IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

No. 6321 of 2005

BETWEEN

GLENN ALEXANDER THOMPSON and
CHERYL MAREE THOMPSON — Plaintiffs

and

MACEDON RANGES SHIRE COUNCIL — First Defendant

and

THE COLIBAN REGION WATER AUTHORITY — Second Defendant

MASTER:	Master Efthim
WHERE HELD:	Melbourne
DATE OF HEARING:	8 February 2006
DATE OF JUDGMENT:	15 May 2006

REASONS FOR DECISION

APPEARANCES:	Counsel	Solicitors
For the Plaintiffs	Mr John Middleton QC Mr Neil Adams	Isakow Lawyers
For the First Defendant	Mr J. Delany SC Mr G. Ahern	Maddocks Lawyers
For the Second Defendant	Mr G. Garde QC Ms S. Burchell	Arnold Dallas McPherson

1. These are two summonses before me. One was filed by the First Defendant, Macedon Ranges Shire Council, and the other by the Second Defendant, Coliban Region Water Authority. The First Defendant was formerly known as The Kyneton Shire Council and the Second Defendant was formerly known as Kyneton Water Board and Kyneton Shire Works Trust. In both matters the Defendants are seeking that judgement be entered against the Plaintiffs, Alexander Thompson and Cheryl Maree Thompson or alternatively that the proceedings be permanently stayed.

Background

2. The Plaintiffs' claim relates to parcels of land described as the Tylden Road Land and the Woodleigh Heights Land. They allege, in the amended Statement of Claim, that they carried on the business of property developers and were the purchasers of the Tylden Road Land and the Woodleigh Heights Land. The Tylden Road Land comprised of fifteen residential allotments and certain industrial allotments. The Woodleigh Heights Land related to land described in certificates of title volume 9171 folio 687, 688, 693, 696, 698, 700, 701, 704, 713, 714.

3. In relation to the Tylden Road Land, in September 1979 Keith Raymond Buchanan (now deceased), made application for a planning permit to subdivide the land. A planning permit was issued on 12 February 1980. Mr Buchanan lodged with the First Defendant for approval a two-lot plan of subdivision (the parent plan) which set out land which was subject to 6 industrial allotments and 18 residential allotments. Between September 1979 and February 1980, he also lodged with the First Defendant for approval plan of subdivision setting out 6 industrial allotments and a plan of subdivision setting out 18 residential allotments.

4. On 20 February 1980, the First Defendant sealed the parent plan and resolved to serve a Notice of Requirement pursuant to Section 569B of the *Local Government Act* upon the owner of the land described in the first industrial plan and the first residential plan. Between March and April of 1980, Mr Buchanan lodged with the First Defendant and the First

Defendant accepted three plans of subdivision (industrial plans) and seven plans of subdivision (residential plans). It is alleged that the First Defendant, contrary to the resolution of 20 February 1980 and contrary to its statutory duty under 569E, omitted to issue 569E notices in respect of the first industrial plan. It is also alleged that in May 1980, the First Defendant exercised power under Section 569B (4)(b) of the *Local Government Act* to avoid the effect of Section 9 of the *Sale of Land Act* 1958 and to avoid the effect of Section 97 of the *Transfer of Land Act* by causing each of the three plans and each of the seven plans to be sealed with the seal of the municipality thereby approving each of the subdivisions set out in the plans. It is said that the First Defendant did not comply with its statutory obligations or alternatively in sealing the said plans acted with reckless disregard as to the existence of any power to lawfully seal the plans and acted with reckless disregard as to the existence of statutory provisions which imposed upon it a duty to refuse to do so.

5. Prior to sealing the plans the First Defendant placed an endorsement on the plans. It is alleged that by endorsing the plans the First Defendant purported to be complying with the statutory duty under Section 569E (3)(a) of the *Local Government Act*, notwithstanding that it knew or was recklessly indifferent of the fact that no valid Section 596E notices had ever been served upon Mr. Buchanan between 18 September 1979 and 20 February 1980. It is said that in purported compliance with Section 569E, the First Defendant acted maliciously, intending to cause harm to the Plaintiffs. The First Defendant fabricated Notices of Requirement. These Notices were issued on 20 February 1980 when the First Defendant allegedly knew that there was no lawful basis for the issue of the Notices .

6. It is further alleged that the First Defendant by sealing the parent plan and series of industrial plans represented to the Registrar of Titles that the parent plan and each of the plans comprising both the series of industrial plans and the series of residential plans was a genuine plan of subdivision that had been approved by the First Defendant in accordance with its obligations pursuant to the provisions of the *Local Government Act, Sale of Land Act* and *Transfer of Land Act* and the Interim Development Order then in force. In relying on the representation the Registrar of Titles accepted the plans for lodgement.

7. In or about September 1980, in relying upon a copy of the original plan and representations by Mr. Buchanan, the Plaintiffs purchased from Mr. Buchanan Lot 1 of

LP134684 being the parent industrial allotment. In or about December 1980, relying upon a copy of the original plan, the Plaintiffs purchased the 15 residential allotments.

8. In or about October 1980, Mr. Buchanan requested that the Plaintiffs provide to the First Defendant a bank guarantee in the sum of $25,000.00 to secure Mr. Buchanan's obligations to construct roads on the subdivision which included the residential allotments. Mr. Buchanan also requested the Plaintiffs provide to the Second Defendant a bank guarantee in the sum of $11,500 to secure his obligation to supply water to the subdivision. The Plaintiffs provided each of these guarantees. At the time of providing the guarantees, the Plaintiffs were unaware that neither of the Defendants had the lawful authority to receive and accept the guarantees. In or about October 1980, the First Defendant exercised its power under Section 569E of the *Local Government Act* to receive and accept from the Plaintiffs the bank guarantee in respect of the purported obligation on the part of Mr. Buchanan. It is alleged that the First Defendant well knew that it had no lawful authority whatsoever to do so. In the alternative it is alleged that the First Defendant received and accepted the guarantee with reckless disregard as to the existence of any authority to do so.

