IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Court Number: **6321 of 2005**

BETWEEN:

GLENN ALEXANDER THOMPSON
& CHERYL MAREE THOMPSON *Plaintiffs*

- and -

MACEDON RANGES SHIRE COUNCIL *First Defendant*

- and -

THE COLIBAN REGION WATER AUTHORITY *Second Defendant*

PLAINTIFFS' SUBMISSIONS

Date of Document: 9 November 2005
Filed on behalf of: The Plaintiffs
Prepared by:
Baldock, Stacy & Niven
PO Box 1070
ORANGE NSW 2800

Ref: JCC:MCP:10819
Solicitors Code: 233
DX 3010 Orange
Tel: 02 6362 2022
Fax: 02 6363 1760

1. SECURITY FOR COSTS

1.1 Supreme Court Rules

Order 62.02 sets out the circumstances in which Security for Costs may be ordered:

(1) Where-

(a) *the plaintiff is ordinarily resident out of Victoria;*

(b) *the plaintiff is a corporation or (not being a plaintiff who sues in a representative capacity) sues, not for his own benefit, but for the benefit of some other person, and there is reason to believe that the plaintiff has insufficient assets in Victoria to pay the costs of the defendant if ordered to do so;*

(c) *a proceeding by the plaintiff in another court for the same claim is pending;*

(d) *subject to paragraph (2), the address of the plaintiff is not stated or is not stated correctly in his originating process;*

(e) *the plaintiff has changed his address after the commencement of the*

proceeding in order to avoid the consequences of the proceeding;

(f) under any Act the Court may require security for costs-

the Court may, on the application of a defendant, order that the plaintiff give security for the costs of the defendant of the proceeding and that the proceeding as against that defendant be stayed until the security is given.

1.2 Plaintiffs are Natural Persons

Order 62.02 clearly contemplates natural persons. However, it is also well established that impecuniosity of a plaintiff who is a natural person is generally no bar to litigation.[1] It follows that only in exceptional circumstances will security be ordered against a natural plaintiff. The First Defendant has failed to establish any reason for departing from the ordinary rule.

1.3 Sufficiency of Plaintiffs assets to meet a costs order

The Plaintiffs *do* have an asset in the jurisdiction sufficient to meet a costs order. The asset is real property and as such represents a complete answer to the First Defendant's application, since the First Defendant would be able to recover costs by process of law.[2] Ms Dixon's evidence about the value of the Plaintiffs' Tylden Rd land is at best anecdotal, and even allowing for the usual practice of relaxing the rules of evidence in interlocutory proceedings, should be given little weight. To the extent that the evidence purports to be expert, it is hardly independent, coming as it does from an employee of the First Defendant.

In any event, the Court would have little difficulty with the proposition that there is a significant difference between the value ascribed to land for rating purposes and that reflected in the sworn valuation of Messrs Smith and Brady. The evidence of Mr Thompson[3] and of the valuers is that the land is now effectively unencumbered and valued at some $195,000, which is more than enough to meet the sum of $162,000 claimed by the First Defendant to represent its likely costs.

1.4 Residency out of Victoria

Rules 1 (b) to ***(f)*** of ***Order 62.02*** are clearly irrelevant to the current proceedings. The basis of the First Defendant's application is therefore limited to the fact that the plaintiffs are resident out of the jurisdiction in accordance with ***Rule 1 (a)*** above.

In the first place, there is a presumption against making an order for security in the case of a plaintiff resident in another state, because judgements can be enforced by the operation of the ***Service and Execution of Process Act 1992 (C'wlth):*** See ***Calvert v Melbourne Harbour Trust Commissioners (1939) VLR 94.***

Secondly, the First Defendant is precluded from relying upon ***Rule 1(a)*** of ***Order 62.02*** unless it can establish that the Plaintiffs are resident, not merely out of Victoria, but out of Australia. To assert otherwise would offend ***S 117 of the Commonwealth Constitution***: See ***Australian Building***

---

[1] Cowell v Taylor (1885) 31 Ch.D. 34 at 38 per Bowen L.J.
[2] Swinbourne v Carter (1853) 23 L.J. Q.B. 16, (1853) 2 W.R.80.
[3] GAT-23 to the third Thompson Affidavit

Construction Employees & Builders Labourers Federation v Commonwealth Trading Bank of Australia (1976) 2 NSWLR371[4] per Helsham J at 374[5].

