

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMON LAW DIVISION

No. 6321 of 2005

BETWEEN

GLENN ALEXANDER THOMPSON and CHERYL MAREE THOMPSON

Plaintiffs

and

MACEDON RANGES SHIRE COUNCIL

First Defendant

and

THE COLIBAN REGION WATER AUTHORITY

Second Defendant

AFFIDAVIT OF MICHELLE ELIZABETH DIXON

Date sworn: 23 September 2005  
Filed on behalf of: The First Defendant  
Prepared by:  
**Maddocks**  
Lawyers  
140 William Street  
Melbourne VIC 3000

Solicitor's Code: 230  
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Ref: MED: 764595  
Attention: Michelle Dixon

I, Michelle Elizabeth Dixon, of 140 William Street, Melbourne in the State of Victoria,  
Solicitor, make oath and say as follows:

A. INTRODUCTION

1. I am a partner of the firm of Maddocks, the First Defendant's solicitors in this proceeding. I have the care and conduct of this proceeding on behalf of the first defendant. Except where otherwise stated, I make this affidavit from my own knowledge. In this affidavit I refer to the First Defendant as the "**Council**" and the Second Defendant as the "**Water Authority**".
2. I make this affidavit in support of the Council's summons dated 23 September 2005 by which it seeks, amongst others, the following orders:
  - (a) judgment for the Council against the Plaintiffs pursuant to Rule 23.03, alternatively pursuant to Rule 23.01;

- (b) alternatively, that the proceeding be permanently stayed pursuant to Rule 23.01.

3. The documents referred to in this affidavit are contained in an exhibit folder ("the exhibit folder").
4. Now produced and shown to me and marked "MED-1" is a true copy of the exhibit folder.

**B. GROUNDS FOR THE RELIEF SOUGHT IN THE SUMMONS**

**(a) Summary Judgment – Rule 23.03**

5. The grounds upon which the Council seeks summary judgment against the Plaintiff are as follows:

- (a) the Plaintiffs seek to agitate issues which were:
- (i) raised and resolved in earlier proceedings between the Plaintiffs and the Council;
  - (ii) resolved by settlement of the earlier proceedings;
- (b) the Plaintiffs seek to raise claims which were open to the Plaintiffs to raise in the earlier proceedings;
- (c) the Plaintiffs claims are manifestly statute barred.

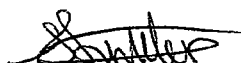
**(b) Judgment or permanent stay – Rule 23.01**

6. The Council relies on the same matters set out in sub-paragraphs 5(a) to (c) above in seeking relief pursuant to Rule 23.01.
7. The factual matters relating to each of these grounds are set out below.

**C. PLAINTIFFS SEEK TO LITIGATE ISSUES WHICH WERE THE SUBJECT OF EARLIER PROCEEDINGS**

**(a) Outline of claims made in the present proceeding**

8. I have read the Plaintiffs' Statement of Claim dated 31 May 2005 and filed by the Plaintiffs in this proceeding (tab 1 in the exhibit folder). Two claims are made by the Plaintiffs' against the Council. The first claim relates to parcels of land described in



the Statement of Claim as the "**Tylden Road land**". The second claim relates to parcels of land described in the Statement of Claim as the "**Woodleigh Heights land**". The primary allegation made by the Plaintiffs against the Council in each claim is that the Council engaged in misfeasance in public office. Both claims are made against the Council as the successor in law to the "Kyneton Shire Council".

**(b) Description of Tylden Road Land and the Woodleigh Heights Land**

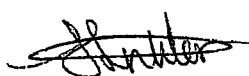
9. Before dealing with the prior proceedings, I set out below a description, taken from the Statement of Claim in this proceeding, of both the "Tylden Road land" and the "Woodleigh Heights land".

**(i) The Tylden Road Land**

10. In paragraph T1 of the Statement of Claim the Plaintiffs' state that the Tylden Road land was created by the subdivision of the land in Certificate of Title Volume 9363 Folio 447. The Tylden Road land is comprised of land described as "Residential land" and land described as "Industrial land". The Residential land is described in the particulars to paragraph 1A of the Statement of Claim as the 15 residential allotments identified in the Certificates of Title Volume 9408 Folios 045, 046, 047, 048, 051, 052, 054, 055, 056, 057, 058, 059, 060, 061, 062.
11. The Industrial land is identified in the particulars to paragraph 1A as the land identified by Lodged Plan Numbers 135199, 135200 and 135201.
12. The paragraphs of the Statement of Claim relating to the Tylden Road land are denoted as T1 to T34. The claim made by the Plaintiffs against the Council in respect of the Tylden Road land is contained in paragraphs 1 to 10, T1 to T28 and D1 to D4 and D6 inclusive in the Statement of Claim.

