

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

Court Number: 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*

**AFFIDAVIT OF GLENN THOMPSON**

Date of Document: 18-10-2005

Filed on behalf of: The Plaintiffs

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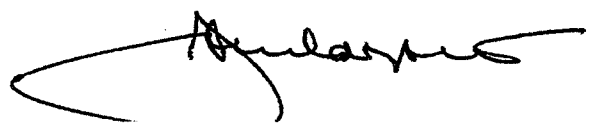
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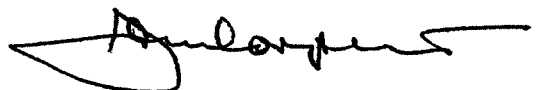
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I, Glenn Alexander Thompson, Programmer, of 68 Summer St Orange New South Wales make oath and say:-

- 1) In 1979 I owned a service station at Whittlesea, a Kenneth Raymond Buchanan ("Buchanan") had been an account customer of mine for a number of years. Buchanan was a well known and respected local entity. He was a Justice of the Peace who sat on the bench at the Whittlesea Magistrates Court. He was the President of the Shire of Whittlesea and was well known for his community work. He also had a reputation as a very wealthy property developer and owner of a chain of electrical retail stores. . Buchanan enjoyed my complete respect and trust.
- 2) In about October/November 1979 Buchanan was several thousands of dollars in debt to me which was not unusual because he paid at irregular intervals. At this time he suggested that instead of paying his account I should convert the debt into equity by purchasing a couple of blocks of land from him at a good price.
- 3) I agreed and Buchanan showed me a plan of subdivision which I now know to be a plan of the subdivision now referred to in paragraph 1A of the statement of claim in these proceedings as the Tylden Road Land. The plan which he showed me was a plan showing all of the residential allotments and all of the industrial allotments.



- 4) Buchanan then took me to Kyneton to show me the land and at the same time he took me to the office of his solicitors, Palmer Stevens & Rennick ("PS&R") where I met Buchanan's solicitor Graeme Bolton. ("Bolton") He also took me to the Council offices where I was introduced to the then Shire Secretary Mr. Stan Porter ("Porter"). At the time of these meetings Buchanan discussed the development with Bolton and Porter.
- 5) Buchanan offered me two allotments and explained to me that he made his subdivision self financing by selling a few allotments off the plan and then using the money from the early sales to pay for the services like roads and water and that by doing this he was able to sell those early allotments cheaply to friends. At this time I had no reason to suspect this was contrary to law.
- 6) I agreed to buy two allotments in the joint names of myself and my then wife Cheryl Maree Thompson ("Maree"). A few days later Buchanan said words to the effect "You should purchase the whole subdivision and if you do so I will teach you the business of property development." I agreed. Buchanan said that he would have the contracts drawn by Bolton. A few days later Buchanan came to my home with the contracts and said words to the effect that "Bolton will act for both of us and I will carry the legal costs." I refused this offer and said that I would use my usual solicitor. Maree and I signed the contracts in the place indicated by Bolton and I then took my copy of the contract to my solicitor at Thomastown.
- 7) Within a day or two Buchanan came back to me and said words to the effect, "As the subdivision is currently being processed by the Titles Office a change in ownership at this time would slow up the approval process so it would be better if we did not proceed at this time. I have another subdivision called Woodleigh Heights and if you wish you may buy a few allotments on that subdivision instead." I agreed to do this and then as suggested by Buchanan I instructed my solicitor not to proceed with any conveyancing associated with the purchase of the Tylden Road land.
- 8) Buchanan then showed me the Woodleigh Heights subdivision and ten random allotments were selected. Buchanan again said that he would have the contracts drawn by Bolton and again suggested that Bolton act for both of us and on this occasion I agreed. Buchanan subsequently came to my home with the contracts, Maree and I signed in the places indicated and Buchanan retained both copies for return to Bolton. One of the allotments was a lot 28 and a further allotment was lot 10. The contracts were marked in pencil to the effect "do not date"
- 9) At the time of purchasing the Woodleigh Heights allotments the subdivision was apparently complete. The allotments were being offered for sale by local real estate agents and there was a very large advertising hoarding measuring some 30 feet in length and 15 feet in height erected at the brick gateway to the subdivision. There was also glossy advertising brochures and the hoarding and brochures advertised the allotments as "the ultimate in rural residential living" There was a large lake present and two very large concrete water tanks on the high spot of the subdivision. There was a

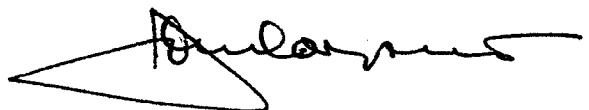


house present on one of the allotments. A copy of the glossy advertising brochure is now produced and shown to me and marked "GAT-1"

- 10) In about April/May 1980 Buchanan approached me and said words to the effect, "I and some friends are intending to develop a retirement village on the Woodleigh Heights subdivision and that as a result I wish to repurchase the allotments which I have sold including those that I have sold to you. The Tylden Rd subdivision is progressing and I have sold two of the allotments to pay for the construction of the roads and water and if you purchase the remainder of the Tylden Rd allotments I will repurchase the Woodleigh Heights allotments from you." In the offices of PS&R and in the company of Bolton I was introduced to the person who had purchased the two Tylden Rd allotments, namely a Mr. Ross Nicholls who was a clerk with PS&R. Mr. Nicholls was introduced as the person who had purchased the two Tylden Rd allotments.
- 11) I agreed to purchase the remaining Tylden Rd allotments in the joint names of Maree and I and to sell the Woodleigh Heights Allotments back to Buchanan. The purchase of the Tylden Rd allotments was done in two parts; First I purchased the parent industrial allotments as referred to in paragraph T1 of the present Statement of Claim and then I purchased 15 of the 18 residential allotments. PS&R acted for both Buchanan and myself in each transaction.
- 12) At the time of agreeing to purchase the Tylden Rd land Buchanan said to me, words to the effect, "Before I can obtain settlement on the sale to yourself and from the sale of the two allotments which I have sold to Mr. Nicholls I am required to provide bank guarantees to the Council and Water Board to guarantee my obligation to construct the roads and water works on the Tylden Rd Subdivision and upon providing those guarantees the Council will release the allotments and settlement can occur."
- 13) Buchanan also said words to the effect, "I am a little overstretched at the moment. Will you provide the required guarantees and I will construct the roads and water works as soon as I can obtain settlement after the guarantees have been provided."
- 14) I provided the Bank Guarantees to the Council and the Water Board in the sums of \$25,000 and \$11,500 respectively and the Council and the Water Board accepted those guarantees.
- 15) Buchanan failed to repurchase the Woodleigh Heights land from me. Initially I was not concerned as I had learned that Buchanan was developing a Timeshare Resort and as the Woodleigh Heights land was necessary to that development I was confident that he would repurchase within a short time.
- 16) As a result of the foregoing transactions by the end of 1980, I held the 10 Woodleigh Heights allotments, 15 of the 18 Tylden Rd residential allotments and the parent industrial allotment which was subject to a plan of subdivision dividing it into 6 industrial allotments.