In the present case the Plaintiffs reside in NSW. The first Defendant has therefore failed to establish any power in the Court to make the order under the Supreme Court Rules.
It is further submitted that any power to order security under ***S33ZF of the Supreme Court Act***, or under the Court's inherent jurisdiction, is equally fettered by ***S117 of the Constitution.***[6]

The Plaintiffs' primary submission is that the First Defendant cannot overcome either the Constitutional issue, or the fact that the Plaintiffs have assets in the jurisdiction sufficient to meet a costs order.

Accordingly, its application must fail.

However, to the extent that they are relevant to the exercise of the Court's discretion, the Plaintiffs now turn to address other matters, some of which are outlined on p.2 of the affidavit of Michelle Elizabeth Dixon of 23 September 2005 ("the security for costs affidavit").

1.5 Plaintiff's prospects of success

The assertion at paragraph 4(a) of the first Defendants security for costs affidavit that the Plaintiffs claim has poor prospects is entirely dependant upon the argument that the claim is either statute barred or estopped by the *Anshun* principle. The Plaintiffs submit:

(i) For all the reasons set out at paragraphs 2 and 3 of these submissions, the limitation and Anshun arguments fail. The Plaintiffs' prospects could not therefore be characterised as poor. The evidence of misfeasance is compelling. In many cases the documents speak for themselves.

(ii) The claim is prima facie regular on its face and discloses a cause of action. Accordingly, in the absence of evidence to the contrary, the court should proceed on the basis that the claim is bona fide with reasonable prospects of success.[7]

(iii) Further and in the alternative to (i) and (ii) above, the Plaintiffs' claim is one of some complexity and it is not practicable for the court to assess the prospects of success.[8] Nor is the court obliged to consider the merits of the Plaintiffs' claim at length.[9]

1.6 The quantum of costs

The First Defendants rely upon the party/party estimate of costs in the sum of $162,000 by Hausler & Associates.[10] Whilst the court can sometimes be assisted by estimated party/party taxed costs, it

---

[4] Interpreting Pt.53, r2 (a) of the NSW Supreme Court Rules, which for practical purposes is identical to the Victorian rule.
[5] Any doubts that may have previously attended the correctness of His Honour's decision have now been removed by more recent decisions. See especially NSW Court of Appeal in Melville v Craig Nowlan & Assoc. Pty Ltd & Anor. (2002) 54 NSWLR 82 at 110.
[6] (1976) 54 NSWLR 371 at 374 .
[7] Bryan E Fencott & Assoc Pty Ltd v Eretta P/L (1987) 16FCR 497; KP Cable Investments Pty Ltd v Meltglow Pty Ltd (1995) 56 FCR 189.
[8] Interwest Pty Ltd (recs and mgrs appointed) v Tricontinental Corp Ltd (1991) 5 ACSR 621.
[9] To do so would ordinarily be a waste of resources (see Impex Pty Ltd v Crowner Products Ltd (1994) 13 ASCR 440 and inter alia, quickset Concrete Productions Pty Ltd v Jayburn Pty Ltd VSC Unreported 26th Oct 1993.
[10] Exhibit "MED 1" to security for costs affidavit.

is not the practice to order security on a full party/party, nor on an indemnity basis. As Fullagar J said in ***Brundza v Robbie & Co (No.2) (1953) 88CLR 171***;

> *"The Court does not set out to give a complete and certain indemnity to a respondent"*

Moreover, the Hausler estimate takes account of a number of steps in the process leading up to hearing, which may never eventuate, eg; 3-4 interlocutory hearings and mediation.

1.7 Alleged failure to adhere to terms of settlement in the past

The assertion in paragraphs 14 and 15 of Ms Dixon's security for costs affidavit is, with respect, misleading. It suggests default on the part of the Plaintiffs and inaccurately states that the Defendants fully performed their obligations under the terms of settlement. The true position is succinctly set out in the reasons for judgement of Beach J.[11] The fact that the defendants had not paid the settlement sums by the due date precipitated the Plaintiffs action in returning the cheques and issuing Notice of Trial. When the defendants sought specific performance in the Practice Court, the Plaintiffs defended the Summons. In doing so, the Plaintiffs were exercising a bona fide legal entitlement. The issue turned upon His Honour's finding that time was not of the essence. The Plaintiffs were intending to appeal but were persuaded by the conduct of the Defendants not to do so, such conduct being one further act in a course of concealment practiced by both Defendants upon the Plaintiffs over many years. The Plaintiffs conduct in contesting the validity of the settlement is irrelevant to the exercise of the Court's discretion in this case.

