

**IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
IN THE COURT OF APPEAL**

Court Number:

BETWEEN:

**GLENN ALEXANDER THOMPSON
& CHERYL MAREE THOMPSON**

Appellant

- and -

MACEDON RANGES SHIRE COUNCIL

First Respondent

- and -

THE COLIBAN REGION WATER AUTHORITY

Second Respondent

NOTICE OF APPEAL

Date of Document: - 21st December 2006

Filed on behalf of: The Appellants

Prepared by: The Appellants.

Tel - 02 63 69 1940

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To;

Macedon Ranges Shire Council.

and

The Coliban Region Water Authority.

TAKE NOTICE that the appellant intends to appeal to the Court of Appeal against;

a/ the whole of the Order of The Honourable Justice Osborn made on 7th December 2006;

b/ the whole of the Costs Order of the Honourable Justice Osborn made on 7th December 2006;
on file number 6321 of 2005.

ORDERS APPEALED FROM;

a/ The Order that the Plaintiffs Appeal be dismissed.

b/ The Order that there be Judgment for the Defendants

c/ The Order that the Plaintiffs pay the Defendants' costs

d/ The Order that the Plaintiffs pay the Defendants' costs on an indemnity basis.

GROUND OF APPEAL

1) Principal Grounds.

- a) It would be wrong and unconscionable of the Defendants to take advantage of the Judgment and Orders made in that the Defendants know full well that the Judgment and Orders made were made as a consequence of erroneous reasons for Judgment;

AND;

- b) The Defendants know full well that his Honours reasons for Judgment are in error and accordingly the Defendants are not entitled to rely on the Judgment and Orders made and are not entitled to assume that the Judgment and Orders of the Court are correct or were rightly made;

IN THAT, inter alia;

- i) In relation to the Woodleigh Heights land the Defendants know full well, inter alia, that the principal determinations of his Honour giving rise to the reasons set out and the orders made are not in accord with the evidence or the law and that they are in specific conflict with and contrary to specific and explicit written submissions jointly made by the Defendants to a previous Court of Record and accordingly the Defendants know full well that the reasons for Judgment are in error and the orders made based on those errors.
- ii) In relation to the Tylden Rd land the Defendants know full well, inter alia, that the principal determination of his Honour giving rise to the reasons and the orders made are in error and not in accord with the evidence in that the First Defendant knows full well that it did give false evidence to the Magistrates Court and did give false evidence in the Supreme Court and both Defendants are fully aware that they did on four separate occasions make false admissions to paragraph 7 of the Statement of Claim and Amended Statement of Claim in the previous Tylden Rd proceeding and did thereby conceal the fact that the section 569E Notice of Requirement referred to in the said paragraph 7 had never been served. The Defendants are also aware of the fact that discovered documents in the Magistrates Court and Supreme Court and the County Court specifically concealed the both the fact of the false evidence and false admissions and the facts concealed by the false evidence and false admissions and accordingly the determination by his Honour that at the time of the said concealment the Plaintiffs were aware of the fact that the notice of requirement referred to in the said paragraph 7 was not served and that the Plaintiffs were aware of the fact of the concealment is known by the Defendants to be wrong and is from the evidence, patently wrong.
- iii) The Defendants were aware of the error of his Honours reasons and were aware of the matters and things set out in paragraph 1)f) hereof and accordingly, at the time the orders were made the Defendants had knowledge for a belief as to the matters and things now set out in paragraph 1)g)i) below.