9. Between May 1982 and 4 November 1982, the First Defendant called upon the guarantee, notified the Plaintiffs and resolved to begin construction of the road. It also entered upon the subdivision to commence road construction and instituted proceedings in the Magistrates' Court for a sum of $3,708 being the amount by which the costs for construction exceeded the bank guarantee.

10. As against the Second Defendant, it is alleged that the Second Defendant received and accepted from the Plaintiffs the bank guarantee in the sum of $11,500 in respect of an obligation against Mr. Buchanan when it knew that it had no lawful authority whatsoever to do so or alternatively did so with reckless disregard as to the existence of any lawful authority. It is alleged on 10 December 1982, the Second Defendant called upon the guarantee when it had no lawful authority to do so.

11. The cause of action against the Defendants is a result of misfeasance in public office by the Defendants. The Plaintiffs claim to have suffered loss and damage as a consequence of the actions of the Defendants in relation to the allotments. In relation to the industrial allotments, the Plaintiffs seek $72,000.00 plus interest calculated from December 1980, less

the value of the parent allotment, if any, at the date of hearing. In the alternative, the Plaintiffs allege that they had been deprived the opportunity of developing the industrial allotments and of selling the land. No particulars of quantification of that loss has been provided. In relation to the residential allotments, the Plaintiffs seek damages of $237,105.00 plus interest calculated from 13 January 1985. They also seek loss or damage to a business caused as a consequence of the actions of the Defendants.

12. In relation to the Woodleigh Heights Land it is alleged that on 22 November 1978, Mr. Buchanan applied to the First Defendant for a permit to develop Woodleigh Heights Estate by subdividing it pursuant to the provisions of the *Cluster Titles Act* 1974. Such subdivision was to consist of 45 allotments averaging approximately 2 acres in size. On 15 November 1978, the first application came before the First Defendant for consideration. It approved the application. 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 Mr Buchanan of the water supply and reticulation system as set out in the submission.

13. In November 1978, the First Defendant accepted a plan of cluster subdivision by Mr. Buchanan. In or about August 1979, it is alleged the First Defendant, maliciously intending to cause harm to the Plaintiffs, exercised power under Section 569B(4) of the *Local Government Act,* with the ulterior purpose of avoiding the effect of Section 9 of the *Sale of Land Act,* by causing the First Cluster Plan to be sealed with the seal of the municipality. The First Defendant allegedly, at the time of sealing the plan, knew that no reticulated water supply system was installed, the proposed cluster subdivision was not permitted and the sealing of the First Cluster Plan would represent to the Registrar of Titles that the *Local Government Act* had been complied with. On 9 August 1979, the Registrar of Titles accepted for lodgement the First Cluster Plan and registered the First Cluster Plan.

14. In November 1979, the Plaintiffs entered into a contract with Mr Buchanan to purchase the Woodleigh Heights Land. At the time of purchasing the allotments, the Plaintiffs were unaware of the conduct of the First Defendant. Had they been aware of the conduct of the First Defendant they would not have purchased the allotment.

15. In November 1980, Mr. Buchanan made application to the First Defendant for a cluster redevelopment dividing each allotment into 3 smaller lots. The First Defendant approved the application and issued a planning permit. At the time of issuing that permit no water supply or reticulation system existed so as to enable any allotments within it to be useable allotments. The First Defendant is alleged to have sealed the second cluster plan unlawfully or 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.

16. In April 1981, Woodleigh Heights Resort Development Pty Limited was incorporated and Mr Buchanan was a director of that company. The Second Defendant in January 1982 entered into an agreement with Woodleigh Heights Resort Development Pty Ltd for the supply and distribution of water to the whole of the subdivision. It is alleged that when entering into the agreement the Second Defendant acted unlawfully with reckless disregard to the existence of any power to do so under Section 307AA (2) of *The Water Act* and acted with reckless disregard to the allotment owners in the cluster subdivision other than Woodleigh Heights Resort Development Pty. Limited.

17. In April 1982, the Plaintiffs became aware that one lot on the plan of cluster subdivision had been sold to Woodleigh Heights Resort Development Pty Ltd without the consent or knowledge of the Plaintiffs.

18. In May 1983, General Credit provided finance to Woodleigh Heights Marketing Pty Ltd (a company incorporated by the plaintiffs) which facilitated the completion of the contract excluding the lot sold to Woodleigh Heights Resort Development Pty Ltd.

19. In August 1983, Woodleigh Heights Resort Developments Pty. Limited entered into contracts with the Plaintiffs to purchase all of the land that the Plaintiffs had purchased except the lot that had been sold to Woodleigh Heights Resort Development Pty. Limited. Between September 1983 and March 1984, Woodleigh Heights Resort Developments failed to complete the contracts. The Plaintiffs advised Woodleigh Heights Resort Developments Pty. Ltd. that it intended to rescind the contracts. Representations were made to the Plaintiffs that if they attempted to rescind the contracts and sell to anyone other than Woodleigh Heights Resort Developments Pty Ltd the Plaintiffs would be prevented from having access to the water on the Plaintiffs' land thereby rendering their land worthless.

20. In April 1984, the Plaintiffs made enquiries of both of the Defendants to ascertain whether the information communicated to the Plaintiffs by Woodleigh Heights Resort Developments Pty. Limited was correct. In response, the Defendants advised that the plan was outside the urban district of Kyneton Water Trust area and accordingly under the provisions of the *Water Act* water could only be supplied pursuant to a private agreement at the discretion of the Second Defendant.

21. It is said that the representations made to the Plaintiffs were false, known by the Defendants to be false and made with the intention of causing harm to the Plaintiffs. In the alternative it is pleaded that the representations were made by a Mr. Porter in the course of his employment as an officer with the Defendants. It is said that the Defendants are vicariously liable for the acts, omissions or statements of Mr. Porter.

22. In May 1984, Supreme Court proceedings were commenced by the Plaintiffs against Woodleigh Heights Resort Development Pty. Limited for specific performance of contracts. Those proceedings were settled.