1.8 Public interest in outcome of the litigation

The allegations made in the Plaintiffs' statement of claim if proven, amount to an abuse of power by two public authorities which has been sustained over many years. The Plaintiffs specifically plead that as members of the public and bona fide purchasers of land for value without notice, they were owed a duty of care. Both Defendants acted in a manner that was directly contrary to that duty. The Plaintiffs are, therefore, seeking to enforce obligations in the nature of public standards of conduct the maintenance of which are clearly in the public interest. Should an order for security be made in a sum that exceeds the value of the land discussed in para 1.3, the litigation would not be able to proceed.[12] It is submitted that should the court come to the view that the First Defendant is entitled to security, the desirability of ventilating an issue of public importance out weighs that entitlement.[13] In this case the issue is one of community trust and confidence in public authorities to perform their statutory obligations and to enforce bona fide, planning laws and regulations especially those designed to protect prospective purchasers of land.[14]

2. SUMMARY JUDGEMENT/STAY APPLICATION

2.1 Onus on the Defendants

The defendants seek summary judgement or a stay under either ***Order 23.01*** or ***Order 23.03*** of the Supreme Court Rules. In so doing they each bear the burden of satisfying the Court that there is no triable issue. The defendants are entitled to judgement if, but only if, it is inevitable that after a full hearing at trial, the court would find for the Defendant: ***Camberfield Pty Ltd v Klapanis [2004] VSCA 104.***

---

[11] Tab 31 to Folder exhibit MED1

[12] Para 9 of Thompson Security For Costs affidavit

[13] See Aussie Airlines Pty Ltd v Australian Airlines Ltd (1995) ATPR 41-444 at 41-006.

[14] See Byron Shire Business for the Future Inc. v Byron Shire Council (1994) 83 LGERA 59 (Land & Environment Court NSW.)

The stridency of the test to be applied in order to dismiss a proceeding at a preliminary stage was emphasised by Dixon J in ***Dey v Victorian Railways Commissioners (1949) 78CLR 62 at 91***[15]:

> *It must be "very clear indeed" that the action is "absolutely hopeless"*

The burden cast upon the Defendants is a very heavy one and the Plaintiffs submit that the Defendants have failed to discharge it.

The defendants' application is based entirely upon three propositions:

(i) that the current proceedings are essentially a re – run of earlier proceedings and are therefore Res Judicata or are estopped in accordance with the principle in ***Port of Melbourne Authority v Anshun Pty Ltd 147 CLR 589.***

(ii) that the proceedings are statute barred

(i) that the plaintiffs are bound by terms of settlement and deeds of release in earlier proceedings

The evidence brought by the Defendants in support of their respective applications is scant. That material which has been provided, fails to adequately address:

(i) that the current proceedings are fundamentally different to any prior proceedings

(ii) that the conduct of the Defendants, including that pleaded in the Statement of claim has concealed from the Plaintiffs their true cause of action until around August 2000

(iii) that the pleadings in the prior proceedings reveal that the Plaintiffs proceeded on an assumption of facts which were incorrect. Those very pleadings *support* the Plaintiffs contention that they were ignorant at that time of the true facts upon which they now proceed.

2.2 Relief sought by Defendants ought be refused

It is not in dispute between the parties that there have been no prior proceedings in respect of the Industrial allotments. Accordingly, no Res Judicata or *Anshun* issue arises in respect of those allotments.

[15] Cited with approval by the Court of Appeal in S.E.C. of Victoria v Rabel & ors. (1998) 1998 1 VR 102.

2.3 The key distinguishing features of the respective actions is set out in the table below:

	1998 Tylden Road proceedings	**Current proceedings (re Tylden Road)**
	Concerned Tylden Rd residential land only.	Concerns Industrial and Residential Land.
Cause of Action:	Monies had and received under mistake of fact/law. Proceedings were solely concerned with guarantees.	Misfeasance in Public Office i.e. (i) denial of essential services to Plaintiffs land through deliberate abuse of power with intent to harm or reckless as to likelihood of harm to persons in position of Plaintiffs (ii) continuing course of conduct calculated to conceal the acts of misfeasance and to conceal from persons in the position of the Plaintiffs the true circumstances pertaining to the land.
Remedy sought:	(i) Recovery of monies wrongly paid to each Defendant under certain guarantees. (ii) Consequential damages for loss occasioned by the wrongful acceptance/calling up of the guarantees.	Damages, being the difference in value at date of purchase between the residential and industrial land for which the Plaintiffs bargained; (land with services) and the value of that actually purchased; (land without services and unusable as a result of the Defendants' acts of misfeasance).
Causal Nexus:	The calling up of the guarantees.	First Defendant's sealing of the plans of subdivision contrary to a positive statutory obligation to refuse to do so. The Second Defendant's complicity in sealing the plans and concealing the council's acts of misfeasance.
Plaintiffs' state of knowledge at time proceedings commenced:	Each Defendant had acted without authority, mistakenly or negligently. Plaintiffs ignorant of matters now relied upon to establish misfeasance	Each Defendant acted maliciously intending harm or reckless as to the likelihood that harm would be occasioned.