- c) In relation to Tylden Rd his Honour was in error in determining "there is no answer to the limitations of actions defence" in that his honours reasons as set out in paragraph 143 of his reasons for Judgment are in error because they are dependant upon his Honours errors of fact and law, including specifically a failure by his Honour to properly consider or consider at all paragraph 7 of the Amended Statement of Claim in the previous Tylden Rd proceeding and which errors are referred to elsewhere in this Notice of Appeal.
- d) In relation to Woodleigh Heights, insofar as His Honour determined that there was no answer to the limitations of actions defence his determination was dependant upon his determinations of fact and law in relation to the reticulated water supply and each and every one of those determinations was in error and not in accord with either the evidence or the law and which determinations are in addition and in any event specifically contradicted by the written submission of the Defendants which was made to a previous Court of Record and which errors are referred to elsewhere in this Notice of Appeal.
- e) In relation to the Purported releases his Honour was in error in that:-
- i) His Honour failed to take into account compelling evidence as to the facts and circumstances surrounding the releases.
 - ii) each of the previous proceedings was specifically predicated on the fraudulent misrepresentations of the Defendants.
 - iii) In relation to Tylden Rd the fraudulent misrepresentation was that the Council had served a Notice of Requirement pursuant to section 569E(1) and (1A) of the Local Government Act
 - iv) In relation to Woodleigh Heights it was the fraudulent representation that the subdivision had been completed according to law and accordingly the private reticulated water supply defined in the submission dated 3/11/78 had been completed.
 - v) In the case of Tylden Rd the fraudulent representation was made in evidence in the Magistrates Court and in the Supreme Court.
 - vi) In the case of Woodleigh Heights the representation was made by the act of sealing the plans of cluster subdivision.
 - vii) In reliance, inter alia, upon these representations the Plaintiffs instituted the previous Tylden Rd proceeding and the previous Woodleigh Heights proceeding and in reliance upon these misrepresentations the Plaintiffs pleaded these exact things at paragraph 7 of the previous Tylden Rd proceeding and at paragraph 13 of the previous Woodleigh Heights proceeding.

- viii) Each of these proceedings were settled by what purport to be terms of settlement but each settlement was made while the Plaintiffs continued to rely upon the said misrepresentations and while the Defendants knew that the Plaintiffs continued to so rely and while the Defendants knew them to be false.
- ix) In the case of Tylden Rd the Plaintiffs received \$40,000 which represented a sum equivalent to return of the monies paid by the Plaintiffs to the Defendants pursuant to the bank guarantees plus \$3,500 which represented a small interest portion.
- x) In the case of Woodleigh Heights the plaintiffs received \$20,000 which represented a payment to go away and avoid being bankrupted.
- xi) In neither case can the monies received be construed as representing payment of the losses suffered by the Plaintiffs and even if so construed they represent a miniscule fraction of the losses suffered by the Plaintiffs on the land.
- xii) It has since been discovered that the things pleaded in the said paragraphs 7 and 13 were in fact false and that the true cause of action was concealed from the Plaintiffs at the time of the previous proceedings.

ACCORDINGLY;

- xiii) To the extent that the Defendants have accord and satisfaction the release that the Defendants enjoy is a release from proceedings which were predicated on their specific fraudulent misrepresentations and which release does not and cannot include a release from proceedings which are based upon the facts which were specifically concealed at the time of the purported releases.
- xiv) His Honours reasons in relation to the Tylden Rd release are in error in that at paragraph 104 his Honour wrongly states "..... the County Court proceeding specifically alleged that the Council did not serve or cause to be served on the subdivider any or any proper notice of requirement " and at paragraph 107 his Honour states that the release embraces "any claim based on the contention that no valid notice of requirement was given " and accordingly his Honours specific reasons are wrong and in error because his Honours reasons deny and ignore paragraph 7 of the Statements of Claim in that proceeding and which paragraph is completely at odds with his Honour's statement.
- xv) His Honours reasons in relation to the Woodleigh Heights release are in error in that his Honour states that the release is " clearly intended to extend to new causes of action with respect to any of the aspect of the facts alleged in the settled proceeding" and it is clear that the predicated "facts alleged" in the previous proceeding were not facts, they

were falsehoods, fabrications, thought to be fact by the Plaintiffs but known to be misrepresentations by the Defendants. The Defendants cannot now rely upon the fact of their falsehoods to avoid the consequences of the truth.

xvi) To the extent that there was a subject matter in the previous proceedings that subject matter existed only in the fraud of the Defendants and accordingly the Defendants cannot now claim issue estoppel.

xvii) The subject matter or claims of the previous proceeding, to the extent that it exists outside of fraud, and the subject matter of the previous proceeding are mutually exclusive and cannot and could not be co-pleaded. There is neither issue estoppel, estoppel by record or Anshun estoppel.

xviii) It would be wrong for the Defendants to now avoid a proceeding based in truth because of the fact of previous proceedings based in their fraud.

