WAS NO AGENCY FOR THIS PURPOSE

ON EVIDENCE AT BENDIGO THE ENGINEER STATED THAT
THE PERSON FOR ACCEPTING THE GUARANTEE AND
LIFTING THE REQUIREMENTS WENT TO
ASSISTED BY COUNSELLOR OF THE
DEVELOPER

(C1)

SC 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.

AD 10. (a) The Firstnamed Defendant admits each and every allegation contained in paragraph 10.

(b) The Secondnamed Defendant does not plead to paragraph 10 as it contains no allegation against it.

THE FIRSTNAMED DEFENDANT ADMITS EACH AND EVERY ALLEGATION CONTAINED IN PARAGRAPH 10.

THE SECONDNAMED DEFENDANT DOES NOT PLEAD TO PARAGRAPH 10 AS IT CONTAINS NO ALLEGATION AGAINST IT.

THE FIRSTNAMED DEFENDANT ADMITS EACH AND EVERY ALLEGATION CONTAINED IN PARAGRAPH 10.

(218)

50 11. In consideration of the provision to it of the first Bank Guarantee the firstnamed Defendant 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:

(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.

AD 11. (a) Save that the Firstnamed Defendant admits the guarantee it denies each and every allegation contained in paragraph 11.

(b) The Secondnamed Defendant does not plead to paragraph 11 as it contains no allegation against it.

SC 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.

AD 12. The First and Secondnamed Defendants do not plead to paragraph 12 as it contains no allegations against them.

SC 13. In or about March 1983 the Plaintiffs sold their interest in the said 15 allotments.

AD 13. The First and Secondnamed Defendants do not plead to paragraph 13 as it contains no allegations against them.

SC 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.569E(1)(b) of the LGA.

AD 14. (a) The Firstnamed Defendant admits each and every allegation contained in paragraph 14.

(b) The Secondnamed Defendant does not plead to paragraph 14 as it contains no allegation against it.

THE WORKS HOWEVER WERE NOT DONE PURSUANT TO S 569E(1)(b)

The requirement by its terms, served on the applicant, was made by the Council under paragraph (a) of subsection (1) in addition to subsection (1A).

(Judgement of R 230 of 1987) Page 8)

220

However, the Council's right to claim payment by way of adjustment of costs of carrying out street construction works applies only when payment or security for payment was given by the owner pursuant to a requirement under paragraphs (b) or (d) of subsection (1). The Magistrate's finding that the requirement dated 20 February 1980 was made pursuant to section 569E(1)(b) or (d) was in conflict with the express terms of the requirement.

(JUDGEMENT of R 235 of 1987 Page 10)

(C2)

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 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.

AD 15. (a) The Firstnamed Defendant admits each and every allegation contained in paragraph 15.

(b) The Secondnamed Defendant does not plead to paragraph 15 as it contains no allegation against it.

SC 16. On or about 12 January 1983 the firstnamed Defendant accepted from Westpac, as agent for the Plaintiffs, the sum of \$25,000 in connection with the construction of the road and in purported pursuance of the request and of the first Bank Guarantee.

16. (a) The Firstnamed Defendant admits each and every allegation contained in paragraph 16.

(b) The Secondnamed Defendant does not plead to paragraph 16 as it contains no allegation against it.

SC 17. The Plaintiffs have reimbursed Westpac with the sum of \$25,000 so paid by it as their agent to the firstnamed Defendant at the firstnamed Defendant's request.

17. The First and Secondnamed Defendants do not plead to paragraph 17 as it contains no allegations against them.

SC 18. On or about 19 November 1980 the firstnamed Defendant lifted the requirement on the land 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 and the notification to the Titles Office are in writing. Copies may be inspected at the offices of the Plaintiffs' solicitor by appointment.

AD 18. (a) The Firstnamed Defendant admits each and every allegation contained in paragraph 18.

(b) The Secondnamed Defendant does not plead to paragraph 18 as it contains no allegation against it.

By the terms of its resolution of 19 November 1980 the Council lifted the requirement. Despite the expression used by it, the Council intended to withdraw the requirement under the provisions of subsection (3) paragraphs (ca). By its notice it informed the Registrar of Titles that the subdividers K.R. and Y.R. Buchanan had complied with the conditions of the requirement placed on the subdivision pursuant to section 569E(1) and (1)(a).

The notice was given by the Council under paragraph (a) of subsection (3) and, as I have already observed, the Registrar of Titles approved the plan under paragraph (e) of the subsection. Consequently, upon the plan of subdivision having been approved by the Registrar of Titles Mr Buchanan was released from any statutory obligation to carry out street construction or waterworks under the terms of the requirement.

4/JO/E2
Thomson

(Judgment of R 235 of 1987 Page 9)

SC 20. In the premises:

- Judgment*
9/
- (a) no additional or substituted requirement could lawfully be made (pursuant to s.569E of the LGA or otherwise) on the Plaintiffs or any other person(s) in relation to the construction of the road on the land;

Furthermore, there is no provision which enables the Council to substitute or amend a requirement once endorsed on a plan of subdivision. By the terms of its resolution of 19 November 1980 the Council lifted the requirement.

(Judgment of R 235 of 1987 Page 9)

- SC 20(b)*
- (b) there was no requirement on the land at any material time when the Plaintiffs were the owners of any part of the land within the meaning of s.569E(1) of the LGA;

Consequently, upon the plan of subdivision having been approved by the Registrar of Titles Mr Buchanan was released from any statutory obligation to carry out street construction or waterworks under the terms of the requirement..