	1995 Woodleigh Heights proceedings	Current proceedings (re Woodleigh Heights)
Cause of Action:	Negligent/fraudulent representations by each of the Defendants specifically about the availability of a water supply to the Plaintiffs' land.[16]	As for Tylden Rd above.
Remedy Sought:	Damages being the difference between *sale price* achieved by mortgagee in 1989 and the price which would have been achieved but for the false representations of the Defendants.	Damages, being the difference in value *at date of purchase* between the value of the land for which the Plaintiffs bargained; (allotments with a reticulated water supply) and the value of that which was actually purchased; (allotments without a water supply and unusable because of the Defendants misfeasance).
Causal Nexus:	Representations (then thought to be false) made to the Plaintiffs and the Plaintiffs mortgagees that water was not available to the Plaintiffs land.	First defendant's wilful sealing of the plans of cluster subdivision contrary to its statutory obligation to refuse to do so. The Second Defendant's complicity in sealing the plans, concealing the misfeasance of the Council and in 1982 providing a water supply for the sole benefit of Woodleigh Heights Resort Developments P/L in the knowledge that a Water Supply should have been present in 1979 for the benefit of all allotment holders.
Plaintiffs' state of knowledge at time proceedings commenced:	Water present on Plaintiffs land at time of purchase and before sealing of plans because planning permit stipulated mandatory installation at that time.[17] Accordingly, Defendants representations to contrary false.	As for Tylden Rd above, and in particular that the Defendants representations although made *male fides* about the absence of water were not false after all. Water was not available solely because of the Defendants misfeasance.

[16] The pleadings were drafted by Mr Glenn Thompson. Mr Thompson was assisted from time to time by Mr Tiernan of Counsel on a pro bono basis when Mr Tiernan was available. Otherwise Mr Thompson was largely unrepresented.
[17] See paragraph 46 of the First Thompson Affidavit

The First Defendants Summary Judgement Affidavit sets out a tabular comparison between paragraphs in the 1988 pleadings and paragraphs in the current pleadings insofar as they are relevant to the Tylden Rd land. At paragraph 47, the same type of comparison is undertaken between paragraphs in the 1995 pleadings and paragraphs in the current pleadings insofar as they affect the Woodleigh Heights land. The affidavit asserts that certain allegations are common to both the present and past proceedings.

Firstly, it is significant that a number of paragraphs in the current pleadings are omitted from this analysis.[18] Those omitted paragraphs are in effect, the "nub" of the Plaintiffs' present claim. The allegations contained in the omitted paragraphs have never been made in any prior proceedings, because, as Mr Thompson deposes in his First Affidavit, the facts underpinning the allegations had been concealed from the Plaintiffs by the Defendants and were not discovered by the Plaintiffs until August 2000.

To the extent that allegations are repeated, they address the following issue of

> exemplary damages and establishing an ongoing (as opposed to aberrant) course of conduct, which had the effect, inter alia of concealing the true facts from the Plaintiffs.

Nothing turns on the fact that those paragraphs have been pleaded in a similar way in prior proceedings.

Further, item (iii) of the table at paragraph 22 and item (vii) at paragraph 47[19] are simply inaccurate. The Plaintiffs submit that the comparison undertaken in relation to those items is flawed:

In the current proceedings the assertions are that:

(i) The council *unlawfully* sealed the Tylden Rd plans of subdivision without services leaving any prospective purchaser without services on the subdivision and without recourse to any legal means of compelling the developer or any other person to provide those services;

(ii) The Registrar of Titles registered the cluster subdivision *only because* of the false representations inherent in the council's unlawful sealing of the plans.