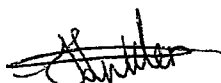
**(ii) Woodleigh Heights Land**

13. The Woodleigh Heights land, comprising 10 allotments, is identified in the particulars to paragraph 1A of the Statement of claim as Lots 1, 2, 7, 10, 12, 14, 15, 18, 27 and 28 on Plan of Cluster Subdivision CS1134, being the land described in Certificates of Title Volume 9171 Folios 687, 688, 693, 696, 698, 700, 701, 704, 713 and 714.
14. The paragraphs of the Statement of Claim relating to the Woodleigh Heights land are denoted W1 to W71.



(c) ***The Prior Tylden Road Land Proceeding***

15. In the course of acting in this matter, I have reviewed Court documents filed in a County Court proceeding commenced by the Plaintiffs in 1988 against the Council and the Water Authority (being proceeding No. 880949). The Council and the Water Authority were the first and second Defendants respectively in that proceeding. Maddocks acted on behalf of both the Council and the Water Authority in that proceeding. The County Court proceeding related to the Residential land component of the Tylden Road Land. In this affidavit I refer to the County Court proceeding as the "**prior Tylden Road proceeding**".
16. The following documents were filed and served in the prior Tylden Road proceeding:
- (a) Summons dated 7 November 1988 and attached Statement of Claim (**tab 2** in the exhibit folder);
  - (b) Amended Statement of Claim (**tab 3** in the exhibit folder);
  - (c) Particulars pursuant to paragraph 29(c) of the Plaintiffs' Amended Statement of Claim (**tab 4** in the exhibit folder);
  - (d) Particulars pursuant to paragraph 51(c) of the Plaintiffs' Amended Statement of Claim (**tab 5** in the exhibit folder);
  - (e) Re-Amended Defence of the Firstnamed and the Secondnamed Defendant (**tab 6** in the exhibit folder);
  - (f) Firstnamed Defendant's interrogatories for the Examination of the Plaintiffs (**tab 7** in the exhibit folder);
  - (g) Answers of the Plaintiffs to the interrogatories delivered for their examination by the Firstnamed Defendant (**tab 9** of the exhibit folder);
  - (h) The Secondnamed Defendant's interrogatories for the examination of the Plaintiffs (**tab 8** of the exhibit folder);
  - (i) Answers of the Plaintiffs to the interrogatories delivered for their examination by the Secondnamed Defendant (**tab 10** of the exhibit folder);
  - (j) Interrogatories delivered on behalf of the Plaintiffs for the examination of the Firstnamed Defendant (**tab 11** of the exhibit folder);



- (k) Answers of the Firstnamed Defendant to the interrogatories delivered for its examination by the Plaintiffs (tab 12 of the exhibit folder);
- (l) Answers of the Secondnamed Defendant to the interrogatories delivered for its examination by the Plaintiffs (tab 13 of the exhibit folder).
17. The claims made against the Council and the Water Authority in the prior Tylden Road proceeding were against their respective predecessors in law.
18. Paragraphs 4 and 12 of the Amended Statement of Claim filed in the prior Tylden Road proceeding relate to the "land" which was the subject of those proceedings.
19. In paragraph 4 it was alleged that in February or March 1980, a Mr Buchanan as owner of a block of land situated in Tylden Road, Kyneton in the State of Victoria lodged with the Council notices of intention to subdivide the land.
20. In paragraph 12, the Plaintiffs alleged that:
- "In December 1980 the Plaintiffs became the owners or became entitled to become registered proprietors of 15 of the 18 allotments comprising the land."*
21. In paragraph 9 of the Plaintiffs answers to the Council's interrogatories, the Plaintiffs provide title details of the 15 allotments referred to in paragraph 12 of the Amended Statement of Claim. The title details are the same as those referred to in paragraph 10 above which are alleged by the Plaintiffs in the current proceeding to comprise the Residential land component of the Tylden Road land.
22. The following common allegations were made in the prior Tylden Road proceeding and are now made by the Plaintiffs in this proceeding:

Description of allegation	Prior Tylden Road Proceeding  Para No. of Amended Statement of Claim	Current Proceeding  Para No. of Statement of Claim.
(i) that in February and March 1980, a Mr Buchanan (now deceased) ("Buchanan")	4	T1 and T4