**My state of knowledge at time of purchase of land.**

- 17) At the time of purchasing the Woodleigh Heights land, due to the facts and circumstances set out in paragraph 9 of this affidavit I believed that water was available to the allotments and that the allotments were useable allotments.



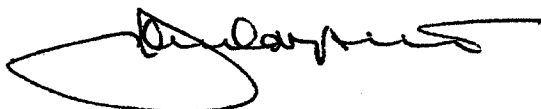
- 18) At the time of purchasing the residential allotments of the Tylden Rd Subdivision, due to the facts and circumstances set out in paragraphs 10 to 14 of this affidavit I believed there was a duty at law on Buchanan to construct the roads and water works necessary to make the allotments useable. I also believed that there was a duty at law to provide the guarantees due to the fact that the Council and Water Board accepted my guarantees. I also believed that the Council and Water Board had acted according to law in accepting those guarantees and that the guarantees would only be called upon if Buchanan defaulted upon his duty at law to provide the services.
- 19) At the time of purchasing the parent industrial allotment I believed that the plans of subdivision which had been filed at the titles office had been completed and filed according to law and that I had in fact purchased six industrial allotments.

**Prior Proceedings Tylden Rd. County Court proceeding 880949 ("The 1988 proceedings")**

20) Buchanan failed to construct the roads and water works and in 1982 the Council and Water Board each represented that it was my duty to do so and in default of my doing so they would call upon my Bank Guarantees and construct the services. I could not and did not construct the services and the Council and Water Board each called up their respective guarantees and constructed the services. Now produced and shown to me are various relevant documents and correspondence marked as follows. Requisition for Bank Guarantee in favour of Shire of Kyneton marked "GAT-2A", Requisition for Bank Guarantee in favour of Kyneton Waterworks Trust marked "GAT-2B", Letter from Shire of Kyneton dated 12<sup>th</sup> May 1982 marked "GAT-2C", Letter from Kyneton Shire Waterworks Trust dated 4<sup>th</sup> June 1982 marked "GAT-2D", Letter from Shire of Kyneton dated 4<sup>th</sup> November 1982 marked "GAT-2E", Letter from Kyneton Shire Waterworks Trust dated 19<sup>th</sup> November 1982 marked "GAT-2F", Letter from Shire of Kyneton dated 10<sup>th</sup> December 1982 marked "GAT-2G", Letter from Kyneton Shire Waterworks Trust dated 10<sup>th</sup> December 1982 marked "GAT-2H", Office duplicate copy letter from CBA Bank, Whittlesea dated 12<sup>th</sup> January 1983 marked "GAT-2I"

- 21) By the time of the calling up of the Bank Guarantees I had formed the opinion that Buchanan was dishonest. I did not suspect any wrongdoing by the Council and Water Board
- 22) After the works were completed the Council made a demand upon me to recover \$3708.00 ("the demand") being the overrun of costs in the road construction. I refused to pay as I considered that the amount covered by my Bank Guarantee was the total extent of my liability. As a result of the Council's demands I read the relevant legislation and formed the opinion:-
- a) That the Council had no legal right to make the demand upon me.
  - b) That the Council and Water Board had no legal right to accept or call upon my Bank Guarantees in the first place.

At the time, I believed that whilst the Council had acted without authority, it had not acted maliciously.

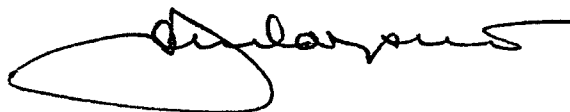


- 23) In 1987 the Council sued me for the \$3,708.00 in the Magistrates Court at Bendigo. I defended the claim on the ground that I was not liable. The magistrate found against me.
- 24) I appealed to the Supreme Court and Mr. Justice Kaye found in my favour. Now produced and shown to me is a true copy of the Judgement of Mr. Justice Kaye marked "GAT-3"
- 25) On the basis of my state of mind referred to in paragraph 22 of this affidavit and encouraged by the judgement of Mr. Justice Kaye, I initiated the 1988 proceedings in the County Court to recover the moneys mistakenly paid pursuant to the Bank Guarantees. I also claimed damages for losses occasioned by the mistaken calling up of the Bank Guarantees. (The Summons and Amended Statement of claim in County Court proceeding 880949 are now exhibited at tab 2 and tab 3 of the exhibit folder of Michelle Elizabeth Dixon marked "MED-1")
- 26) On the second day of hearing the Council and Water Board made an offer of \$40,000.00 to settle the matter. I was advised that I should accept the offer of settlement. I agreed and terms of settlement were drawn and signed. (The Terms of Settlement in County Court proceeding 880949 are now exhibited at tab 14 of the exhibit folder of Michelle Elizabeth Dixon marked "MED-1") At the time of signing the terms of settlement Counsel for the Council and Water Board handed me a large black folder containing copies of various documents. I took this material home and gave it a cursory glance but because I considered the matter to be at an end, I archived the folder and did not look again at its contents until August 2000. Had I been aware of the matters deposed in paragraph 56 of this affidavit at the time of signing the Terms of Settlement I would not have settled the 1988 proceedings.

**Prior Proceedings, Woodleigh Heights. Supreme Court proceeding 7966 of 1995 ("the 1995 proceeding)**

- 27) As stated previously in this affidavit, at the time of purchasing the Woodleigh Heights land I believed that water was available to the allotments and that the allotments were useable. Between about April 1984 and about November 1989 the Council and Water Board represented to my mortgagors and I that water was not available to my allotments, as a result of which building permits could not be obtained and the allotments were therefore unusable. These representations were initially conveyed in a sequence of letters between my mortgagee, Australian Guarantee Corporation ("AGC"), and the defendants. Now produced and shown to me and marked as follows is that series of letters. Letter from AGC dated 29<sup>th</sup> November 1984 marked "GAT-4A", Letter from Kyneton Water Board dated 7<sup>th</sup> December 1984 marked "GAT-4B", Letter from Shire of Kyneton dated 20<sup>th</sup> December 1984 marked "GAT-4C", Letter Office duplicate copy letter from AGC dated 9<sup>th</sup> April 1985 marked "GAT-4D", Letter from Kyneton Water Board dated 3<sup>rd</sup> May 1985 marked "GAT4E", Letter from Kyneton Water Board dated 7<sup>th</sup> May 1985 marked "GAT-4F"

(During this period Graeme Noel Wilson ("Wilson") was the Shire Engineer, Porter was the Secretary of the Council and the Water Board however Porter retired in late 1984 and was replaced by David Parkinson ("Parkinson") in both positions)



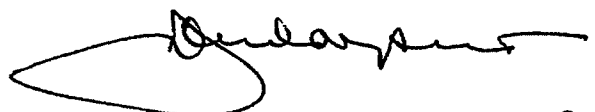
28) During the period from about 1985 until 1989 both the Council and Water Board refused to allow me access to the relevant files. Eventually in about March of 1995, after Wilson and Parkinson were retrenched, I was finally granted access to the files. Upon viewing the files I discovered, inter alia, the documents, facts and circumstances now referred to in paragraphs W2 to W5 inclusive of the present Statement of Claim.

