

AMENDED PURSUANT TO ORDER 36.03 AND FILED ON 4 NOVEMBER 2005

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

Court Number: 6321/2005

BETWEEN:

**GLENN ALEXANDER THOMPSON
& CHERYL MAREE THOMPSON**

Plaintiffs

- and -

MACEDON RANGES SHIRE COUNCIL

First Defendant

- and -

THE COLIBAN REGION WATER AUTHORITY

Second Defendant

AMENDED STATEMENT OF CLAIM

Date of Document: ~~31 May~~ 4 November 2005

Filed on behalf of: The Plaintiffs

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1. Section numbers referred to throughout these pleadings are, unless otherwise specified, references to sections of the Local Government Act 1958 (Vic)
- 1A The Plaintiffs were at all material times, members of the public and bona fide purchasers for value without notice of certain parcels of land described in this Statement of Claim as "The Tylden Road Land" and the "Woodleigh Heights Land".

PARTICULARS OF LAND

- (i) The Tylden Road Land was, at all material times comprised of certain residential allotments ("the residential allotments") and certain industrial allotments ("the industrial land")
- (ii) The residential allotments are identified at the office of Registrar of Titles as certificates of title Volume 9408 folios 045, 046, 047, 048, 051, 052, 054, 055, 056, 057, 058, 059, 060, 061 and 062.

- (iii) The plans for the industrial land were assigned Lodged Plan Numbers and are identified at the office of Registrar of Titles as Lodged Plans number 135199, 135200 and 135201.
 - (iv) The Woodleigh Heights Land is identified at the office of Registrar of Titles as lots 1,2, 7, 10, 12, 14, 15, 18, 27 and 28, on Plan of Cluster Subdivision CS1134 ["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.
- 1B The Plaintiffs at all material times carried on the business of property developers ("the Business") in the course of which they acquired the Tylden Road land and the Woodleigh Heights land.
- 1C Further and in the alternative, but for the breaches of duty of the Defendants set out below, the Plaintiffs would have commenced to carry on the Business and, in the course of carrying it on would have acquired the Tylden Road land and the Woodleigh Heights land.
2. The First Defendant:
- (a) is a Body Corporate duly incorporated pursuant to the provisions of the Local Government Act 1989 and in particular by an Order of the Governor in Council published in the Government Gazette 19 January 1995 and;
 - (b) pursuant to Part 8 of the Gazetted order referred to in (a) above is the successor in law to the former Council known as "Kyneton Shire Council" ("The Council") and as such assumes all of the Councils legal rights, obligations and liabilities.
3. The Second Defendant:
- (a) is a Body Corporate duly incorporated pursuant to the provisions of the Water Act 1989 (and in particular, pursuant to provisions of an Order of the Minister of Water Resources published in the Government Gazette on the 25 March 1992); and
 - (b) as and from the 30 March 1992 assumed the whole of the property and all of the rights, liabilities, obligations, powers and functions of the "Kyneton Water Board ("The Water Board").The Water Board was itself constituted by an Order of the Governor in Council, dated 20 September 1983, which order also abolished the predecessor of the Water Board, the "Kyneton Shire Water

Works Trust" (The Trust).As and from 1 October 1983, the Water Board assumed the whole of the property and all of the rights, liabilities, obligations, powers and functions of The Trust.

4. The Council was an entity incorporated under the provisions of s.8 of the Local Government Act 1958, and was the holder of public office. The exercise of certain powers and the discharge of certain duties was incidental to the holding of that office, such powers being prescribed and proscribed by statute, principally the provisions of the Local Government Act 1958.
5. The Council owed a duty to the Plaintiffs as members of the public and/or to the class of persons which included the Plaintiffs to act in accordance with its statutory duties, within the limits of its statutory powers and to exercise any such powers and to discharge any such duties properly and legitimately for the public benefit and not for an ulterior purpose.
6. The Water Board was incorporated in the manner described in paragraph 3(b) above and was the holder of public office. The exercise of certain powers and the discharge of certain duties was incidental to the holding of that office, such powers and duties being prescribed and proscribed by statute, principally, the provisions of the Water Act 1958.
7. The Water Board owed a duty to the Plaintiffs as members of the public and/or to the class of persons which included the Plaintiffs to act in accordance with its statutory duties, within the limits of its statutory powers, and to exercise any such powers and discharge any such duties, properly and legitimately for the public benefit and not for an ulterior purpose.
8. Graham J. Wilson ("Wilson") held the position of Shire Engineer at all relevant times. Wilson was appointed as an Officer of the Council pursuant to s 158 of the Local Government Act, was remunerated from Municipal Shire funds and was appointed for the purpose of assisting the Council in carrying out the provisions of the Local Government Act and to assist in giving effect to the Council's rights and obligations under that Act. Wilson was, accordingly, the holder of public office. Wilson was able to exercise certain powers and was obliged to discharge certain duties which were incidental to the holding of his office.
9. At all relevant times up until about November 1984 George Stanley Porter (now deceased) ("Porter") held office as Secretary of the Shire of Kyneton ("Shire Secretary") and Secretary of the Kyneton Water Board ("Water Board Secretary").

Porter held both positions simultaneously during the relevant period. Porter was appointed as an Officer of the Council pursuant to the provisions of s 158 of the Local Government Act was remunerated from municipal shire funds, was appointed for the purpose of assisting the Council in carrying out the provisions of the Local Government Act and to assist in giving effect to the Council's rights and obligations under that Act. Porter was appointed as an officer of the Kyneton Shire Water Works Trust pursuant to the provisions of s. 156 of The Water Act. By an order of the Governor in Council dated 20 September 1983, Porter ceased to be Secretary of the Kyneton Shire Water Works Trust and became Secretary of the Kyneton Water Board. As Secretary of the Water Board, Porter was remunerated from public funds and was appointed for the purpose of assisting the Water Board in carrying out the provisions of the Water Act and to assist in giving effect to the Water Board's rights and obligations under that Act. Porter was an Officer of both the Council and the Water Board and in each position was the holder of public office. Porter was able to exercise certain powers and was obliged to discharge certain duties which were incidental to the holding of each office.

10. On or about November 1984, David J. Parkinson ("Parkinson") was appointed Shire Secretary and was also appointed the Secretary of the Water Board. Parkinson succeeded Porter in each of the aforementioned positions. Parkinson was able to exercise certain powers and was obliged to discharge certain duties which were incidental to the holding of each office.

AS TO THE TYLDEN ROAD LAND, THE PLAINTIFFS PLEAD THEIR CAUSE OF ACTION AS FOLLOWS:

All paragraphs relating to the Tylden Road land are denoted thus: T1, T2, etc.

- T1. On the 18 September 1979 Kenneth Raymond Buchanan (now deceased) ("Buchanan") made application for a planning permit to subdivide certain land identified in the Office of the Registrar of Titles as Volume 9363 Folio 447. The land was a joint tenancy registered in the names of Buchanan and his wife Yvonne Rae Buchanan. At all material times the Plaintiffs dealt only with Buchanan and had no dealings whatsoever with Yvonne Rae Buchanan. Annexed to the application for the said planning permit was a plan of subdivision ("the original plan") which set out:

- (a) six industrial allotments and
- (b) 18 residential allotments.

On the 23 October 1979 the Council issued planning permit number P.P.2441 in respect of the original plan.

On or about the 12 February 1980 Buchanan lodged a two Lot plan of sub division with the Council for approval ("the parent plan"). Lot 1 of the parent plan ("the parent industrial allotment") set out the land which was the subject of the 6 industrial allotments on the original plan and Lot Two of the parent plan ("the parent residential allotment") set out the land which was the subject of the 18 residential allotments on the original plan.

T2. Between the 18th September 1979 and 20th February 1980 Buchanan lodged with the Council for approval:

- (a) a plan of subdivision setting out 6 industrial allotments ("the first industrial plan") and
- (b) a plan of subdivision setting out 18 residential allotments ("the first residential plan").

T3. On the 20 February 1980 the Council:

- (a) sealed the parent plan;
- (b) resolved to serve a notice of requirement pursuant to s. 569E of the Local Government Act ("s.569E notice") upon the then owner of the land described in:
 - (i) The first industrial plan;
 - (ii) The first residential plan.