	lodged with the Council Notices of Intention to Subdivide/plans of subdivision in respect of the Tylden Road land.		
(ii)	that on or around 20 February 1980, the Council served/resolved to serve a notice on Buchanan pursuant to section 569E of the <i>Local Government Act</i> 1958 ("the LGA").	7	T3
(iii)	that on 21 May 1980 the Council sealed 7 residential plans of subdivision in respect of the Tylden Road land.	8	T4(b) and T7
(iv)	that the notice pursuant to section 569E of the LGA related to the requirement on the part of the subdivider to construct specified works including road works, on the Tylden Road land.	7	T20
(v)	that in or about October 1980 the Plaintiffs, at the request of Buchanan, provided to the Council a bank guarantee in the sum of \$25,000.00 in respect of an amount that might become payable by the Plaintiffs to the Council in connection with the subdivision of the Tylden Road land.	9 and 10	T19
(vi)	that on or about 24 November 1980 the Council notified the Registrar of Titles that Buchanan had complied with the requirements of section 596E of the LGA.	18	T20(g)
(vii)	that the Registrar approved/accepted for lodgment the Tylden Road plans of	19	T16

subdivision.		
(viii) that in December 1980, the Plaintiffs became the owners or became entitled to become the registered proprietors of 15 of the 18 allotments comprising the Residential land component of the Tylden Road land.	12	T18 (see also particulars to para 1A and paragraphs T1 and T2(b))
(ix) that on 10 December 1982 the Council called upon the bank guarantee in connection with the construction of a road on the Tylden Road land, the issuing bank being the Westpac Bank.	15	T22 (iii)
(x) that in January 1983, the Westpac Bank paid to the Council the amount of \$25,000.00 pursuant to the bank guarantee;	16	T22 (iii)
(xi) that in March/April 2003 the Plaintiffs sold their interest in the 15 allotments acquired by them and comprising the Residential land component of the Tylden Road land.	13	D3(ii) on page 36
(xii) that between about February 1983 and March 1984 the Council caused a road to be constructed on the Tylden Road land in connection with the subdivision of the land.	14	T22 (iv)

23. In the Amended Statement of Claim in the prior Tylden Road proceeding, the Plaintiffs alleged that the Council was not entitled to call upon or retain the amount of \$25,000.00 pursuant to the bank guarantee on the grounds that:

- (a) the Council failed to comply with the provisions of sections 569 and 569E of the LGA ( para 20(a));

- (b) the calling upon the and acceptance of, the amount of \$25,000.00 was:
- (i) in breach of a warranty described as the "first warranty" (paragraphs 11, 21 and 22);
  - (ii) a breach of a duty of care owed by the Council to the Plaintiffs (paragraphs 21 and 22);
  - (iii) was in breach of a warranty described as the "second warranty" (see paragraphs 24 and 28);
  - (iv) as a consequence of a representation made by the Council which was untrue (paragraphs 24 and 28);
- (c) the consideration for the payment of the amount of \$25,000.00 by the Plaintiffs to the Council had wholly failed (paragraph 30);
- (d) the amount of \$25,000.00 was paid by Westpac to the Council in purported discharge of a demand made contrary to law (paragraph 31);
- (e) the amount of \$25,000.00 was paid by Westpac and received by the Council under a mistake of fact (paragraph 32).
24. The Plaintiffs claimed loss and damage by reason of the causes of action referred to in paragraph 23 above.
25. The particulars to paragraph 29 of the Amended Statement of Claim set out details of such loss and damage, which particulars were in the following terms:

PARTICULARS

- "(a) The sum of \$25,000.00
- (b) Interest incurred by the Plaintiffs at the account of the Bank as a consequence of the said unlawful/wrongful/negligent request for and acceptance of the said sum. Full particulars will be provided before the hearing and determination of this action.
- (c) Consequential losses sustained by the Plaintiffs as a result of the sale of the 15 allotments, the sale of which was forced by the Firstnamed Defendant's wrongful request for and acceptance of the said sum. Full particulars will be provided prior to the hearing and determination of this action."



26. Particulars of "consequential loss" sustained by the Plaintiffs as a result of the sale of the 15 allotments were set out in the "Particulars pursuant to paragraph 29(c) of the Plaintiffs' Amended Statement of Claim". Paragraphs 1, 2 and 4 to 7 (inclusive) of such particulars were in the following terms:

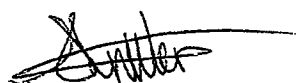
"1. *The Plaintiffs purchased the land in December 1980 for the sum of \$92,000.00. The land was comprised of 15 allotments.*

2. *The Plaintiffs sold the 15 allotments to Chelmantau Pty Ltd for a total sum of \$100,000.00 in April 1983 pursuant to 'Copyright Contract of Sales of Land' dated April 1983 (a copy of which contract may be inspected at the offices of the Plaintiffs' solicitors).*

...