29) As a result of perusing the files referred to in paragraph 28 of this affidavit I formed the following state of mind:-

- a) That the operation of law and in particular the Interim Development Order then in force required the subdivision to be completed according to the terms of planning permit no. 2191 ("PP219").
- b) The terms of PP2191 required that the development be carried out in accordance with the plans and submissions which formed part of the application.
- c) The said plans and submissions specifically included a reticulated water supply under the control and ownership of the Body Corporate.
- d) That because of subparagraphs a), b), and c) above, a water supply should have been present at the time that the Plans of Cluster Subdivision were sealed by the Council and when I subsequently purchased my allotments.
- e) It followed therefore, from a) to d) above, that the representations of the Council and the Water Board referred to in paragraph 27 of this affidavit were false. Now produced and shown to me marked with the letters "GAT-5A" is a copy of PP2191 and marked with the letters "GAT-5B" is a copy of the submission referred to in paragraph b).

30) Having acquired the state of knowledge referred to in the previous paragraph I issued the 1995 proceedings against the Council and Water Board. In the 1995 proceedings I alleged that the representations by the Council and Water Board that my allotments did not have access to a reticulated water supply were fraudulent representations. (The Amended Further Statement of Claim in the 1995 Supreme Court proceeding is now exhibited at tab 16 of the exhibit folder of Michelle Elizabeth Dixon marked "MED-1")

31) After a number of interlocutory hearings the Court eventually ordered mediation in about 1999. Mr. George Golvan QC was engaged as mediator. I have read and crave leave to refer to the affidavit of Mr. Steven Edward sworn 12<sup>th</sup> September 2005 and filed in these proceedings ("the Edward affidavit") and in particular paragraph 22 of that affidavit. To the extent that paragraph 22 of that affidavit implies that Mr. Neville represented me at mediation I deny that implication. I was unrepresented. Mr. Neville is a solicitor and a personal friend. He was not retained by me in the mediation and had no knowledge of the case. Mr. Neville agreed to accompany me solely to lend



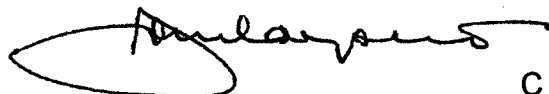
moral support and to assist in the negotiating process. Mr. Steven Edward the present solicitor for the second defendant was also present at the mediation. The mediation proceeded as follows:-

- a) I telephoned Mr. Golvan to arrange a pre-mediation conference. Mr. Golvan advised me that he had already held a pre-mediation conference with Counsel for the Council and Water Board. I was not invited to participate in that pre-mediation conference. Mr Golvan advised me that a conference with me was unnecessary as he had sufficient information from the court documents.
- b) Each party provided a Mediation Position Statement. Of relevance is that the position statement of the Water Board which, inter alia states; "Parkinson was acting in the course of his normal duties and was responsible for the implementation of the policy of the Board." Now produced and shown to me marked with the letters "GAT-6" is a copy of the Mediation Position Statement of the Water Board.
- c) At mediation Mr. Golvan came to me and explained that my action was almost certain to fail and that I would be bankrupted by the costs. Mr. Golvan then advised me that the Council and Water Board were prepared to pay me a small sum to settle in order to avoid further costs.
- d) The defendants were each represented by Queens Counsel. The defendants' counsel and Golvan Q.C all expressed the view that I would fail on the basis that Wilson and Parkinson had each been acting according to policy. Faced with the opinion of three Senior Counsel and being unrepresented I felt that I was unable to succeed and I reluctantly accepted the settlement offer made.

32) Mr. Golvan prepared the Terms of Settlement and I signed them. (The Terms of Settlement of the 1995 Supreme Court proceeding are now exhibited at tab 29 of the exhibit folder of Michelle Elizabeth Dixon marked "MED-1")

33) The following day I spoke with my friend, Mr. Francis Tiernan who is a Barrister. Mr. Tiernan berated me for settling and advised me that I should not have settled in the circumstances.

34) The terms of settlement required the Council and Water Board to pay \$25,000 by a particular date. The monies were not paid by the due date and as a result I considered the Council and Water Board to be in default of the terms of settlement. Upon eventual receipt of the settlement cheques I returned them and issued Notice of Trial. I have read the affidavit of Michelle Elizabeth Dixon sworn on 23<sup>rd</sup> September 2005 and filed in these proceedings in support of the First Defendant's application for Security for Costs ("the Dixon Security for Costs affidavit"). In reply to paragraph 15 of that affidavit I deny that I refused to comply with the terms of settlement. I also refer to paragraph 24 of the affidavit of Steven Mark Edward sworn on 12<sup>th</sup> September and filed in these proceedings in support of the Second Defendant's application for summary judgement. ("The Edward affidavit"). To the extent that paragraph 24 of that affidavit implies that I refused to comply with the Terms of Settlement I deny the allegation. Despite the matters deposed by Ms Dixon and Mr. Edward the defendants had in



fact defaulted on the terms of the Settlement Agreement and the true facts are set out in the Judgement of Mr. Justice Beach which is exhibited to paragraph 37 of this affidavit.

35) The Council and Water Board then issued proceedings in the Practice Court seeking specific performance of the Terms of Settlement.

36) My defence to the Summonses seeking specific performance was:-

- a) That the Council and Water Board had defaulted on the Terms of Settlement in that they did not pay the monies due by the due date specified in the Terms of Settlement.
- b) The circumstances of the mediation referred to in paragraph 31 of this affidavit which led me to believe that I was unlikely to succeed.
- c) My defence is set out in the Judgement of

37) In the Practice Court I represented myself. Mr. Justice Beach held:- (The Judgement of Mr. Justice Beach is now exhibited at tab 31 of the exhibit folder of Michelle Elizabeth Dixon marked "MED-1")

- a) Time for the defendants to pay was not of the essence.
- b) The circumstances of the mediation could not be raised in the proceeding.

38) I was ordered to perform the Terms of Settlement.