T4. Between the 4 March 1980 and 2 April 1980 Buchanan lodged with the Council and the Council accepted:

- (a) 3 plans of subdivision ("the series of industrial plans");
- (b) 7 plans of subdivision ("the series of residential plans").

The series of industrial plans and the series of residential plans referred to in (a) and (b) above were lodged in respect of the same land described in T2, namely the first industrial plan and the first residential plan.

The 3 plans of subdivision referred to in paragraph (a) above consisted of two 2-lot plans of subdivision which created a single allotment plus a residue and one 4-lot plan of subdivision which created 4 allotments.

The 7 plans of subdivision referred to in paragraph (b) above consisted of six 2-lot subdivisions each of which created a single allotment and a residue and one 12-lot subdivision which created 12 allotments.

- T5. Between 20 February 1980 and 2 April 1980, the Council, directly contrary to its own resolution of 20 February 1980 referred to in paragraph T3(b), contrary to its statutory duty under s569E and in furtherance of its malicious or reckless conduct pleaded in paragraphs T7-T10 below, omitted to issue 569E Notices in respect of the first industrial plan and in respect of the first residential plan.
- T6. In wilful or reckless disregard of its statutory duty under s 569B(4)(b) and/or in furtherance of the tortious acts pleaded in paragraphs T7-T10 below, the council did not further process the First Industrial Plan nor the First Residential Plan in any way whatsoever after the 20 February 1980.
- T7. Maliciously, intending to cause harm to the Plaintiffs' or to a class of persons which included the Plaintiffs', the Council, on the 21 May 1980 exercised power under s. 569B (4) of the Local Government Act for an ulterior purpose, namely, to avoid the effect of s 9 of the Sale of Land Act 1958 and to avoid the effect of s 97 of the Transfer of Land Act by causing each of the three plans comprising the series of industrial plans and each of seven plans comprising the series of residential plans to be sealed with the seal of the municipality, thereby approving each of the subdivisions set out in the said plans.
- T8. Further and in the alternative to paragraph T7 above, the Council, acting maliciously and with the same intention pleaded in that paragraph, purported to comply with the provisions of s.569B(4)(b) to approve the series of industrial plans and the series of residential plans by sealing the said plans.
- T9. Whether exercising a power for an ulterior purpose as described in paragraph T7, or purporting to comply with its statutory obligations as described in paragraph T8, the council in any event well knew:
- (a) that Buchanan had not complied with the provisions of ss.569(1) and 569A;
 - (b) that no planning permit was ever issued in respect of the proposed subdivision described in the said plans, nor was such a planning permit ever applied for;

- (c) that the proposed subdivision described in the said plans did not comply with an Interim Development Order then in force by virtue of the Town and Country Planning Act 1961 and:
- (d) that having regard to the facts and circumstances referred to in subparagraphs (a) to (c) above, the provisions of s.569B(7) imposed a duty upon the council to refuse to seal the said plans.
- (e) that the act of sealing the series of residential plans and series of industrial plans would, by virtue of the operation of s.569B(10), represent to all persons including the Registrar of Titles, that the Local Government Act had been complied with and that all preliminary steps and proceedings required to be taken had been taken.

Alternatively, the Council, in sealing the said plans acted with reckless disregard as to the existence of any power to lawfully seal the plans and with reckless disregard as to the existence of statutory provisions which imposed upon it a duty to refuse to do so.

- T10. Further and in the alternative to paragraphs T7, T8 and T9 above, the Council's unlawful conduct was undertaken with reckless disregard as to the probability that such conduct would occasion harm to the Plaintiffs or to a class of persons which included the Plaintiffs.
- T11. Prior to sealing the series of industrial Plans and the series of residential plans on 21st May 1980, the Council, acting with the malice referred to in paragraphs T7 and T8 or the recklessness referred to in paragraph T9, caused to be placed upon each of the plans in the series of residential plans and also upon each of the plans in the series of industrial plans an endorsement in the following terms:

"A requirement under s(1) & s(1A) of s569E of the Local Government Act 1958 has been made by the Council of the Shire of Kyneton in respect of this plan of subdivision"

By so endorsing the said plans, the council purported to be complying with its statutory duty under s 569E(3)(a), notwithstanding that it well knew or was recklessly indifferent to the fact that no valid s.569E notices had ever been served upon Buchanan between 18th September 1979 and 20th February 1980, in respect of the land described in either the series of industrial plans or the series of residential plans, so as to lawfully entitle the Council to make the said endorsements.

- T12 Maliciously, in purported compliance with s. 569E, intending to cause harm to the Plaintiffs or to a class of persons which included the Plaintiffs, and to lend verisimilitude to the unlawful manner of its approval of the subdivisions referred to in paragraphs T7 and T8 the Council fabricated Notices of Requirement. The Notices purported to have issued on 20th February 1980. The Council well knew that there was no lawful basis for the issue of the Notices.

PARTICULARS

- (i) See paragraph T20(c) below.
- T13. Further and in the alternative to paragraphs T11 and T12 above, the Council undertook the conduct described in those paragraphs with reckless disregard as to the probability that such conduct would occasion harm to the Plaintiffs or to a class of persons which included the Plaintiffs.
- T14. Further and in the alternative to paragraphs T11, T12 and T13 above the Plaintiffs allege that the acts complained of in those paragraphs and attributed to the Council relating to the endorsement of the plans of subdivision, and the issue and/or fabrication of Notices of Requirement dated 20th February 1980, were acts committed by Porter. At the time that Porter committed the aforementioned acts he was:
- (a) an officer of the Council and duly appointed in accordance with the statutory provisions as pleaded in paragraph 9 above;
 - (b) acting in the course of his employment as an officer of the Council.

Accordingly, the Council was vicariously liable for the acts done by Porter.

- T15. The Council, by sealing the parent plan, the series of industrial plans and the series of residential plans (and thereby approving the subdivisions referred to therein) represented to the Registrar of Titles that the parent plan and each of the ten plans comprising both the series of industrial plans and the series of residential plans:
- (a) was a genuine plan of subdivision;
 - (b) had been approved by the Council in accordance with the Council's obligations pursuant to the provisions of the Local Government Act, the Sale of Land Act, the Transfer of Land Act and the Interim Development Order then in force.

- (c) that Buchanan had done, or was liable to do, all the things required of him by the Council under s.569E(1) and s.569E(IA)
- (d) that each and every allotment set out in the plans of subdivision was a useable allotment for the purposes of 569B(7)(a)(iii)

The representations to the Registrar of Titles contained in each of the paragraphs (a) to (d) above, were false.

T16. Between the 21 May 1980 and 12 April 1981, relying on the representations of the council as set out in paragraph T15 above the Registrar of Titles:

- (a) accepted for lodgement, the parent plan;
- (b) accepted for lodgement, the 3 plans comprising the series of industrial plans;
- (c) accepted for lodgement, the 7 plans comprising the series of residential plans;
- (d) assigned a Lodged Plan number in relation to the parent plan namely LP134684;
- (e) assigned a separate Lodged Plan number in relation to each of the 3 plans comprising the series of industrial plans namely LP135199, LP135200 and LP135201;
- (f) assigned a separate Lodged Plan number in relation to each of the 7 plans comprising the series of residential plans namely LP135202 to LP135208 inclusive.

from which time Lot 1 of LP134684 being the parent industrial allotment was subject to the 3 plans comprising the series of industrial plans and Lot 2 of LP134684 being the parent residential allotment was subject to the 7 plans comprising the series of residential plans. Accordingly, the Registrar was deceived as to the true nature of the allotments referred to in paragraphs (a) to (f) above in that he was unaware (inter alia) of the fact that none of the allotments were serviced by roads or water, nor was he aware that at the time of registering the plans that there was no legally enforceable requirement upon any person to provide such roads or water. Had the Registrar been aware of the facts and circumstances pleaded in this paragraph, title would not have issued in respect of the said allotments.

T17. In or about September 1980, relying upon a copy of the original plan referred to in paragraph T1, and representations by Buchanan, the Plaintiffs purchased from

Buchanan, Lot 1 of LP134684, being the parent industrial allotment referred to in paragraph T1. The parent Industrial allotment was the same land that was the subject of the series of Industrial plans, that had been sealed and approved by the council in the manner described in paragraphs T3 to T10 inclusive. At the time of purchase the plaintiffs were unaware of the conduct of the Council pleaded in paragraphs T3 to T13 inclusive and of Porter pleaded in paragraph T14.

