

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION**

No 6321 of 2005

B E T W E E N

**GLENN ALEXANDER THOMPSON
& CHERYL MAREE THOMPSON**

Plaintiffs

and

MACEDON RANGES SHIRE COUNCIL

First Defendant

-and-

THE COLIBAN REGION WATER AUTHORITY

Second Defendant

**OUTLINE OF SUBMISSIONS OF THE SECOND DEFENDANT
FOR 31 OCTOBER 2006**

Date of document: 30 October 2006

Filed on behalf of: the Second Defendant

Prepared by:

Arnold Dallas McPherson
Lawyers
337 Hargreaves Street
BENDIGO VIC 3550

Solicitor code:
DX 55054 Bendigo
Tel 5445 9200 Fax 5441 4424
Ref: Steven Edward

Application & Material

1. The plaintiffs allege that they are owners of certain parcels of land described as (1) the Tylden Road land in December 1980, being 15 residential allotments identified in certificate of title volume 9408 folios 045, 046, 047, 048, 049, 051, 052, 054, 055, 056, 057, 058, 059, 060, 061, 062 and industrial land identified by lodged plan numbers 135199, 135200 and 135201 and (2) Woodleigh Heights land in and around late 1981, being the land described in certificates of title volume 9171 folios 687, 688, 693, 698, 700, 701, 704, 713 and 714 and carried on business of property developers.
2. The first defendant was formerly known as the Kyneton Shire Council. The second defendant was previously known as the Kyneton Water Board and the Kyneton Shire Water Works Trust.

3. The plaintiffs allege that there was a requirement imposed by the Shire of Kyneton under section 569E(1) and (1A) of the *Local Government Act 1958* (Vic) in respect of plans of subdivisions. They allege that in or about October 1980, the plaintiffs provided bank guarantees obtained from the Commercial Bank of Australia Limited in the sum of \$25,000 for road construction and \$11,500 to cover water main and associated water works for the Tylden Road land. The plaintiffs claim that the second defendant called on the guarantees on 10 December 1982 to construct water main and associated water works in 1983 and 1984 and that it acted wrongfully and without lawful authority causing loss and damage to the plaintiffs. The plaintiffs claim that the Tylden Road land was not at any time situated within the urban district or rural district of the second defendant.
4. The plaintiffs further claim that they have suffered a loss of profit in that they were called on to sell the residential allotments at Tylden Road prematurely.
5. In relation to the Woodleigh Heights land, the plaintiffs allege that the second defendant entered into an agreement on or about 1 January 1982 for the supply and distribution of water to Woodleigh Heights Resort Development Pty Ltd (WHRD), a company incorporated by the previous owners of the land. The plaintiffs claim that the second defendant acted wrongfully and in excess of its powers in entering into an agreement with WHRD to supply and distribute water to the subdivision. The plaintiffs defaulted on their mortgage and their land was sold by public auction by Australian Guarantee Corporation Pty Ltd (AGC) on 17 November 1984.
6. The plaintiffs claim that the second defendant misrepresented to them the situation in relation to access to an approved reticulated water supply. The plaintiffs say as a result, the auction scheduled for 23 November 1985 was cancelled. Subsequently, the plaintiffs sold their land in 1989 to Deckwood Pty Ltd for a lower price than they otherwise would have obtained had reticulation been available on the land.

Orders Sought

7. The second defendant seeks the orders sought in the summons dated 20 September 2005 that the proceeding be dismissed or permanently stayed as

against the second defendant under rule 23.01, alternatively, that the proceeding be dismissed or permanently stayed as against the second defendant as frivolous, oppressive and an abuse of process and costs of and incidental to the proceeding and of this application on an indemnity basis.

8. The proceeding is an abuse of process and is in breach of the terms of settlement in each of the County Court and Supreme Court proceedings.

Material

9. In support of its application, the second defendant relies upon and reads the following material:

- 9.1 Affidavit of Steven Mark Edward, sworn 12 September 2005.
- 9.2 Further affidavit of Steven Mark Edward in response to affidavit of Glenn Thompson sworn 18 October 2005 sworn 3 and 11 November 2005.
- 9.3 Defence of the second defendant dated 4 July 2005.

