

**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

OUTLINE OF SUBMISSIONS ON BEHALF OF THE FIRST DEFENDANT

Date of document: 9 November 2005

Filed on behalf of: The First Defendant

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Attention: Michelle Dixon

A. INTRODUCTION

1. In these submissions, the first defendant and the second defendant are referred to as the "**Council**" and the "**Water Authority**" respectively.
2. The primary relief sought in the Council's summons filed 23 September 2005 is an order for summary judgment against the plaintiffs. In the event that the application for summary judgment is not successful, the Council seeks an order for security for costs against the plaintiffs.
3. The orders sought in the summons are in the following terms:
 - (a) That judgment be entered for the Council against the plaintiffs pursuant to Rule 23.03.

(b) That judgment be entered for the Council against the plaintiffs, alternatively the proceeding be permanently stayed:

(i) pursuant to Rule 23.01;

(ii) alternatively, in the inherent jurisdiction of the Court,

on the basis, that the proceeding is scandalous, frivolous or vexatious and an abuse of the process of the Court.

(c) Alternatively, in the event judgment is not entered in the proceeding or the proceeding permanently stayed, an order:

(i) that the plaintiffs in the inherent jurisdiction of the Court, alternatively pursuant to Rule 62.02(1)(a), provide security for the Council's costs to trial of this proceeding in an amount of \$162,000.00 or such other amount as may be fixed by the Court;

(ii) that the proceeding be permanently stayed as against the Council unless the plaintiffs provide security for the Council's costs of this proceeding to trial in the amount of \$162,000.00 or such other amount as may be fixed by the Court within 14 days of such security being ordered by the Court.

(d) That the plaintiffs pay the Council's costs of and incidental to the proceeding and of this application on an indemnity basis.

4. In seeking these orders, the Council relies upon:

(a) the "long" affidavit of Michelle Elizabeth Dixon sworn 23 September 2005 ("the first Dixon summary judgment affidavit");

(b) the "shorter" affidavit of Michelle Elizabeth Dixon sworn 23 September 2005 ("the Dixon security for costs affidavit");

(c) the affidavit of Michelle Elizabeth Dixon sworn 28 October 2005 ("the second Dixon summary judgment affidavit").

5. In opposing these orders, the plaintiffs rely upon:

- (a) the "long" affidavit of Glenn Alexander Thompson sworn 18 October 2005 ("the Thompson summary judgment affidavit");
- (b) the "shorter" affidavit of Glenn Alexander Thompson sworn 18 October 2005 ("the Thompson security for costs affidavit");
- (c) the "second" affidavit of Glenn Alexander Thompson sworn 7 November 2005 ("Thompson 2"); and
- (d) the "third" affidavit of Glenn Alexander Thompson sworn 7 November 2005 ("Thompson 3").

B. SUMMARY JUDGMENT – GROUNDS FOR RELIEF SOUGHT

6. The Council seeks judgment against the plaintiffs pursuant to Rule 23.03, alternatively pursuant to Rule 23.01. In each case the grounds upon which the Council relies are as follows:

- (a) the plaintiffs seek to agitate issues which were:
 - (i) raised and resolved upon settlement of earlier proceedings between the plaintiffs and the Council;
 - (ii) the subject of releases in favour of the Council at the time of settlement of such earlier proceedings;
- (b) to the extent any of the claims made are "fresh" claims or claims not released at settlement of the earlier proceedings the claims are so closely connected with the subject matter of those proceedings that they should have been

raised in them. Applying *Port of Melbourne Authority v Anshun*¹ it is not open to the plaintiffs to now bring such claims; and

(c) the plaintiffs' claims are manifestly statute barred.

7. Rule 23.03 entitles a defendant who has a good defence on the merits to obtain summary judgment against a plaintiff. This case is such a case so far as the position of the Council is concerned. Rule 23.01(1) is relied upon by the Council in the alternative. On such an application, the Court may consider both the pleading and evidence. The Rule is an appropriate one to be relied upon where, as here, there is a clear defence under the Limitation of Actions Act 1958². Leaving pleading deficiencies to one side, the proceeding constituted by the amended statement of claim is scandalous, frivolous and vexatious and is an abuse of the process of the Court. To permit the case to go forward in light of the matters identified in paragraph 6, developed below, would be to permit injustice and unfairness to the Council to be perpetrated via the legal process. That is the abuse which the rule is designed to counter and this case is one which calls for the timely exercise of the power³. As the Council is entitled to judgment in reliance upon Rule 23.03 so to is it entitled to judgment pursuant to Rule 23.01(1).