4. *Chelmantau Pty Ltd then sold the allotments as follows:*

- (a) *Lot 1 Volume 9408 Folio 045 – Details not known at this stage.*
- (b) *Lot 7 Volume 9408 Folio 046 on 30 November 1984 for the sum of \$22,000.00.*
- (c) *Lot 8 Volume 9408 Folio 047 on 4 October 1984 for the sum of \$17,950.00.*
- (d) *Lot 5 Volume 9408 Folio 048 on 19 July 1985 for the sum of \$22,950.00.*
- (e) *Lot 2 Volume 9408 Folio 051 on 5 February 1985 for the sum of \$23,950.00.*
- (f) *Lot 3 Volume 9408 Folio 052 – Details not known at this stage.*
- (g) *Lot 9 Volume 9408 Folio 054 on 3 August 1984 for the sum of \$20,000.00.*
- (h) *Lot 10 Volume 9408 Folio 055 on 4 October 1985 for the sum of \$24,300.00.*



- (i) Lot 11 Volume 9408 Folio 056 on 25 November 1987 for the sum of \$22,950.00
- (j) Lot 12 Volume 9408 Folio 057 on 14 February 1985 for the sum of \$21,950.00.
- (k) Lot 13 Volume 9408 Folio 058 on 4 July 1986 for the sum of \$30,000.00.
- (l) Lots 14 and 15 being Volume 9408 Folios 059 and 060 respectively, on 11 December 1984 for the sum of \$41,000.00 in total.
- (m) Lot 17 Volume 9408 Folio 061 on 10 April 1984 for the sum of \$22,000.00.
- (n) Lot 18 Volume 9408 Folio 062 – Details not known at this stage.

5. Thus, twelve of the fifteen allotments were sold (six in 1984, three in 1985, two in 1986 and one in 1987) for a total sum of \$269,050.0. (Particulars of the sale of the remaining three allotments shall be provided prior to trial).

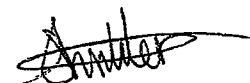
6. Had the said sum not been requested and accepted by the Firstnamed Defendant, the Plaintiffs would have sold the allotments at a substantial profit shortly after the road had been constructed.

7. The Plaintiffs suffered a loss of profit in the region of \$200,000.00."

27. The loss and damage claimed by the Plaintiffs against the Council in the prior Tylden Road proceeding was for an amount not exceeding \$68,800.00

28. The Plaintiffs in the prior Tylden Road proceeding also claimed damages in an amount not exceeding \$31,500.00 against the Water Authority arising from a bank guarantee provided to the Water Authority in the amount of \$11,500.00

29. In the current proceeding, the Plaintiffs allege that "In consequence of the conduct of the Defendants amounting to misfeasance in public office pleaded in this Statement



of Claim the Plaintiffs have suffered loss and damage. (see para D1 on page 37 of the Statement Of Claim).

30. The particulars of the loss and damage allegedly suffered by the Plaintiffs in respect of the residential land component of the Tylden Road land are set out in pages 38 and 39 of the Statement Of Claim and are in the following terms:

**"PARTICULARS OF LOSS AND DAMAGE  
IN RELATION TO RESIDENTIAL ALLOTMENTS**

- D3 (i) *The Plaintiffs by reason of the misfeasance of the Defendants pleaded in this Statement of Claim suffered a significant financial hardship beginning when the Bank Guarantees were called upon in January 1983 as a consequence of which they were forced, prematurely, to sell the entire 15 allotments as 1 parcel of land at a price significantly below the true market value of 15 individual allotments.*
- (ii) *On or about April 1983 the Plaintiffs entered into a Contract with Chelmantau Pty. Limited for the sale of the residential allotments. On or about 27<sup>th</sup> July 1983 the land was transferred to Chelmantau Pty. Limited in consideration of the sum of \$100,000.00 being an average price of \$6,666.00 per allotment.*
- (iii) *Chelmantau were able to sell the entirety of the allotments between January and November 1987 for an average price of \$22,473.00 per allotment.*
- (iv) *The Plaintiffs' loss is therefore the difference between the value of the Plaintiffs' sale to Chelmantau and the Plaintiffs' reasonable expectations of sales upon the open market as reflected in the prices obtained for the allotments by Chelmantau.*
- (v) *The Plaintiffs' loss is quantified as follows:*
- 15 allotments x \$22,733 = \$337,105.00*
- Less proceeds of sale to Chelmantau 15 x \$6,666.00 = \$100,000.00*
- Nett loss \$237,105.00 plus interest calculated from 13<sup>th</sup> January 1984.*

**PARTICULARS**

*The above figures represent sales which are significantly proximate in time to the Plaintiffs' forced sale to represent a true market value which would have been available to*

*the Plaintiffs had they not suffered the consequences of the Defendants' breaches of duty.*

- (vi) *Full particulars of the quantification of the losses referred to above will be supplied prior to the hearing.*

**PARTICULARS OF LOSS OF BUSINESS**

- D4. *Full particulars of the quantification of the loss of or damage to the Business will be supplied prior to hearing."*