10. The second defendant also refers to the material filed by the plaintiffs in the proceedings to date:

- 10.1 Affidavits of Glenn Thompson sworn 18 October 2005 (two) in relation to the strike out applications and 7 November 2005 (two) and 10 November 2005.
- 10.2 Affidavit of Brendan Smith sworn on 9 November 2005.
- 10.3 The plaintiffs' statement of claim dated 31 May 2005 and proposed amended statement of claim dated 4 November 2005.

Short Chronology

11. The following events are relevant in the proceeding in relation to the subject matter of Tylden Road:

Date	Event
7 November 1988	Summons and attached Statement of Claim in County Court proceeding No 880949 between the plaintiffs and the Council and the Water Authority (Tylden Road Proceeding)
16 December 1988	Defence
5 April 1989	First Defendant's Affidavit of documents
10 May 1989	Firstnamed defendant's interrogatories for the examination of the plaintiffs
10 May 1989	Secondnamed defendant's interrogatories for the examination of the plaintiffs
23 May 1989	First Supplementary affidavit of documents
17 July 1989	First Further Supplementary affidavit of documents
June 1989	Amended Defence

25 August 1989	Answers of the plaintiffs to their interrogatories delivered for their examination by the firstnamed defendant
25 August 1989	Answers of the plaintiffs to their interrogatories delivered for their examination by the secondnamed defendant
3 January 1990	First defendant's third supplementary affidavit of documents
12 April 1990	Interrogatories delivered on behalf of the plaintiffs for the examination of the firstnamed defendant
18 May 1990	Answers of the firstnamed defendant to the interrogatories delivered for its examination by the plaintiffs
18 May 1990	Answers of the secondnamed defendant to the interrogatories delivered for its examination by the plaintiffs
13 May 1991	Amended Statement of Claim in Tylden Road Proceeding
31 May 1991	Defence of Firstnamed and secondnamed defendants
3 June 1991	Further re-amended defence dated 3 June 1991
4 June 1991	Particulars pursuant to paragraph 29(c) of the plaintiffs' amended statement of claim
4 June 1991	Particulars pursuant to paragraph 51(c) of the plaintiffs' amended statement of claim
9 August 1990	Re-Amended Defence of Firstnamed and secondnamed defendants
12 June 1991	Tylden Road Proceeding trial before Judge Howden
14 June 1991	Terms of Settlement in the Tylden Road Proceeding
14 June 1991	Order of Judge Howden made on 14 June 1991 that "by consent settled action to be struck out".

12. The following events are relevant in the proceeding in relation to the subject matter of Woodleigh Heights:

Date	Event
26 October 1995	Writ in Supreme Court proceeding No 7966 of 1995 between the plaintiffs and the Council and the Water Authority and two individuals (Woodleigh Heights Proceeding)
22 February 1998	Plaintiffs' affidavit sworn by Glenn Alexander Thompson on 17 December 1998 made pursuant to the orders of Mr Justice Ashley of 13 November 1998
23 February 1998	Plaintiffs' affidavit sworn by Glenn Alexander Thompson on 18 February 1998
28 August 1998	Amended Statement of Claim
22 December 1998	Plaintiffs' further affidavit of documents
5 February 1999	Affidavit of David Leslie Pumpa on behalf of the first, third and fourth defendants sworn on 5 February 1999
25 February 1999	Plaintiffs' affidavit sworn by Glenn Alexander Thompson on 22 February 1998
17 March 1999	Amended Further Statement of Claim made pursuant to the order of Mr Justice Ashley on 26 February 1999
22 April 1999	Order of Master Bruce made on 22 April 1999 referring

	matter to mediation
19 May 1999	Defence of the second defendant to the amended further statement of claim served pursuant to the order made by the Honourable Mr Justice Ashley on 26 February 1999
20 May 1999	Defence of the first defendant to the amended further statement of claim dated 19 May 1999
20 May 1999	Defence of the third defendant to the amended further statement of claim
20 May 1999	Defence of the fourth defendant to the amended further statement of claim
2 June 1999	Plaintiffs' reply to the defence of the secondnamed defendant dated 18 May 1999
17 June 1999	Plaintiffs' reply to the defence of the firstnamed defendant dated 19 May 1999
17 June 1999	Plaintiffs' reply to the defence of the thirdnamed defendant dated 19 May 1999
17 June 1999	Plaintiffs' reply to the defence of the fourthnamed defendant dated 19 May 1999
29 July 1999	Terms of Settlement in Woodleigh Heights Proceeding
17 August 1999	Plaintiffs' affidavit sworn by Jim Prosser-Fenn on 16 August 1999
23 August 1999	Secondnamed Defendant's affidavit sworn by Steven Edward on 23 August 1999
24 August 1999	Secondnamed defendant's summons seeking declaration that terms of settlement be specifically performed
30 August 1999	First, third and fourth defendants' summons seeking declaration that terms of settlement be specifically performed and Affidavit of David Leslie Pumpa on behalf of the first, third and fourth defendants sworn on 30 August 1999
31 August 1999	Plaintiffs' affidavit sworn by Glenn Alexander Thompson on 31 August 1999
1 September 1999	<i>Thompson v Macedon Ranges Shire Council</i> [1999] VSC 338 per Beach J