8. Whilst a Court will be wary to shut out a bona fide claim on a pleading or interlocutory application the fact that the transaction is intricate will not disentitle the Court from seeing whether the proceeding amounts to an abuse of process or is vexatious.⁴ Further, on an application for summary judgment pursuant to Rule 23.03 the merits of the case are critical. If the defendant establishes it has a good defence on the merits as the Council does here then the case must stand dismissed. The case can be permitted to go no further when as here it is inevitable that at trial the Court would find for the Council⁵.

9. It is important to note at the outset, that the fact that lengthy affidavit material has been filed and served by the parties is neither determinative of the outcome nor

¹ (1981) 147 CLR 589.

² See *Riches v DPP* [1973] 2 All ER 935; *Ronex Properties Pty Ltd v John Laing Construction Ltd* [1983] QB 398; *Callinan v Western Australian Newspapers Ltd* [1988] WAR 212.

³ See *State Bank of NSW v Stanhouse Ltd* (1997) Aust Torts Rep 81-423 at 64,086 per Giles CJ.

⁴ *Day v Victorian Railway Commissioners* (1948) 78 CLR 62 at 92 per Dixon CJ.

⁵ *Camberfield Pty Ltd v Klapanis* [2004] VSCA 104.

indicative of any particular result. The fact that the amended pleading is itself difficult to follow and the affidavit evidence relatively extensive does not mean that the case is one where the Council has a good defence on the merits. Whilst two days have been set aside to deal with the matter the High Court has acknowledged that it may be necessary to undertake argument of an extensive kind in order to discern whether a party has a good claim or defence on the merits. Better to spend two days now than many dollars upon interlocutory matters and a lengthy trial all for nought.⁶

10. Each of the grounds that are set out in paragraph 6 above are considered in turn.

C. PLAINTIFFS SEEK TO LITIGATE ISSUES THE SUBJECT OF EARLIER PROCEEDINGS

(a) Claims made in the present proceeding

11. The plaintiffs make two claims against the Council. The first relates to parcels of land described as the "Tylden Road land". The Tylden Road land is comprised of land described as "Residential land" and land described as "Industrial land". The second claim relates to parcels of land described in the statement of claim as the "Woodleigh Heights land".
12. The allegation made by the plaintiffs against the Council is a claim in tort. In each claim it is said that the Council engaged in misfeasance in public office. Following the decision in *Northern Territory v Mengel*⁷ the circumstances in which such a claim in tort will be successfully made out are very narrow. As the majority held in *Mengel*, misfeasance in public office is a "deliberate tort".⁸ Deane J identified the elements of the tort:

*"Its elements are: (i) an invalid or unauthorised act; (ii) done maliciously; (iii) by a public officer; (iv) in the purported discharge of his or her public duty; (v) which causes loss or harm to the plaintiff."*⁹

⁶ See Barwick CJ in *General Steel Industries v Cmr for Railways (NSW)* (1964) 112 CLR 125 at p 130.

⁷ (1995) 185 CLR 307.

⁸ (1995) 185 CLR 304 at 345; 129 ALR 1; applied in *Grimwade v Victoria* (1997) Aust Torts Reps 81-422 at 64,074 per Harper J.

⁹ At 345.

13. The nature of the plaintiffs' claim means there is a heavy onus of proof upon the plaintiffs at trial. The plaintiffs must establish a "deliberate and dishonest abuse of power"¹⁰. The public officer here, the now deceased Porter, must be shown to have acted in bad faith.¹¹ That is, to have committed the unlawful acts complained of with improper motive.¹² To establish the tort, either malice or knowledge of the absence of power (including reckless indifference as to the extent of power but not constructive knowledge of the absence of power)¹³ must be pleaded and proved. As has been noted in the House of Lords in *Three Rivers*, the case law reveals "two different forms of liability for misfeasance in public office".¹⁴ One is "targeted malice" conduct specifically intended to injure a person or persons, here that would need to be conduct on the part of Porter specifically intended to injure the plaintiffs¹⁵. The other is found where a public officer, here said to be Porter, acts knowing that he or she has no power to do the act complained of and that the act will probably injure the plaintiffs¹⁶.