His Honours reasons are not in accord with either the facts, the evidence or the law.

f) After his Honour's reasons for Judgement were delivered and before his Honour made the Orders of the Court the Plaintiffs made a written submission to the Court as to the wrongness of his Honours reasons. The written submission of the Plaintiffs, inter alia:-

i) Included a copy of page 6 of a written joint submission of the Defendants to a previous Court of Record wherein the Defendants, in the said joint submission, specifically contradicted the findings of his Honour in relation to:-

(1) The Planning Policy or scheme of the First Defendant.

(2) As to the requirement for a reticulated water supply, potable or not, as a precondition to subdivision of the Woodleigh Heights land.

(3) As to whether the Planning Permit required the completion of the water supply and reticulation system described in the submission dated 3/11/78.

ii) Noted that Justice Osborne had, at paragraph 56, omitted to transcribe paragraph 7 of the Amended Statement of Claim in the previous Tylden Rd proceeding and which omitted paragraph by its specific terms was inconsistent with the determination of Justice Osborne as set out in paragraphs 57 and 58 of his reasons.

g) As a consequence of the matters set out in paragraph 1)f) hereof the following grounds of appeal exist:-

i) That Justice Osborn made his orders of 7/12/06;

(1) in full knowledge that his reasons for Judgement were substantially wrong and not in accord with the evidence before him;

OR;

(2) while possessed of knowledge of evidence that ought to have given rise to a belief by him that his reasons for judgment were or may be substantially wrong and not in accord with the evidence;

OR;

(3) while possessed of knowledge of evidence that did give rise to a belief by him that his reasons for Judgement were or may be substantially wrong and not in accord with the evidence;

OR;

(4) that there is reasonable basis for an apprehension that Justice Osborne did make his orders of 7/12/06 in the circumstances set out in either of grounds 1)g)i)1) or 1)g)i)2) or 1)g)i)3).

OR;

(5) that there is reasonable basis for an apprehension that Justice Osborne may have made his orders of 7/12/06 in the circumstances set out in either 1)g)i)1) or 1)g)i)2) or 1)g)i)3).

2) In relation to the Woodleigh Heights Subdivision.

(a) His Honour was in error in his determinations as to the requirements or conditions of Planning Permit 2191 in that his determinations were not in accord with the evidence and in addition were specifically contrary to the written submissions of the Defendants which were jointly made to a previous court of record.

(b) His Honour was in error in his determinations as to potable water and non-potable water in that his determinations were not in accord with the evidence and in addition were specifically contrary to the written submissions of the Defendants which were jointly made to a previous court of record.

(c) His Honour was in error in determining that a reticulated water supply, potable or not, was not a pre-condition of the cluster subdivision of the land in that his determination was not in accord with the evidence and in addition was specifically contrary to the written submissions of the Defendants which were jointly made to a previous court of record.

- (d) His Honour was in error in that each and every determination of his Honour which was dependant upon his determinations as to the conditions of Planning Permit 2191 was in error and not in accord with the evidence.
- (e) His Honour was in error in that each and every determination of his Honour which was dependant upon his determination as to potable water as distinct from non potable water was in error and not in accord with the evidence.
- (f) His Honour was in error in personally raising the issue of the conditions of Planning Permit 2191 without notice and which issue was not in issue between the parties until raised by his Honour.
- (g) His Honour was in error in personally raising the issue of the distinction between potable and non-potable water without notice and which issue was not in issue between the parties until raised by the his Honour.
- (h) His Honour was in error in that the raising of "potable water" as distinct from "non-potable water" obfuscated the issues and facilitated erroneous and wrong determinations and reasons by him and which reasons and determinations were not in accord with the true issues and not in accord with the evidence.
- (i) His Honour was in error in making water engineering determinations which he was neither competent nor qualified to make and which were wrong and not in accord with either the issues or the evidence.
- (j) His Honour was in error in that he confused the "Shire of Kyneton Interim Development Order" with the "Shire of Kyneton Planning Policy" or "Scheme" and then concluding policy matters from the said Development Order.
- (k) His Honour was in error in specifically attributing submissions to the Plaintiffs that which, in fact, were not given or made at all.
- (l) His Honour was in error in not attributing an unlawful or ultra vires status to the purported 1982 water supply agreement and the water supply provided in purported pursuance to that agreement so that each and every one of his determinations which is predicated on the said agreement and supply being lawful is in error and not in accord with the law.
- (m) His Honour was in error in that each and every point made by him in paragraph 181 of his reasons for Judgement, under the heading "Summary with Respect to the Woodleigh Land" is in error and not in accord with the evidence.