Legal Considerations

13. The plaintiffs' present proceedings seeks:

- to re-agitate issues that were raised and resolved in earlier proceedings between the plaintiffs and the second defendant;
- alternatively, to agitate issues that could have been raised and resolved in those earlier proceedings as matters that are inter-related with the subject matter of the prior proceedings;
- to agitate issues that were resolved by settlement in the prior proceedings;
- to agitate issues that are in any event manifestly statute barred.

Anshun estoppel and res judicata – requires matters should have been raised previously

14. The second defendant relies on the doctrine of res judicata and says that the plaintiffs are precluded from bringing these proceedings.
15. The doctrines of res judicata and Anshun estoppel apply to matters which were not raised in the prior proceedings but which could and should have been raised: *Port of Melbourne Authority v Anshun Pty Ltd (Anshun)* (1981) 147 CLR 589 at 599. There will be an estoppel where the matter relied upon in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it there: *Anshun* at 602. The principle is based on the policy that parties to litigation should bring forward their whole case and not seek to reopen issues in subsequent litigation, not only to avoid the possibility of inconsistent decisions but also to make efficient use of court resources and judicial time: *Ford Motor Co of Australia Ltd v Tristar Steering & Suspension Australia Ltd* [2003] FCA 596 at [35] per Goldberg J.
16. The principle applies to matters that could have been relied on in the former proceedings to ground a claim and applies where the matter is relied upon in the second proceeding to ground a cause of action. Here, the matters raised in the second proceeding could readily have been raised in the first proceeding and were within the jurisdiction of the first tribunal: *Morlend Finance Corp (Vic) Pty Ltd v Levine* [1990] VR 205.
17. Where a party has behaved unreasonably in not raising a matter in the earlier proceedings, that party will generally not be permitted to litigate it later. *Port of Melbourne Authority v Anshun Pty Ltd (No 2)* [1981] VR 81 at 89.
18. Where a person takes fresh proceedings in circumstances where the cause of action arises substantially out of the same matters of fact as those in the first proceedings that person will be estopped from bringing the later proceedings. See *Trawl Industries of Australia Pty Ltd (in liq) v Effem Foods Pty Ltd* (1992) 36 FCR 406, where the plaintiff's claim in negligence in second proceedings arose out of same 'factual matrix' as its claim in first proceedings under section 52 *Trade Practices Act 1974* (Cth).

19. Res judicata or cause of action estoppel, which precludes reliance on causes of action determined in prior proceedings between the parties also arises in this proceeding as court orders were made disposing of both the prior Tylden Road and Woodleigh Heights proceedings after the execution and performance of terms of settlement.

20. It is submitted that if this proceeding were allowed to continue, it would amount to an abuse of process. This principle applies where the party is held to be bound in substance by an earlier determination even if the technical requirements of res judicata and issue estoppel are absent: *Neil Pearson & Co Pty Ltd v Comptroller-General of Customs* (1995) 38 NSWLR 443; *National Mutual Life Assn of Australasia Ltd v Grosvenor Hill (Queensland)* (2001) 183 ALR 700 and extends to interlocutory determinations: *Stephen v Garnett* [1898] 1 QB 677 AT 680-1 PER Smith LJ; *Collier v Howard* (unreported SCNSW, McLelland CJ, No 1797 of 1996, 23 April 1996); *Wentworth v Rogers* (unreported, SCNSW, Sperling J, No 019228 of 1982, 10 September 1996). It is submitted that the present proceeding is an abuse of process by bringing on fresh proceedings involving the same subject matter and similar prayer for relief as the prior proceeding. The principle applies even if the earlier decision was not final and conclusive in a res judicata or issue estoppel sense: *Nominal Defendant v Manning* (2000) 50 NSWLR 139.