- T18. In or about December 1980, relying upon a copy of the original plan referred to in paragraph T1, the Plaintiffs purchased the 15 residential allotments. The residential allotments were part of the land described in the first residential plan and were also part of the land set out in the series of residential plans which were sealed and approved by the Council in the manner described in paragraph T3 to T10 inclusive. The series of residential plans is described at the office of the Registrar of Titles as LP135202 to LP135208 inclusive. At the time of purchase of the said land, the Plaintiffs were unaware of the conduct of the Council pleaded in paragraphs T10 to T12 inclusive and of Porter pleaded in paragraph T14.
- T19. In or about October 1980 Buchanan, who at that time had agreed to sell to the Plaintiffs some of the land shown on the residential series of plans, requested that the Plaintiffs provide to the Council a bank guarantee in the sum of \$25,000.00 to secure Buchanan's obligation to construct roads on the subdivision which included the residential allotments ("the subdivision"). Buchanan also requested that the Plaintiffs provide to the Kyneton Shire Water Works Trust a bank guarantee in the sum of \$11,500.00 to secure his obligation to supply water to the subdivision. The Plaintiffs provided each of the said guarantees. In providing the said guarantees the Plaintiffs acted upon representations made to them by Buchanan and upon the representations made by each of the Council and the Trust by their conduct in receiving and accepting the guarantees, that both the Council and the Trust had lawful authority to receive and accept the guarantees. At the time of providing the guarantees the Plaintiffs were unaware of the fact that neither the Council nor the Trust had power or lawful authority to accept them.
- T20. In or about October 1980 the Council, acting maliciously and intending to cause harm to the Plaintiffs or to a class of persons which included the Plaintiffs purported to exercise its power under s.569E of the Local Government Act to receive and accept from the Plaintiffs the bank guarantee referred to in paragraph T19 in respect of the purported obligation on the part of Buchanan to construct roads on the subdivision. At the time of receiving and accepting the said guarantee the Council well knew that it had no lawful authority whatsoever to do so in that it knew:

- (a) All of the facts and circumstances pleaded in paragraphs T1 to T13 inclusive;
- (b) That no valid s.569E Notices in respect of the subdivision had ever been served upon the owner (Buchanan) before the said plans had been sealed (as required by s.569E(3)(a) and (b));
- (c) That the series of s.569E Notices in respect of the subdivision which gave rise to the endorsements on the series of residential plans and which purported to have been issued on 20th February 1980 could not possibly have been issued on that date because the plans to which they relate could not have been lodged before 4th March 1980 being the date of the 30th Schedule Notices which accompanied the said plans;
- (d) That no resolution authorising the Council to serve the s.569E Notices described in (b) and (c) above had been made on or before 20th February 1980, or at all;
- (e) That even if the Notices described in subparagraph (c) above had been genuine and had been issued and served legitimately (which is specifically denied), the actual requirements specified in the said Notices were requirements under s.569E(1)(a) and s.569E(1A) and not requirements under s.569E(1)(b) or s.569E(1)(d) and therefore that the s.569E Notices were not, nor could they be construed to be Notices of a requirement to provide a guarantee;
- (f) That the very obligation on the part of Buchanan which the Plaintiffs were purportedly securing by the lodgment of their bank guarantee had been withdrawn by resolution of the Council on 19th November 1980;
- (g) That the Council by letter dated 24th November 1980 falsely represented to the Registrar of Titles that Buchanan had complied with the Requirements under s.569E(1) and s.569E(1A) referred to in (c) above;
- (h) That in response to a request by Buchanan the Council had, contrary to the express provisions of s.569E(3)(a) by letter to Buchanan dated 7th May 1980, agreed to seal the plans of subdivision without a requirement placed thereon provided that a bank guarantee to the value of \$25,000.00 was lodged to cover road construction costs;

- (i) That no request pursuant to s.569E(1B) had been received by the Council from the Kyneton Shire Water Works Trust on or before 20th February 1980 so as to trigger the provisions of s.569E(1A);
- (j) That in addition to occupying the office of Shire Secretary, Porter also occupied the office of Secretary of Kyneton Shire Water Works Trust and in that position would have been the officer responsible for the issue of a request referred to in paragraph (i) above.

Alternatively, the Council in receiving and accepting the guarantee above did so with reckless disregard as to the existence of any lawful authority to do so.

T21. Further and in the alternative to paragraph T20 above, the Council's conduct described in that paragraph was undertaken with reckless disregard as to the probability that such conduct would occasion harm to the Plaintiffs or to a class of persons which included the Plaintiffs.

T22. Maliciously, intending to cause harm to the Plaintiffs or to a class of persons which included the Plaintiffs, the Council embarked upon the following course of conduct:

- (i) Between 12th May 1982 and 4th November 1982 demanded, on pain of calling upon the guarantee referred to in paragraph T19 above that the Plaintiffs construct roads upon the subdivision.
- (ii) On 19th November 1982 the Council, notified the Plaintiffs that it had resolved to commence construction of the roads and call upon the Plaintiffs' guarantee to facilitate such construction.
- (iii) On 10th December 1982 the Council called upon the guarantee by requesting payment from the Westpac Bank in the sum of \$25,000.00. The Bank complied with the Council's request in due course.
- (iv) Entered upon the subdivision and commenced road construction, such construction being commenced in about June 1983 and being completed by April 1984.
- (v) Instituted proceedings in the Magistrate's Court at Bendigo for the sum of \$3,708.00 being the amount by which the cost of the construction exceeded the bank guarantee.

By engaging in the course of conduct described in this paragraph, the Council purported to be exercising its power or lawful authority under s.569E(1)(b) and

s.569E(1)(d). The Council well knew that it had no such power or lawful authority in that it knew:

- (a) all of the facts and circumstances pleaded in paragraph T20 (a) to (j) inclusive and all of the facts and circumstances pleaded in paragraphs T1 to T14 inclusive;
- (b) that the Plaintiffs were not and could never have been the owners of the subdivision within the meaning of s.569E;
- (c) that to the extent that there was any obligation upon any person whatsoever to comply with any Notice of Requirement, such an obligation had been removed when the Council on 19th November 1980 resolved to withdraw the requirements purportedly placed on the subdivision ;
- (d) that the provisions of s.569E empowered the Council to require an owner to construct roads or to provide security to the Council so that the Council may construct roads. There was no power contained in s.569E or anywhere else in the Local Government Act to compel an owner to do both;
- (e) that s.569E(ca) empowers a Council to withdraw a requirement but not to substitute a requirement;
- (f) the provisions of the Local Government Act did not empower the Council to substitute or amend a requirement once such a requirement is lawfully served upon an owner.

Alternatively, the Council, by engaging in the course of conduct described in this paragraph acted with reckless disregard as to the existence of any power to:

- (i) lawfully compel the Plaintiffs to construct roads upon the subdivision;
- (ii) enable the Council to enter upon the subdivision and commence construction of the roads;
- (iii) use the Plaintiffs' bank guarantee to finance such construction.

T23. Further and in the alternative to paragraph T22 above the Council, acting maliciously with same intention referred to in that paragraph, used its power under s.569E(4) for an ulterior purpose, namely to obtain a financial advantage to which it was not lawfully entitled by having the Plaintiffs' monies fund road construction works on the subdivision.

- T24. Further and in the alternative to paragraphs T22 and T23 above the Council's conduct described in those paragraphs was undertaken with reckless disregard as to the probability that such conduct would occasion harm to the Plaintiffs or to a class of persons which included the Plaintiffs.
- T25. Further and/or in the alternative to paragraphs T20 to T24 inclusive above, the conduct complained of in those paragraphs and attributed to the Council relating to the receipt and acceptance of guarantees, the issue of demands upon the Plaintiffs to construct roads, and the calling up of guarantees, was Porter's conduct.

At the time that Porter engaged the aforementioned conduct he was:

- (a) an officer of the Council and duly appointed in accordance with the statutory provisions as pleaded in paragraph 9 above;
- (b) acting in the course of his employment as an officer of the Council.

Accordingly the Council was vicariously liable for the acts done by Porter.

- T26. Further and/or in the alternative to paragraphs T22(iv) and (v) above the Plaintiffs allege that the acts complained of in those paragraphs and attributable to the Council were committed by Wilson. At the time of committing the said acts Wilson was:

- (a) an officer of the Council, having been appointed in accordance with the statutory requirements as pleaded in paragraph 8 above;
- (b) acting in the course of his employment as an officer of the Council.