39) I considered that I had good grounds for an appeal against the orders of Mr. Justice Beach.

40) I elected not to appeal because:

- a) During the course of the Practice Court hearing the Council and Water Board showed me a reticulation plan for the subdivision. The plan clearly showed that the principal water mains were in fact laid in 1982 and not in 1979 as alleged by me and, on my understanding, as required by law. At the time of swearing this affidavit I have been unable to locate a copy of this plan but crave leave to file and serve a copy prior to hearing.
- b) At the time of showing me the reticulation plan Counsel and Solicitors for the Council and Water Board pointed out that the plan disclosed that the water main was in fact laid in 1982 and not 1979 as alleged by me. They said to me words to the effect "How do you explain that"?
- c) My entire cause of action hinged upon the assertion that the subdivision had been completed according to law and that therefore a reticulated water supply should have been present in 1979 at the time of the sealing of the plans of cluster subdivision.
- d) Because of my ignorance of the true facts as now pleaded in paragraphs W1 to W13 of the present Statement of Claim, the evidence disclosed by the reticulation plan that a water main had not been installed until 1982, seemed to me to be fatal to any prospects of ultimate success after appeal.

41) I advised the Council and Water Board that I would not appeal the determination of Justice Beach. I did as ordered and filed a Notice of Discontinuance.

**The difference between current proceedings and the previous proceedings.**

42) I refer to the Affidavit of Michelle Elizabeth Dixon sworn on 23<sup>rd</sup> September 2005 and filed in these proceedings in support of the First Defendant's application for summary judgement ("the Dixon

summary judgement affidavit and the Edward affidavit. Each of those affidavits alleges that the causes of action in the 1988 and the 1995 proceedings are the same as the cause of action in the present proceedings.

a) I refer to the Dixon summary judgement affidavit and note that in the table in paragraph 22 of that affidavit the deponent represents that cause of action in the 1988 proceeding is the same as in the present proceeding in relation to the Tylden Rd. land. I deny this. I note that the table makes no reference to paragraphs T5, T6, T8, T9, T10, T11, T12, T14, T15 or T18. ("the omitted paragraphs") The reference to paragraph T7 is potentially misleading because the table truncates its content. I say that the omitted paragraphs relate to the true cause of my loss and damage in respect to the Tylden Rd land and the facts and circumstances set out in those paragraphs were not pleaded in the 1988 proceedings because they were concealed from me by the defendants conduct until August 2000.

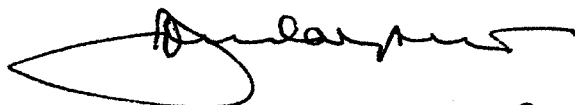
b) I again refer to the Dixon summary judgement affidavit and note that in the table forming paragraph 47 of that affidavit represents that the cause of action in the 1995 proceeding is the same as in the present proceeding in relation to the Woodleigh Heights land. I deny this. I note that the table makes no reference to paragraphs W8, W9, W10, W11, W12 or W14 ("the further omitted paragraphs"). I say that the reference to paragraph W13 is potentially misleading because the table truncates its content. I say that the further omitted paragraphs relate to the true cause of my loss and damage in respect to the Woodleigh Heights land and the facts and circumstances set out in these paragraphs were not pleaded in the 1995 proceedings because they were concealed from me by the defendants' conduct until August 2000.

c) I refer to the Edward affidavit and note that Mr. Edward alleges that the paragraphs identified by him from the present proceeding contain the same subject matter as in the 1988 and 1995 proceedings. I deny this allegation. The present proceedings plead that the conduct of the Water Board was carried out in full knowledge that the plans of subdivision were sealed by the Council in the manner alleged in the present statement of claim and in full knowledge that the said conduct exacerbated and concealed the true cause of my loss and damage as now known. In the 1988 proceeding the conduct of the Water Board was simply that it had called upon my bank guarantee by mistake of law and in the 1995 proceeding the Water Board together with the Council falsely represented that a reticulated water supply was not available to my land.

43) I say that the present proceedings are quite different from the previous proceedings, set out below is a comparison of the previous proceeding and the present proceeding in respect to both the Tylden Rd. land and the Woodleigh Heights land.

**44) The Tylden Rd. 1988 proceeding.**

a) The 1988 proceeding related only to the residential allotments. The 1988 proceeding did not concern the industrial allotments.



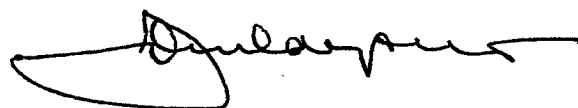
- b) The 1988 Tylden Rd proceeding was predicated upon the belief that the Council had:-
  - i) lawfully sealed the plans of subdivision and;
  - ii) lawfully issued notices of requirement in respect to the construction of roads and the construction of water works.
- c) The cause of action was that the Council and Water Board had acted in mistake of law in:-
  - i) Accepting my bank guarantees;
  - ii) Holding that the notices of requirement applied to me
  - iii) Calling upon my bank guarantees
  - iv) Constructing the roads and water works at my cost
  - v) Holding me liable for overrun of costs.
- d) My state of knowledge at the time of initiating the proceedings was that whilst the Council and Water Board had each acted in mistake of law in respect to the Notices of Requirement, they had nevertheless acted lawfully and without malice and had lawfully sealed the plans and lawfully issued the Notice of Requirement.

**45) The present proceeding insofar as they relate to Tylden Rd.**

- a) The present proceeding relates to both the industrial allotments and the residential allotments.
- b) The present proceeding is firstly predicated on the allegations that the Council:-
  - i) Sealed the plans of subdivision in direct contravention of its statutory duty to refuse to seal them (See section 569B(7) of the Local Government Act 1958) and/or purported to lawfully seal the plans for an ulterior purpose, namely to avoid the provisions of s9 of the Sale of Land Act.
  - ii) Unlawfully sealed the plans in full knowledge that:-
    - (1) No services were present.
    - (2) There as no lawful means of ensuring the provision of those services.
    - (3) The allotments so created were unusable and that there was no lawful means of ensuring that they be made useable.
    - (4) There was no planning permit permitting any one of the subdivisions created.
    - (5) Each of the subdivisions created was in breach of the Shire of Kyneton Interim Development Order then in place.
- c) The present proceeding is further predicated on the allegation that after the Council did those things referred to in paragraph 45(b) of this affidavit, the Council and Water Board then engaged in a course of conduct which exacerbated the loss and damage and also concealed from me the true cause of my loss and damage.

**46) Woodleigh Heights. 1995 proceedings**

- a) The Woodleigh Heights 1995 proceeding was predicated upon my belief that the Council had:-
  - i) Lawfully sealed the Plan of Cluster Subdivision.