23. In August 1984, the Plaintiffs were in default of a mortgage to Australian Guarantee Corporation Limited (which had taken over General Credits) and it was agreed between the Plaintiffs and Australian Guarantee Corporation Ltd that the land which was subject to the mortgage would be sold by public auction. Advertising hoardings and "For Sale" signs were allegedly vandalised or removed and/or stolen. In November 1984, the Second Defendant acting allegedly without any lawful authority wrote an unsolicited letter to the agent of Australian Guarantee Corporation Ltd stating that the Plaintiffs' land did not have access to water and sewerage and that such services would not be provided. Alternatively, it is pleaded that Mr. Porter (an officer of both Defendants) made the representations. It said that those representations were false and were made so that Australian Guarantee Corporation Ltd would act upon them. Those representations were calculated to frustrate a proposed auction of the Plaintiffs' land. This auction set down for 17 November 1984 was cancelled.

24. After a series of representations allegedly made by the First Defendant relating to the supply of water it was alleged that the Plaintiffs' real estate agents were deceived into believing there was no water available to Plaintiffs' land. Between November 1985 and

November 1989, the Plaintiffs attempted unsuccessfully to establish a legal entitlement to supply water to their allotments. On or about November 1989, Esanda Pty. Ltd. exercised their right of mortgagee sale over the Plaintiffs' land, the land was sold to a company known as Deckwood Pty. Ltd. The Directors of this company were allegedly relatives and associates of Mr. Buchanan.

25. The Plaintiffs claim damages as a result of the Defendants' alleged misfeasance in public office. The loss is qualified as a difference between market value at the date of purchase of the Plaintiffs' unusable allotments and the market value of those allotments had they been supplied with water at the dates of purchase and accordingly rendered usable. Exemplary damages are also sought.

The Grounds Relied Upon by the Defendants

26. Both Defendants seek to rely upon the following grounds in support of their application:

- The Plaintiffs seek to re-agitate issues which were raised and resolved upon settlement of earlier proceedings between the Plaintiffs and the Defendants and subject to releases in favour of the Defendants.
- The subject matter of any new claims alleged in the statement of claim were so closely connected with the subject matter of earlier proceedings that they should have been raised in earlier proceedings and it is not open to the Plaintiffs to now bring new claims. (See *Port of Melbourne Authority v Anshun* (1981)) 147 CLR 589).
- The Plaintiffs' claims are manifestly statute barred.

Principles to be Applied in an Application for Summary Judgement

27. The principles to be applied are those referred to *Webster & Anor v. Lampard* [1993] 117 CLR 598 the following passage when Mason, C.J. Dean and Dawson, J.J. in a joint judgement stated (at p.602);

> *"It is important to note at the outset that the issue before the learned Master on the application for summary judgment was not whether Mr. and Mrs. Webster would probably succeed in their action against Sergeant Lampard. It was whether the material before the Master demonstrated that that action should not be permitted to*

go to trial in the ordinary way because it was apparent that it must fail. The power to order summary judgment must be exercised with "exceptional caution" (General Steel Industries Inc. v Commissioner For Railways *(N.S.W.) (1964), 112 C.L.R. 125 at p.129) and "should never be exercised unless it is clear that there is no real question to be tried"* (Fancourt v Mercantile Credits Ltd (1983), *154 C.L.R 87, at p.99). As Dixon J. commented in Dey v. Victorian Railways Commissioners (1949) 78 C.L.R 62, at p.91):*

> *"A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the Court with or without a jury. The fact that a transaction is intricate may not disentitle the Court to examine a cause of action alleged to grow out of it for the purpose of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the Court to dismiss the action as frivolous and vexatious and an abuse of process."*

28. I also note that in *Lindon v Commonwealth* [No. 2] 1996 70 ALJR 541 Kirby J stated:

> *"The guiding principle is, as stated in O26, r 18(2), doing what is just. If it is clear that proceedings within the concept of the pleading under scrutiny are doomed to fail, the Court should dismiss the action to protect the defendant from being further troubled, to save the plaintiff from further costs and disappointment and to relieve the Court of the burden of further wasted time which could be devoted to the determination of claims which have legal merit."*

29. That decision was referred to in *Camberfield Pty Ltd v Klapanis* [2004] VSCA 104 where Batt JA with whom Winneke P and Dodds-Streeton AJA agreed, stated (p.12):-

> *"Finally, it was pointed out that summary judgment should be given in favour of the defendant only if it is inevitable that a trial court after full hearing would find for the defendant, reference being made to Webster v. Lampard and Lindon v. The Commonwealth [No.2] in addition to cases referred to earlier. As will be apparent, I accept the proposition. "*

30. If the Defendants are to be successful, it must be very clear that the Plaintiffs case is destined to fail.

<u>Are the Claims Statute Barred?</u>

32. Section 5(1) (a) of the *Limitations of Actions Act* 1958 states:

> *"(1) The following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued-*

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

33. The Defendants rely on Section 5 as a complete defence and bar to the Plaintiffs claim. It is submitted that the Plaintiffs must prove that the cause of action accrued within the limitation period proving that damage was suffered within the relevant period. However in the present case there is no doubt that the proceedings are out of time by over a decade.

34. In order to overcome Section 5 (1) of the *Limitations Actions Act* 1958 the Plaintiffs rely on Section 27 of the Act which states:

"Where in the case of any action for which a period of limitation is prescribed by this Act-

(a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
(b) the right of action is concealed by the fraud of any such person as aforesaid; or
(c) the action is for relief from the consequences of a mistake-

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it."