Accordingly the Council was vicariously liable for the acts done by Wilson.

- T27. Maliciously, intending to cause harm to the Plaintiffs or to a class of persons which included the Plaintiffs, the Council exercised its power under s.569E(3)(ca.) for an ulterior purpose namely to deceive the Registrar of Titles as to the existence of a condition precedent to the exercise of the Registrar's power under s.569E(3)(e). The Council deceived the Registrar by falsely representing in correspondence dated 24th November 1980 that Buchanan had complied with the conditions of the requirement endorsed upon the plans of subdivision referred to in paragraph T11 when it well knew that Buchanan had not constructed roads upon the subdivision, nor had he entered into an agreement with the Trust to facilitate the supply of water for the subdivision.

T28. Further and/or in the alternative to paragraph T27 above, the false representation referred to in that paragraph and attributed to Council was made by Porter. Porter well knew that the said representation as to Buchanan's compliance was false in that he knew:

- (a) All of the facts and circumstances pleaded in paragraphs T20 to T24 inclusive;
- (b) That Council had resolved on 19th November 1980 to withdraw the requirement endorsed upon the sealed plans.

At the time of making the said representation Porter was:

- (i) an officer of the Council and duly appointed in accordance with the statutory provisions as pleaded in paragraph 9 above;
- (ii) acting in the course of his employment as an officer of the Council.

Accordingly the Council was vicariously liable for the representations made by Porter.

T29. In or about October 1980 the Kyneton Shire Water Works Trust, acting maliciously and intending to cause harm to the Plaintiffs or to a class of persons which included the Plaintiffs, acted to unlawfully receive and accept from the Plaintiffs the bank guarantee in the sum of \$11,500.00 referred to in paragraph T19 in respect of the purported obligation on the part of Buchanan to supply water to the subdivision. At the time of receiving and accepting the said guarantee the Trust well knew that it had no lawful authority whatsoever to do so in that it knew:

- (a) all of the facts and circumstances pleaded in paragraphs T11, T13 and T19 and all of the facts and circumstances pleaded in paragraph T20(b) to (j) inclusive;
- (b) that because the subdivision was within the Waterworks District but outside the Urban District for the purposes of the Water Act 1958 the only possible means of supplying water to the subdivision was under a Water Agreement pursuant to s.307AA of that Act. Accordingly, s.307AA was the only possible source of power that may have entitled the Trust to receive any monies from any person in respect of the supply of water within the Waterworks District.
- (c) that the relevant provisions of s.307AA could never have applied to the Plaintiffs because:

- (i) they were not and could never have been the owners of the subdivision within the meaning of s.307AA at the relevant time; and
 - (ii) were not and could never have been parties to an agreement for the supply of water as provided for by s.307AA.
- (d) that notwithstanding implied representations by the Council to the contrary, no request had been received by the Council from the Trust pursuant to s.569E(IB) of the Local Government Act in order to enable the service upon the owner of the subdivision a Notice of Requirement pursuant to s.569E(IA) of the Local Government Act;
- (e) even if the Notice of Requirement described in paragraph (d) above had any legitimacy (which is specifically denied), it could only have been a requirement placed upon Buchanan and not the Plaintiffs.

Alternatively the Trust, in engaging in the conduct described in this paragraph did so with reckless disregard as to the existence of any lawful authority to do so.

- T30. Further and in the alternative to paragraph T29 above, the Trust's conduct described in that paragraph was undertaken with reckless disregard as to the probability that such conduct would occasion harm to the Plaintiffs or to a class of persons which included the Plaintiffs.
- T31. Maliciously, intending to cause harm to the Plaintiffs or to a class of persons which included the Plaintiffs, the Trust between 12th May 1982 and 4th November 1982 demanded, on pain of calling upon the guarantee referred to in paragraph T19 above that the Plaintiffs install a water supply system to the subdivision ("the water works"). In or about November 1982 the Trust notified the Plaintiffs that it had resolved to commence construction of the water works and call upon the Plaintiffs' guarantee to facilitate such construction. On 10th December 1982 the Trust called upon the guarantee by requesting payment from the Westpac Bank in the sum of \$11,500.00. The Bank complied with the Trust's request in due course.
- T32. By the course of conduct described in paragraph T31 above the Trust purported to be doing so bona fide and with lawful authority. The Trust well knew when it called upon the guarantee and when it entered upon the subdivision to commence the construction of the water works that there was no lawful authority for it to do so AND the Plaintiffs repeat all of the matters pleaded in paragraph T29(a) to (e) above.

Alternatively, the Trust by engaging in the conduct described in this paragraph did so with reckless disregard as to the existence of any lawful authority or power to do so.

- T33. Further and in the alternative to paragraphs T29-T32 the Trust's conduct described in those paragraphs was undertaken with reckless disregard as to the probability that such conduct would occasion harm to the Plaintiffs or to a class of persons which included the Plaintiffs.
- T34. Further and/or in the alternative to paragraphs T29 to T32 inclusive, the conduct complained of in those paragraphs and attributed to the Water Board in relation to the receipt and acceptance of the guarantee, the issue of demands upon the Plaintiffs to provide water and the calling up of the guarantee was Porter's conduct. At the time that Porter engaged in the aforementioned conduct he was:
- (a) an officer of the Water Board duly appointed in accordance with the statutory provisions pleaded in paragraph 9;
 - (b) acting in the course of his employment as an officer of the Water Board.

Accordingly the Water Board was vicariously liable for the acts done by Porter.

AS TO THE WOODLEIGH HEIGHTS LAND, THE PLAINTIFFS PLEAD THEIR CAUSE OF ACTION AS FOLLOWS:

All paragraphs relating to the Cause of Action in respect of the Woodleigh Heights land are denoted thus: W1, W2, etc.

- W1. The Woodleigh Heights Land was part of a larger parcel of land known as the Woodleigh Heights Estate and;
- (a) was, as at 1978, owned by Buchanan;
 - (b) was within the municipal district of the Council as designated pursuant to the provisions of the Local Government Act 1958;
 - (c) was in 1978 part within and part without the Waterworks District of The Trust designated pursuant to the provisions of Subdivision 3 of part III of the Water Act 1958;
 - (d) was in 1978 outside both the Urban District and the Rural District of The Trust as designated pursuant to the provisions of the Water Act 1958.

- W2. By Application dated 22nd November 1978 Buchanan applied to the Council for a permit ("the First Application") to develop the Woodleigh Heights Estate by subdividing it pursuant to the provisions of the Cluster Titles Act 1974, such subdivision consisting of 45 allotments averaging approximately 2 acres in size, together with substantial areas of common property and provision for the installation of a privately owned and operated water supply and reticulation system forming part of the common property.

PARTICULARS

The First Application consisted of the following relevant documents:

- (a) Application for Permit dated 10th November 1978 accompanied by a;
- (b) Submission dated 3.11.78, prepared by James A. Harris & Associates Pty. Ltd. ("the Submission").

- W3. The submission contained details of a proposed reticulated water supply.
- W4. On 15th November 1978 the First Application came before the Council for consideration. The Council approved the Application, issuing Permit No. PP2191 ("the First Permit"). The Permit authorised Buchanan to develop the Woodleigh Heights Estate on certain conditions.
- W5. It was a condition of the First Permit that the Woodleigh Heights Estate be developed in accordance with the Plans and Submission comprising the Application for Cluster Subdivision, including the construction and installation by Buchanan of the water supply and reticulation system as set out in the Submission.