**(d) Settlement of and Release from claims in the Prior Tylden Road Proceeding**

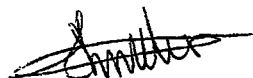
31. The claims made by the Plaintiffs against the Defendants in the prior Tylden Road proceeding were settled on the terms contained in signed Terms of Settlement dated 14 June 1991 (tab 14 of the exhibit folder).
32. Clauses 1 and 5 of the Terms of Settlement provided as follows:

- "1. *The Defendants jointly and severally agree to pay the Plaintiffs' solicitors on behalf of the Plaintiffs the sum of \$40,000 together with costs as agreed or in default of agreement as taxed and the Plaintiffs agree to accept the said sum in full settlement of the proceedings herein.*
5. *Subject to the Defendants' performance of these Terms of Settlement, the Plaintiffs release the Defendants from all claims, suits and demands whatsoever the subject matter of this proceeding."*

33. The Court file in this proceeding contained a minute of order of Judge Howden dated 14 June 1991 (tab 15 of the exhibit folder). The minute of order notes that the proceeding has been settled by consent and that the action is to be struck out.

**(e) The prior Woodleigh Heights proceeding**

34. In the course of acting in this matter, I have also reviewed Court documents in a Supreme Court proceeding commenced by the Plaintiff in 2005 against the Council and the Water Authority (being proceeding No. 7966). The Council and the Water Authority were the first and second Defendants respectively to that proceeding.



35. The 1995 Supreme Court proceeding related to the Woodleigh Heights land. In this affidavit I refer to the 1995 Supreme Court proceeding as **"the prior Woodland Heights proceeding"**.
36. Two individuals being David Parkinson and Graeme Wilson were the third and fourth Defendants respectively to the prior Woodland Heights proceeding.
37. For the purposes of this proceeding, Maddocks has obtained copies of the following documents filed and served in the prior Woodland Heights Proceeding:
- (a) Amended Further Statement Of Claim dated 17 March 1999 (**tab 16** of the exhibit folder);
  - (b) Defence of the First Defendant to the Amended Further Statement Of Claim dated 19 May 1999 (**tab 17** of the exhibit folder);
  - (c) Defence of the Second Defendant to the Amended Further Statement Of Claim dated 18 May 1999 (**tab 18** of the exhibit folder);
  - (d) Defence of the Third Defendant to the Further Amended Statement Of Claim dated 19 May 1999 (**tab 19** of the exhibit folder);
  - (e) Defence of the Fourth Defendant to the Further Amended Statement Of Claim dated 19 May 1999 (**tab 20** of the exhibit folder);
  - (f) Plaintiffs' Reply to the Defence of the First Defendant dated 17 June 1999 (**tab 21** of the exhibit folder);
  - (g) Plaintiffs' Reply to the Defence of the Second Defendant dated 2 June 1999 (**tab 22** of the exhibit folder);
  - (h) Plaintiffs' Reply to the Defence of the Third Defendant dated 17 June 1999 (**tab 23** of the exhibit folder);
  - (i) Plaintiffs' Reply to the Defence of the Fourth Defendant dated 17 June 1999 (**tab 24** of the exhibit folder);
  - (j) Plaintiffs' Affidavit sworn 18 February 1998 (**tab 25** of the exhibit folder);
  - (k) Plaintiffs' Affidavit pursuant to Rule 29.08(2) sworn 17 December 1998 (**tab 26** of the exhibit folder);

- (l) Affidavit of David Leslie Pumpa sworn 5 February 1999 (**tab 27** of the exhibit folder);
  - (m) Plaintiffs' Affidavit sworn 22 February 1999 (**tab 28** of the exhibit folder);
  - (n) Affidavit of Jim Prosser-Fenn sworn 16 August 1999 (**tab 29** of the exhibit folder);
  - (o) Plaintiffs' Affidavit sworn 31 August 1999 (**tab 30** of the exhibit folder).
38. As stated in paragraph 14 above, the Woodleigh Heights land (which comprises 10 allotments) is defined in the particulars to paragraph 1A of the statement of claim in this proceeding as:
- "lots 1, 2, 7, 10, 12, 14, 15, 18, 27 and 28 on Plan of Cluster Subdivision CS 1134 ["CS1134"] and being all of the land more particularly described in Certificates of Title Volume 9171 Folios 687, 688, 693, 696, 698, 700, 701, 704, 713 and 714 respectively."*
39. In paragraph 4(c) of the Amended Further Statement of Claim filed in the First Woodleigh Heights proceeding dated 17 March 1999 (**tab 16** of the exhibit folder) the Plaintiffs allege that they "entered into a contract to purchase certain land within the 'Woodleigh Heights Estate', located at Edgecombe Road, Kyneton in the State of Victoria. The land, the subject of the contract to purchase is particularized as being *"Lots 1, 2, 7, 10, 12 and 27 on Plan of Cluster Subdivision CS 1134"* (see the particulars to paragraph 4 of the Amended Further Statement of Claim).
40. Mr Thompson, the First Plaintiff in this proceeding, swore an affidavit dated 22 February 1999 in the prior Woodleigh Heights proceeding (**tab 28** in the exhibit folder).
41. In paragraph 7 of that affidavit, Mr Thompson deposes as follows:
- "In addition to the land described in paragraph 5 of the Further Statement of Claim there was a further four allotments subject to the terms contract including Lot 28 on CS 1134".*
42. The Further Statement of Claim referred to in paragraph 7 of Mr Thompson's affidavit was dated 28 August 1998 (**tab 30** of the exhibit folder). Paragraph 5 of the Further Statement of Claim is in similar terms to paragraph 4(c) of the Amended Further Statement of Claim.