4/JO/E2
Thomson

9

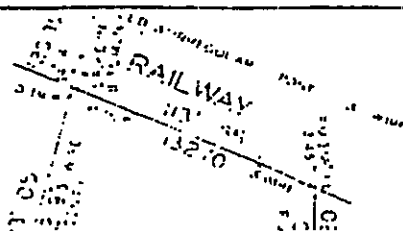
JUDGMENT

(Judgment of R 235 of 1987 Page 9)

TM: DALHOUSIE

PIPES UNLESS NOTED

A. 9363 F. 447



APPROVED
28.11.1980

- (22)
- 5c
20 (c) the Plaintiffs were not at any material time the owners of any part of the land from whom the firstnamed Defendant was lawfully entitled to accept any payment (pursuant to s.569E of the LGA or otherwise) in relation to the construction of the road on the land;

Although in his letter of 23 October 1980 the applicant described the subdivision as "now a joint venture with the Buchanans", there was no evidence before the Magistrate that at the time of service of the requirement or at any relevant time thereafter the applicant was possessed of any equitable interest in the land.

It follows that at the relevant time the applicant was not the owner of the land within the meaning of section 569E(1) and that he was not the owner from whom the Council was entitled to recover any payment under subsection (4) of section 569E.

(Judgment of 23/5/1987 Page 6)

- 5c 20
Grand A.
JB
(d) the Plaintiffs were not at any material time persons who could lawfully provide or from whom the firstnamed Defendant could lawfully accept security for the cost of construction of the road on the land;

- (a) The Magistrate was in error in finding that the Applicant was a person who could lawfully provide security for the cost of works pursuant to S.569E(1) of the Local Government Act 1958 as amended.

GROUND (a) O/R 23/5/1987

Ground (a) having been made out is sufficient to dispose of the order to review proceedings, but counsel

(JUDGMENT of 23/5/1987 Page 6)

C25

20

(e) the firstnamed Defendant had no power lawfully to construct the road on the land;

The right of the Council to carry out street construction work and claim payment of an amount in excess of payment made or security given by the owner is provided for by subsection (4).

However, the Council's right to claim payment by way of adjustment of costs of carrying out street construction works applies only when payment or security for payment was given by the owner pursuant to a requirement under paragraphs (b) or (d) of subsection (1). The Magistrate's finding that the requirement dated 20 February 1980 was made pursuant to section 569E(1) (b) or (d) was in conflict with the express terms of the requirement.

(Judgment of 23/5 1987 p 10)

NOT TO BE USED

Furthermore, there is no provision which enables the Council to substitute or amend a requirement once endorsed on a plan of subdivision. By the terms of its resolution of 19 November 1980 the Council lifted the requirement. Despite the expression used by it, the Council intended to withdraw the requirement under the provisions of subsection (3) paragraphs (ca). By its notice it informed the Registrar of Titles that the subdividers K.R. and Y.R. Buchanan had complied with the conditions of the requirement placed on the subdivision pursuant to section 569E(1) and (1) (a).

(JUDGEMENT ON 23/5 1987 P 9)

THEREFORE -

Ss. (7A) inserted by No. 7689 s. 23 (b), amended by No. 8531 s. 3 (d).

(7A) Where a council withdraws any requirement made under subsection (1) the works in question may thereafter be executed by the council pursuant to Division 10 of this Part or to section 651.

(S 569E(7A) L. G. H.) THIS WAS NOT DONE

NOTE - NOT ONLY WAS THE REQUIREMENT WETED AND AT ER END BUT IT WAS SUCH THAT COUNCIL WAS UNABLE TO PROCEED UNDER 569E (4) INCLUSE

- (f) the firstnamed Defendant did not act in accordance with law in relation to the subdivision of the land and the construction of the road; and

*IN RELATION TO CONSTRUCTION SEE PREVIOUS
IN RELATION TO SUBDIVISION*

Notice by person
proposing to lay
out street, &c., on
or to subdivide
private property.

S. 569
substituted by
No. 6975 s. 23.

Non-application
of subdivision to
sales to Crown,
&c.

Para. (b)
substituted by
No. 7495 s. 33
(a).

569. (1) Where in the case of any land to which this subdivision applies any person intends—

- (a) to make or lay out on such land any new street road lane or passage whether the same respectively is to be dedicated to the public as a highway or not; or
- (b) to subdivide such land into two or more parts otherwise than by the sale transfer or conveyance of one or more parts of the land to the Crown or to any person on behalf of the Crown or to any public statutory body constituted under any law of the State or the Commonwealth—

L.C.A.

such person shall—

- (c) give notice of his intention to the council in writing in the form of the Thirtieth Schedule; and
- (d) submit to the council a plan and a copy thereof which copy shall be retained by the council and also as many additional copies thereof as for the purposes of reference to statutory authorities the council thinks necessary.

Thirtieth
Schedule.

Plan.

Particulars to be
set out on plan.
S. 569A inserted
by No. 6975 s.
23.

569A. (1) The plan submitted to the council shall show distinctly delineated thereon—

- (a) all allotments into which the land is to be subdivided marked with distinct numbers or symbols;

*NOT ONE OF THE PLANS SERVED BY COUNCIL
MET THE REQUIREMENTS OF THE LEGISLATION
THE PURPOSE & EFFECT OF SERVING PLANS CONTRIVED
IN THIS MANNER WAS KNOWN OR OUGHT TO HAVE
BEEN KNOWN TO COUNCIL*

The sale of subdivisional land (ss. 569D(2)-(3) & 569E)

When land is being subdivided, the general principle is that no allotment created by the subdivision can be sold until such time as the plan of subdivision has been approved by the Registrar of Titles. Any agreement for sale in contravention of that prohibition is absolutely void, and any person who has paid any money under such an agreement is entitled to recover it. However, if land is being subdivided into two allotments only, it can be sold subject to one plan of subdivision being registered.

Special temporary provision has been made for the case of the subdivision of a building into flats. However, that temporary provision only operates in respect of contracts of sale made within two years from 1st September, 1965.

5C
RC (1)

(g) the firstnamed Defendant was not at any material time lawfully entitled to:

(i) request; or

(ii) accept from;

the Plaintiffs the sum of \$25,000 or any other sum in connection with the subdivision of the land or the construction of the road.