PARTICULARS

The Plaintiffs refer to condition 8 of PP2191 which states:

- (a) "The development to be carried out in accordance with the plans and submission which formed part of this application".
- W6. At the time of the First Application, the Council had in place a planning policy. The said planning policy provided, (inter alia) in respect of the land in which the Woodleigh Heights Estate was situated, that the issue of any proposed planning permit for a proposed subdivision was conditional upon:
- (a) no proposed allotment being smaller in size than 3 acres;

- (b) any proposed allotment less than 6 acres would be served by a reticulated water supply.
- W7. In or about November 1978 Buchanan lodged with the Council and the Council accepted a Plan of Cluster Subdivision ("the First Cluster Plan").
- W8. Maliciously, intending to cause harm to the Plaintiffs or to a class of persons which included the Plaintiffs, the Council, in or about August 1979 exercised power under s.569B(4) of the Local Government Act for an ulterior purpose, namely, to avoid the effect of s.9 of Sale of Land Act 1958 by causing the First Cluster Plan to be sealed with the seal of the Municipality.
- W9. Further and in the alternative to paragraph W8 above the Council, acting maliciously and with the same intention pleaded in that paragraph, purported to comply with the provisions of s.569B(4)(b) to approve the said plan by sealing it with the seal of the Municipality.
- W10. Whether exercising a power for an ulterior purpose as described in paragraph W8, or purporting to comply with its statutory obligations as described in paragraph W9, at the time of sealing the First Cluster Plan, the Council in any event well knew;
- (a) all of the facts and circumstances pleaded in paragraphs W2, W3, W4, W5 and W6 above;
- (b) that no reticulated water supply system had been installed in accordance with condition 8 of PP2191 or at all.
- (c) that it had not complied with its obligations under s.569B(2)(ac) of the Local Government Act;
- (d) that the proposed Cluster Subdivision described in the First Cluster Plan was not permitted by the Interim Development Order then in force and that accordingly, Council was obliged not to seal the plan by virtue of the provisions of s.6(1)(b) of the Cluster Titles Act;
- (e) that having regard to the facts and circumstances referred to in subparagraphs (a) to (c) above, the provisions of s.569B(7) imposed a duty upon the Council to refuse to seal the First Cluster Plan. By failing to refuse to seal the plan the Council wilfully disregarded its obligations under s.569B(7).
- (f) that the act of sealing the First Cluster Plan would, by virtue of the operation of s.569B(10), represent to all persons including the Registrar of Titles, that the

Local Government Act had been complied with and that all preliminary steps and proceedings required to be taken had been taken.

Alternatively, the Council in sealing the First Cluster plan acted with reckless disregard as to the existence of any power to lawfully seal the plan and with reckless disregard as to the existence of statutory provisions which imposed upon it a duty to refuse to do so.

- W11. Further and in the alternative to paragraphs W9 and W10 above the Council's conduct pleaded in those paragraphs was undertaken with reckless disregard as to the probability that such conduct would occasion harm to the Plaintiffs or to a class of persons which included the Plaintiffs.
- W12. The Council by sealing the First Cluster Plan represented to the Registrar of Titles that the First Cluster Plan;
- (a) had been approved by the Council in accordance with Council's obligations under the Local Government Act, the Sale of Land Act, the Cluster Titles Act and the Interim Development Order then in force;
 - (b) that Buchanan had done all the things required by the Council pursuant to the conditions of PP2191;
 - (c) that each and every allotment set out in the First Cluster Plan was a usable allotment for the purposes of s.569B(7)(a)(iii).

The representations to the Registrar of Titles contained in paragraphs (a) to (c) above were false, and were known by the Council to be false.

- W13. On 9th August 1979, relying upon the representations of the Council as set out in paragraph W12 above the Registrar of Titles:
- (a) accepted for lodgment the First Cluster Plan;
 - (b) registered the First Cluster Plan, assigning to it Cluster Subdivision No CS1134 ("CS1134")
- W14. On or about 1st November 1979 the Plaintiffs entered into a contract with Buchanan to purchase the Woodleigh Heights land which was contained within CS1134 ("the Plaintiffs' land"). (See Particulars of land in paragraph 1A(iv).

The Contract was a Vendor Terms Contract and provided (inter alia) for completion to take place on 1st November 1981. In the period between exchange and completion,

Buchanan as Vendor assigned his rights to General Credits Limited. General Credits Limited lodged a Caveat on 20th November 1979 over the said allotments acknowledging the interest of the Plaintiffs as Purchasers.

At the time of purchasing the said allotments the Plaintiffs were unaware of the conduct of the Council pleaded in paragraphs W8 to W12 inclusive above. Had they been aware of such conduct they would not have purchased the allotments.

- W15. In or about November 1980 the Buchanans made application to the Council for a cluster redevelopment of CS1134 dividing each allotment of CS1134 into three smaller allotments ("The Second Cluster Plan").
- W16. Fixed with the state of knowledge pleaded in paragraphs W10(a) to (f) above the Council, in furtherance of the tortious acts pleaded in paragraphs W8 to W12 inclusive above, approved the Application for cluster redevelopment and issued Planning Permit 2784 ("the Second Permit") in or about November 1980. At the time of issuing PP2784 no water supply or reticulation system existed within CS1134 so as to enable any allotments within it to be useable allotments within the meaning of s.569B(7)(iii) or the Council's Planning Policy.
- W17. Maliciously, intending to cause harm to the Plaintiffs or to a class of persons which included the Plaintiffs, the Council, purported to exercise power under s.569B(4) of the Local Government Act by causing the Second Cluster Plan to be sealed with the seal of the Municipality.
- W18. When purporting to exercise power as pleaded in paragraph W17 above the Council well knew:
- (a) all of the facts and circumstances pleaded in paragraphs W1 to W10 inclusive; and
 - (b) that no reticulated water supply system under the control of the Body Corporate had been installed in accordance with PP2191 or at all;
 - (c) that having regard to the facts and circumstances referred to in paragraphs (a) and (b) above, the provisions of s.569B(7) of the Local Government Act and s.6(1)(b) of the Cluster Titles Act imposed a duty upon the Council to refuse to seal the Second Cluster Plan. By failing to refuse to seal the plan the Council wilfully disregarded its obligations under those statutory provisions.

Alternatively, the Council in sealing the Second Cluster Plan acted with reckless disregard as to the existence of any power to lawfully seal the plan and with reckless

disregard as to the existence of statutory provisions which imposed upon it a duty to refuse to do so.

- W19. Further and in the alternative to paragraphs W17 and W18 above, the Council's conduct pleaded in those paragraphs was undertaken with reckless disregard as to the probability that such conduct would occasion harm to the Plaintiffs or to a class of persons which included the Plaintiffs.
- W20. In April 1981 the company Woodleigh Heights Resort Development Pty. Limited ("WHRD") was incorporated. Buchanan was a director of that Company and one Brian Murphy ("Murphy") was Company Secretary.
- W21. Maliciously, intending to cause harm to the Plaintiffs or to a class of persons which included the Plaintiffs, the Trust, on or about 1st January 1982 purported to exercise power and lawful authority under the Water Act by entering into an agreement with WHRD for the supply and distribution of water to the whole of the subdivision. ("the water agreement") The Trust's conduct in entering into the said water agreement was contrary to the provisions of s.307AA(2). The Trust, in purporting to exercise power did so for an ulterior purpose, namely to deny the Body Corporate of the Cluster Subdivision of CS1134 ("the Body Corporate") its lawful entitlement to control the supply of water to the said subdivision.
- W22. When purporting to exercise power or lawful authority as described in paragraph W21, the Trust well knew:
- (a) that the terms of PP2191 expressly required the Body Corporate to control all private facilities within the subdivision including water;
 - (b) that WHRD was only one of a number of allotment owners within the CS1134 with no greater and no lesser entitlement to an undivided share or the common property than any other allotment holder.
 - (c) that WHRD was not the Body Corporate nor could it ever have been construed as such an entity;
 - (d) that the Council by the conduct pleaded in paragraphs W8 to W19 had misrepresented to the Registrar of Titles that a reticulated water supply system was already in existence;
 - (e) to the extent that the agreement purported to facilitate the supply of water to allotments that were outside the water district, that the agreement contravened s.186 of the Water Act;

- (f) that the provisions of s.307AA(2) did not permit the Trust to enter into such an agreement.

Alternatively, the Trust by entering into the said water agreement acted with reckless disregard as to the existence of any power to do so under s.307AA(2) or any other statutory provision and with reckless disregard as to the interests of allotment owners in the Cluster Subdivision other than WHRD.