By contrast, the paragraphs in the prior proceedings are bland statements of fact asserting merely that the Tylden Rd plans of subdivision were sealed (in the case of the 1988 proceedings) and the plans of Cluster subdivision were registered. (in the case of the 1995 proceedings). There are no allegations of misfeasance, or for that matter wrongful conduct of any description in relation to the actual sealing of the plans or their registration.

The items discussed above are a good illustration of the Plaintiffs' ignorance of the true facts when they instituted those proceedings.

3. LIMITATION ISSUE

The Defendants contend that the proceedings are Statute barred by the operation of ***S 5(1)(a)*** of the ***Limitation of Actions Act 1958. ("the Act")*** The Plaintiffs rely on ***S 27*** of the Act, the relevant portion of which provides relevantly as follows:

---

[18] The omitted paragraphs are set out in paragraph 42(a) and (b) of the First Thompson Affidavit.
[19] The inaccurate paragraphs are truncated versions of that set out in the pleadings.

27. 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:

With regard to fraudulent concealment, it must be shown that facts relevant to the right of action were concealed, and that the concealment was fraudulent. Fraud here is being used in the sense of showing some form of moral turpitude even if short of dishonesty or common law fraud – see for example *Hamilton v Kaljo* (1989) 17 NSWLR 381, *Seymour v Seymour* (1996) 40 NSWLR 358, 372. Merely to establish ignorance of the right of action is insufficient. However there is no need to show that active measures were taken to prevent detection, if the way in which the defendant has acted is itself sufficient concealment (*Bulli Coal Mining Co v Osborne* [1899] AC 351 (PC) and *Beaman v ARTS Ltd* [1949] 1 KB 550 [[1949] 1 All ER 465] (CA)).

In these cases, the limitation period does not begin to run until the fraud is discovered, or could with reasonable diligence have been discovered. Reasonable diligence means what an ordinary prudent person would do having regard to all the circumstances (see *Peco Arts Inc. v Hazlitt Gallery Ltd* (1983) 1 W.L.R. 1315). It seems that discovery by the plaintiff's agent or failure by the agent to exercise reasonable diligence will not be imputed to the plaintiff.

The "fraud" upon which the plaintiffs rely to invoke ***S.27*** is the Defendants' conduct in concealing from them the true nature of their cause of action. The plaintiffs did not discover the "fraud" until August 2000 and could not, with reasonable diligence have discovered it before that date.[20] Time therefore commences to run from the time of discovery of the "fraud" and accordingly, the Plaintiffs are not Statute Barred.

3.1 Concealment caused by conduct pleaded in the Statement of Claim

It is apparent on the face of the pleadings that in many instances, the very nature of the tortious conduct alleged against the Defendants has had the effect of concealing from the Plaintiffs their true cause of action. In ***Hawkins v Clayton (1988) 164CLR 539***, Deane J dealt with a limitation defence as follows:

> *"the reference in s 14(1) of the Limitation Act [NSW] to the cause of action first accruing should be construed as excluding any period in which the wrongful act itself effectively precluded the institution of proceeding"*[21]

[20] The Plaintiffs ignorance of the true facts is described in paragraphs 48 – 52 inclusive of the 1st Thompson Affidavit and the circumstances of the Plaintiffs' discovery of the "fraud" are set out at paragraphs 53 and 54 of that Affidavit.
[21] (1988) 164CLR 539 at 589 –90

Some examples of the Defendants' conduct pleaded in the Statement of Claim which has also had the effect of concealing from the Plaintiffs the true cause of action are set out below.

a) Conduct of the First Defendant

(i) Unlawful sealing of the plans of subdivision

Section 97(2)(a) of the ***Transfer of Land Act 1958*** provides that the Registrar of Titles will not approve a plan of sub-division unless it accords with the plan sealed by Council.

The Council has a statutory obligation under ***S569B (7)*** to refuse to seal plans of sub-division unless it was satisfied inter alia that the plan complies in all respects with the Local Government Act.

On the 20 February 1980 two plans earlier lodged by Buchanan one creating 18 residential lots, the other creating 6 industrial lots came before Council for condideration.