(c27)

Although in his letter of 23 October 1980 the applicant described the subdivision as "now a joint venture with the Buchanans", there was no evidence before the Magistrate that at the time of service of the requirement or at any relevant time thereafter the applicant was possessed of any equitable interest in the land.

It follows that at the relevant time the applicant was not the owner of the land within the meaning of section 569E(1) and that he was not the owner from whom the Council was entitled to recover any payment under subsection (4) of section 569E.

JUDGEMENT OF 23.1.1981 Page

IN ADDITION THE COUNCIL NEVER WAS ENTITLED TO DO THE WORK

However, the Council's right to claim payment by way of adjustment of costs of carrying out street construction works applies only when payment or security for payment was given by the owner pursuant to a requirement under paragraphs (b) or (d) of subsection (1). The Magistrate's finding that the requirement dated 20 February 1980 was made pursuant to section 569E(1) (b) or (d) was in conflict with the express terms of the requirement.

238

IN ADDITION AT THE TIME OF DOING THE WORK
THE REQUIREMENT HAD BEEN "WITHDRAWN"
AND WAS AT AN END.

Furthermore, there is no provision which enables the Council to substitute or amend a requirement once endorsed on a plan of subdivision. By the terms of its resolution of 19 November 1980 the Council lifted the requirement. Despite the expression used by it, the Council intended to withdraw the requirement under the provisions of subsection (3) paragraphs (ca). By its notice it informed the Registrar of Titles that the subdividers K.R. and Y.R. Buchanan had complied with the conditions of the requirement placed on the subdivision pursuant to section 569E(1) and (1)(a).

The notice was given by the Council under paragraph (a) of subsection (3) and, as I have already observed, the Registrar of Titles approved the plan under paragraph (e) of the subsection. Consequently, upon the plan of subdivision having been approved by the Registrar of Titles Mr Buchanan was released from any statutory obligation to carry out street construction or waterworks under the terms of the requirement.

4/JO/E2
Thomson

9

JUDGMENT

(Judgment of R 238 1987 Page 9)

IN ADDITION THE COUNCIL HED "LIED" TO
THE REGISTRAR OF TITLES IN ORDER TO
HAVE THE PLANS APPROVED.

The Registrar of Titles,
283 Queen Street,
MELBOURNE VIC. 3000.

24th November, 1980.

Dear Sir,

Plan of Subdivision 2 lots. Part Crown Portion 129 and Part Crown Portion 132,
Parish of Lauriston. Surveyors Reference No. 79305/G. Plan Sealed 21st May, 1980.

Notice is given that the subdivider K. R. & Y. R. Buchanan, has complied with
the conditions of the requirement placed on the above plans pursuant to Section
569E(1) and (1)(a) of the Local Government Act 1958.

Yours faithfully,

S. G. PORTER
SENIOR CLERK

INTERROGATORY 9. Look at paragraph 18 of the 'Plaintiffs' Statement of Claim and state:

(a) what the conditions of the requirement therein referred to were;

(b) whether each of the conditions therein referred to had been complied with in any and if so what way in or about -

(i) September 1980;

(ii) October 1980;

(iii) November 1980;

(iv) some other and if so what date in 1980 -

by the sub-divider therein referred to;

(c) whether each of the conditions therein referred to were not complied with in any and if so what way.

9. In answer to Interrogatory 9:

4.

(a) The requirements of Section 569E of the Local Government Act 1958;

(b) No;

(c) At a later stage the conditions were complied with by the Firstnamed Defendant.

Having lied to the Registrar of Titles.
The Council was no longer protected
by the legislation

8. A plan of subdivision must be sealed or rejected by a council within 100 days of its submission to the council. A council will no longer be able to hold up the sealing of the plan until roads are made but the power to require full or part construction of roads is continued. However, the plan must be sealed before the requirement is carried out so that the subdivider can proceed with his application to have the plan registered by the Registrar of Titles. The council's position will be protected by providing that the Registrar of Titles is not to register the plan until the requirement has been carried out.

9. Where complex problems have arisen under the existing laws which cannot be solved by application of the standards provisions of the Bill, provision is made for the parties to apply to an arbitrator who will be able to make whatever orders he thinks necessary to sort out the complications.

Mr. Eylan.

HEARNARD (ASSEMBLY) 1962
PAGE 1058 (SALE OF LAND BILL)

THE COUNCIL THEN SUBSEQUENTLY LIED TO
MYSELF AND MISREPRESENTED BOTH FACT AND
LEGISLATION.

(REFER FROM PAGES 20-32)

20. (a) The Firstnamed Defendant dies each and every
allegation contained in paragraph 20.

(b) The Secondnamed Defendant does not plead to paragraph
20 as it contains no allegations.

SC

C3

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.

AD

21. (a) The Firstnamed Defendant denies each and every allegation contained in paragraph 21.

F)

(b) The Secondnamed Defendant does not plead to paragraph 21 as it contains no allegation against it.

SC

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 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.

F)

AC

22. (a) The Firstnamed Defendant denies each and every allegation contained in paragraph 22.

(b) The Secondnamed Defendant does not plead to paragraph 22 as it contains no allegation against it.

SC 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.

AD 23. (a) Insofar as it contains any allegations against it the Firstnamed Defendant denies each and every allegation contained in paragraph 23.

(b) The Secondnamed Defendant does not plead to paragraph 23 as it contains no allegation against it.

COUNCILS
INTERROGATORY

15. Look to paragraph 23 of the Statement of Claim and give the usual particulars of the information supplied to the Firstnamed Defendant as alleged therein.

MY
ANSWER.

15. IN ANSWER TO INTERROGATORY 15, I SAY:-

The information was oral. It was contained in a telephone conversation between myself and a person whom I understood to be Mr Stan Porter, the Shire Secretary. I rang the Shire Secretary and asked him not to call up the guarantees because it would cause the Plaintiffs financial difficulties and would force them to sell the 15 lots in order to pay for it. He replied that the firstnamed Defendant had the legal right to force the Plaintiffs to construct the roads on the Tylden's Road land and were so acting because of complaints received from owners of other allotments on the Tylden's Road land. I said that I would go and see these persons and ask them to withdraw their complaint. He then admitted that there never was any complaint. I then said that I would cancel the first Bank Guarantee. He said that if I cancelled the guarantee the firstnamed Defendant would sue us.