35. Mr. Thompson, in order to demonstrate that his action has not been statute barred, has sworn in his first affidavit as follows:

- He initiated proceedings in the County Court in 1988 in relation to the Tylden Road land to recover moneys mistakenly paid pursuant to bank guarantees. He also claimed damages for losses occasioned by the mistaken calling up of the bank guarantees.
- On the second day of the hearing, the Defendants made an offer of $40,000.00 to settle the matter and he agreed. Terms of settlement were drawn. At the time of signing the terms of settlement counsel for the Defendants handed to Mr. Thompson a large black folder containing copies of various documents. He took this material home and gave it a cursory glance but because he considered the matter to an end, did not look at the contents until August 2000.
- During the period from 1985 until 1989, the Defendants refused to allow him access to the relevant files. In March 1995, he was finally granted access to files and upon

reviewing these files he issued 1995 proceedings against the Defendants in relation to the Woodleigh Heights land.

- In 1999, those proceedings were settled at mediation and it was agreed that the Defendants pay $25,000.00 to the Plaintiffs by a particular date. Mr. Neville, solicitor, accompanied Mr. Thompson at the mediation but was not instructed to act.
- The Defendants issued proceedings in the Practice Court of this Court seeking specific performance of the terms of settlement. Mr. Thompson was ordered to perform the terms of settlement by Beach J.
- He did not appeal against the decision because during the course of the Practice Court hearing, the Defendants showed Mr. Thompson a reticulation plan for the subdivision. This plan seemed to Mr. Thompson to be fatal to any prospects of ultimate success after appeal.
- In August 2000, Mr. Thompson for the purpose of preparing a defence and counter claim against the First Defendant in respect to a rates claim brought by the First Defendant, began reviewing all the documents available to him. Upon examining the documents within the black folder (given to him in 1988), it became apparent to him that there were two versions of plans for the industrial allotments of the Tylden Road subdivision, namely complete versions and clipped versions. The clipped versions had been clipped in the copying in such a manner as to remove or omit the identifying number which was present on the complete version.
- He noticed that the black folder also contained copies of residential series of Tylden Road plans and those plans had also been clipped and he recognised the clipped plans to be identical to those which had been admitted into evidence in the Magistrates' Court proceeding in the Court of Appeal (seeking payment under the guarantee in 1987).
- As a result of perusing the documents in the black folder Mr. Thompson came to a series of conclusions and it became apparent to Mr. Thompson for the first time that the First Defendant had acted maliciously or recklessly by sealing the residential plans contrary to its lawful obligations to refuse to do so and that the evidence of Mr. Wilson (an employee of the First Defendant) given to the Magistrates' Court had the effect of concealing the First Defendant's true conduct from the Court and himself.

36. In relation to the Woodleigh Heights Land, Mr. Thompson swears that he:

- He reconsidered the failed 1995 proceedings and the reticulation plan which had been shown to him in the Practice Court of this Court.
- He realised that the First Defendant 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 of the subdivision not being completed according to law. Furthermore, the reticulated water supply was not present in 1979 as required by law but instead was laid down in 1982.
- He was unable to reconcile the representation made to him in the Practice Court 1999 with his prior state of knowledge.
- The conduct of the Defendants in relation to the Woodleigh Heights Land was essentially similar to the conduct in the Tylden Road Land.
- The Defendants engaged in an ongoing course of conduct the effect of which was to conceal from Mr. Thompson the true facts as now known.

37. Mr. Thompson also swears that there has been a continuous course of conduct designed to conceal from him the true cause of loss and damage. In relation to the Tylden Road Land, he swears that false evidence and falsified documents were put into evidence in the Magistrates' Court. The defence in the County Court proceedings is also said to have been conducted in a manner to conceal the true defence and true facts. He swears that false admissions and incomplete discovery were made. In relation to Woodleigh Heights Land, he swears that he was induced to sign terms of settlement when the true facts had been concealed from him and the defence of the Supreme Court proceedings were conducted in such a manner to conceal the true course of action which was known to the Defendants and known to be fatal to the Plaintiff's claim.

38. The Second Defendant has referred me to some inconsistencies in the affidavits sworn by Mr. Thompson. In particular to the matters referred to in his first affidavit (para 37) that Mr. Thompson represented himself in the Practice Court. The Second Defendant alleges that Mr. Thompson was represented. I note that in the reasons for decision of Beach J, it appears that the Plaintiffs appeared in person whereas the Order of the Court refers to Mr. Tiernan of counsel appearing for the Plaintiffs.

39. Steven Mark Edward (solicitor for the Second Defendant) in response to the first affidavit of Mr. Thompson swore that he attended the Plaintiffs' solicitor's premises in

Orange, New South Wales on 4 and 5 February 1999, to inspect documents discovered by the Plaintiffs. He did not have enough time on those two dates to inspect all documents. The documents he inspected included surveyor's plan of the subdivision of Tylden Road Land.

40. In his second affidavit Mr. Thompson, in response to an affidavit sworn by Mr. Edward, solicitor, swears that in the course of the 1995 proceedings he made discovery and that the Second Defendant's solicitor Mr. Edward, did not attend at his solicitor's premises but attended at the domestic residence of Mr. Thompson and set up a photocopier in his kitchen area adjacent to his bedroom. Mr. Edward had a free range of all documents that were produced by Mr. Thompson but was required, as a matter of principle, to limit the copying of documents that related to the matters in question in the 1995 Supreme Court proceeding. He believes that Mr Edward copied numerous documents that he was not entitled to copy including confidential communications. Mr. Thompson did not object because as he was working and he had to leave Mr. Edward alone in his premises and did not have time to vet anything which Mr. Edward was doing.

41. In response to Mr. Thompson's affidavit, a further affidavit was sworn by Mr. Edward. He swears that on 23, 24 and 25 March 1999, he attended at the Plaintiffs' solicitors office and photocopied all documents produced by the Plaintiffs' for discovery. On 22 March 1999, he drove from Bendigo to Orange for the purpose of photocopying the Plaintiffs discovered documents. He went to the offices of Baldock Stacey and Niven at about 9am on the 23 March. He was present when a photocopying machine which he arranged to hire was carried to the room on the upper floor of the Baldock, Stacy & Niven (the Plaintiffs' solicitors) building. This was the same room where he carried out partial inspection of the Plaintiffs' documents on 4 and 5 February 1999.