The plans considered by Council on that day were not proceeded with.[22]

Subsequently by way of series of Notices to the Effect of the 30th Schedule one of which is exhibited at GAT-14, Buchanan lodged a series of plans creating both residential and industrial lots in respect of the same land as was considered by Council on 20 February. These plans did not comply with ***Ss 569A(1)(a), (b) and (c).*** The plans when sealed by the Council gave rise to an illegal series of two lot subdivisions which were contrived to facilitate the sale of allotments in breach of ***S9*** of the ***Sale of Land Act 1958.***

The conduct perpetrated by the Council in sealing (and thereby approving) these plans is starkly illustrated by a comparison of the plans exhibited at GAT-9 with the plans at GAT-14. In GAT-9 each plan purports to create a lot and a residue and dedicate a proportion of road applicable only to the lot created. Subsequent plans excise from the subdivision any lots created by the previous plan. By viewing the GAT-9 plans consecutively and comparing them with the GAT-14 plans, it can be seen that the road and the 18 residential allotments depicted in complete form in the GAT-14 plan emerge step by step from the GAT-9 plan.

(ii) False information provided to Registrar of Titles

In 1979 – 80, ***S569E*** empowered the council to require a subdivider to construct roads and provide a water supply. This was done by a Notice of Requirement pursuant to ***S569E (1)*** and ***(1A)***. After service of a Notice of Requirement upon a subdivider, a council was required to endorse the plans of subdivision to the effect that the Notice had been issued. ***S569E(3)(a)*** mandated that the endorsement be made before the council was permitted to seal the plans.

In this case, a Notice of Requirement was served or was purported to have been served upon the subdivider (Buchanan)[23]. On 21 May 1980 the council placed the mandatory endorsement on the plans and sealed them. On 19 November 1980, the Council resolved to withdraw that Notice of Requirement[24].

S569E (3)(e) prohibited the Registrar from approving any plan until the Council had lodged a statement with the Titles Office to the effect that the Notice had either been complied with or withdrawn.

---

[22] see paragraph 53(f)(ii) of first Thompson affidavit
[23] See GAT 13 to 1ST Thompson Affidavit
[24] GAT-24 page 20-21 of third Thompson affidavit

It is not in dispute between the parties that as at November 1980, no roads or waterworks had been constructed upon the subdivision by anybody, least of all Buchanan.

Notwithstanding the fact that there were no roads or water works installed on the subdivision and that no arrangements had been made for their installation pursuant to ***S569E (1) (b)***, the Council, less than a week after it had withdrawn the Notice of Requirement, lodged a statement with the Registrar to the effect that Buchanan ***had*** complied with the Notice (ie that he had in fact constructed the said roads and water works).

The Statement lodged by the Council in purported compliance with ***S569E (3) (e)*** is, on the evidence available to the Court on this application alone, patently false. It follows that the Council has misrepresented to the Registrar, the existence of an essential precondition to the registration of the plans of subdivision.

Moreover, the Notice of Requirement which the Council resolved to issue on 20 February 1980 (see GAT-13) and allegedly issued on that date:

(i) Purports to relate to one of the illegal plans referred to in paragraph 3.1(a) (i) above (see also paragraph 53 (c) (ii) (d) and (e)of the first Thompson affidavit and GAT-9 plan containing allotment G)

(ii) Predates the illegal plans which were not filed with the Council before 4 March 1980 (see GAT-14)

(iii) Was later represented in pleadings by the Council to refer to the 18 residential lot plan of 20 February[25]

In Torrens Title, registration is everything. ***Sections 569A*** and ***569B*** were clearly intended to act as consumer protection provisions. The Sections empowered the Council to place obligations on subdividers for the protection of prospective purchasers of land; in short, to ensure that allotments could only be registered if services had been constructed or there was a legally enforceable requirement on the subdivider to provide such services.

In this case the very body entrusted with the enforcement of those consumer protection provisions failed to act lawfully.

Further examples of concealment as an integral part of the tortious acts pleaded against the First Defendant in the current Statement of Claim are to be found, inter alia, at T8 to T12 inclusive, T15, T16 and T20.

b) Conduct of the Second Defendant

The ***Cluster Titles Act*** (1974) enabled the registration of the Woodleigh Heights cluster subdivision ("CS1134") by virtue of which a body corporate namely body corporate CS1134 was created. The body corporate was charged with, inter alia, the maintenance of common property.

The planning permit (PP 2191) for the Woodleigh Heights cluster subdivision[26] mandated:

(i) that the body corporate be responsible for inter alia the water supply to the subdivision (condition 6 of PP 2191);

---

[25] See Paragraph 7 of Statement of Claim at tab 3 of MED1 and admission in paragraph 7 of Re-Amended Defence at tab 6 of MED1

[26] Gat-5 to first Thompson affidavit

(ii) that the development of the subdivision be carried out in accordance with plans and the submission which formed part of the application (condition 8 of PP 2191).