(Refer Front Pages 20 - 32)

SC 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:

- (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.

AL 24. (a) The Firstnamed Defendant denies each and every allegation contained in paragraph 24.

(b) The Secondnamed Defendant does not plead to paragraph 24 as it contains no allegation against it.

(REFER FRONT PAGES 20-32)

SC 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.

AD 25. (a) The Firstnamed Defendant denies each and every allegation contained in paragraph 25.

(b) The Secondnamed Defendant does not plead to paragraph 25 as it contains no allegation against it.

SC 26. In the premises the firstnamed Defendant was under a duty to take care in the making of the first representation to the Plaintiffs.

AD 26. (a) The Firstnamed Defendant denies each and every allegation contained in paragraph 26.

(b) The Secondnamed Defendant does not plead to paragraph 26 as it contains no allegation against it.

SC 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.

AD 27. (a) The Firstnamed Defendant denies each and every allegation contained in paragraph 27.

(b) The Secondnamed Defendant does not plead to paragraph 27 as it contains no allegations against it.

(C-41)

SC 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.

AD 28. (a) Insofar as it contains any allegations against it the Firstnamed Defendant denies each and every allegation contained in paragraph 28.

(b) The Secondnamed Defendant does not plead to paragraph 28 as it contains no allegation against it.

SC 29. By reason of the matters aforesaid the Plaintiffs have suffered loss and damage.

PARTICULARS

(a) The sum of \$25,000.

(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.

AC 29. (a) The Firstnamed Defendant denies each and every allegation contained in paragraph 29.

(b) The Secondnamed Defendant does not plead to paragraph 29 as it contains no allegation against it.

(C41)

SC 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 has wholly failed; and
- (b) in the premises the firstnamed Defendant has had and received the said sum to the use of the Plaintiffs.

AD 30. (a) The Firstnamed Defendant denies each and every allegation contained in paragraph 30.

- (b) The Secondnamed Defendant does not plead to paragraph 30 as it contains no allegation against it.

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

- (a) the sum of \$25,000 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.

AD 31. (a) The Firstnamed Defendant denies each and every allegation contained in paragraph 31.

- (b) The Secondnamed Defendant does not plead to paragraph 31 as it contains no allegation against it.

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

- (a) the sum of \$25,000 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.

AD 32. (a) The Firstnamed Defendant denies each and every allegation contained in paragraph 32.

- (b) The Secondnamed Defendant does not plead to paragraph 32 as it contains no allegation against it.

SC 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 which were or might become payable by the Plaintiffs to the secondnamed Defendant in connection with the subdivision of the land.

AC 33. (a) The Firstnamed Defendant does not plead to paragraph 33 as it contains no allegation against.

(b) The Secondnamed Defendant admits each and every allegation contained in paragraph 9 and says further that the Guarantees provided by the Plaintiffs were provided as agents for the owner.

I COULD NOT AND DID NOT GIVE A GUARANTEE AS AGENT FOR BUCHANAN WHERE THE INTENTION WAS TO GIVE EFFECT TO THE UNLAWFUL INTENT EVIDENCED IN COUNCIL'S LETTER TO BUCHANAN OF 27/5/80 AND WHICH INTENT WAS TO BREACH THE PROVISIONS OF S 569 E (3) (a) OF THE L. G. A. (REFER PAGE C14)

THE WATER BOARD HOWEVER DID ACCEPT
MY GUARANTEE AND DID ~~GIVE EFFECT TO~~
ENABLE COUNCIL TO GIVE EFFECT TO
THIS UNLAWFUL INTENT

C.M. Thompson: Forwarding Bank Guarantee \$11,500 to allow
subdivision to be released Trentham Road Kyneton Pt.C.P. 132.

Commr Fielding) That the Trust agree to the lifting of
Hamilton) the requirement subject to the approval of
the Engineer in regard to the adequacy of
the estimate of cost.

CA RRIED. .../4

(BOARD MINUTE OF 6/11/80 DOC W8)

AT THE TIME OF LIFTING THE REQUIREMENT
THERE WAS NO WATER SUPPLY AGREEMENT
IN PLACE WITH BUCHANAN

MY GUARANTEE THEREFORE WAS IMMEDIATELY
PLACED AT RISK

THE WATER BOARD ACCEPTED MY GUARANTEE
FOR THE PURPOSE OF LETTING BUCHANAN
OFF THE HOOK SO TO SPEAK

WATER DID NOT SUPPLY THE GUARANTEE FOR THE
PURPOSE STATED IN THE MINUTE

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

AC 34. (a) The Firstnamed Defendant does not plead to paragraph 34 as it contains no allegation against it.

(b) The Secondnamed Defendant admits each and every allegation contained in paragraph 34.

SC 35. In consideration of the issue of the second Bank Guaranteed 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:

(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 third warranty is to be implied from the Plaintiffs' provision and the secondnamed Defendant's acceptance of the second Bank Guarantee, from the need to give business efficacy to the relationship between the parties and by law.

AD 35. (a) The Firstnamed Defendant does not plead to paragraph 35 as it contains no allegation against it.

(b) Save that the Secondnamed Defendant admits the existence of the guarantee it otherwise denies each and every allegation contained in paragraph 35.

WDB

SC 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.

WBL

36. (a) The Firstnamed Defendant does not plead to paragraph 36 as it contains no allegation against it.

(b) The Secondnamed Defendant admits each and every allegation contained in paragraph 36.

SC 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 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.

37. (a) The Firstnamed Defendant does not plead to paragraph 37 as it contains no allegation against it.