42. In my view, Mr. Edward in his further affidavit provides a comprehensive and plausible explanation of the inspection process. He also refers to letters relating to the discovery that had been written by the parties. His explanation of the discovery process is to be preferred to matters deposed to by Mr. Thompson. The inconsistencies referred to by the Second Defendant whilst interesting do not lead to me to determine the issues in favor of the Defendants.

43. For the Plaintiffs to have the limitation period postponed they need to demonstrate that their right of action is concealed by fraud. In *Hamilton v.Kaljo* (1989) 17 NSWLR McLelland, J. considered the term "fraudulently concealed". His honour stated (at p.386):-

> *"It has been submitted on behalf of the plaintiff that the expression "fraudulently concealed" does not necessarily import dishonest...*
>
> *The question of what is sufficient to constitute "fraud" for this purpose has been discussed in several modern English cases...*
>
> *For my own part, I would regard it as a misuse of language, and unsound, to apply the statutory expression "fraudulently" in s55 to any conduct which did not involve some form of dishonesty or moral turpitude. I see no reason to think that that expression does not carry the same connotation as the expression "fraud" were used in* Real Property Act*...and equivalent legislation".*

44. In *Heath Underwriting & Insurance (Australia) Pty Ltd v. Daraway Constructions* (unreported Supreme Court of Victoria 3 August 1995). Batt, J. when considering s.27(b) of the *Limitations of Actions Act* referred to the decision of McLelland, J. and concluded that "fraud" means common law fraud and that there must be intentional concealment. His honour stated (at p.32):-

> *"The plaintiff relied further or alternatively upon a contention that the defendant's conduct made it "unconscionable" in all the circumstances to permit it to rely upon the Limitation of Actions Act 1958. In support, it called in aid again the judgment of Deane, J. in Hawkins v. Clayton at 589. In my view, in the case of a common law claim there is no relevant answer to the Act except that contained in s27. In other words, if s27 is not satisfied a plaintiff cannot, in my view, avoid the operation of the Act by reference to unconscionable conduct on the part of the defendant...*
>
> *I turn now to whether there was concealment by fraud in the common law sense on the part of the defendant of the rights of action. To constitute fraud at common law "actual fraud, personal dishonesty or moral turpitude" (Bahr v. Nicolay [No 2] (1988) 164 CLR 604 at 614) is requisite. Intentionally to conceal a right of action after it has arisen in order to keep a plaintiff out of moneys properly due to it would constitute fraud at common law. Where the concealment arises at the same time as the right of action the more traditional formulation of the common law concept of fraud is applicable, at any rate where, as here, the right of action arises from statements (declarations) made by the defendant. Thus, there will be fraud where the declarations were knowingly made falsely or were made without honest belief in their truth or recklessly, careless whether they were true or false."*

45. Senior Counsel for the Plaintiffs relied on *Heath Underwriting & Insurance (Australia) Pty. Ltd. v. Daraway Constructions* to support the submission that it is a question of fact in the circumstances as to whether there has been fraudulent concealment. The Plaintiffs state that the mere handing over of documents or the knowledge of the existing documents may not be sufficient. It is submitted that I should take into account not only the documents that were discovered in the black folder but also in the context of evidence given by Mr. Wilson in the Magistrates' Court which was alleged to be false.

46. Senior Counsel for the Plaintiffs referred me to *Bulli Coal Mining Company v. Patrick Hill Osborne & Anor* [1899] AC 351 where the Privy Counsel made the following observation (at p 363):-

> *"The contention on behalf of the appellants that the statute is a bar unless the wrongdoer is proved to have taken active measures in order to prevent detection is opposed to common sense as well as to the principles of equity. Two men, acting independently, steal a neighbour's coal. One is so clumsy in his operations, or so incautious, that he has to do something more in order to conceal his fraud. The other chooses his opportunity so wisely, and acts so warily, that he can safely calculate on not being found out for many a long day. Why is the one to go scot-free at the end of a limited period rather than the other? It would be something of a mockery for courts of equity to denounce fraud as "a secret thing", and to profess to punish it sooner or later, and then to hold out a reward for the cunning that makes detection difficult or remote."*

47. Similarly in *Beaman v. A.R.T.S. Ltd.* [1949] 1All ER 465 Somervell, LJ (at 471) stated:-

> *"There remains the question whether the cause of action was concealed by the fraud. If Y. undertakes to store and keep the goods of X., X. is clearly entitled to assume that Y. will not give them away. If Y. does so without communicating with X., he, as it seems to me, brings himself with the principle laid down in* Bulli Coal Mining Co. v. Osborne. *That case decided that it was not necessary that the wrongdoer should have taken steps to prevent detection. Regard must be had to the nature and character of the act. A wrongdoer who "chooses his opportunity so wisely and acts so warily that he can safely calculate on not being found out for many a long day." cannot claim the advantage of the limitation period."*

48. The operation of Section 27(a) of the *Limitations of Actions Act* was also considered by Warren, J (as she then was) in *Di Sante v. Camando Nominees* (Supreme Court of Victoria, Warren J, 25 May 2000, unreported). Her Honour (at p.23) said:

"In New South Wales equivalent provisions to s27 of the Victorian statute are contained in s55 of the Limitation Act 1969. In considering the New South Wales provisions in Hamilton v. Kaljo & Ors (1987) 17 NSWLR 381 McLelland J considered (at 386) that the postponement of the limitation bar in matters where fraud, deceit or concealment are alleged require proof of some form of dishonesty or moral turpitude. Hamilton was considered by the New South Wales Court of Appeal in Seymour v. Seymour (1996) 40 NSWLR 358. There, Mahoney A-CJ, with whom Meagher JA and Abadee AJA agreed, held that the New South Wales provision required a consciousness of wrongdoing:

> *'In my opinion, there must be in what is involved a consciousness that what is being done is wrong or that to take advantage of the relevant situation involves wrongdoing. At least, this is so in the generality of cases. (There is in this as many things, the problem of dealing with the person who 'closes his eyes to wrong' or is so lacking in conscience that he is not conscious of his own lack of proper standards)'.*

A similar view was expressed in Grahame Allen & Sons Pty Ltd v. Water Resources Commission; (2000)1 Qd R 523

There is no allegation at this point made by the plaintiff against ANZ of a consciousness of wrongdoing. I agree with the approach of the New South Wales and Queensland authorities."