21. Some underlying policy considerations are that parties to litigation must not only avoid the possibility of inconsistent decisions but also to make efficient use of court resources and judicial time and avoid bringing on multiple proceedings on the same issues. Once the plaintiffs settled the Tylden Road and Woodleigh Heights proceedings and orders of the Court were made to dismiss the matters, it was improper for the plaintiffs to file fresh proceedings on the same matters that have already been disposed of between the parties.

22. The present proceeding seeks substantially the same relief as the prior proceedings and the grounds relied upon are the same as or alternatively are matter which might have been brought forward in the prior proceedings. The present proceeding does not add anything to the former Tylden Road and Woodleigh Heights proceedings and it is contended that it is an abuse of process for a party to seek to litigate the same issues in subsequent, or in this case, multiple, proceedings: *Neil Pearson & Co* at 451 per Kirby ACJ, CA

(NSW). It is submitted that the present proceedings are so closely connected with the subject matter of the Tylden Road and Woodleigh Heights proceedings that the plaintiffs are estopped from raising these matters again in fresh proceedings.

Stay of proceedings — issue not raised in prior proceeding

23. A party to litigation ought to bring forward his whole case, and if he does not, he will not be allowed to raise the matter for determination in a second proceeding which might have been brought forward in an earlier proceeding against the same opponent. There will be an estoppel if the matter relied upon in the second proceeding was so relevant to the subject matter of the first proceeding that it would have been unreasonable not to rely on it: see [I 23.01.130]. Failure to bring the whole case forward for adjudication when it was unreasonable not to do so is a form of abuse of process see *Henderson v Henderson* (1843) 3 Hare 100 at 114–115; [1843–60] All ER Rep 378 at 381–382 per Wigram VC:

"In trying this question, I believe I state the rule of the Court correctly, when I say, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time." [Emphasis added].

24. It is submitted that the action must be struck out with costs for the reasons outlined above.

Legal submissions – releases in respect of previous proceedings are sufficient

25. The plaintiffs executed releases by terms of settlement dated 14 June 1991 in relation to the Tylden Road Proceeding providing "Subject to the Defendants' performance of these Terms of Settlements, the Plaintiffs release the Defendants from all claims, suits and demands whatsoever the subject of this proceeding" and 29 July 1999 in respect of the Woodleigh Heights Proceeding

in the form of clause 4 stating "The Plaintiffs and Defendants agree to release each other from all actions, suits, demands and costs rising out of, or in any way related to the subject matter of the proceedings".

26. A release of all claims extinguishes all actions, claims, suits, demands and costs then existing. The release in the Tylden Road Proceedings is a release from all actions, claims, suits, demands and costs "whatsoever" the subject of the proceeding. Perusal of the pleadings and court documents listed in paragraph 11 including the different versions of the statement of claim and the particulars show that in the current action the plaintiffs are acting in contravention of their release.

27. The release of the Woodleigh Heights Proceeding extends to all actions, suits, demands and costs "rising out of or in any way related to the subject matter of the proceedings" (our underlining). It is clear and inescapable that the present action is an action which arises out of, or is in any way related to the subject matter of the Woodleigh Heights Proceeding.

Statute Barred

28. The second defendant relies on section 5 of the *Limitations of Action Act 1958* (Vic) and says that the claims in this proceeding are statute barred: paragraph 11 of the defence of the second defendant.

29. Section 5(1)(a) provides:

The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued –

(a) Subject to sub-sections (1AA) and (1A), actions founded on simple contract (including contract implied in law) or actions founded on tort including actions for damages for breach of a statutory duty.

30. A limitation defence has been pleaded. The plaintiffs must then prove that the cause of action accrued within the limitation period by proving that damage was suffered within the relevant period. In the present case, there is no doubt that the proceedings are well out of time by over a decade. There is no arguable case that they are in time.