(b) The Secondnamed Defendant admits each and every allegation contained in paragraph 37.

(vvb /)

SC 38. On or about 12 January 1983 the secondnamed Defendant accepted from Westpac, as agent for the Plaintiffs, the sum of \$11,500 in connection with the construction of the main and in purported pursuance of the request and of the second Bank Guarantee.

38. (a) The Firstnamed Defendant does not plead to paragraph 38 as it contains no allegation against it.

(b) The Secondnamed Defendant admits each and every allegation contained in paragraph 38.

SC 39. The Plaintiffs have reimbursed Westpac with the sum of \$11,500 so paid by it as their agent to the secondnamed Defendant at the secondnamed Defendant's request.

39. (a) The Firstnamed Defendant does not plead to paragraph 39 as it contains no allegation against it.

(b) Insofar as it contains any allegations against it the Secondnamed Defendant does not admit each and every allegation contained in paragraph 39.

WB

SC 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.

- 40. (a) The Firstnamed Defendant does not plead to paragraph 40 as it contains no allegation against it.
- (b) The Secondnamed Defendant does not admit each and every allegation contained in paragraph 40.

9. In or about:

- (a) October 1980;
 - (b) November 1980;
 - (c) some other and if so what date in 1980 -
- was there an agreement for the provision of water supply to the land or any part of the land made between -
- (i) the sub-divider referred to in paragraph 7 of the Plaintiffs' Statement of Claim;
 - (ii) Mr. K.R. Buchanan;
 - (iii) the Plaintiffs or either or them -
- and the secondnamed Defendant?

9. In answer to Interrogatory 9:
(a), (b) & (c) No.

11. Was the construction of the water main carried out pursuant to or under:
- (a) an agreement;
 - (b) an agreement for the provision of water supply to the land or any part of the land - made between -
 - (i) the sub-divider referred to in paragraph 7 of the Plaintiffs' Statement of Claim;
 - (ii) Mr. K.R. Buchanan;
 - (iii) the Plaintiffs or either of them - and the secondnamed Defendant?

11. In answer to Interrogatory 11:
(a) & (b) No.

15. In or about:

- (a) 1980;
- (b) 1981;
- (c) 1982;
- (d) 1983;
- (e) 1984 -

was there an agreement between the secondnamed Defendant and -

- (i) Mr. K.R. Buchanan;

15. In answer to Interrogatory 15:

(a) - (e) (i) - (iii) No.

???

IMPROVED DEFENCE.

41. (a) The Firstnamed Defendant does not admit each and every allegation contained in paragraph 40.

WB

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

41. (a) The Firstnamed Defendant does not plead to paragraph 41 as it contains no allegation against it.

(b) Insofar as it contains any allegations against it the Secondnamed Defendant denies each and every allegation contained in paragraph 41.

AS

SC 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.

AO

6. (a) The Firstnamed Defendant does not plead to paragraph 6 as it contains no allegation against it.

(b) The Secondnamed Defendant admits each and every allegation contained in paragraph 6.

AND THERE WAS NO AGREEMENT UNDER SECTION 307 AA OF THE WATER ACT (REFER PREVIOUS PAGE)

THE PROVISIONS OF 307 AA (5) DO NOT APPLY

Sa. (5) amended by No. 10081 s. 5 (1).

(5) The construction or installation other than by the Director-General or the Rural Water Commission of works pursuant to an agreement under this section shall not be commenced unless the plans and specifications therefor have been approved by the Minister.

WB 11

THE ONLY LAWFULL MEANS OF CARRYING OUT THE WORKS WAS PURSUANT TO S 307(1)(h)

PART VIII.—GENERAL PROVISIONS
DIVISION I—POWERS AND PROPERTY OF AUTHORITIES

General powers of Authorities.
No. 3801 s. 282:
No. 5153 s. 6:
No. 5838 s. 13.
S. 307 amended by Nos. 7590 s. 7 (c), 7050 s. 5 (c) (i).

307. (1) For the purposes of this Act any Authority by its officers or servants may subject to the provisions and restrictions herein contained and in accordance with plans approved by the Governor in Council exercise any of the following powers:

(h) It may at any time enter upon any public or private lands streets or roads and construct any channel and lay or place therein any pipe and may repair alter cut off or remove any pipe so laid and may in like manner enter upon any such lands streets or roads for the purpose of repairing or altering any channels or water-courses and other works under its control or in any way connected with such works;

Numbered para.
(h) by No. 7590 s. 7 (b).

THE APPROVAL OF THE GOVERNOR IN COUNCIL WAS NEITHER SOUGHT NOR OBTAINED.

THE WATER TRUST DID HOWEVER SEEK THE MINISTERIAL APPROVAL REQUIRE BY S 307AA(5).

THE TRUST'S ENGINEERS WROTE AND SOUGHT APPROVAL

The Secretary,
State Rivers & Water Supply Commission,
590 Orrong Road,
ARMADALE. 3143

LOCAL
AUTHORITIES
2 - APR 1981
Rec'd

Dear Sir,

Re: Kyneton Shire Waterworks Trust
Contracts 1/81 and 2/81

We are forwarding herewith copies of our Drawing Nos 2167/14 and 15 together with associated documents including a detailed estimate for four separate reticulation extensions in Kyneton.

All four extensions are required to serve lots being created by subdivision and in each case the subdivisor has entered into an agreement with the Trust to pay the cost of the proposed extension together with a contribution of \$200 per block created towards the Trust's Headwork Fund.