43. Apart from Lot 28, Mr Thompson does not identify the further lots referred to in paragraph 7 of his affidavit.

44. In paragraph 15 of his affidavit sworn 22 February 1999, Mr Thompson deposes that:

*"... by contract dated 12<sup>th</sup> August 1981 the Buchanans had again sold lot 28 of CS 1134".*

45. In the current proceeding, the Plaintiffs similarly allege in the statement of claim that Lots 28 had been sold by the Buchanans to another party (see paragraphs W24 and W26).

46. Whilst Mr Thompson did not identify the further three lots in paragraph 7 of his affidavit sworn 22 February 1999, from my reading of the relevant documents I believe that such lots are those particularized in the Statement of Claim in this proceeding as lots numbered 14, 15 and 18.

47. The following common allegations were made in the prior Woodleigh heights proceeding and are now made in this proceeding:

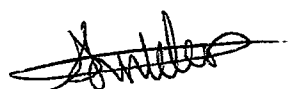
Description of allegation	Prior Woodleigh Heights proceeding.  Para No. of Amended Further Statement Of Claim	Current Proceeding  Para No of Statement Of Claim
(i) That the Woodleigh Heights land was part of a larger parcel of land known as the Woodleigh Heights Estate.	4	W1
(ii) That the Woodleigh Heights Estate:	5	W1
(a) was, as at 1978, owned by Buchanan;		
(b) was within the municipal district of the Council;		
(c) was in 1978 part within and part outside the Waterworks District		

of the Water Authority;		
(d)	was in 1978 outside both the Urban District and the Rural District of the Water Authority.	
(iii)	that by application dated 22 November 1978 Buchanan applied to the Council to develop the Woodleigh Heights Estate.	6 W2
(iv)	that the application provided for the installation of a privately owned and operated water supply and reticulation system forming part of the common property.	6 W2
(v)	that on 15 November 1978 the Council issued to Buchanan a Planning Permit (No. PP 2191) authorising Buchanan to develop the Woodleigh Heights Estate on certain conditions.	8 W4
(vi)	that it was a condition of Permit No. PP 2191 that the development of the Woodleigh Heights Estate include the construction and installation of the water supply and reticulation system.	9 W5
(vii)	on 9 August 1979, Plan of Cluster Subdivision No. CS 1134 was registered by the Registrar of Titles.	10 W13
(viii)	on or about 1 November 1979 the Plaintiffs entered into a vendor terms contract of sale with Buchanan to purchase the Woodleigh Heights land being part of the Woodleigh Heights Estate ("the terms contract of sale").	4(c) W14

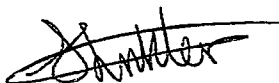


(ix)	that the completion date of the terms contract of sale was 1 November 1981.	20B	W14
(x)	that the Council did not refer Plan of Cluster Subdivision CS 1134 to the Water Authority pursuant to section 569B(2)(ac) of the LGA.	10	W10(c)
(xi)	that in or about November 1980 the Buchanans made application to the Council for a cluster redevelopment of CS 1134 dividing each allotment of CS 1134 into three smaller allotments.	15	W15
(xii)	that on or about November 1980 the Council approved the cluster redevelopment of CS 1134 and issued Planning Permit No. 2784 ("PP2784").	16	W16
(xiii)	that in or around November 1979 the Buchanans assigned their rights under the terms contract of sale to General Credits Limited.	20A	W14
(xiv)	that in April 1982 the Plaintiffs became aware that Lot 28 on CS 1134 had been sold to a company called Woodleigh Heights Resort Developments Pty Ltd ("WHRD"), a company associated with Buchanan.	See particulars to para 20(c)	W24
(xv)	that in or about late 1981, the Plaintiffs incorporated a company known as Woodleigh Heights Marketing Pty Limited ("WHM").	See particulars to para 20E	W25
(xvi)	that in May 1983 the nine lots comprising the Woodleigh Heights land was transferred by the Plaintiffs to WHM;	Para 20F	W26