31. The conduct complained of by the plaintiffs alleges loss which is said to occur during the following times:

- 31.1 loss calculated from December 1980 being the loss of the value at the time of the plaintiffs' purchase of the land described in the First Industrial Plan.
- 31.2 loss calculated from January 1983 when the plaintiffs allegedly suffered significant financial hardship beginning when the bank guarantees were called upon and they were forced to sell 15 allotments of land.
- 31.3 loss calculated from on or about April 1983 when the plaintiffs entered into a contract with Chelmantau Pty Limited for the sale of the residential allotments.
- 31.4 January 1984 and November 1987 when Chelmantau Pty Limited sold the allotments for an average of \$22,473 per allotment.
- 31.5 loss calculated from November 1984 when AGC cancelled the proposed public auction.

The latest date the plaintiffs can possibly calculate damage from in respect of the Woodleigh Heights claim is 1989 when Esanda Pty Limited allegedly sold the plaintiffs' land to Deckwood Pty Limited.

32. It is submitted that the claims are hopelessly out of time and it is not open to be argued that they could be within the limitation period.

The Tylden Road Claims

33. By summons no 880949 issued on 7 November 1988 in the County Court of Victoria, Melbourne, the plaintiffs claimed damages as to the Tylden Road land from the first and second defendants concerning the matters alleged in paragraphs 1 to 10, T1 to T34, D1 and D6.

34. The plaintiffs filed and served *inter alia* a statement of claim annexed to the summons dated 7 November 1988, an amended statement of claim dated 13 May 1991 and particulars dated 4 June 1991. The second defendant relied on *inter alia* a defence dated 16 December 1988, an amended defence of June

1989, a re-amended defence dated 9 August 1990 and a further re-amended defence dated 3 June 1991.

35. On 12 June 1991, the Tylden Road proceeding came on for trial before his Honour Judge Howden and was heard on 12 June to 14 June 1991 inclusive. By terms of settlement dated 14 June 1991, the parties settled the Tylden Road proceeding and orders were made that the action be struck out. By reason of the terms of settlement, orders of the court and performance of the obligations under the terms of settlement, the defendants were released from all claims, suits and demands arising from the subject matter.
36. Both the County Court proceeding and the current pleading at paragraphs 1 to 10, T29-34 and D1 to D6 concern the same subject matter. The proceedings relate to the Tylden Road land and claim damages, interest and costs and involve identical parties. The allegations in relation to the second defendant in the County Court proceeding paragraphs are found at paragraphs 1 to 6 and 34 to 57.

Allegation	Prior Tylden Road Proceeding	Present Proceeding
References to Local Government Act	1	1
Plaintiffs members of public and bona fide purchasers for value	12	1A
Plaintiffs property developers		1B
Plaintiffs would have commenced to carry on the business but for the defendants' breaches of duty	21, 29	1C
First Defendant	1	2
Second Defendant	2,3	3
First Defendant	1	4
First Defendant owing duty to plaintiffs as members of public/class of persons	21	5
Second Defendant incorporated	2,3	6
Second Defendant owed duty to plaintiffs	43	7
Graham Wilson, Shire Engineer		8
George Porter, Secretary of Shire of Keyneton	24	9
David Parkinson, Shire Secretary and Secretary of water Board		10
Second Defendant received bank cheque in the sum of \$11,500 in October 1980; no lawful authority; not parties to agreement for supply of	34, 38, 40, 41, 42	T29

water; no notice of requirement pursuant to s 569E(1A)		
Reckless disregard as to probability of occasioning harm	43, 44	T30
Second Defendants called on the guarantee; notified plaintiffs it had resolved to construct the water works	36, 37	T31
Second Defendant purported to act bona fide and with lawful authority; knew when called on guarantee that it did not have lawful authority	43, 44	T32
Reckless disregard as to probability of occasioning harm	43, 44	T33
Porter engaged in conduct as officer of the second defendant and in the course of his employment		T34
Loss and damage	29, 51, 56, 57	D1
Loss calculated from December 1980 being the loss of the value at the time of the plaintiffs' purchase of the land described in the First Industrial Plan.	29	D2
(i) loss calculated from January 1983 when the plaintiffs allegedly suffered significant financial hardship beginning when the bank guarantees were called upon and they were forced to sell 15 allotments of land. (ii) loss calculated from on or about April 1983 when the plaintiffs entered into a contract with Chelmantau Pty Limited for the sale of the residential allotments. (iii) January 1984 and November 1987 when Chelmantau Pty Limited sold the allotments for an average of \$22,473 per allotment	29	D3
Loss to the business	29	D4
Loss calculated from November 1984 when AGC cancelled the proposed public auction.	29	D5
Exemplary damages		D6

Woodleigh Heights claims

37. By action no 7966 of 1995 in the Supreme Court of Victoria, at Melbourne, issued on 26 October 1995, the plaintiffs claimed damages as to the Woodleigh

Heights land from the first and second defendants and David Parkinson and Graeme Wilson concerning the matters alleged in paragraphs 1 to 10, W1 to W70 and D1 and D6.