- W23. Further and in the alternative to paragraphs W21 to W22 above, the Trust's conduct pleaded in those paragraphs was undertaken with reckless disregard as to the probability that such conduct would occasion harm to the Plaintiffs or to a class of persons which included the Plaintiffs.
- W24. In April 1982 the Plaintiffs became aware that Lot 28, referred to in paragraph 1A(iv) above, had, sometime between 1st November 1979 and April 1982 been sold to Woodleigh Heights Resort Developments Pty. Ltd. without the knowledge or consent of the Plaintiffs notwithstanding the Caveat referred to in paragraph W14.
- W25. On or about late 1981 the Plaintiffs incorporated a company known as Woodleigh Heights Marketing Pty. Limited.
- W26. In May 1983 by arrangement with General Credits and the Plaintiffs, General Credits provided finance to Woodleigh Heights Marketing Pty. Limited which facilitated the completion of the contract referred to in paragraph W14 above, excluding Lot 28. By Declaration of Trust, Woodleigh Heights Marketing Pty. Limited which had become the registered proprietor of the remaining 9 Lots, acknowledged the equitable interest of the Plaintiffs in the said 9 Lots.
- W27. WHRD, who were developing a timeshare resort on CS1134, had by early 1983, purchased or had under option most of the land within CS1134. In order to complete the proposed timeshare resort development as it had planned, WHRD needed to purchase the Plaintiffs' land. On 31st August 1983 WHRD entered into Contracts with the Plaintiffs to purchase all of the land referred to in 1A(iv) except Lot 28. The sale was to be effected by three separate Contracts for Sale each of which had as their dates for completion, September 1983, December 1983 and March 1984 respectively.
- W28. Between September 1983 and March 1984 WHRD failed to complete each and every one of the Contracts for Sale referred to in paragraph W27 above.

- W29. The Plaintiffs advised WHRD that it intended to rescind the Contracts and to sell the allotments elsewhere.
- W30. 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.

PARTICULARS

- (a) The representations by WHRD were contained in conversations between the First named Plaintiff and Murphy in or about March and April 1984.
- (b) Murphy told the First named Plaintiff:
- (i) That WHRD had a Private Water Supply Agreement between itself and The Trust ("the water agreement") for the supply of water to all of CS1134 including the Plaintiffs' land;
 - (ii) That under the water agreement WHRD controlled the supply of water to the whole of CS1134 including the supply of water to the Plaintiffs' land;
 - (iii) That under the water agreement WHRD were in a position to render the Plaintiffs' land valueless by lawfully denying a supply of water to it and thereby preventing the issue of building permits in respect of the Plaintiffs' land.

The representations made by WHRD to the Plaintiffs were made maliciously and with the intention of depriving the Plaintiffs of the opportunity of selling the land at its true market value or to any purchaser other than WHRD.

- W31. In April 1984 the Plaintiffs made enquiries of the Council and the Water Board to ascertain whether the information communicated to the Plaintiffs by WHRD referred to in paragraph W30 was correct.
- W32. In response to the Plaintiffs' enquiries the Council and the Water Board advised the Plaintiffs, inter alia, that CS1134 was outside the Urban District of Kyneton Water Trust area and accordingly under the provisions of the Water Act 1958 water could

only be supplied to CS1134 pursuant to a private agreement at the discretion of the Water Board.

W33. In further response to the Plaintiffs' enquiries referred to in paragraph W31 above, the Council and the Water Board acting maliciously and in furtherance of the malicious acts of WHRD referred to in paragraph W30 above, made certain representations to the Plaintiffs ("the first representations"). The first representations were false, known by the Council and the Water Board to be false and were made with the intention of causing harm to the Plaintiffs or to a class of persons which included the Plaintiffs or alternatively were made with reckless disregard as to the probability that such conduct would occasion harm to the Plaintiffs or to a class of persons which included the Plaintiffs. The first representations were:

- (a) that there was a lawful agreement for supply of water between the Water Board and WHRD pursuant to the Water Act;
- (b) that under the said Water Agreement, WHRD owned and operated the water supply and reticulation system for the whole of CS1134;
- (c) that the Plaintiffs' allotments could not obtain access to the water supply and reticulation system except with the consent of WHRD;
- (d) that the Body Corporate was not entitled to access the water supply or reticulation system within CS1134.

W34. Further and in the alternative to paragraph W33 above the first representations pleaded in that paragraph were representations made by Porter. The representations were made in the course of Porter's employment as an officer of both the Council and the Water Board. Accordingly the Council and the Water Board were vicariously liable for the acts, omissions, statements and representations of Porter. At the time the first representations referred to in paragraph W33 above were made, both the Council and the Water Board or alternatively Porter well knew:

- (a) all of the facts and circumstances pleaded in paragraphs W2 to W12 inclusive and W15 to W22 inclusive;
- (b) that pursuant to s.307AA(8) of the Water Act the pipeline installed between Dettman's Lane and the Cluster Subdivision vested in the Water Board;
- (c) that the balance of the water supply and reticulation system vested in the Body Corporate;

- (d) that contrary to the express provisions of the said water agreement, WHRD were not and could never have been the owners or occupiers of the whole of the land within CS1134.

- W35. In the course of responding to the Plaintiffs' enquiries referred to in paragraph W31, the Water Board and the Council purported to be doing so bona fide and with lawful authority. Both the Council and the Water Board and alternatively Porter well knew that when the first representations were made they were false and that the Plaintiffs would rely upon them. The first representations were beyond the scope of any lawful authority vested in either the Council, the Water Board or Porter.
- W36. At the time that the first representations were made by the Water Board and the Council, the Plaintiffs erroneously believed that the Water Board and the Council were acting bona fide, and in fact relied upon the representations. They had, at the time, no knowledge of the conduct of the Council pleaded in paragraphs W8 to W12 inclusive and W16 to W19 inclusive or of the conduct of the Water Board pleaded in paragraphs W21 to W23 inclusive. The first representations were in furtherance of the tortious conduct pleaded in those paragraphs and were intended to deceive the Plaintiffs as to the true nature of their entitlement to an undivided share of the common property of CS1134. The first representations did in fact so deceive the Plaintiffs. The first representations were also intended to deceive the Plaintiffs by concealing from them, the unlawful nature of the water agreement pleaded in paragraph W21 and the unlawful conduct of the Council, the Water Board or alternatively Porter in entering the said agreement. The Plaintiffs were in fact so deceived.
- W37. In May 1984 the Plaintiffs commenced proceedings (by way of writ and statement of claim in action number 2360 of 1984) in the Supreme Court of Victoria against Woodleigh Heights Resort Developments for Specific Performance of the Contracts of Sale referred to in paragraph W27.
- W38. As at August 1984 part of the Plaintiffs' land was encumbered by various mortgages including a first mortgage to General Credits Limited.
- W39. As at August 1984 the first mortgagee, General Credits Limited had been taken over/acquired by or otherwise merged with Australian Guarantee Corporation Limited such that the conduct and management of the first mortgage was from then on conducted by Australian Guarantee Corporation Limited ("AGC").

- W40. As at August 1984, the Plaintiffs were in default of the mortgage to AGC and it was agreed between the Plaintiff and AGC that the land which was subject to the mortgage namely allotment numbers 1, 2, 7, 10, 12, 27 would be sold by public auction.
- W41. L.J. Hooker, real estate agents of Kyneton ("AGC's Agent") were appointed as agents by AGC, to sell the Plaintiffs' land. An auction date of 17th November 1984 was fixed.
- W42. AGC's agent acting on behalf of AGC erected advertising hoardings adjacent to the main entrance to Woodleigh Heights Estate on or about October 1984. This hoarding and other "For Sale" signs were vandalised and/or removed and/or stolen ("the interference"). AGC complained to representatives of WHRD about the interference during October 1984 by letter dated 25th October 1984. Brian Murphy, the Managing Director of WHRD, wrote to AGC on Body Corporate letterhead representing that advertising signs could not be erected because the rules of the Body Corporate forbade the erection of such signs. The representations were false, made with malice, and were calculated to frustrate and/or prevent the Plaintiffs, their servants and/or agents, the Plaintiffs' Mortgagees and/or their servants and/or agents from selling the Plaintiffs' land;
- (a) at its true value; and/or
 - (b) to any person or company other than WHRD.
- W43. On or about 13th November 1984, the Water Board, acting without any lawful authority, in furtherance of the malicious conduct of WHRD referred to in paragraph W42 above and itself acting maliciously intending to cause harm to the Plaintiffs or to a class of persons which included the Plaintiffs, wrote an unsolicited letter to AGC's agent. The letter represented that the Plaintiffs' land did not have access to water and sewerage and that such services could not and would not be provided ("the written representations").
- W44. Alternatively the written representations referred to in paragraph W43 above were made by Porter. The representations were made by Porter in the course of his employment as an officer of the Water Board. Accordingly the Water Board were vicariously liable for the representations of Porter.
- W45. The written representations were false, were made with the intention that AGC and/or its agents would act upon them and were calculated to frustrate the auction of the Plaintiffs' land scheduled to proceed on 17th November 1984.