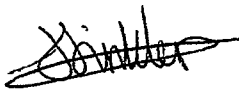
(xvii)	that in 1983 WHM executed a Declaration of Trust in relation to the Woodleigh Heights land.	20 I(b)	W 26
(xviii)	that in August 1983, WHRD entered into contracts with the Plaintiffs to purchase all of the Woodleigh Heights land save for Lot 28;	31A	W27
(xix)	that by March/April 1984, WHRD had failed to complete the contracts of sale entered into with the Plaintiffs to purchase the Woodleigh Heights land.	31A	W28
(xx)	that WHRD represented to the Plaintiffs that if the Plaintiffs attempted to rescind the contracts and sell to anyone other than WHRD, then WHRD would prevent the Plaintiffs from having access to water on the Plaintiffs land, thereby rendering the land worthless.	31B	W30
(xxi)	that in April 1984 the Plaintiffs made enquiries of the Council and the Water Authority to ascertain whether the information communicated to the Plaintiffs by WHRD (as set out in subparagraph (xx) above was correct).	32	W 31
(xxii)	that the Council and the Water Authority advised the Plaintiffs that CS 1134 was outside the Urban District of Kyneton water trust area and that accordingly under the <i>Water Act</i> 1958, water could only be supplied to CS 1134 pursuant to a private agreement at the discretion of the Water Authority.	33(a)	W 32



(xxiii)	that the Council and the Water Authority represented to the Plaintiffs that:		
(a)	there was a lawful agreement for the supply of water between the Water Authority and WHRD pursuant to the <i>Water Act</i> ;	33(b)	W 33(a)
(b)	that under the Water Agreement, WHRD owned and operated the supply and reticulation system for the whole of CS 1134;	33(c)	W 33(b)
(c)	that the Plaintiffs' allotments could not obtain access to the water supply and reticulation system except with the consent of WHRD;	33(d)	W 33(c)
(d)	that the Body Corporate was not entitled to access the water supply or reticulation system within CS 1134.	33(e)	W 33(d)
(xxiv)	that as at August 1984 the Woodleigh Heights land was encumbered by various mortgages including a first mortgage to General Credits Limited.	35	W 38
(xxv)	that as at August 1984 General Credits Limited had been taken over and acquired by Australian Guarantee Corporation Limited ("AGC").	36	W 39
(xxvi)	that as at August 1984 the Plaintiffs were in default under the mortgage to AGC and it was agreed that the land the subject of the mortgage to AGC (being	37	W 40



lots 1, 2, 7, 10, 12 and 27) would be sold by public auction.		
(xxvii) that L. J. Hooker were appointed by AGC as the real estate agents to sell the land. An auction date of 17 November 1984 was fixed.	38	W 41
(xxviii) that L. J. Hooker erected advertising hoardings adjacent to the main entrance of the Woodleigh Heights Estate.	Particulars to para 38	W 42
(xxix) that on or about 13 November 1984 the Water Authority represented to AGC that the Plaintiffs' land did not have access to water and sewerage and that such services would not be provided.	39A	W 43
(xxx) that in reliance upon the written representations, the Plaintiffs and AGC agreed that the proposed auction set down for 17 November 1984 be cancelled.	40B	W 47
(xxxi) that by letters dated 29 November 1984 AGC enquired of both the Council and the Water Authority as to the availability of sewage and mains reticulated water to the Plaintiffs land.	41	W 48
(xxxii) that by letters dated 3 May 1985 and 7 May 1985 the Water Authority advised AGC that the Plaintiffs' allotments were outside the Urban Water District and that accordingly the Water Authority had not mechanism to supply water to the allotment without the agreement of WHRD.	45	W 49(ii)



(xxxiii) that in or about October 1985 the Plaintiffs engaged L. J. Hooker to sell the Plaintiffs land.	50	W 57
(xxxiv) that in reliance upon further representations made to the Plaintiffs or their agents that water was not available to the Plaintiffs' allotments, the auction scheduled for 23 November 1985 was cancelled.	55A	W 67
(xxxv) that in or around November 1989 a mortgagee exercised its right of sale over the Plaintiffs' land.	65(d) and (e)	W 71

48. In the prior Woodleigh Heights proceeding, the Plaintiffs claimed loss and damage by reason of being compelled to sell the Woodleigh Heights land on the basis that such land did not have access to or entitlement to a water supply and reticulation supply when the position, according to the Plaintiffs, was to the contrary.

49. The Plaintiffs alleged in the Amended Further Statement Of Claim that such loss arose by reason of:

- (a) representations made by the Council and the Water Authority which were allegedly untrue; and
- (b) the negligence on the part of both the Council and the Water Authority.