14. In *Mengel*, Brennan J concluded that:

*Malice, knowledge and reckless indifference are states of mind that stamp on a purported but invalid exercise of power the character of abuse of or misfeasance in public office. If the impugned conduct then causes injury, the cause of action is complete.*¹⁷

On the plaintiffs' case as pleaded, the causes of action were complete in 1980 in the case of the Tylden Road industrial land¹⁸, in 1983 in the case of the Tylden Road residential land¹⁹ and in 1984 in the case of the Woodleigh Heights land²⁰.

15. This case seeks to agitate claims based upon an intentional tort for the most part said to be committed by a person now deceased, the causes of action for which were all complete more than twenty years ago. It seeks to make such serious allegations more than twenty five years after most of the events to which the complaints relate.

¹⁰ *Three Rivers* [2000] 3 All ER 1 at 8; [2000] 2 WLR 1220 at 1231 per Lord Steyn citing [2000] 2 WLR 15 at 67C-D (majority Court of Appeal).

¹¹ See Lord Hutton in *Three Rivers* [2000] 3 All ER 1; [2000] 2 WLR 1220.

¹² *Three Rivers* [2000] 3 All ER 1 at 34-5; [2000] 2 WLR 1220 at 1259 per Lord Hutton.

¹³ *Mengel* (1995) 185 CLR 307 at 346, 357, 359; discussed by Kneebone, above n 19, at 131.

¹⁴ See Lord Steyn [2000] 3 All ER 1 at 8; [2000] 2 WLR 1220 at 1231.

¹⁵ In this case the bad faith is the improper or ulterior motive.

¹⁶ In this case the bad faith is the lack of an honest belief that the act is lawful.

¹⁷ (1995) 185 CLR 307 at 357; 129 ALR 1.

¹⁸ Particulars of Loss and Damage page 34.

¹⁹ Particulars of Loss and Damage page 35.

²⁰ Paragraph D5 of the original Statement of Claim, page 36 of the amended document.

Simply wrong

The plaintiffs in 2005 rely upon the same facts pleaded in earlier proceedings brought by them long since compromised and the subject of releases in the Council's favour. It is difficult to conceive of a case which more clearly exhibits the hallmarks of an abuse of process, one appropriate for summary disposition.

(b) The prior Tylden Road proceeding

16. This is not the first claim in tort brought by these plaintiffs against the Council concerning the Tylden Road Residential land. That land and essentially the same facts relied upon here was the subject of County Court proceedings commenced by the plaintiffs in 1988 against the Council and the Water Authority ("the prior Tylden Road proceeding").²¹
17. The comparative table set out in paragraph 22 of the first Dixon summary judgment affidavit shows quite clearly that allegations of fact made in the prior Tylden Road proceeding are the same allegations sought to be relied upon by the plaintiffs in this proceeding to constitute the cause of action relied upon and for the relief sought.
18. In the prior Tylden Road land proceeding the plaintiffs claimed "consequential" loss and damage arising from the sale of the Residential land component of the Tylden Road land.²² In the current proceeding, the plaintiffs claim the same consequential loss and damage.²³ The particulars of such consequential loss and damage provided by the plaintiffs in both the prior Tylden Road proceeding and the current proceedings are substantially the same.²⁴
19. The plaintiffs have purported to file and serve an amended statement of claim pursuant to Rule 36.03 dated 4 November 2005. The amendments relate to particulars of loss and damage. In respect of the claims relating to the Tylden Road land, the amended particulars concern the Residential land only. Whilst the amended particulars seek to explain why the residential allotments were allegedly sold at less than market value, the plaintiffs' alleged loss and damage in respect of the Residential land remains unchanged from that alleged in the prior Tylden Road proceeding.

²¹ See paras 10 and 15-21 of the first Dixon summary judgment affidavit

²² See paras 25 to 27 of the first Dixon summary judgment affidavit

20. As discussed below, the prior Tylden Road proceeding was compromised in 1991. It is a clear abuse of process to seek to bring a second claim in 2005 which relies upon the same facts and alleges the same damage as the earlier compromised proceeding.