38. The plaintiffs filed and served *inter alia* an indorsement of claim attached to the writ dated 26 October 1995, a further statement of claim dated 28 August 1998, a reply and amended reply to the second defendant's defence dated 18 September 198 and 23 September 1998 and an amended further statement of claim dated 17 March 1999. The second defendant relied on, *inter alia*, a defence dated 31 January 1997, a defence dated 11 September 1998, a rejoinder to the amended reply to the second defendant's defence, an amended reply to the second defendant's defence dated 6 October 1998 and a defence to the further amended statement of claim dated 18 May 1999.
39. By written terms of settlement dated 29 July 1999, the plaintiffs and defendants settled the prior Woodleigh Heights proceeding. Under the terms of settlement, the defendants were released from all actions, suits, demands and costs arising out of, or in any way related to the subject matter of the proceeding.
40. Subsequent to the execution of the terms of settlement and despite payment of the settlement monies, the plaintiffs refused to file a notice of discontinuance and purported to file a notice of trial dated 16 August 1999.
41. By summonses dated 24 August and 30 August 1999, the defendants sought orders that the plaintiffs specifically perform the terms of settlement.
42. On 1 September 1999, the summonses were returnable before Mr Justice Beach who ordered that the terms of settlement dated 29 July 1999 be specifically performed.
43. The defendants were released from the claim made in the proceeding in relation to the Woodleigh Heights land.
44. Both the Supreme Court proceeding and the current pleading at paragraphs 1 to 10, W62 to W71 and D1 to D6 concern the same subject matter. The proceedings relate to the Woodleigh Heights estate and claim damages, interest and costs and involve identical parties.

Allegation	Prior Woodleigh Heights Proceeding	Present Proceeding
References to Local Government Act	1	1
Plaintiffs members of public and bona fide purchasers for value	12	1A
Plaintiffs property developers		1B
Plaintiffs would have commenced to carry on the business but for the defendants' breaches of duty	63A	1C
First Defendant	1	2
Second Defendant	2	3
First Defendant	1	4
First Defendant owing duty to plaintiffs as members of public/class of persons	63A	5
Second Defendant incorporated	2	6
Second Defendant owed duty to plaintiffs	63A	7
Graham Wilson, Shire Engineer	4	8
George Porter, Secretary of Shire of Keyneton	32	9
David Parkinson, Shire Secretary and Secretary of water Board	3	10
		W62
		W63
False representations in relation to water not being available, no agreement between the Board and other parties, no guarantee that the Board would supply water	52A	W64
Parkinson made representations	54A, 56A	W65
None		W66
Reliance	55A	W67
Cancellation of auction	55A	W68
Deny opportunity to sell	67A	W69
Unsuccessful attempts to establish legal entitlement to supply water to CS1134	56A	W70
Esanda exercised rights of mortgagee sale over the land	65	W71
Loss and damage	67A	D1
loss calculated from December 1980 being the loss of the value at the time of the plaintiffs' purchase of the land described in the First Industrial Plan.	67A	D2
(iv) loss calculated from January 1983 when the plaintiffs allegedly suffered significant financial hardship beginning when the bank guarantees were called upon and they were forced to sell 15 allotments of land.	67A	D3

(v) loss calculated from on or about April 1983 when the plaintiffs entered into a contract with Chelmantau Pty Limited for the sale of the residential allotments.		
(vi) January 1984 and November 1987 when Chelmantau Pty Limited sold the allotments for an average of \$22,473 per allotment		
Loss to the business	67A	D4
Loss calculated from November 1984 when AGC cancelled the proposed public auction.	67A	D5
Exemplary damages		D6