50. The quantum of the loss and damage alleged to have been suffered by the Plaintiffs in the prior Woodleigh Heights proceeding is set out in the particulars to paragraph 67A of the Amended Further Statement Of Claim, which particulars were in the following terms:

*"PARTICULARS*

- (a) *The Plaintiffs' land was sold for a total price of \$135,000;*



- (b) *Had the Plaintiffs' land been sold on the basis that there was an entitlement to an approved private water supply and reticulation system its sale value would have been \$431,500;*
- (c) *The Plaintiffs have suffered loss and damage in the sum of \$296,500 being the difference between the abovementioned figures."*

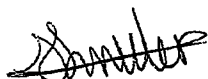
51. The particulars of loss and damage in the present proceeding in respect of the Woodleigh Heights land is set out in paragraph D6 of the Statement Of Claim, which paragraph provides as follows:

**"PARTICULARS OF LOSS AND DAMAGE  
IN RESPECT OF THE WOODLEIGH HEIGHTS LAND**

D5. (i) *But for the conduct of the Defendants pleaded in this Statement Of Claim 6 of the 9 three lot subdivisions (a total of 18 individual allotments) could have been sold by AGC in 1984. But for the conduct of the Defendants pleaded in this Statement Of Claim the Plaintiffs Woodleigh Heights land would have been sold on the open market between November 1984 and December 1987. The earliest opportunity to sell to a purchaser other than WHRD was November 1984 as described in paragraphs W40 and W41. The Plaintiffs' loss is calculated from that date. The Plaintiffs would also have been at liberty at a time to sell the remaining 3 three lot subdivisions (a total of 9 individual allotments) on the open market. The Plaintiffs' loss is the value of the land as at November 1984 when AGC cancelled the proposed public auction.*

(ii) *The Plaintiffs' loss arising from the matters referred to in particular (i) above is quantified as follows:*

Value of the allotments as at November 1984 (approx)	\$460,000
Less mortgages owing as at November 1984	\$130,00
Nett loss	\$330,000



*Plus interest calculated from November 1984*

(iii) *The Plaintiffs also suffered loss or damage to the Business full particulars of the quantification of which will be supplied prior to the hearing."*

52. Based on my review of the Court documents in each proceeding I believe that the 6 lots referred to in the particulars of loss and damage in the current proceeding are the same lots in the prior Woodleigh Heights proceeding alleged to have proposed to have been sold at auction in 1984.

(f) ***Settlement of and Release from claims in the prior Woodleigh Heights proceeding***

53. Exhibited to the affidavit of Jim Prosser-Fenn sworn 16 August 1999 (tab 29 of the exhibit folder) are signed Terms of Settlement in the prior Woodleigh Heights proceeding dated 29 July 1999.

54. By the Terms of Settlement:

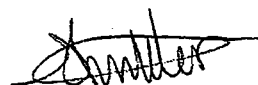
- (a) the Defendants agreed to pay \$25,000 to the Plaintiffs;
- (b) the parties provided mutual releases as follows:

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

55. The enforceability of the Terms of Settlement were contested by the Plaintiffs. In the unreported decision of Beach J in *Thompson v Macedon Ranges Shire Council* [1999] VSC 338 (tab 31 of the exhibit folder) His Honour declared that "the terms of settlement of these proceedings dated 29 July 1999 and executed by or on behalf of the parties herein ought be specifically performed".

#### **D. LIMITATION PERIOD FOR THE PLAINTIFFS' CLAIM HAS EXPIRED**

56. The loss and damage allegedly suffered by the Plaintiffs in respect of the Tylden Road land claim is set out in paragraphs D2 to D6 of the Statement of Claim. As to the Industrial land component of the claim, the loss is calculated as at December 1980 (paragraph D2). As to the Residential land component of the Tylden Road



land claim the Plaintiffs calculate the loss and damage as from 13 January 1984 (paragraph D3).

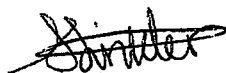
57. As to the Woodleigh Heights land claim, the Plaintiffs alleged loss is calculated as and from November 1984 (paragraph D5). The latest date that the Plaintiffs could have suffered loss in respect of the Woodleigh Heights land claim is 1989 when Esanda Pty Limited allegedly exercised its rights over the Plaintiffs' land and sold the land to Deckwood Pty Limited (paragraph W71).
58. On the face of the Plaintiffs' Statement of Claim the claims made by the Plaintiffs against the Council are manifestly statute barred.
59. In the light of the matters deposed to in this affidavit, the Council seeks, and I believe is entitled, to the relief set out in paragraphs 1 and 2 of its summons.

SWORN at Melbourne in the State of  
Victoria this 23 day of September 2005

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Before me:



SUZANNE TINKLER  
140 William Street, Melbourne, 3000  
A natural person who is a current  
practitioner within the meaning of  
the Legal Practice Act 1996