- ii) That Planning Permit 2191 ("PP2191") dictated that the reticulated water supply set out in the plans and submissions forming part of the application for PP 2191 be present and complete at the time that the Council sealed the plans of Cluster Subdivision in. (see exhibit GAT-5A)
- iii) That a reticulated water supply was in fact present in 1979.
- iv) That the allotments were useable as and from the time of sealing in 1979.
- v) That because of subparagraphs i) to iv) above, the representations by the Council and Water Board to the effect that a reticulated water supply was not available to my allotments were false representations..

**47) Present proceeding insofar as it relates to Woodleigh Heights.**

- a) The present proceeding is predicated on the allegations that the Council:-
  - i) Sealed the plans of subdivision in direct contravention of its statutory duty to refuse to seal them (See section 569B(7) of the Local Government Act 1958 and S6 and S11 of the Cluster Titles Act) and/or purported to lawfully seal the plans for ulterior purpose, namely to avoid the provisions of s9 of the Sale of Land Act..
  - ii) Unlawfully sealed the plans in full knowledge that:-
    - (1) No water was present.
    - (2) There was no lawful means of ensuring the provision of water.
    - (3) The allotments so created were unusable and that there was no lawful means of ensuring that they be made useable.
    - (4) That the cluster subdivision was not completed as required by law and was in breach of the Shire of Kyneton Interim Development order at the time of sealing.
- b) The present proceeding is further predicated on the allegation that after the Council did those things referred to in paragraph 47(a) of this affidavit the Council and Water Board then engaged in a course of conduct which exacerbated the loss and damage and also concealed from me the true cause of my loss and damage.

**Limitation issues, Concealment of my true cause of loss and damage.**

- 48) During the entire period from 1979 until the present the Council and Water Board have each represented that they have acted lawfully in all respects.
- 49) At all times subsequent to the settlement of the 1988 proceedings until August 2000 in respect of the Tylden Rd land I had no reason to suspect the existence of any of the conduct alleged in the current pleadings on the part of either the Council or Water Board in relation to the Tylden Rd Land
- 50) My state of knowledge in respect to the Woodleigh Heights land prior to August 2000 was:-
  - a) My allotments were spread throughout the cluster subdivision. The effect of the Defendants' representations referred to in paragraph 27 of this affidavit was that all of the allotments in the cluster subdivision except those which were owned by me had access to an approved reticulated water supply. This situation was so obviously iniquitous that at that time I firmly believed that a



fraud had been perpetrated against me (as I had alleged in the 1995 proceedings) I could not say or demonstrate what that fraud was or who was responsible for it.

- b) On the one hand, I thought I had proof of the matters set out in the 1995 Supreme Court proceedings that at law a reticulated water supply was required to be present in 1979. On the other hand I had been shown a reticulation plan in the Practice Court which showed that the primary water main was laid in 1982.
- c) I could not reconcile the competing propositions referred to in (b) above. Accordingly, I felt unable, after settlement of the 1995 proceedings, to prove any wrongdoing on behalf of either the Council or Water Board.

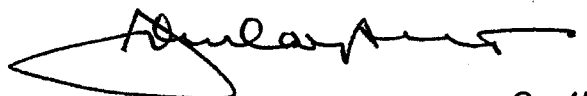
51) In relation to Buchanan I had formed the opinion that he was a dishonest person. I learned from my lawyer, Mr. Danny Ginsburgh that Buchanan had somehow managed to manipulate the plans of subdivision to avoid the provisions of s9 of the Sale of Land Act thereby enabling him to sell allotments and raise capital for the provision of roads and water which he ordinarily had an obligation to provide, or make provision for, prior to sale. I had no reason to suspect that the Council was in any way involved in Buchanan's wrongdoing.

52) In relation to the Council and Water Board I had no knowledge of anything save that which had been previously set out in the previous proceedings together with knowledge that the water main had been laid in 1982 as represented by the Counsel and lawyers for the defendants.

***My state of knowledge in August 2000:-***

**53) In relation to Tylden Rd.**

- a) For the purpose of preparing a defence and counterclaim against the Council in respect to a rates claim which the Council had brought against me I again began reviewing all of the documents available to me. I re-examined the contents of the large black folder referred to in paragraph 26 of this affidavit.
- b) Upon examining the documents within the black folder it became apparent that there were two versions of the plans for the industrial allotments of the Tylden Rd subdivision. Namely complete versions and clipped versions. I recognised the clipped versions as being the same as those which had been submitted into evidence by Wilson in the 1987 Magistrates Court proceeding and in the subsequent Supreme Court Appeal. I also noticed that the clipped versions had been clipped in copying in such a manner as to remove or omit the identifying number which was present on the complete version. Now produced and shown to me and marked with the letters "GAT-7" is a bundle of plans comprising the complete versions of those plans. Now produced and shown to me and marked with the letters "GAT-8" is a bundle of plans comprising the clipped versions of those plans.
- c) I then noticed that the black folder also contained copies of the residential series of the Tylden Road plans of subdivision and that these plans had also been clipped and I recognised these



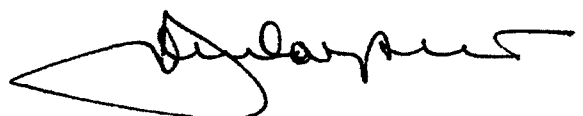
clipped plans to also be identical to those which had been admitted into evidence in the Magistrates Court and the Supreme Court Appeal. I then reflected on the Magistrates Court proceedings which I depose to in paragraph 23 of this affidavit. Now produced and shown to me and marked with the letters "GAT-9" is a bundle of plans comprising the clipped versions of those plans.

i) In the Magistrates Court, a bundle of documents was tendered which contained, inter alia, the following documents:-

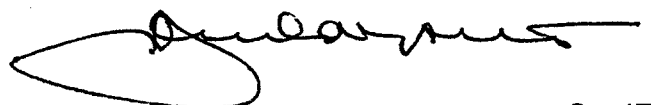
- (1) A large plan showing all of the residential allotments and the complete road. Now produced and shown to me and marked with the letters "GAT-10" is a copy of the large plan.
- (2) The three plans comprising the Industrial series of plans none of which show all allotments and all of which had been clipped in the manner described above. (see exhibit GAT-8)
- (3) The seven plans comprising the Residential series of plans, none of which show all of the allotments and none of which show the complete road and all of which had been clipped in the manner described above. (see exhibit GAT-9)
- (4) Council minutes for 20<sup>th</sup> February 1980 containing at item 8 a minute of resolution that the Council serve Notice of Requirement on the subdivider in relation to the subdivision referred to in items 8(a) and 8(b) of the Engineers Report of 20<sup>th</sup> February 1980. Now produced and shown to me and marked with the letters "GAT-11" is a copy of Council minutes of 20<sup>th</sup> February 1980.
- (5) Engineers report of 20<sup>th</sup> February 1980 containing:-
  - (a) at item 8(a) a reference to a 16 lot plan of subdivision owned by Buchanan. (note the reference to 16 is a typographical error and should be 18). Now produced and shown to me and marked with the letters "GAT-12" is a copy of the Engineers Report of 20<sup>th</sup> February 1980..
  - (b) at item 8(b) a reference to a 6 lot plan of subdivision (industrial) owned by Buchanan.
- (6) Copy of a Notice of Requirement dated 20<sup>th</sup> February 1980 and bearing the plan reference number 79305/G and a statement that the plan referred to was lodged with the Council on 12<sup>th</sup> February 1980 and a statement that the Notice of Requirement related to the road shown on the plan. Now produced and shown to me and marked with the letters "GAT-13" is a copy of the Notice of Requirement referred to..