- (n) In relation to the remaining determinations and inferences drawn in relation to the Woodleigh Heights land the Appellants refer to the grounds of appeal set out in paragraph 4 hereof.

3) In relation to the Tylden Road subdivision.

- a) His Honour was in error where at paragraph 56 of his reasons for Judgment his Honour transcribed paragraph 20 of the Amended Statement of Claim in the previous Tylden Rd proceeding but omitted to transcribe paragraph 7 of the said Amended Statement of Claim to his paragraph 56. The said paragraph 7 is in specific conflict with and irreconcilable with the conclusions reached by his Honour at paragraphs 57 and 58 and elsewhere in his reasons for Judgment and accordingly his reasons for judgment are not in accord with either the evidence or the facts.
- b) His Honour was in error in that paragraphs 57 and 58 of the his Honour's reasons for Judgment are not consistent with paragraph 54 of the said reasons.
- c) His Honour was in error in finding that the Plaintiffs were aware of the facts in that this finding is not in accord with the evidence.
- d) His Honour was in error in his analysis of the "Book of Pleadings" in that his Honour states at paragraph 118(b) of his reasons that the said document demonstrates that the Plaintiffs were well aware "There was no notice of requirement served or pursued in respect of the original proposal to subdivide ... ;... .." whereas the said document does not either expressly or implicitly say or imply any such thing and which determination by his Honour is in express conflict with the specific pleading in paragraph 7 of the Amended Statement of Claim in the previous Tylden Rd proceeding and which paragraph 7 was admitted to four times by the Defendants and which paragraph 7 was omitted from consideration by his Honour and accordingly the determination of his Honour was not in accord with the evidence before him.
- e) His Honour is in error where at paragraph 182 of his reasons for Judgment his Honour states that insofar as his conclusions are ones of fact, "I have reached such conclusions on the basis of agreed documentary evidence as to the underlying circumstances" whereas this statement by his Honour is simply not true. One example of a most important finding of fact which has no such basis is found at paragraph 101(d) of his Honours reasons for Judgment. This particular finding of fact is based entirely upon his Honours acceptance of the Defendants and his own misconstruction of what was said in the First Plaintiffs Affidavit and a rejection by his Honour of the Plaintiffs submissions on the issue. The "Black Book" being the "discovered document" did not lend itself to reproduction for the purpose of exhibits but was placed on the bar table by the First Plaintiff at the time of making the Plaintiffs' submissions and at lines 20 to 30 of page

163 of the transcript of the second day the Plaintiffs invited anybody, including his Honour, to look at the Black Book and the Plaintiffs submitted that there was no such evidence in the Black Book and then invited the Defendants to look at it. Neither his Honour nor the Defendants looked at the Black Book which was placed on the Bar Table and accordingly his Honour's statement at paragraph 182 is wrong and his critical finding of fact at paragraph 101(d) has no evidentiary basis at all. In addition, paragraph 182 is additionally wrong in that only the fact of the exhibited documents was agreed. The evidence purportedly contained within them or in other words the "documentary evidence" is and was hotly disputed. In relation to paragraph 101(d) the documentary evidence which his Honour did not consider or view does not support his Honours conclusion of fact.

- f) In relation to the remaining determinations and inferences drawn by his Honour in relation to the Woodleigh Heights land the Appellants refer to the further grounds of appeal set out in paragraph 4 hereof.