A summary of the relevant details for each extension is set out on the attached sheet information and we advise

(DOC W9)

300

THERE WAS HOWEVER NO AGREEMENT

(NOTE THE SUBJECT WORKS FORMED PART OF)

WB 1

THE COMMISSION SUBMITTED TO THE MINISTER

Form S. 011

STATE RIVERS AND WATER SUPPLY COMMISSION

MEMORANDUM:

EDWARD/AJ

Branch or Office: LOCAL AUTHORITIES

To: DIVISIONAL ENGINEER, LOCAL AUTHORITIES

Date: 10 April 1981 W10

From: K.D. WARD, EXECUTIVE ENGINEER

Corr. No. 981/62

Subject: KYNETON SHIRE WATERWORKS TRUST
KYNETON URBAN DISTRICT

WORKS UNDER SECTION 307AA WATER ACT

re: JOHNSON COURT, ABATTOIRS ROAD,
LAURISTON ROAD AND REBECCA DRIVE
RETICULATION EXTENSIONS

1. Proposed Works

- Johnson Court - 252m of 150mm
- Abattoirs Road - 260mm
- Lauriston Road
- Rebecca Drive

2.

AND RECOMMENDED.

6. Recommendation:

It is recommended that the approval of the Minister of Water Supply be sought to the attached plan for water supply works to be carried out by the Kyneton Shire Waterworks Trust by agreement with the developer in accordance with Section 307AA of the Water Act.

K.D. WARD,
Executive Engineer.

WHEREUPON

APPROVED
Minister of Water Supply
27/4/81

(THE APPROVAL OF THE MINISTER THEREFOR
WAS FOR WORKS
(A) WITHIN "THE URBAN DISTRICT"
(B) TO BE CARRIED OUT BY AGREEMENT
UNDER SECTION 307A

AS WE HAVE NOTED ALREADY:-
THE LAND WAS NOT IN THE URBAN DISTRICT
& THERE WAS NO AGREEMENT.

() THEREFORE:- NO APPROVAL AT ALL FOR
THE WORKS CARRIED OUT

SC 42. In the premises:

- (a) no additional or substituted requirement could lawfully be made on the Plaintiffs in relation to the construction of the main on the land;

SECTION 307AA(4) IS THE ONLY PROVISION FOR
 AUTHORITIES TO IMPOSE A REQUIREMENT.

(4) Where any plan of subdivision of land is referred to an Authority pursuant to the provisions of sub-section (2) of section 569B of the Local Government Act 1958 the Authority may serve a notice on the owner of the land to which the plan of subdivision relates requiring such owner to enter into an agreement under sub-section (2).

AND AS THIS ONLY APPLIES WHEN
 REFERRED BY COUNCIL PURSUANT TO
 569B OF THE L.G.A. WHICH IN TURN
 MUST BE DONE BY COUNCIL BEFORE
 THE PLANS ARE SEALED THEN IT
 FOLLOWS THAT NO ADDITIONAL OR
 SUBSTITUTE REQUIREMENT MAY BE
 MADE AFTER THE PLANS ARE
 SEALED.

- (b) the Plaintiffs were not at any material time the owners of any part of the land 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) 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;

AS THERE NEVER WAS AN AGREEMENT
PURSUANT TO 307AA(2) OR AT ALL THEN
WAS NO MECHANISM BY WHICH THE TRUST
COULD:

- A - ACCEPT ANY PAYMENT
- B - ACCEPT ANY SECURITY

AND AS THE WORKS WERE CARRIED OUT
WITHOUT LWFULL AUTHORITY ETC.

- (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 constfuction 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 or any other sum in connection with the subdivision of the land or the construction of the main.

42. (a) The Firstnamed Defendant does not plead to paragraph 42 as it contains no allegation against it.
- (b) The Secondnamed Defendant denies each and every allegation contained in paragraph 42.

SC 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:

- (i) contrary to law; and/or
- (ii) wrongful and in breach of the third warranty; and/or
- (iii) negligent and in breach of a duty owed by it to

43. (a) The Firstnamed Defendant does not plead to paragraph 43 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 43.

SC 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 as detailed in paragraph 38 hereof was:

- (i) contrary to law; and/or
- (ii) wrongful and in breach of the third warranty; and/or
- (iii) negligent and in breach of a duty owed by it to the Plaintiffs.

44. (a) The Firstnamed Defendant does not plead to paragraph 44 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 44.

SC 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.

45. (a) The Firstnamed Defendant does not plead to paragraph 45 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 45.

(1) (REFER FRONT PAGES 20 - 32)

WB 18

WB

36. 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 and the construction of works thereon 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:
 - (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 secondnamed 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.

46. (a) The Firstnamed Defendant does not plead to paragraph 46 as it contains no allegation against it.
- (b) The Secondnamed Defendant denies each and every allegation contained in paragraph 46.

SC 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.

47. (a) The Firstnamed Defendant does not plead to paragraph 47 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 47.

SC 48. In the premises the secondnamed Defendant was under a duty to take care in the making of the second representation to the Plaintiffs.

48. (a) The Firstnamed Defendant does not plead to paragraph 48 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 48.

SC 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.

49. (a) The Firstnamed Defendant does not plead to paragraph 49 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 49.

SC 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.

50. (a) The Firstnamed Defendant does not plead to paragraph 50 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 50.

WB 21

SC 51. By reason of the matters aforesaid the Plaintiffs have suffered loss and damage.

PARTICULARS

- (a) The sum of \$11,500.
- (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 prior to 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.

51. (a) Insofar as it contains any allegations against it the Firstnamed Defendant denies each and every allegation contained in paragraph 51.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 51.

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

52. (a) The Firstnamed Defendant does not plead to paragraph 52 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 52.

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

- (a) the sum of \$11,500 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.

53. (a) The Firstnamed Defendant does not plead to paragraph 53 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 53.

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

- (a) the sum of \$11,500 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.

54. (a) The Firstnamed Defendant does not plead to paragraph 54 as it contains no allegation against it.

(b) The Secondnamed Defendant denies each and every allegation contained in paragraph 54.

(WB 24)

55. Further, by reasons of the facts set out in paragraph 9 and 10 of the Statement of Claim the Firstnamed and Secondnamed Defendants carried out works to the land referred to in paragraph 5 of the Statement of Claim and in so doing acted to their financial detriment.