49. In *Skrijel v. Mengler* (Supreme Court of Victoria, Eames, J., 5 October 1998, unreported) in relation to the meaning of fraud Eames, J. (at para. 46) stated:

> *"[46] "Fraud", in this context, involves a consciousness that what is being done is wrong or that to take advantage of a relevant situation involves wrongdoing. The section is not confined to simple common law fraud, but extends to conduct beyond that, which involves some form of dishonesty or moral turpitude: see Hamilton v. Kaljo (1989) 17 NSWLR 381 at 386; Seymour v. Seymour (1996) 40 NSWLR 358, at 371-2."*

50. Based on the above authorities, in my view, for the Plaintiffs to succeed, there must be consciousness of wrongdoing by the Defendants which has been concealed from the Plaintiffs. This involves an analysis of all of the circumstances referred to in the affidavits.

51. The Plaintiffs submit that it was not until August 2000, that it was discovered that the initial sealing of the Plaintiffs' subdivision was unlawful or illegal. The critical documents from the black folder which led Mr Thompson to reach his conclusions was the copy of the complete version of the plans contained therein. The Plaintiffs submit I should take the

following matters into account in relation to the question of concealment regarding the Tylden Road Land:

- the black folder was given to Mr. Thompson on the completion of the Tylden Road litigation in 1991;
- the residential land in Tylden Road was in fact sold and all that Mr. Thompson had was the parent title. In other words not only had the litigation been put behind him but commercially everything had been concluded;
- there was no reason to look at the black folder until new litigation prompted Mr. Thompson to defend himself against demand made;
- the circumstances involving false representations made by Mr. Wilson in Court;
- the Registrar of Titles registered the plan of subdivision. An impression was given that everything had been done properly and led to Mr. Thompson reflecting differently than he should have;
- all the litigation was premised on the basis that the subdivision was lawful at its initial stages; and
- Mr. Thompson was denied access to relevant files.

52. The first question I have to determine whether there has been a concealment. If there has been a concealment "there must be a consciousness that what is being done is wrong or that to take advantage of the relevant situation involves wrongdoing".

53. It is clear from Mr. Thompson's first affidavit that critical documents from the black folder which led to this matter being further litigated are the complete version of the plans of the industrial allotments of the Tylden Road subdivision. In relation to these claims, I note that Michelle Elizabeth Dixon, solicitor for the First Defendant, has sworn she has reviewed the documents discovered by the First Defendant in the Tylden Road proceedings heard previously. Each of the documents described by Mr. Thompson as the complete plans were discovered by the First Defendant in the Tylden Road proceedings as discovered document number 4 in its supplementary affidavit sworn 23 May 1989. She also swears that the clipped versions of the plans were also discovered. In addition it appears from correspondence that Neville & Co. solicitors acting on behalf of Mr. Thompson requested and were provided with a copy of all the documents discovered by the First Defendant by supplementary affidavit of

documents other than document No. 9 (which was not requested by them). Complete version of plans was therefore provided to Neville & Co.

. Mr Edward, solicitor, for the Second Defendant swore that he undertook inspection of documents discovered by the Plaintiffs in earlier proceedings those documents include a copy of the complete version for the plans for industrial allotments.

54. Based on the material before me there has been nothing concealed from Mr Thompson. The documents contained in the black folder had been previously discovered to Mr Thompson.

55. The Plaintiffs submit that I should look at all of the circumstances to see whether there has been a concealment. I now turn to the evidence, allegedly given by Mr Wilson. Mr. Thompson alleges that at the time Mr. Wilson gave evidence the First Defendant was fully aware or recklessly indifferent to the existence of a series of facts. That evidence was given in 1987. Since then the Plaintiffs brought actions in the Supreme Court, County Court and tried to set aside settlement in 1999. It was not until the year 2000 that the evidence given by Mr Wilson in the Magistrates' Court had the effect of concealing the First Defendants conduct from the Court himself. It is amazing that Mr Thompson is of that belief. It is clear that he had all the documents, and had heard the evidence of Mr Wilson. He had been to Court on a further three occasions. One may ask why Mr Wilson's evidence had the effect of concealing the First Defendant's true conduct from the Court and Mr. Thompson. This is not a credible explanation.

56. Mr. Edward has produced to the Court a series of manila folders containing exhibits. SME1 Volume 1 and Volume 2 are two folders of copies of court documents and papers relating to the County Court action issued on 7 November 1988. Document No. 43 is a book of pleadings in those proceedings that was discovered by Mr Thompson. Obviously any claim of privilege has been waived. Those pleadings contain hand written notes made by Mr Thompson. There is no evidence before me of when those notes were made but there is a clear inference that those notes would have been made prior to 1993. The Defendants relied heavily on these notes to demonstrate Mr. Thompson's state of knowledge.

57. I do not propose to repeat what was written on all of those pleadings but to highlight some of the important matters which written in the book of pleadings. They are as follows:

Page 2

- *"On 12 February 1980, Buchanan lodged a notice to the effect of the 13th schedule of The Local Government Act."*

Page 5

- *"Notwithstanding that it was illegal Buchanan has sold at least 2 of the allotments... in order to avoid the provisions of Section 9 of the Sale of Land Act which at that time prevented the sale of allotments on subdivision of more than two allotments etc Buchanan then lodged seven separate plans which were contrived to create several subdivisions of two lots each."*

Page 6

- *"Buchanan lodged 30th schedule notices in relation to these new contrived plans."*

Page 7

- *"The Council served a separate "Notice of Requirement" in relation each of the contrived plans which were numbered 79305E-79305K".* (Counsel for the First Defendant submits that within that sequence one would think that there would be plans with the letter G which is a plan that had been discovered to Mr Thompson).