4) In Relation to the matters generally.

- a) That Justice Osborn's reasons for Judgement are in error and not in accord with the evidence and/or the law, in that;
 - i) Paragraph 2(a) is contradicted by and/or not consistent with paragraphs 13 and 53.
 - ii) Paragraph 2(a) is not in accord with the evidence.
 - iii) Paragraph 2(b) is contradicted by and or not consistent with paragraphs 19, 63, 64 and 177.
 - iv) Paragraph 2(b) is not in accord with the evidence.
 - v) Each of paragraphs 5, 6, 10, 14, 18, 20, 56, 57, 58, 59, 60, 61, 62, 65, 73, 81, 82, 96(a), 96(c), 97, 101(a), 101(b), 101(c), 101(d), 101(e), 102(a), 102(b), 102(c) 102(d) 102(e), 102(f), 103, 104, 107, 115(c), 116, 117, 118(d), 119, 120, 125, 126, 127, 128, 129, 130, 138, 138(a), 138(b), 138(c) 139, 140, 141, 143, 144, 147, 148, 151, 152, 154, 155, 157, 160, 161, 162, 163(a), 163(b), 163(c), 163(d), 163(e), 164, 165, 167, 168, 169, 172, 173, 174, 177, 178, 179, 180, 181(a), 181(b) 181(c), 181(d), 181(e), 181(f), 181(g), 181(h) and 182 of Justice Osborn's written reasons for Judgement each contain either statements of fact, conclusions, statements of law, and inferences which are either or all of not in accord with the evidence, facts or law. By way of brief example;
 - (1) Justice Osborn's understanding of the law at paragraph 52 is wrong and not consistent with the law as stated at paragraph 53. There is no requirement endorsed on a plan of subdivision. The only endorsement is as to the fact of the requirement.

- (2) Paragraph 56 is wrong and misleading because it omits to transcribe paragraph 7 of the Amended Statement of Claim referred to.
- (3) Paragraph 57 is contradicted by and/or not consistent with paragraph 54 and relies upon the omission referred to in relation to paragraph 56.
- (4) Paragraph 58 is contradicted by and/or not consistent with paragraph 54 and relies upon the omission referred to in relation to paragraph 56.
- (5) Paragraph 59 is contradicted by and/or not consistent with paragraph 54 and relies upon the omission referred to in relation to paragraph 56.
- (6) Each of paragraphs 69, 81, 147, 152, 163(a), 169, 170, 171, 181(b), 181(c), 181(d) and each of footnotes 9 and 46 are in error in that they are wrong and misleading because each of these paragraphs and footnotes contains references to "potable" or "not potable" water and there is no evidence that such a distinction is relevant at all.
- (7) Footnote 11 is wrong as no such submission was given by the Plaintiffs.
- (8) Paragraph 97(a) is wrong. The Plaintiffs made no such submission.
- (9) Paragraph 104 is contradicted by and/or not consistent with paragraph 54 and relies upon the omission referred to in relation to paragraph 56.
- (10) Paragraph 107 relies upon the assertion that the previous Tylden Rd proceeding alleges as set out in paragraphs 56 and 58 and elsewhere. Paragraph 107 therefore fails for the same reasons as paragraphs 56 and 58 and in particular the omission referred to in relation to paragraph 56 and additionally paragraph 107 is contradicted by and/or not consistent with paragraph 54.
- (11) Paragraph 115(c) is expressly wrong.
- (12) Paragraph 116 relies upon paragraphs 56, 57, 58, 59, 104, 107 and 115 and therefore suffers from the same deficiency as those paragraphs.
- (13) Paragraph 130 includes an implied assertion by Justice Osborn that the Plaintiffs were aware that the First Defendant had lied to the Magistrates Court and the Supreme Court and had falsified documents for the purpose of misleading the Courts and concealing the facts. Paragraph 130 also includes an implied assertion that at the time of the County Court proceeding the Plaintiffs were aware that both Defendants had made false admissions in relation to paragraph 7 of the Statement of Claim and Amended Statement of Claim and which paragraph, significantly, is the paragraph which is

referred to above in relation to paragraphs 56, 57, 58, 59, 104, 107 and 116 of his Honours reasons. Both of these implied assertions are wrong.