Common property is defined in the Section 3 of the Act as

> *"land as is for the time being delineated as common property on a plan of subdivision in cluster form or on a registered cluster plan".*

The registered Cluster Plan depicts common property.[27] The submission details arrangements for the supply of water and the plans in the submission depict water reticulation pipes laid in common property.

It is beyond dispute that all allotment holders in *any* cluster subdivision are entitled to an undivided share of common property. Woodleigh Heights Resort Development Pty Limited ("WHRD") were but one of a number of allotment holders within CS1134.

Notwithstanding this, the Second Defendant entered into an exclusive agreement for the supply of water to WHRD.[28]

The Second Defendant perpetuated this ineffective water agreement over a number of years as the reason that water could not be made available to the Plaintiffs allotments within CS1134. The true position was that a reticulated water supply stipulated by the planning permit was absent *ab initio* as a result of the First Defendants misfeasance in sealing the plans unlawfully and the Second Defendants complicity in that unlawful sealing.

3.2 Concealment by other conduct – both Defendants

a) Concealment in the 1995 proceedings:

The Plaintiffs instituted these proceedings in the belief that a water supply was present in the common property and available to their allotments in CS1134, the availability of such water supply being stipulated by law.[29]

The Defendants defended this action in the knowledge that:

a) no reticulated water supply had been laid in common property or at all at the time of the Plaintiffs purchase in 1979 because of the First Defendants misfeasance;

b) a water main providing water to CS1134 was not laid until 1982.

The circumstances described in b) above were not disclosed to the Plaintiffs until four years after they had instituted the proceedings and only after the proceedings had settled. The circumstances described in a) above were never disclosed.

b) Concealment in the 1988 proceedings:

In the 1988 proceedings the Defendants failed to comply with orders for discovery and/or provided documents during the course of discovery which were edited and photocopied in such a way as to

---

[27] See GAT-25 to third Thompson Affidavit
[28] See GAT-26 to third Thompson Affidavit
[29] Condition 8 of PP 2191 read together with clause 2(b) shire of Kyneton interim development order. See GAT-27

conceal from the Plaintiffs facts and circumstances, which are now known to amount to acts of misfeasance.

Mr Thompson canvasses the Defendants' conduct in this regard at some length in his first Affidavit.

c) Ms Dixon's Further Affidavit sworn 28 October 2005:

Material in this Affidavit seeks to rebut the assertions of concealment referred to by Mr Thompson in his first Affidavit. It also seeks to allege that Mr Thompson was on notice of his true cause of action as a result of documents allegedly discovered in the 1988 proceedings.

Far from challenging Mr Thompson's assertions, Ms Dixon's further Affidavit merely highlights the nature and extent of the First Defendant's continuing course of conduct which concealed the true facts from the Plaintiffs.

In relation to paragraph 9 of Ms Dixon's Further Affidavit wherein she deposes that a complete set of plans was discovered by the First Defendant, the following submissions are made:

a) As Mr Thompson deposes, item 4 on the relevant Affidavit of discovery is not a complete set of plans but merely a copy of correspondence referring to certain correspondence.

b) In any event the documents purported to have been discovered as referred to in MED-12 of Ms Dixon's further Affidavit in the 1988 proceedings, are complete copies of industrial plans only. The 1988 proceedings related solely to the Tylden Road *residential* land and the industrial plans shown in Exhibit MED-12 would have been entirely irrelevant to those proceedings.

c) It is noteworthy that in her further Affidavit Ms Dixon only goes so far in paragraph 5 as asserting "a belief" that a complete set of residential plans were discovered by Council. Nowhere in her Affidavit does Ms Dixon depose to the fact that such plans *were in fact* discovered. The Plaintiffs also note that the plans Ms Dixon "believes" were discovered are not exhibited to her Further Affidavit or indeed in any Affidavit filed on behalf of the First Defendant.

3.4 Anshun

The Defendants seek to rely on ***Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR589.*** The principle espoused in that case precludes the raising in later litigation, matters that should have been put in issue in earlier proceedings between the same parties.[30]

Firstly, the Plaintiffs submit that should the Court extend the limitation period as a result of the concealment discussed in 3.1 - 3.3 above the ***Anshun*** issue does not need to be decided.