Page 8

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

Page 10

- *"Buchanan therefore approached the Council (that notation is on a letter written by Mr Buchanan to Mr Wilson, Shire Engineer of the Shire of Kyneton. The last paragraph of that letter states " Would it be possible for approval to be given at the next Council meeting to accept the bank guarantees so that the requirement on the subdivision may be lifted".*

Page 14

- *"At the time of providing the guarantee I had the reasonable expectation that the Council and Water Trust would only accept the guarantees in relation to a legally*

enforceable agreement between themselves and Buchanan or a legal requirement upon Buchanan".

Page 15

- *"As I now know the Council and the Water Trust accepted the guarantees for the purpose of giving effect to the unlawful intention indicated in Council's letter of 7 May 1980 which was an intention to act in breach of Section 569E(3)(a) of the Local Government Act".*

Page 17

- *"The council however always intended that the requirements were "secretly still on foot".* (Here there is knowledge of alleged covert or secret activity)

C3

- *"The claim was derived from the evidence of the Shire Engineer's given at the Bendigo Magistrates' Court."*

C4

- *Discovery however indicates that the council's evidence at Bendigo was false. Discovery reveals that the relevant 30th Schedule Notices were dated 4 March* 1980.

C12

- *"Mr. Buchanan had illegally sold two of the lots and had been able to do so as the Council was prepared to accept plans of the subdivision contrived in such a manner as to appear to be two lot subdivisions."*

C15

- *"Subsequently upon receipt of my guarantee Council gave effect to its original intent by lying to the Registrar of Titles."*

58. Clearly on an analysis of the pleadings by Mr Thompson, it appears that nothing has been concealed from the Plaintiffs I do not accept the submission that the notations on these pleadings are proof that Mr. Thompson was under a wrong impression. The only conclusion that I can come to is that there can not have been any concealment.

59. I am also at a loss to understand how there has been any concealment in relation to the Woodleigh Heights Land. I note that Mr. Thompson swears that upon reaching the conclusions in relation to Tylden Road Land, he began to consider the possibility that the First Defendant may have acted unlawfully in relation to the Woodleigh Heights Land. He

therefore reconsidered the failed 1995 proceedings and the reticulation plan which had been shown to him in the Practice Court. He then realised that the First Defendant had sealed the plans of cluster subdivision in contravention of their statutory duty to refuse to seal them. Furthermore, they did so in full knowledge of that the subdivision had not been completed according to law and a reticulated water supply was not present in 1979 as required by law but was laid in 1982.

60. I do not accept that documents in the black folder also prompted Mr Thompson to enable to reconcile the representations made to him in the Practice Court 1999 with his prior state of knowledge. Submissions have been put to me that the objective documentary evidence establishes that Mr. Thompson was aware from at least 1987 that the reticulation water supply was laid in 1982. I have been referred by the First Defendant to a letter dated 24 August 1987, where Mr. Thompson wrote to the First Defendant. I have read that letter and refer to the following paragraphs, in particular, paragraphs 30 and 33 which are inconsistent with the allegations made by Mr Thompson:

> *"25. Sometime in 1980 or 1981 the timing of which is irrelevant the Kyneton Council approved the resubdivision of the Woodleigh Heights Subdivision into 131 allotments.*
>
> *27. By minute dated 6 November 1980 the Kyneton Water Board resolved to advise the Kyneton Development Committee that it could supply 1,000,000 gallons annually in any reticulated area and that any anticipated consumption in excess of that figure would be subjected to negotiation.*
>
> *30. Kyneton Water Board did subsequently enter into a water supply agreement between itself and Woodleigh Heights Resort Developments Pty Ltd for the supply of water to the whole of the Woodleigh Heights Subdivision.*
>
> *33. Subsequent to the making of the above agreement trenches were dug and pipes laid along a considerable length of Edgecombe Road in order to facilitate the supply of water to the Woodleigh Heights Subdivision.*
>
> *112. The Board under cover of letter dated 12 September 1985 made a copy of the agreement available [being the agreement referred to in paragraph 30 of the August 1987 letter] after my solicitor threatened to take legal action to force the Board to make a copy available.*
>
> *113. My Supreme Court action No 2360 of 1984 was settled on the day that the copy of the agreement was received at the office of my solicitor which was too late to be considered."*

61. Even if there has been a concealment which has not been proved, it is my view that there is nothing before me that would lead to a conclusion that there has been a fraudulent concealment. There is nothing in the circumstances which demonstrate the consciousness of what is being done is wrong. All the documents and information which was relied upon were given to Mr. Thompson. There is no evidence of any wrongdoing on behalf of the Defendants in the provision of the information to Mr. Thompson.

62. The observations and circumstances referred to lead to a conclusion that the limitation period should not be postponed. In my view of the situation is clear cut and it would be inevitable for a Court to decide that limitation period should not be postponed by virtue of Section 27(b) of the *Limitations Act.*

A Comparison of the Pleadings

The Tylden Road Proceedings

63. I have been given three tables comparing the 1988 Tylden Road Proceedings with the current proceedings. The First Defendant's solicitor, Ms. Dixon, in her first affidavit has provided a table of arising differences between the two proceedings.

64. Mr. Edward, solicitor for the Second Defendant, in his first affidavit swears that in both the proceedings the claims for damages involve identical parties and have been subject to prior legal proceedings and cover the same matters.

65. The Plaintiffs submit that in the amended statement of claim before the Court a pleading has been made for the first time that the Council unlawfully sealed the Tylden Road plans of subdivision without services. The prospective purchaser without services on the subdivision therefore would not have any recourse to any legal means of compelling a developer or any other person to provide those services.