- (14) Paragraph 138(a) is inconsistent with paragraph 118(d) and vice versa.
- (15) Paragraph 157 is specifically contradicted by the plaintiffs' submission as noted at footnote 48 and by the Joint Submission of both Defendants to a different Court of Record.
- (16) Paragraph 166 omits relevant clauses of the agreement referred to.
- (17) Paragraph 167 is wrong and supercilious, the Plaintiffs made no such submission. The Plaintiffs specifically and unequivocally alleged that the said agreement was unlawful and the Plaintiffs made no reference whatever to either potable or not potable.
- (18) Paragraph 174 is specifically contradicted by paragraph 153 and vice versa.
- (19) At paragraph 168 of his reasons for Judgment Justice Osborn made determinations on questions of water engineering which he was not qualified to make and which in addition are wrong and not in accord with either the evidence or the issues.

5) In relation to estoppel by record, or *Anshun* estoppel.

- a) His Honour was in error in that paragraphs 2(a) and 2(b) of his Honours reasons assert that the present proceeding re-litigates the previous proceedings whereas paragraph 183 of his Honours reasons asserts that he has not considered the question of estoppel by record or *Anshun*.
- b) His Honour was in error in that his reasons for judgment in relation to Woodleigh Heights rely upon determinations by him which are not in accord with the evidence and not in accord with the written submissions previously made by the Defendants to a previous Court of Record and accordingly on the evidence and on the said previous submissions of the Defendants the Plaintiffs' allegations as to statutory fraud and fraudulent conduct thereafter are "otherwise arguable" and accordingly as stated in paragraph 183 of his Honours reasons he would have hesitated to conclude that there was no arguable case to go to trial.
- c) His Honour was in error in that his reasons for Judgment in relation to Tylden Rd rely upon determinations made by him which are not in accord with the evidence and not in accord with paragraph 7 of the previous Tylden Rd proceedings and not in accord with the fact of the false evidence given in the Magistrates Court and the Supreme Court and not in accord with the specifically false admissions by both defendants to the said paragraph 7 and therefore not in

accord with the evidence before him and accordingly on the evidence the Plaintiffs' allegations as to statutory fraud and fraudulent conduct thereafter are "otherwise arguable" and accordingly as stated in paragraph 183 of his Honours reasons he would have hesitated to conclude that there was no arguable case to go to trial.

- d) His Honour was in error in not considering the issues of estoppel by record and/or Anshun estoppel in that his Honours reasons for not considering these issues are in error and not in accord with the evidence and that if his Honour had considered these issues he may have found that the predicated allegation of the previous proceedings were specifically based upon the false representations of the Defendants and that the Defendants continued to conceal the falsity of those representations by mounting sham defences including false admissions in each of the previous proceedings as was detailed in paragraphs 63 to 68 inclusive of part 1 of the Plaintiffs written submissions to his Honour and accordingly the subject matters of the previous and present proceedings are mutually exclusive and neither issue estoppel or Anshun apply to bar the Plaintiffs' present proceedings.
- e) His Honour was in error in not finding that neither issue estoppel or Anshun apply to bar the Plaintiffs' present proceeding as each of the previous proceedings was predicated on the specific misrepresentations of the Defendants and in relation to each of the previous proceedings the Defendants ran sham Defences which concealed the true facts from both the Courts and the Plaintiffs whereas the present proceeding is specifically predicated upon the facts which were previously concealed by the Defendants and accordingly the subject matter of the present proceeding is the antithesis of the subject matter of the previous proceedings and neither issue estoppel or Anshun can be applied against the Plaintiffs.

6) In relation to the purported releases.