The Plans for the Industrial Allotment at Tylden Road

45. The plaintiffs claim that until August 2000, he had no reason to suspect the existence of any of the conduct complained of in the current pleading. He claims that it was only on examining the folder of documents in August 2000 that he alleges was given to him at the settlement of the County Court proceeding in June 1991 that caused him to issue the current proceedings.
46. In the previous Woodleigh Heights proceedings the first named plaintiff filed and served a Further Affidavit of Documents sworn by the first named plaintiff on 22 December 1998. The Third Schedule of that Further Affidavit of Documents lists at item 93 "Plans of Subdivision Tylden Road Property": item 66 listed in exhibit SME 2 Volume 3.
47. In Steven Edward's further affidavit sworn on 3 November 2005, he deposes that on 4 and 5 February 1999, he attended Orange, New South Wales, to inspect documents discovered by the plaintiffs. According to notes made at the time of inspection, the surveyor's plan of subdivision for Tylden Road was one of 25 items in a pile of documents.
48. On 23, 24, 25 and 26 March 1999, Mr Edward again attended at the plaintiffs' solicitor's premises at Orange photocopied all of the documents then produced by the plaintiffs for the purpose of discovery, amongst the documents were several pages being plans of subdivision of the Tylden Road property: SME 3 copy of the said plans of subdivision photocopied in Orange in March 1999.

The documents relied on by the plaintiffs, being exhibit GAT-7, appear to identical to the items numbered 2, 3 and 4 in exhibit SME 3.

49. Further, in item 43 of SME 1 Volume 2 is exhibited a true copy of the plaintiffs' document entitled "book of pleadings" in the County Court proceeding, undated. The handwritten notes contained in that document traverse the same subject matter as what the plaintiffs are seeking to agitate in the current proceeding: see pages 5 to 9, 12 and 20. The handwritten notes reflect what the first plaintiff has deposed to in his affidavit in opposition in this proceeding.

50. In his second further affidavit of 11 November 2005, Mr Edward gives further detail and exhibits relevant correspondence dealing with discovery and inspection of documents at the office of the plaintiffs' solicitors.

Costs

51. The Court should exercise its discretion to award costs over and above the ordinary, as this is a case where the plaintiffs have engaged in unmeritorious and improper conduct such as to warrant the court showing its disapproval and at the same time preventing the defendants being left out-of-pocket.

52. In *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 at 401 (Fed C of A), Woodward J said:

I believe that it is appropriate to consider awarding "solicitor and client" or "indemnity" costs, whenever it appears that an action had been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law. Such cases are, fortunately, rare. But when they occur, the court will need to consider how it should exercise its unfettered discretion.

53. The court will require some evidence of unreasonable conduct, albeit that it need not rise as high as vexation: *Rosniak v GIO* (1997) 41 NSWLR 608 at 616. In *Ugly Tribe Co Pty Ltd v Sikola*; [2001] VSC 189 at [7], Harper J said that circumstances in which it had been held proper to order indemnity costs, characterised as special circumstances, included the following (citations omitted):

- (i) *The making of an allegation, known to be false, that the opposite party is guilty of fraud.*
- (ii) *The making of an irrelevant allegation of fraud.*
- (iii) *Conduct which causes loss of time to the court and to other parties.*
- (iv) *The commencement or continuation of proceedings for an ulterior motive.*
- (v) *Conduct which amounts to a contempt of court.*
- (vi) *The commencement or continuation of proceedings in wilful disregard of known facts or clearly established law.*
- (vii) *The failure until after the commencement of the trial, and without explanation, to discover documents the timely discovery of which would have considerably shortened, and very possibly avoided, the trial.*
[Emphasis added]

54. Justice Beach has already ordered specific performance of the Terms of Settlement in the Woodleigh Heights Proceedings. The plaintiff's conduct is in wilful disregard of the terms of settlement and the orders of the Court.

55. It is submitted that this is an appropriate case in which indemnity costs should be awarded to the second defendant. Following the delivery of judgment on 15 May 2006, Master Efthim heard argument as to the level of costs that should be ordered. Following the hearing of argument, Master Efthim ruled that this was an appropriate case in which indemnity costs should be ordered.

56. In his reasons for decision dated 15 May 2006, Master Efthim fully considered the arguments presented by Mr Middleton QC (as his Honour then was) on behalf of the plaintiffs and he came to the view that the arguments presented in this submission were well founded. It is submitted that Master Efthim's reasons are correct and that as a consequence there is no substance in this appeal.

Conclusion

57. It is submitted that the appeal from the order of Master Efthim be dismissed.

Greg Garde

Sharon Burchell
Counsel for the Second Defendant

Dated: 30 October 2006