ii) With reference to the bundle of documents and in particular the documents identified above Graeme Wilson gave evidence inter alia, :-

- (1) That the Council had approved a planning permit for the Tylden Rd subdivision permitting 18 residential allotments and 6 industrial allotments.



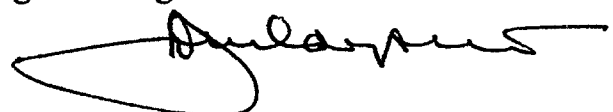
- (2) that the large plan and the series of plans were all filed with the Council on 12<sup>th</sup> February 1980.
- (3) That the Council considered the large plan on 20<sup>th</sup> February 1980 and resolved to issue and serve on the developer a notice of requirement in relation to the roads shown on the plan and for the provision of water.
- (4) That pursuant to the resolution of Council the Council did serve on the developer the Notice of Requirement dated 20<sup>th</sup> February 1980
- (5) That the large plan was processed in seven parts, those parts being sealed by Council on 21<sup>st</sup> May 1980 with a road-making endorsement placed thereon.
- d) Upon further examination and close reading of the documents it became apparent that the Notice of Requirement which had been admitted into evidence in the Magistrates Court and in the Supreme Court Appeal and which was discovered in the County Court proceeding contained the reference number 79305/G which was sequentially similar to the numbers disclosed on the non clipped versions of the Industrial Plans.
- e) From this I was able to deduce that the Notice of Requirement tendered in evidence in fact related to one of the residential series of plans and not to the large Plan referred to in paragraph 53,c),i),(1) of this affidavit and which large plan showed the whole of the residential allotments and the whole of the road to be constructed.
- f) As a result of perusing the documents in the black folder referred to in paragraph 26 of this affidavit and reviewing the documents tendered in the Magistrates Court and the evidence given by Wilson in that Court I came to a number of conclusions. Those conclusions were:-
- i) As the residential series of plans were filed with the Council on or after the 4<sup>th</sup> March 1980 the Notice of Requirement given in evidence had been falsely dated 20<sup>th</sup> February 1980. Now produced and shown to me and marked with the letters "GAT-14" is a copy of the Notice to the effect of the Thirtieth Schedule of the Local Government Act dated 4<sup>th</sup> March 1980.
  - ii) The plan of subdivision considered by the Council on 20<sup>th</sup> February 1980 had been abandoned by both the Council and Buchanan and not further processed. The seven plans comprising the residential series of plans were processed in substitution.
  - iii) That the Notice of Requirement had in fact been fabricated and that Wilson's evidence in the Magistrates Court could not be correct.
- g) At the time of Wilson giving his evidence the Council was fully aware of or recklessly indifferent to the existence of the following facts:-
- i) That the large plan in evidence was not a plan of subdivision and was not the plan considered by the Council on 20<sup>th</sup> February 1980.
  - ii) That the plans considered by the Council on 20<sup>th</sup> February 1980 had been abandoned by both the Council and Buchanan and not processed any further since 20<sup>th</sup> February 1980. The three



plans comprising the Industrial series of plans and the seven plans comprising the residential series of plans were unlawfully processed in substitution for the plans considered by the Council on 20<sup>th</sup> February 1980.

- iii) That the Notice of requirement dated 20<sup>th</sup> February 1980 and given in evidence relates to the plan bearing the identifying number 79305/G and not to the plan considered by the Council on 20<sup>th</sup> February 1980.
- iv) That the plan of subdivision bearing the number 79305/G is in fact only a two lot plan of subdivision, that plan being one of the series of residential and which contains Lot G. and Lot 8.
- v) That the Industrial series of plans and the Residential series of plans bear the identifying number sequence 79305/B to 79305/K inclusive.
- vi) That the plan bearing the identifying number 79305/G showed only a very small portion of the road.
- vii) That the plans comprising the Industrial series of plans and the Residential series of plans were lodged with the Council on or after 4<sup>th</sup> March 1980 and not on 12<sup>th</sup> February 1980
- viii) That the copies of the plans given in evidence and comprising the Industrial series of plans and the Residential series of plans had all been clipped in copying so as to omit the abovementioned identifying numbers as described above.
- ix) That the clipped copies of the Residential series of plans prevented the Court and myself from becoming aware of the true fact that the Notice of Requirement did not relate to a plan showing creating 18 residential lots and 6 industrial lots and showing the complete road.
- x) That each of the plans comprising the Industrial series of plans and the Residential series of plans each constitute a separate and distinct subdivision each requiring a separate Planning Permit before being lawfully approved.
- xi) That there never was any application for a planning permit nor was any planning permit issued permitting any one of the subdivisions created by each of the plans comprising the Industrial series of plans and the Residential series of plans.
- h) Upon reaching the above conclusions it became apparent to me for the first time:-
  - i) that the Council had acted maliciously or recklessly by sealing the residential plans contrary to its lawful obligation to refuse to do so.
  - ii) that Wilson's evidence given to the Magistrates Court had the effect of concealing the Council's true conduct from the Court and myself.
- i) I further concluded that at the time of sealing the series of residential plans the Council was not only fully aware that no services existed but it was also fully aware that there was no lawful means of providing or compelling the provisions of those services.

54) My state of knowledge in relation to Woodleigh Heights in August 2000.



- a) Upon reaching the foregoing conclusions in relation to the Tylden Rd land I began to consider the possibility that the Council may have acted unlawfully in relation to the Woodleigh Heights land. I reconsidered the failed 1995 proceedings and the reticulation plan which had been shown to me in the Practice Court. I then realised that the Council had in fact sealed the plans of Cluster Subdivision in contravention of its statutory duty to refuse to so seal them and in full knowledge that the subdivision had not been completed according to law and the reticulated water supply was not present in 1979 as required by law but was instead laid in 1982 as pointed out to me in the Practice Court. I was now able to reconcile the representations made to me in the Practice Court in 1999 with my prior state of knowledge. It was now apparent that the Conduct of the Council and Water Board in relation to the Woodleigh Heights Subdivision was essentially similar to their conduct in relation to the Tylden Rd land.. Subsequently the Council and Water Board engaged in an ongoing course of conduct the effect of which was to conceal from me the true facts as now known. In the case of the Woodleigh Heights land this ongoing course of conduct is now set out in paragraphs W14 to W71 inclusive of the present Statement of Claim.

