

amended the requirement, the Council did so without power.

51 The above decision carefully articulates the primary bases upon which it can be said the Council acted irregularly both with respect to purporting to impose guarantee obligations upon the plaintiffs and in purporting to assert continuing underlying obligations with respect to the construction of the roads after the sealing of the plans of subdivision.

52 Significantly Kaye J held that it is the performance of an obligation with respect to the provision of roads or services which is endorsed on the plan of subdivision and the subject of notice served upon him, which the owner is obliged to discharge. I respectfully agree. The plaintiffs now draw attention to the fact that his Honour's decision proceeded on the basis that lawful notices of requirement had been issued with respect to the construction of roads and the provision of water supply on 20 February 1980. Evidence obtained in the course of subsequent proceedings demonstrates this was not the fact.

53 The decision of Kaye J was the fount of subsequent proceedings. Thereafter in reliance upon his Honour's reasoning, the plaintiffs instituted proceedings in the County Court seeking damages from the defendants:

- in respect of moneys previously paid to both the Council and the second defendant ("the Water Board") pursuant to guarantees unlawfully obtained from the plaintiffs for the cost of the construction of subdivisional roads and provision of water supply to the Tylden land; and
- in respect of consequential loss said to have been suffered as a result of the sale of the residential component of the Tylden land.

The Tylden Land Proceeding

54 The statement of claim in the County Court proceeding was amended in May 1991 to plead in further detail the statutory processes of subdivision undertaken by the

Council.⁷ In particular it was pleaded that an initial notice of intention to subdivide the whole of the Tylden land was initially given on or about 12 February 1980 by Buchanan, the subdivider. Thereafter Buchanan gave a further four notices of intention to subdivide on 4 March 1980. On or about 20 February 1980 the Council had served a requirement pursuant to s.559E(1) and (1A) in respect of the construction of road works and the obtaining of a statement from the Water Board that an agreement had been entered into to make provision for water supply. On 21 May 1980 the Council sealed seven separate plans of subdivision relating to the Tylden land.

55 Thereafter it was alleged that in or about October 1980 the plaintiffs provided a bank guarantee of \$25,000 in respect of moneys which might become payable by the plaintiffs to the Council in connection with the subdivision of the land. In or about November 1980 the Council withdrew the requirement on the land with respect to the provision of such a guarantee and notified the Registrar of Titles in accordance with the withdrawal. The Registrar then approved the plans of subdivision.

56 The amended statement of claim then alleges:

"In the premises, the firstnamed defendant was not entitled to retain and/or call up the first bank guarantee either pursuant to section 569E, or at all, for the following reasons:

- (a) that it failed to comply properly or at all with the provisions of s.569 and s.569E in that:
 - (i) *there was no or no proper or sufficient notices given by the subdivider, pursuant to section 569(1) of the LGA; (my emphasis)*
 - (ii) The plans of subdivision sealed by the firstnamed defendant in relation to the land contravened:
 - A. section 569A(1)(a) in that each of them did not show at all, or distinctly all allotments into which the land was to be subdivided marked with distinct numbers or symbols;

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B. *section 569A(1)(c) in that plans 79305E, 79305F, 79305G, and 79305H did not show at all or show distinctly all new streets, roads, lanes or passages proposed to be made or laid out; (my emphasis)*

- (iii) *the firstnamed defendant did not serve or cause to be served on the subdivider any, or any proper or sufficient 'requirements' within the meaning of section 569E(3)(b); (my emphasis)*
 - (iv) *the firstnamed defendant did not retain copies of any or all of the purposed 'requirements', nor did it keep at all or sufficiently, at its offices (or anywhere else) an up to date summary in writing of all actions taken pursuant to s.569E in respect of the requirements - thus contravening s.569E(3)(c);*
 - (v) *the purported 'requirements' had been withdrawn by the firstnamed defendant within the meaning of s. 569E(3)(ca);*
 - (vi) *that in contravention of section 569E(3)(d) the firstnamed 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, when such requirement or requirements had not been complied with and the firstnamed defendant knew that such requirement or requirements had not been complied with;*
- (b) *there was no other valid and/or enforceable basis or ground upon which the firstnamed defendant could retain and/or call up the first bank guarantee."*

57 This pleading is manifestly inconsistent with the assertions made in the firstnamed plaintiff's primary affidavit⁸ that:

"The Tylden Road proceeding was predicated upon the belief that the Council had:-

- (i) lawfully sealed the plans of subdivision; and
- (ii) lawfully issued notices of requirement in respect to the construction of roads and the construction of water works."

58 It may be that the Tylden Road proceeding was issued with these assumptions that the Council had acted lawfully, but the amended statement of claim specifically alleged that the plans were not lawfully sealed and lawful notices of requirement

⁸ Sworn 18 October 2005.

were not issued.

59 It is further to be observed from the allegations emphasised in the quotation above that this pleading specifically alleged that:

- (a) the subdivider gave no or no proper notices pursuant to s.569(1) of the *Local Government Act* with respect to the plans of subdivision ultimately sealed and certified;
- (b) such plans including Plan 79305G did not show all the new roads proposed to be made or laid out;
- (c) the Council did not serve *any or any proper* "requirements" upon the subdivider;
- (d) the Council did not retain copies of purported "requirements".

60 Each of these allegations forms part of the subject-matter which the plaintiffs now wish to revive. The critical allegation now relied on is that the Council did not serve proper "requirements". The plaintiffs' awareness of this fact is now said to have been triggered by the recent realisation that plan 79305G did not show all the roads proposed to be laid out and may have been deliberately "clipped" when produced in evidence in the Magistrates' Court. The underlying facts (other than the clipping) were squarely pleaded in 1991.

61 The amended statement of claim went on to allege that the plaintiffs not only suffered the loss of the guarantee in the sum of \$25,000 but that this expense resulted in the forced sale of 15 residential allotments comprised in the Tylden land. The plaintiffs purchased 15 of 18 lots in the subdivision in December 1980 for the sum of \$92,000. The 15 lots were on-sold for a total sum of \$100,000 in April 1983 and the proceeds (presumably the net proceeds) were expended upon the construction by the Council of a road. Subsequently the purchaser, Chelmantau Pty Ltd, on-sold the allotments and achieved a total return of \$269,050 for 12 of the 15 allotments by 1987. The plaintiffs accordingly claimed a loss of profit in the region of \$200,000. It is this same loss of profit which they now wish to claim again. It is again calculated by reference to the differential between the price achieved by the plaintiffs and that achieved by Chelmantau.