WB2

PARTICULARS

Between October 1982 and September 1984:

- (i) the Firstnamed Defendant constructed a road upon the land at a cost to it of \$28,708.
- (ii) the Secondnamed Defendant between August and November 1981 constructed a water mains to the land at a cost to it of \$6,658.71.

56. In the premises referred to in paragraph 55 hereof the Plaintiffs are estopped from denying the validity of the guarantee given by them to the Defendants.

9. In or about October 1980 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 which were or might become payable by the Plaintiffs to the firstnamed Defendant in connection with the subdivision of the land.

(PARA 9 SC)

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.

(PARA 10 SC)

A/ I DO NOT DENY THE VALIDITY OF MY GUARANTEES.

B/ I DO SAY THAT NEITHER AUTHORITY HAD THE RIGHT TO ACCEPT MY GUARANTEE FOR THE PURPOSE OF ENABLING BUCHANAN TO REALISE UPON HIS UNLAWFUL SALES BY GIVING EFFECT TO THE UNLAWFUL INTENT EVIDENCED IN COUNCILS LETTER TO BUCHANAN OF 7/5/80
NOR COULD MY GUARANTEE INDUCE COUNCIL TO MISINFORM THE REGISTRAR OF TITLES AS IT DID IN ITS LETTER OF 24/11/80

C/ COUNCIL & THE WATER BOARD ARE ESTOPPED FROM MAKING THE DEFENCE CLAIMED IN PARA 55 AND 56

COUNCIL CONSTRUCTED THE ROADS BECAUSE I HAD FAILED TO DO SO.

SUBDIVISION - SOUTH KYNETON:

Work not carried out on subdivision.

Recommendation: That Council take the Bank Guarantee up and construct the roads.

Crx. Hinneberg)
Pearce) That the recommendation be adopted.

CARRIED.

AND SIMILARLY THE WATER TRUST WITH THE WATER WORKS.

TRENTHAM ROAD SUBDIVISION L.P. 134684

Commr Jenkins) That notice be given to the subdivider that the main
Hamilton) in this subdivision should be constructed forthwith,
failure to give a firm undertaking by the 14th July, 1982 will result in the Trust undertaking the works at his cost.

(Doc)
C19
17/11/82

(Doc)
W16
(2/6/82)

I SAY FURTHER THAT.

Both Council and the Water Trust claimed to have the right to carry out the works in the event that -

I DEFENDED UPON MY LEGAL OBLIGATION TO CONSTRUCT THE WORKS

AND I SAY FURTHER THAT

BOTH COUNCIL AND THE WATER BOARD CLAIMED THAT THIS LEGAL OBLIGATION AROSE FROM WHAT I NOW KNOW TO BE A REQUIREMENT AND WHICH THEY CLAIMED TO BE CURRENT AND BINDING ON MYSELF AND MYSELF ALONE AS OWNER OF THE LAND.

AND MR WILSON FOR COUNCIL GAVE EVIDENCE TO THIS EFFECT IN THE BENDIGO MAGISTRATES COURT

(k)

I say that evidence was given that by letter dated the 12th May, 1982 and the 4th November, 1982 addressed to the applicant wife they were asked to advise the respondent of their intentions in respect of complying with the requirements endorsed on the plans of subdivision.

(PARA 8(K) AFFIDAVIT OF RESPONDENT d/r 235/1987)

WHEREAS:-

THE REQUIREMENT HAD BEEN LIFTED.
AND WERE AT AN END

AND THE REGISTRAR OF TITLES HAD LONG
BEFORE BEEN ADVISED THAT THE
REQUIREMENT HAD BEEN COMPLIED WITH.
WHEREUPON THE REGISTRAR OF TITLES
CANCELLED THE REQUIREMENT ENDORSED
ON THE PLANS AND THEN APPROVED THE
PLANS.

IN ANY EVENT THE REQUIREMENT NEVER
DID APPLY TO ME AND BUCHANAN
WAS RELEASED FROM HIS OBLIGATION.

Consequently, upon the plan of
subdivision having been approved by the Registrar of Titles
Mr Buchanan was released from any statutory obligation to
carry out street construction or waterworks under the terms
of the requirement.

4/JO/E2
Thomson

9

JUDGMENT

THERE NEVER WAS AND NEVER COULD BE
ANY DEFAULT

COUNCIL AND THE WATER TRUST MISREPRESENTED
BOTH FACT AND LEGISLATION SO
THAT I BELIEVED I WAS IN DEFAULT AND
THEN CALLED UPON MY GUARANTEES
UPON MY DEFAULT AND DID THE WORK
BECAUSE OF MY DEFAULT

BOTH CLAIMED THEY WOULD DO THE WORK
AND SELL MY LAND TO REPAIRED

57. Further, and alternatively to paragraph 56 the Defendants carried out, at their cost, sundry works to the land referred to in paragraphs 14 and 36 of the Statement of Claim in circumstances where the plaintiffs received a substantial benefit in circumstances where it would be unconscionable for the Plaintiff to retain such benefit.

Between October 1982 and September 1984:

- (i) the Firstnamed Defendant constructed a road upon the land at a cost to it of \$28,708.
- (ii) the Secondnamed Defendant between August and November 1981 constructed a water mains to the land at a cost to it of \$6,658.71.

THIS PARAGRAPH LACKS BASIC LOGIC

It is clear that no matter who did the work the benefit would accrue. However if Council had not released Buchanan from his obligation then the benefit would have accrued at no cost to me. However as Council did release Buchanan and subsequently carried out the works at my cost I have suffered a net loss. In addition as I was forced to sell the land before the construction of the works I did not realize the benefit which accrued to the land at my expense.

AT LAW A COUNCIL MAY APPLY THE PROVISIONS OF S 569E (10)

(10) The council shall be empowered to cause any work carried out pursuant to a requirement under sub-section (1) of this section to be supervised by an officer or person appointed by the council and may make a charge for such supervision not exceeding Two and one-half per centum of the actual cost of the work, and, where by agreement the plans and specifications for that work are prepared by the council, the council may make an additional charge for the said preparation not exceeding Three and one-half per centum of the actual cost of the work; and in the event of any dispute as to the actual cost of the work the matter may be determined for the purposes of this paragraph by the Planning Appeals Board.