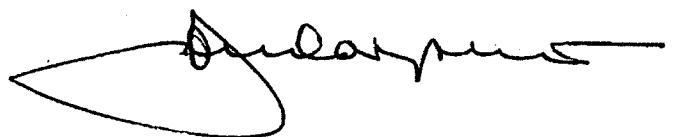
**55) Summary of differences between previous and current proceedings.**

- a) In the previous proceedings the causes of action were as set out in paragraphs 44 and 46 of this affidavit. Upon becoming aware of the matters set out in paragraphs 53 and 54 of this affidavit the true causes of my loss and damage became known and are similar in respect to both the Tylden Road land and the Woodleigh Heights land in that in both cases the loss and damage occurred from the time I purchased unusable allotments.
- b) My present cause of action is that the Council did in breach of its specific duty seal the residential series of plans and the industrial series of plans and the plans of cluster subdivision in full knowledge that the allotments thereby created were unusable due to a lack of services and in full knowledge that there was no lawful means to compel or cause construction of those services in order to make the allotments useable.
- c) In relation to the Tylden Road land the present cause of action is set out in the present Statement of Claim such claims having not been pleaded in previous proceedings.
- d) In relation to the Woodleigh Heights land the present cause of action is set out in the present Statement of Claim such claims having not been pleaded in previous proceedings.

**Concealment of the causes of action.**

- 56) The defendants have engaged in a continuous course of conduct designed to conceal from me the true cause of my loss and damage. That conduct has been referred to throughout this affidavit and includes as follows:-

- a) **In relation to the Tylden Rd land.**

A handwritten signature in black ink, appearing to be 'D. J. ...', written over a large, stylized, teardrop-shaped flourish.

- i) The act of sealing the various plans and thereby inducing the Registrar of Titles to issue separate titles in the case of the residential allotments and in the case of the Industrial land to accept and assign lodged plan numbers to the sealed plans.
- ii) By doing those things now set out in paragraphs T13 to T34 of the present statement of claim.
- iii) By giving false evidence and admitting falsified documents into evidence in the Magistrates Court at Bendigo.
- iv) By discovering the same clipped documents in the 1988 County Court proceeding.
- v) By conducting the Defence of the 1988 County Court proceeding in such a manner as to conceal the true defence and true facts which were known to the defendants and known to be fatal to the 1988 County Court proceedings.
- vi) By inducing me to settle the 1988 County Court proceedings in full knowledge that due to incomplete discovery and false admissions the true facts remained concealed from me.
- vii) During the Course of the 1988 proceeding the defendants made false admissions and failed to provide complete discovery. The relevant conduct of the proceeding was as follows:-

57) This proceeding was initiated on 7<sup>th</sup> November 1988 by Summons and Statement of Claim. (A copy of the Summons and Statement of Claim and the Amended Statement of Claim are exhibited at tabs 3 and 4 respectively of the exhibit folder of Michelle Elizabeth Dixon marked "MED-1")

(1) The cause of action was recovery of monies had and received under mistake of law.

(2) My cause of action as against the Council was entirely based upon:-

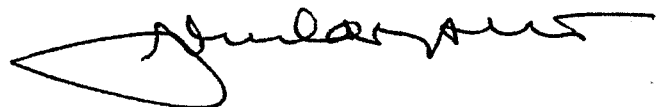
(a) the evidence given by the Council in Magistrates Court proceeding D1419/87

(b) The affidavit of the Council in Supreme Court proceeding OR/235/87 and which affidavit repeated the evidence given in Magistrates Court proceeding D141/87

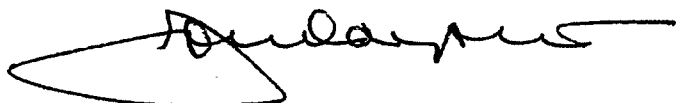
(c) The judgment of Mr. Justice Kay in OR/235/87 which was, in summary, that I was not "the owner" of the Tylden Road land at the time of the making of the S569E requirements and that the specific terms of the S569E requirement did not provide for the giving of Bank Guarantees and as a result the Council did not have the authority at law to accept or call upon my bank guarantees.

(3) The statement of claim in the County Court proceeding relied upon and repeated the evidence of the Council as given in the Magistrates Court and Supreme Court Affidavit and, in relevant part, claimed:-

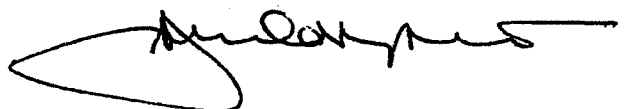
(a) "On or about 12<sup>th</sup> February 1980 a Mr. K. R. Buchanan ("the subdivider") lodged with the firstnamed defendant notices in the form of the Thirtieth Schedule to the LGA of intention to subdivide into 18 residential allotments....."



- (b) "On or about 20 February 1980 the firstnamed defendant served the subdivider with a written notice of requirement....."
- (4) In its defence the Council admitted each of the abovementioned claims and thereby again confirmed the relevant evidence given in the Magistrates Court and in the Affidavit of the Council in OR/235/87. A copy of the Defence is now shown to me and marked with the letters GAT-15
- (5) By affidavit of Discovery dated 5<sup>th</sup> April 1989 the Council, inter alia,
- (a) Failed to discover any planning permits.
  - (b) Failed to discover any notices in the form of the thirtieth schedule
  - (c) Discovered one only S569E Notice of Requirement. That Notice is the same one that was tendered in the Magistrates Court and was in the Supreme Court appeal. I refer to this Notice of Requirement in paragraph 53(6) and elsewhere in this affidavit.
  - (d) Discovered each of the plans comprising what is now referred to in the present statement of claim as "the parent plan", "the series of industrial plans" and "the series of residential plans" (The Copies of the two series of plans discovered were the same clipped versions as those tendered in the Magistrates Court proceedings and subsequently in evidence in the Supreme Court in OR/235/87). I have referred to these plans in paragraphs 53(a), 53(b) and elsewhere in this affidavit. A copy of the Affidavit of Discovery is now shown to me and marked with the letters GAT-16
- (6) As a consequence, by Notice under Order 16 Rule 24, I required the Council to make further discovery and in particular I required the Council to discover the Notices to the effect of the Thirtieth Schedule Notice. A copy of the Notice under Order 16 Rule 24 is now shown to me and marked with the letters "GAT-17" (I did not require any further discovery of S569E Notices of Requirement as at that time I had no knowledge or reason to believe that there was more than one and no reason to suspect that they had been fabricated. Similarly I did not require further discovery of any plans of subdivision as at that time I did not know and had no reason to suspect that those which had been discovered were clipped or falsified).
- (7) The Specific request made by me was that Council discover the Notices to the effect of the Thirtieth Schedule in relation the plans referred to in items 7(c), 8(a) and 8(b) of the Shire of Kyneton Engineers Report dated 20<sup>th</sup> February 1980.