- a) In relation to Tylden Rd his Honours reasons at paragraph 104 are in error in that;
 - i) in the said paragraph 104 his Honour states "... .. the amended statement of claim of May 1991 in the County Court proceeding specifically alleged that the Council did not serve or cause to be served on the subdivider any or any proper notice of requirements", whereas the plain fact is that paragraph 7 of the said amended statement of claim clearly and unequivocally alleges that on or about 20th February 1980 the Council did serve a Notice of Requirement.
 - ii) On any reading of the said amended statement of claim at paragraphs 7 the said amended statement of claim plainly alleges that on or about 20th February 1980 the Council served a Notice of Requirement requiring the construction of roads and the and the obtaining of a

statement from the water board and at paragraph 20 it plainly and separately alleges that there was no or no proper or sufficient requirement providing for the giving and receiving of the bank guarantees.

iii) Paragraph 104 of his Honours reasons relies upon denial and omission of paragraph 7 and a misconstruction of paragraph 20 of the said amended statement of claim. Accordingly his reasons as to the release in relation to Tylden Road are in error and not in accord with the evidence and are in fact dependant upon his Honour's omission and ignore of the said paragraph 7 from consideration and a misconstruction of paragraph 20 and to quote paragraph 20 in isolation and out of context.

b) In relation to both Tylden Rd and Woodleigh Heights his Honour is in error of law in that;

i) at paragraph 176 his Honour correctly says in relation to releases that they extend, where the wording permits, 'to new causes of action with respect to any of the facts alleged in the settled proceeding'.

ii) The critical words here are "the facts alleged" because in each of the previous proceedings the supposed "facts alleged" were not facts, they were allegations based upon the fraudulent misrepresentations of the Defendants and which at the time of the previous proceedings were thought by the Plaintiffs to be facts but which were known by the Defendants to be falsehoods.

iii) In the case of Tylden Rd the supposed fact which was alleged is found at paragraph 7 of the previous statements of claim and was an allegation that on or about the 20th February 1980 the Council had served a Notice of Requirement.

iv) in the case of Woodleigh Heights the supposed facts alleged are at paragraph 13 and were that the private water supply and reticulation system had been completed.

v) The supposed facts are not facts at all. They are falsehoods which were known only to the Defendants. Even if facts they and the facts pleaded in the present proceeding are mutually exclusive and a release from one cannot include its antithesis.

7) In relation to the conduct of the hearing.

a) His Honour was in error in personally raising issues which were not in issue between the parties and then determining the issues raised by him against the Plaintiffs and then determining the matter, at least in part, on those issues raised by him.

b) His Honour was in error in determining triable issues and in additional error in determining those triable issues after assuring the Plaintiffs that they would not be determined at that time,

and determined them without hearing submissions on the issues. One such issue was the construction of the Planning Permit which his Honour summarily determined. In relation to this the following exchange took place between his Honour and the First Plaintiff at pages 108 and 109 of the transcript of the second day;

- i) HIS HONOUR: Yes, that's not what I was putting to you Mr Thompson. You say it was in breach of the planning permit because - as I understand it, because there was no articulated water supply.
 - ii) MR THOMPSON: Yes. Yes, that's correct.
 - iii) HIS HONOUR: Yes.
 - iv) MR THOMPSON: It was in breach of the planning permit.
 - v) HIS HONOUR: That's what you say.
 - vi) MR THOMPSON: Yes.
 - vii) HIS HONOUR: Yes, and it depends on construction of the planning permit as to whether that's right, but that's not the sort of question that would be resolved at this stage.
 - viii) MR THOMPSON: No, that's quite right, and I understand that.
- c) From the transcript and from the reasons for Judgement and from the facts and circumstances precedent and which facts and circumstances includes the conduct of Counsel and Solicitors as detailed in the Plaintiffs written submissions to his Honour there are grounds for a reasonable public belief or public apprehension that;
- i) His Honour was biased against the Plaintiffs.
 - ii) His Honour was prejudiced against the Plaintiffs.
 - iii) His Honour pre-determined the matter.
 - iv) Justice was not done.

8) Orders sought.

- a) That the Plaintiffs appeal from the Orders of Master Efthim be allowed.
- b) That the applications by the Defendants be dismissed.
- c) That the Defendants pay the costs of the Plaintiffs.
- d) Such other orders as this Honourable Court deems appropriate.

Glenn Thompson