In order to invoke the principle the Defendant must satisfy the following prerequisite:

> *"in a later proceeding some claim must be made, or some state of fact or law must be alleged or denied, that could have been adjudicated upon in an earlier proceeding at the instance of the party against whom the invocation is sought or his privies."* ***Moreland Finance Corporation v Levine (1990) VR205 per Tadgell J at 209.***

[30] (1981) 147 CLR 589 at 597-598

In the present case, the Defendants have failed to satisfy the prerequisite. The Plaintiffs were in no position to allege in the earlier proceedings, the acts of misfeasance upon which they now rely. The Plaintiffs could hardly have been expected to agitate in the 1988 and 1995 proceedings, issues about which they were clearly ignorant at that time, as a result of the Defendants' ongoing course of concealment, such concealment being manifest in the very proceedings which purport to underpin the foreshadowed *Anshun* application.[31] Furthermore, the fact that the Plaintiff's current claims were not raised in the previous proceedings is clearly indicative of their ignorance of the true facts and circumstances at that time. The pleadings in each of the earlier proceedings are entirely consistent with the Plaintiffs' state of knowledge when those proceedings were instituted and with their present assertion that the true facts had been concealed from them at that time.

3.5 Settlement/Deeds of Release

A principle of construction reading down general words relating to obligations and liabilities is well established in Australia in the context of construing the scope of a release. So much was recently confirmed by Campbell J in *Joshem Property Group Pty Ltd v Malachi Corporation Pty Ltd* [2004] NSWSC 1020; 51 ACSR 346 where his Honour noted (at [15]) that:

> *"[15] One basis upon which the defendant asserts that the plaintiff's claim is not a genuine claim, within the meaning of the definition of "offsetting claim" in s459H(5) of the Corporations Act 2001 (Cth), is that the claim has been released by the releases which are contained in the deed. The releases which are contained in the deed, and in particular those in cl 23, are undoubtedly broad ones. However, as Grant v John Grant & Sons Pty Ltd (1954) 91 CLR 112 makes clear, both at law and in equity general words of release are construed by reference to the circumstances which gave rise to them. Even words in* ***general terms are construed as relating to the dispute which the parties either knew about, or had in mind as being intended to be released.*** *This approach of equity to releases derives from the same strand of principle as does the law of rectification, which seeks to hold parties to the bargain which they intended to make, but no more."* (Emphasis added)

As was noted by Heerey J in *Geoffrey Niels Handberg (in his capacity as administrator of Australian Risk Analysis Pty Ltd v Chacmol Holdings Pty Ltd* [2004] FCA 720 when his Honour applied the principle to construe the scope of an "*all monies clause*" in a deed of charge (at [15] to [16]):

> *"[15]* ***This is a case where the general words of the all monies clause have to be read down and confined to what is the object of the transaction.*** *The applicable principle is stated by the High Court in Grant v John Grant & Sons Pty Ltd (1954) 91 CLR 112.* ***In that case the general words of a release were read down and confined to the matters forming the subject of the disputes which the deed recited.*** *Dixon CH, Fullagar, Kitto and Taylor JJ said at 131:*
>
> > *The question is whether upon a proper interpretation of the deed the general release clause should be restrained to matters in dispute within the meaning of these recitals. The question depends primarily upon the application of the prima facie canon of construction qualifying the general words of a release by reference to particular matters which recitals show to be the occasion of the instrument. But it is also affected by the general tenor of the deed. It is unnecessary to say more about the canon of construction or to discuss further the contents of the deed. As to the first, all that remains is to apply the principle that prima facie the release should be read as confined to the*

[31] see matters discussed at para3.3

matters forming the subject of the disputes which the deed recites. As to the second, such indications as can be found in the provisions of the deed point rather in the same direction. The detailed character of the terms of the settlement, the careful readjustment of rights, the specific reference to the debt of H C Grant and his wife and its discharge and the particularity of the allocation of things and contracts between the companies do not favour the view that a general release was intended going outside the actual area of dispute.

[16] I do not accept the respondents' argument that their Honours were confining themselves to some special rule of construction applicable only to releases. No rational reason was advanced why releases should be different from all other legal instruments in this regard. *Rather Grant is an example of courts construing an instrument as a whole and, in order to give effect to the intention of the parties (objectively determined), reading down general words to give effect to the intention so manifested rather than reading them literally."* (Emphasis added)

In this case, the releases could not be construed to cover the cause of action now sought to be addressed by the plaintiffs. The fact is that the contracting parties did not contemplate or turn their minds to the unlawful sealing issues.

John Middleton SC
Neil Adams C
Baldock Stacy & Niven