- W46. The written representations were made maliciously intending to cause harm to the Plaintiffs or to a class of persons which included the Plaintiffs. Further and in the alternative, the written representations contained in the said correspondence were made with reckless indifference to the probability that they would occasion harm to the Plaintiffs or to a class of persons which included the Plaintiff.
- W47. In reliance upon the written representations, the Plaintiffs and AGC agreed that the proposed auction of the Plaintiffs' land set down for 17th November 1984 be cancelled and AGC's agent was instructed accordingly.
- W48. By letters dated 29th November 1984 AGC enquired of both the Water Board and the Council as to the availability of sewage and mains reticulated water to the Plaintiffs' land and as to the acceptability to the Board and the Council of the alternatives of tank/bore water and septic sewerage.
- W49. In response to AGC's enquiry referred to in paragraph W48 above, the Water Board, acting maliciously and intending to cause harm to the Plaintiffs or to a class of persons which included the Plaintiffs, engaged in a course of conduct calculated to continue to obstruct the Plaintiffs and/or the Plaintiffs' mortgagees from selling the land at its true value and/or to any person or entity other than WHRD. That course of conduct was as follows:
- (i) deliberately omitting to respond adequately or at all to the substance of AGC's enquiry contained in its letter of 29th November 1984; and
 - (ii) deliberately and falsely representing to AGC in letters dated 3rd May 1985 and 7th May 1985 respectively, that the Plaintiffs' allotments were outside the Urban Water District and accordingly that the Board had no mechanism to supply water to the allotments without the agreement of WHRD.
- W50. Further and in the alternative the course of conduct referred to in paragraphs W49 above, was undertaken by the Water Board with reckless disregard as to the probability that such conduct would occasion harm to the Plaintiffs or to a class of persons which included the Plaintiffs.
- W51. Further and in the alternative the conduct pleaded in paragraphs W49 and W50 above and attributed to the Water Board was Porter's conduct. At the time of engaging in the said conduct Porter was acting in the course of his employment as an officer of the Water Board. Accordingly the Water Board was vicariously liable for the conduct of Porter.

W52. At the time of engaging in the conduct pleaded in paragraphs W49, W50 and W51 above the Water Board or, alternatively, Porter, well knew;

- (i) that on 8th November 1984 the Water Board had resolved to submit a plan to the Department of Water Resources seeking approval of the Governor in Council to extend the "Urban District" and "Water District" so as to include all of the allotments within CS1134;
- (ii) that on 27th March 1985 the plan to extend the water districts referred to in paragraph (i) above was published in the Victorian Government Gazette;
- (iii) all of the facts and circumstances pleaded in paragraphs W1 to W12, W16 to W19 inclusive and W31 to W35 inclusive;
- (iv) that as at 29th November 1984 the proposed extension of the Urban and Water Districts referred to in paragraph (i) above, once published in the Victorian Government Gazette, would have vested in the Plaintiffs an absolute right of access to water to the Plaintiffs' land by virtue of s.208 of the Water Act.
- (v) that as at the 3rd and 7th May 1985 respectively, the proposed extension referred to in paragraph (i) above had been published in the Victorian Government Gazette and that accordingly the absolute right of access to water referred to in paragraph (iv) above vested in the Plaintiffs by virtue of s.208 of the Water Act as occupiers of land within the Urban District.

W53. On or about 1st May 1985 acting maliciously and intending to cause harm to the Plaintiffs or to a class of persons which included the Plaintiffs, the Water Board exercised power under s.121 of the Water Act to submit a plan to the Department of Water Resources for the approval of the Governor in Council to reduce the size of the urban water district so as to exclude all of CS1134. The exercise of the said power was for an ulterior purpose, namely, to lend verisimilitude to false representations made by the Water Board to AGC in letters dated 3rd May 1985 and 7th May 1985.

W54. The course of conduct by the Water Board pleaded in paragraph W49 above was in furtherance of the malicious conduct of WHRD pleaded in paragraphs W30 and W42 above and was also calculated to prevent, impede or frustrate the Plaintiffs and/or the Plaintiffs' mortgagee from selling the Plaintiffs' land at its true value and/or to any person or entity other than WHRD.

- W55. The Supreme Court proceedings referred to in paragraph W37 came on for hearing before Marks J. in September 1985. Acting in reliance upon the representations made by the Council and the Water Board or alternatively Porter and referred to in paragraphs W33 and W34, the Plaintiffs agreed to settle the proceedings while the matter was part heard.
- W56. The Terms of Settlement provided inter alia that WHRD do all things necessary on its part to procure the consent of the Trust or the Water Board to allow the Plaintiffs' allotments the benefit of the supply of water and Marks J made orders which included, inter alia, that the Terms of Settlement be placed on the Court file and that matter be adjourned sine die pending completion of the Terms of Settlement. ("his Honour's orders")
- W57. Following the settlement of the Supreme Court proceedings referred to in paragraph W55 and W56 above, relying on the terms of the Terms of Settlement and the first representations set out in paragraph W33 , the Plaintiffs, engaged L.J. Hooker Kyneton ("the Plaintiffs' agent") to sell the Plaintiffs' land. The Plaintiffs' agent advertised the land for sale and scheduled an auction for 23rd November 1985. In preparation for the said sale the Plaintiffs erected 'For Sale' signs on their blocks in the subdivision. Over a period of approximately two weeks the signs were removed/vandalised/stolen. The Plaintiffs reported the matter to the Kyneton Police. The Plaintiffs re-erected the signs. Whilst in the process of re-erecting the signs the Plaintiffs were directly approached by Directors and employees of WHRD, including Murphy and were threatened with physical harm if the signs were not removed. The Plaintiffs again reported the matter to Kyneton Police.
- W58. The conduct of WHRD, its directors and employees described in paragraph W57 above was malicious, and was calculated to frustrate and/or prevent the Plaintiffs, or the Plaintiffs' agent from selling the Plaintiffs' land;
- (a) at its true value and/or
 - (b) to any person or entity other than WHRD.
- W59. On 5th November 1985, the Council acting maliciously, intending to cause harm to the Plaintiffs or to a class of persons which included the Plaintiffs, purported to exercise authority to demand that the Plaintiffs remove their "For Sale" signs;
- (i) to further the malicious acts of WHRD described in paragraphs W30, W42, W57 and W58 above;

- (ii) to frustrate and/or prevent the Plaintiffs, and/or the Plaintiffs' agent, from selling the Plaintiffs' land at its true value and/or to any person or entity other than WHRD.

W60. Further and in the alternative to paragraph W59 above, the acts complained of in that paragraph and attributed to the Council were committed by Wilson. At the time of committing the said acts Wilson was;

- (a) an officer of the Council having been appointed in accordance with the statutory requirements as pleaded in paragraph 8 above;
- (b) acting in the course of his employment as an officer of the Council;

Accordingly, the Council was vicariously liable for the conduct of Wilson.

W61. On 23rd October 1985 WHRD wrote to the Water Board informing the Board of WHRD's obligations imposed the Terms of Settlement and by his Honour's orders and requesting the Board to make a fresh agreement with the Body Corporate of CS1134 to allow the owners of all allotments within CS1134 and in particular the Plaintiffs to the benefit of the supply of water.

W62. After the receipt of the letter referred to in paragraph W61 above, the Water Board, acting maliciously intending to cause harm to the Plaintiffs or a class of persons which included the Plaintiffs, engaged in a course of conduct;

- (a) in furtherance of the malicious acts of WHRD pleaded in paragraphs W30, W42, W57 and W58;
- (b) to frustrate and/or defeat the spirit and effect of the Orders of His Honour referred to in paragraph W56 above.

PARTICULARS

1. At a meeting of the Water Board on 31st October 1985 the Board acknowledged receipt of the letter from WHRD referred to in paragraph W61 above and noted as follows;

"The original agreements apparently were made in the belief that Woodleigh Heights Resort Developments Pty. Limited was the Body Corporate, which is not the case".