- (8) As a consequence of my request the Council filed a Supplementary Affidavit of Documents dated 23<sup>rd</sup> May 1989 and, inter, alia discovered 5 Notices to the effect of the Thirtieth Schedule as follows:-
- (a) One of these was dated 12<sup>th</sup> Feb 1980 and to it was attached a plan of subdivision showing all 18 of the residential allotments.
  - (b) The remaining four Notices were all dated 4<sup>th</sup> March 1980. One of these four Notices had a handwritten note "Plan submitted in 5 sections, 30<sup>th</sup> schedules all identical to this" (see exhibit "GAT-14")
  - (c) No relevant plans of subdivision were attached to the notices dated 4<sup>th</sup> March 1980.
  - (d) The Supplementary Affidavit of Documents, as I now know, at item 1, falsely states or implies that the 30<sup>th</sup> Schedule Notice discovered and dated 4<sup>th</sup> March 1980 relates to the Plan of Subdivision referred to in the Engineers Report of 20<sup>th</sup> February 1980. A copy of the Supplementary Affidavit of Documents is now shown to me and marked with the letters "GAT-18" Subsequently after orders the Defendants filed a Further Supplementary Affidavit of Documents and a Third Supplementary Affidavit of Documents. These further affidavits are now shown to me and marked with the letters "GAT-19" and "GAT-20" respectively.
- (9) As a consequence of this further discovery I continued to believe those things which had been represented in the Magistrates Court and the Supreme Court, which were:-
- (a) That the plan showing all 18 residential allotments as attached to the Notice to the effect of the Thirtieth Schedule dated 12<sup>th</sup> February 1980 had been properly filed on that day.
  - (b) That the plan showing all 18 residential allotments had been properly considered by Council on the 20<sup>th</sup> February 1980 and that one only S569E Notice of Requirement dated 20<sup>th</sup> February 1980 had properly issued pursuant to Council's resolution of 20<sup>th</sup> February 1980.
  - (c) That the plan which had been filed on 12<sup>th</sup> February and considered by Council on 20<sup>th</sup> February 1980 had subsequently been processed in multiple parts.
- (10) As a further consequence of this further discovery I was led to believe, and did believe, that the said multiple parts had been filed on or about 4<sup>th</sup> March 1980 and then lawfully processed.
- (11) As a consequence of the further discovery I filed an amended statement of claim which, in relevant part, claimed:-



(a) "In February and March 1980 Mr. K.R. Buchanan .....lodged.....Notices of Intention to Subdivide.....Notice dated 20<sup>th</sup> February 1980 and 4 Notices .... Each dated 4 March 1980"

(b) "On or about 20 February 1980 the firstnamed defendant served the subdivider with a written notice of requirement pursuant to ss.569E(1)....."

(12) The Council and Water Board subsequently filed an amended defence and a re-amended defence each of which admitted each of these claims. They then filed a further re-amended defence which admitted the service of the Notice of Requirement but did not admit the matters related to the filing of the Notices of Intention to subdivide. Of note is the fact that where appropriate either the Council or the Water Board would not plead to a claim however in respect to each of the abovementioned claims both the Council and Water Board specifically pleaded as set out above. A copy of the Amended Defence is now shown to me and marked with the letters GAT-21 (A copy of the Re-Amended Defence is exhibited at tab 6 of the exhibit folder of Michelle Elizabeth Dixon marked "MED-1")

(13) Insofar as the Water Board was concerned the cause of action was based upon the same basis as with the Council and additionally the fact that at the relevant times the land was not within either the Urban or Rural districts of the Water Board and there was no water supply agreement pursuant to s307AA of the Water Act 1958 otherwise empowering them to hold or call upon my bank guarantees or to construct the water works at my cost.

(14) The facts therefore are:-

- (a) The Council did not discover complete copies of any of the plans comprising the two series of plans.
- (b) The Council discovered one only S569E Notice of Requirement dated 20<sup>th</sup> February 1980
- (c) The Council and Water Board misrepresented the Notices to the effect of the Thirtieth Schedule in their Supplementary Affidavit of documents.
- (d) The Council failed to discover any Planning Permits.
- (e) In their Further Re-Amended Defence each of the Council and Water Board admitted that on or about the 20<sup>th</sup> February 1980 the Council served the subdivider with a written notice of requirement. (as I now know each of these admissions was false and known to be false at the time that the admission was made)

(15) By the Council making false and inadequate discovery and by the Council and Water Board jointly making false admissions the Council and the Water Board continued the precise deception first perpetrated in the Magistrates Court and then repeated in the Supreme Court and in doing so intentionally continued to conceal from the Court and myself the facts which were discovered by me in August 2000 as set out above.

**b) In relation to the Woodleigh Heights land.**

- i) The act of sealing the plans of cluster subdivision and the subsequent plans of cluster re-subdivision in full knowledge that the subdivision had not been completed according to law and thereby inducing the Registrar of Titles to issue separate titles for each allotment.
- ii) By doing those things now set out in paragraphs W14 to W71 of the present statement of claim.
- iii) By inducing me to sign Terms of Settlement in respect to the 1995 Supreme Court proceedings in full knowledge that the true facts remained concealed from me.
- iv) By conducting the Defence of the 1995 Supreme Court proceeding in such a manner as to conceal the true cause of action which was known to the defendants and known to be fatal to the 1995 Supreme Court proceedings.
- v) By showing me the reticulation plan referred to in paragraph 40 of this affidavit in full knowledge that the matters disclosed by that plan were fatal to my 1995 Supreme Court Statement of Claim and at the same time still failing to disclose the true facts of the circumstances in which the Plans of Cluster Subdivision were sealed without services being present in 1979 as required by law. The fact that the reticulated water supply was required by law to be present in 1979 was set out in the 1995 Supreme Court Statement of Claim.


SWORN at Orange in the State of

New South Wales this 18<sup>th</sup> day

of October 2005

}  
}  
}  
Glen Thompson

Before me:

  
John C Carpenter

John Charles Carpenter  
Solicitor  
68 Summer St  
Orange NSW 2800