66. I note that in paragraph 20 of the County Court Statement of Claim, it was pleaded that the First Defendant was not entitled to retain and/or call up the first bank guarantee as the

First Defendant failed to properly comply with all provision of Section 569E of the *Local Government Act.* Paragraph 20 pleads:

- The plans of subdivision contravene Section 569A(1)(a) and Section 569A(1)(c) of the *Local Government Act.*
- The First Defendant did not serve on the subdivider proper or sufficient requirements within the meaning of Section 569E(3)(b).
- The First Defendant did not retain copies of any or all of the purported requirements.
- The purported requirements had been withdrawn by the First Defendant within the meaning of Section 569E(3)(cc).
- In contravention of Section 569E(3)(d), the First Defendant caused to be lodged with the Office of Titles a statement to the effect that the purported requirement or requirements had been complied with by the owner and such a requirement or requirements had not been complied with and the First Defendant knew that such requirement or requirements had not been complied with.
- There is no valid or enforceable basis ground upon which the First Defendant could retain or call up the first guarantee.

67. On a analysis of the two proceedings, it is clear to me that there are some differences in the way they are pleaded. The County Court pleadings related only to residential land whereas here before me, the pleadings relate both to residential land and industrial land. In addition, the cause of action in relation to the present proceedings relates to misfeasance in public office whereas the pleadings before the County Court relied on a breach of duty or false representations.

68. The First Defendant submits that the misfeasance in public office is another aspect of wrongful behaviour but does not amount to a new case before the Court.

69. Even though I do not have to consider this question, as it is clear that the claims are statute barred, I am of the view that the current pleadings relate to the same facts. It is interesting to note that as against the First Defendant the Plaintiffs claimed in prior proceedings the sum of $25,000.00, interest, and consequential losses sustained by the

Plaintiffs as a result of the sale of the 15 allotments. As against the Second Defendant it claimed $11,500, interest, and consequential losses sustained by the Plaintiffs as a result of the sale of the 15 allotments. The damages that the Plaintiff now claims is the difference in the market value as at the date of purchase of the allotments without services, and the market value of those allotments with services. In reality, there is little difference between the damages claimed.

70. The pleadings against the Second Defendant are found in paragraphs T29 to T34. I have compared this pleading to paragraphs 33 to 57 of the amended statement of claim in the County Court proceedings. It is clear that the present proceedings are better pleaded and in addition claim that the Second Defendant acted maliciously. The situation however, is basically the same and again there is not much difference in the claim for damages. I do note that it is said that the new pleadings arose out of the discovery of the unlawful sealing of the plans. This is not conduct which can be attributed to the Second Defendant.

Woodleigh Heights Land

71. The Woodleigh Heights proceedings were commenced in this Court in 1995. As with the Tylden Road Land, I have been given comparative tables of the pleadings of that case. I note that Mr. Thompson swears in his affidavit that the 1995 Woodleigh Heights proceeding was predicated on his belief that the First Defendant had lawfully sealed the cluster plan of subdivision. The present pleading relies on the wilful sealing of plans of the cluster plan of subdivision contrary to the statutory obligation of the First Defendant to refuse to do so. The Plaintiffs rely on the Second Defendant's complicity in sealing the plans and concealing the misfeasance of the First Defendant in providing a water supply for the sole benefit of Woodleigh Heights Resort Development Pty. Ltd. and in the knowledge that the water supply should have been present in 1979 for the benefit of all allotment holders. Misfeasance in public office is alleged against both the Defendants.

72. As with the Tylden Road plan the causes of action are based in tort but are pleaded differently and it appears that the damages sought are similar. Analysis of both pleadings leads to the conclusion that the causes of action relate to the same facts.

The Deeds of Settlement

73. In my view, as the same facts are relied upon and damages sought are essentially the same, the releases in the prior Tylden Road proceedings and the prior Woodleigh Heights proceedings are a complete answer to the claims bought by the Plaintiffs.

74. The only issue that remains is that no claim has been brought in relation to the Tylden Road Industrial Land. The parties accept that the Plaintiffs have not previously sought relief in this respect or sued the Defendants concerning the Tylden Road Industrial Land.

75. In my view in relation to the limitation period precludes such an action. However I note that in *Port of Melbourne Authority v Anshun Pty Ltd* [1981] 147 CLR 589, Gibbs, C.J., Mason and Aickin J.J. (at p.602) stated:

> *"In these cases in applying the Henderson v. Henderson principle to a plaintiff said to estopped from bringing a new action by reason of the dismissal of an earlier action, Somervell, L.J. and Lord Wilberforce insisted that the issue in question was so clearly part of the subject matter of the initial litigation and so clearly could have been raised that it would be an abuse of process to allow a new proceeding. Even then the abuse of process test is not one of great utility. And its utility is no more evident when it is applied to a plaintiff's new proceeding which is said to be estopped because the plaintiff omitted to plead a defence in an earlier action.*
>
> *I this situation we would prefer to say that there will be no estoppel unless is appears that the matter relied upon as a defence in the second action was so relevant to the subject matter of the first action that it would have been unreasonable not to rely on it. Generally speaking, it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and it's subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding."*

76. I have ruled previously that Mr. Thompson had the plans in 1991 and that they were previously discovered to him. Mr. Thompson could have amended the County Court proceedings when he did receive the plans but did not do so. An *Anshun* estoppel therefore would operate.

Conclusion

77. On the facts before me, the claims brought by the Plaintiffs are statute barred. I am also of the view that the matters complained of have been litigated previously and have been settled and proper deeds of releases have been executed. In relation to the Tyldon Road Industrial Land an *Anshun* estoppel applies.

CERTIFICATE

I certify that this and the 26 preceding pages are a true copy of the Reasons for Decision of Master Efthim of the Supreme Court of Victoria delivered on 15 May 2006.

DATED this 15th day of May 2006.

IN THE SUPREME COURT
15 MAY 2006
ASSOCIATE TO MASTER EFTHIM

SUPREME COURT OF VICTORIA
ASSOCIATE TO MASTER

Ms Kristen Smith
Associate

SC: REASONS FOR DECISION