2. Thus fixed with the knowledge that it had;

- (a) entered into a Water Agreement with the wrong entity in the first place; and
- b) that it was in breach of s.6(1)(b) of the Cluster Titles Act, the IDO then in force and PP2191, the Water Board deliberately failed to either;
 - (i) accede to the request by WHRD referred to in paragraph W61 above; or;
 - (ii) rectify the breach of PP2191 which, by virtue of the IDO then in force constituted a continuing breach of s.6(1)(b) of the Cluster Titles Act.

W63. Further and in the alternative to paragraph W62 above the Water Board by engaging in the course of conduct described in those paragraphs acted with reckless disregard as to the probability that such conduct would occasion harm to the Plaintiffs or to a class of persons which included the Plaintiffs.

W64. On 12th November 1985 the Water Board, acting maliciously without any lawful authority and acting in furtherance of the conduct referred to in paragraph W62 above, intending to cause harm to the Plaintiffs or to a class of persons which included the Plaintiffs, wrote an unsolicited letter to the Plaintiffs' Agent falsely representing to the Agent;

- (i) that water was not available to the Plaintiffs' allotments;
- (ii) that no agreement was in existence between the Board and any other parties to supply individual blocks; and
- (iii) that there was no guarantee that the Board would supply water or waste water services to the allotments.

The false representations were made with the intention that the Plaintiffs and/or the Plaintiffs' agent would act upon them.

W65. Alternatively the false representations referred to in paragraph 64 above and attributed to the Water Board were representations made by Parkinson.

At the time that Parkinson made the false representations he was:

- (c) an officer of the Water Board and duly appointed in accordance with the statutory provisions as pleaded in paragraph 10 above;

(d) acting in the course of his employment as an officer of the Water Board.

Accordingly the Water Board was vicariously liable for the representations made by Parkinson.

- W67. Acting upon the false representations referred to in paragraphs W64 and W65, both the Plaintiffs and the Plaintiffs' agent were deceived into believing that there was no water available to the Plaintiffs' land nor any immediate prospects of water being supplied to the said land. The auction scheduled for 23rd November 1985 was cancelled.
- W68. Following the cancellation of the auction sale referred to in paragraph W67 above, WHRD in furtherance of their malicious conduct pleaded in paragraphs W30, W42, W57 and W58 above, wrote to the Plaintiffs' Agent offering to purchase the Plaintiffs' land for the sum of \$10,000.00 per block. The market value of the Plaintiffs' land at this time was approximately \$20,000.00 per block.
- W69. The course of conduct on the part of each of the Council, the Water Board, Porter, Wilson, Parkinson and WHRD pleaded in this Statement of Claim had the effect of depriving the Plaintiffs of their true entitlement to an undivided share of the common property, in particular, access to a reticulated water supply, thereby denying them the opportunity to sell their allotments on the open market.
- W70. Between November 1985 and November 1989 the Plaintiffs attempted unsuccessfully to establish a legal entitlement to supply of water to their allotments in CS1134.
- W71. On or about November 1989 Esanda Pty. Limited exercised their right of mortgagee sale over the Plaintiffs' land. Esanda sold the land to a company known as Deckwood Pty. Limited, the Directors of which were relatives and associates of Buchanan.

DAMAGES

- D1. But for the conduct of the Defendants amounting to misfeasance in public office pleaded in this Statement of Claim, neither the Tylden rd land nor the Woodleigh Heights land would have been registered with the Registrar of Titles. In consequence of such registration the Plaintiffs have suffered loss and damage.

PARTICULARS OF LOSS AND DAMAGE IN RESPECT

OF THE INDUSTRIAL ALLOTMENTS

- D2. (i) The Plaintiffs bargained for the parent allotment namely LP134684 on the basis that it was subject to a lawful 6 lot plan of subdivision, which when duly processed would have given the Plaintiffs indefeasible title to each of 6 industrial allotments. Instead, as a result of the misfeasance of the Defendants pleaded in this Statement of Claim the Plaintiffs have indefeasible title to no more than the parent allotment.
- (ii) The Plaintiffs' loss is therefore the value at the time of the Plaintiffs' purchase of the land described in the First Industrial Plan, assuming that that plan was lawfully sealed and approved by the Council, lawfully subdivided into 6 allotments each of which was then ultimately registered by the Registrar of Titles. The Plaintiffs' loss is therefore quantified as follows:

$\$12,000 \times 6 = \$72,000$ plus interest calculated from December 1980 less the current value of the Parent allotment (if any) at the date of hearing. Full particulars to be supplied prior to hearing.

PARTICULARS

\$12,000 is a Real Estate Agent's estimate value of each of the 6 allotments described on the Industrial Plan made in or about 1979.

- (iii) Further and/or in the alternative to paragraph (ii) above, the Plaintiffs by reason of the Defendant's acts of misfeasance as pleaded in this Statement of Claim, have been deprived of the opportunity of developing the industrial allotments as an industrial estate by placing buildings upon the allotments, improving the value of the land and onselling it. Full particulars of the quantification of this loss will be supplied prior to hearing;
- (iv) Further and/or in the alternative to paragraphs (ii) and (iii) above, the Plaintiffs by reason of the acts of misfeasance of the Defendants pleaded in this Statement of Claim remain in possession of no more than the Parent title instead of the 6 industrial allotments for which they bargained. The Plaintiffs' loss is therefore quantified as follows:

The value as at the date of hearing of the 6 proposed allotments described in the First Industrial Plan minus the value at date of hearing of the Parent title LP134684 (if any).

**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.~~

(i) The Plaintiffs, as bona fide purchasers for value without notice, bargained for and were entitled to receive, indefeasible title to 15 allotments with roads constructed and water installed thereon ("services") or at least, a legally enforceable right to such services. As a result of the misfeasance of the Defendants, the Plaintiffs received instead, indefeasible title to 15 allotments without services and without any legally enforceable means to compel the construction or installation of the services. The Plaintiffs have, accordingly, suffered loss which is quantified as the difference between the market value at date of purchase of the allotments without services and the market value of those same allotments with services.

(ii) On or about April 1983 the Plaintiffs entered into a Contract with Chelmantau Pty. Limited ("Chelmantau") for the sale of the residential allotments. On or about 27th 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 1984 and November 1987 with services for an average price of \$22,473.00 per allotment. The difference between the average price paid by Chelmantau and the average price obtained on sale is reflective of the difference in the value of the land without services as purchased from the Plaintiffs and the value of the land with services as sold by Chelmantau.

(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 of the lots with services as reflected in the prices obtained for the allotments by Chelmantau.

(v) The Plaintiffs' loss is quantified as follows:

15 allotments x \$22,473 = \$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 13th January 1984.

PARTICULARS

The above figures represent sales which are sufficiently 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 the hearing.

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

- D5. (i) The Plaintiffs, as bona fide purchasers for value without notice had bargained for and were entitled to receive indefeasible title to 9 three lot subdivisions each of which was serviced by a reticulated water supply. As a result of the Defendants' misfeasance, they received instead, indefeasible title to 9 three lot subdivisions, which were not serviced by such a water supply, were therefore ineligible, inter alia, for building permits and were as such, unusable. The Plaintiffs' loss is therefore quantified as the difference between the market value at date of purchase of the Plaintiffs' unusable allotments and the market value of those allotments had they been supplied with water at date of purchase and accordingly rendered usable.
- ~~(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 that 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) Full particulars of the quantification of the loss referred to above will be supplied prior to hearing.~~

~~(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	\$130,000
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.~~

EXEMPLARY DAMAGES

- D6. Furthermore, each of the Defendants, has by the misfeasance alleged against them in this Statement of Claim, acted with a contumelious disregard for the rights of the Plaintiffs. Accordingly the Plaintiffs seek in addition to the damages or loss particularised in D1 to D5 inclusive, an award of exemplary damages.

AND THE PLAINTIFF CLAIMS:

- A. Damages
- B. Exemplary Damages
- C. Interest (in equity or pursuant to Statute)
- D. Costs
- E. Such further or other orders as this Honorable Court deems appropriate

DATED: ~~31 May~~ 4 November 2005

LEX LASRY QC

NEIL ADAMS

Isakow Lawyers
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Baldock Stacy & Niven
Solicitors Attorneys & Notaries
Solicitors for the Plaintiff

Indorsed on and ~~delivered with~~ the Writ