Ss. (10)
amended by
No. 7272 s. 6
(d) (vi), 9512 s. 2
(1).

However as the sums added by council do not reflect the amounts all direct under the act it is clear that the council again acted unlawfully and not pursuant to ~~these~~ this subsection.

The clear implication here is that Councils action against me at Bendigo was an attempt to recover unlawfull amounts. That action like their defence herein has no basis in fact.

IN THE CASE OF THE WATER BOARD
THE PARTICULARS RECITE THAT THE
works were carried out at a cost of
\$6,658.71c

However, the Water Trust called upon my
guarantee in the sum of \$11,500

Kyneton Shire Waterworks Trust

TELEPHONE 22 1433
S. G. PORTER
Secretary & Treasurer

SHIRE HALL
KYNETON
3444

10th December 1982

The Manager
and Lending Department,
Westpac Banking Corporation Limited,
360 Collins Street,
MELBOURNE. 3001.


Dear Sir,

RE: G.A. & C.M. THOMPSON
TRADING AS WHITTLESEA SERVICE STATION

In the terms of the guarantee given by the Commercial Bank of
Australia Ltd. dated 17th October, 1980 the Trust now notifies the
Bank that it desires payment of \$11,500.00 for the purpose of
constructing a watermain on the subdivision on Crown Portion 132
Parish of Lauriston.

Please forward payment as soon as possible to the Trust,
P.O. Box 151, Kyneton.

Yours faithfully,


S.G. PORTER
SECRETARY.

and have not accounted to me
for the difference and have therefore
retained a profit of \$4841.29

not only have the water board made
a profit but they attempted to
Bill me for an extra several
thousand dollars

I did not pay this extra amount billed.

The water Board now denies having billed me for extra but do claim they had billed me for rates.

I Made Specific Demand for this document on Notice under Order 16 Rule 24 Dated 26TH APRIL 1989.

10. Copy of invoice/debit note Kyneton Shire Waterworks Trust to Thompson and purporting to be due to excess of cost of Waterworks re Hill Drive subdivision.

THIS DOCUMENT REFERRED TO AS ITEM 10 IN MY SCHEDULE WAS DISCOVERED BY THE WATER BOARD AS ITEM 9 IN THE SUPPLEMENTARY AFFIDAVIT

9. Copy of invoice/debit note Kyneton Shire Waterworks Trust to Thompson relating to outstanding rates.

THESE DOCUMENTS ARE NUMBERED DIFFERENTLY IN THE SCHEDULE AND SUPPLEMENTARY AFFIDAVIT AS THE WATER BOARD REFUSED TO DISCOVER ITEM 5 OF MY SCHEDULE WITH THE RESULT MY SCHEDULE ITEM 6 BECAME DISCOVERED ITEM 5 ETC.

IN THE LETTER COVERING THE SUPPLEMENTARY
AFFIDAVIS THE SOLICITORS ADVISE
IN RELATION TO ITEM 10 OF MY SCHEDULE

Finally, you will note that document no. 10 is differently described in our Affidavit. We are instructed that the document as you describe it does not and never has existed.

Yours faithfully,
MADDOCK LONIE & CHISHOLM

Upon Requesting Copies of this document
we were advised by letter dated
17/5/89.

Re: Shire of Kyneton & Kyneton Water Board -ats- Thompson

We refer to our telephone conversation of the 16th of May 1989 between our Ms. Neal and your Mr. Nugent and now enclose herewith copy documents as contained in our Supplementary Affidavit of Documents.

We confirm our advices that document no. 9 is not included as is not relevant to these proceedings and also because our client is currently unable to locate it.

THE FACTS ARE:-

KYNETON WATER TRUST DID SEND ME A
BILL / DEBIT NOTE FOR EXTRA COSTS ON
THE CONSTRUCTION OF THE WATER WORKS
AND WHICH I HAVE LOST.

THEY DID DISCOVER ITEM 9 of their
affidavit and apparently located it for
long enough to declare that it was
a Bill for Rates.

Unfortunately for the Trust however
the facts indicate they were
again lying. ~~lying~~

THE LAND WAS AT ALL MATERIAL TIMES OUTSIDE THE KYNETON URBAN DISTRICT AND NOT SUPPLIED WITH WATER.

As The Following provisions Apply

162. A waterworks trust may from time to time declare by notice published in the *Government Gazette* and in some newspaper circulating in its district that any part of its waterworks district described in such notice is supplied with water or drained by works carried out under the provisions of this Act.

Power to trust to specify parts of district supplied with water or drains.

No. 3801 s. 148;

No. 4513 s. 13

(1);

No. 5072 s. 11

(2);

No. 5573 s. 6.

S. 162 amended

by No. 5838 s. 26

(a), substituted

by No. 7781 s. 6.

Power to trust to

make and levy

rates.

No. 3801 s. 149.

S. 163 amended

163. (1) A waterworks trust may make and levy a water rate in respect of all lands and tenements in such part or parts of its waterworks district as have been described in notices published in accordance with section 162.

To properties in areas supplied with water.

Whereas this provision applies

Power to trust to make and levy special rates.

No. 3801 s. 150.

S. 164 amended

164. (1) Any waterworks trust may make and levy a special rate in respect of lands and tenements in any part of its waterworks district not described in any notice published under section 162.

to properties in areas not supplied.

I am advised by the department of Water resources that Kyneton has never struck a special rate.

Therefore this land was never rated at any time when owned by myself.

I therefore maintain that not only has the water Board already made a profit by unlawfully retaining \$4841.24 but it sought to charge me extra.

I have since discovered the document evidencing this fact but has sought to misdescribe it and has refused to make a copy available and has unfortunately lost it since discovering it.