(c) the prior Woodleigh Heights proceeding

21. The Woodleigh Heights land has also been the subject of previous proceedings. In 1995, the Plaintiff commenced proceedings in the Supreme Court against the Council, the Authority and two individuals in respect of the Woodleigh Heights land ("the prior Woodleigh Heights proceeding").²⁵ Fraud was alleged by Mr Thompson against the Council in that proceeding. It is noteworthy that Mr Thompson now concedes that he made the allegation of fraud in that proceeding in circumstances where he *"could not say or demonstrate what the fraud was or who was responsible for it"*²⁶.
22. The comparative table in paragraph 45 of the first Dixon summary judgment affidavit clearly shows that allegations of fact made in the prior Woodleigh Heights proceeding are now sought to be advanced again in the present proceeding. Like the prior Tylden Road proceeding, the prior Woodleigh Heights claims included claims founded in tort.
23. The amended statement of claim contains amended particulars of loss and damage in respect of the Woodleigh Heights land. The amended particulars set out the basis upon which the plaintiffs' alleged loss is to be calculated. A similar, if not identical basis, was adopted by the plaintiffs in the particulars of loss and damage in the prior Woodleigh Heights proceeding.²⁷
24. As discussed below, the prior Woodleigh Heights proceeding was settled in 1999. The plaintiffs instituted that claim in 1995 and settled it in 1999. It is not open to them to bring a second proceeding based on the same facts and alleging the same

²³ See para 30 of the first Dixon summary judgment affidavit

²⁴ See paras 25, 26 and 30 of the first Dixon summary judgment affidavit

²⁵ See paras 34 to 37 of the first Dixon summary judgment affidavit and tabs 16 to 30 of the exhibits folder

²⁶ See para 50(a) of the Thompson summary judgment affidavit.

²⁷ See paras 50 and 51 of the first Dixon summary judgment affidavit.

damage ten years after the first proceeding was instituted and six years after it was compromised.

(d) The Tylden Road industrial land

25. The claims made in the present proceeding in respect of the Tylden Road land relate to both the residential land and the industrial land. The Council acknowledges²⁸ that the prior Tylden Road proceeding only related to the residential land.
26. What precludes the making of the industrial land claim is first, that it is so closely connected with the prior Tylden Road Proceeding that the plaintiffs are estopped from bringing a later separate proceeding, second, that it is manifestly statute barred. Both issues are further discussed below.

(e) Release from claims in the Prior Tylden Road Proceeding

27. As earlier noted, the claims made by the plaintiffs against the Council and the Water Authority in the prior Tylden Road proceeding were settled on the terms contained in signed Terms of Settlement dated 14 June 1991.²⁹
28. The plaintiffs can not succeed in respect of the Tylden Road residential land claims in this proceeding. The release contained in the earlier proceeding is a complete answer.
29. Clauses 1 and 5 of the Terms of Settlement are in the following terms:

"1. *The Defendants jointly and severally agree to pay the plaintiffs' solicitors on behalf of the plaintiffs the sum of \$40,000 together with costs as agreed or in default of agreement as taxed and the plaintiffs agree to accept the said sum in full settlement of the proceedings herein.*

5. *Subject to the Defendants' performance of these Terms of Settlement, the plaintiffs release the Defendants from all claims, suits and demands whatsoever the subject matter of this proceeding.* [emphasis added]

²⁸ Paragraph 15 of the first Dixon summary judgment affidavit

²⁹ See para 31 of the first Dixon summary judgment affidavit and tab 14 of the exhibit folder

30. The "subject matter" of the prior Tylden Road proceeding was the residential land component of the Tylden Road land, the complaints made by the plaintiffs against the Council allege tortious behaviour causing loss to them concerning such land. By reason of the fact of the settlement and the terms of the 1991 release, the plaintiffs cannot make the tortious claim in the current proceeding in respect of the same residential land.
- Settlement obtained by fraud and not disclosure*

(f) Releases from claims in the prior Woodleigh Heights proceeding

31. The claims made by the plaintiffs against the Defendants in the prior Woodleigh Heights proceeding were settled on the terms contained in signed Terms of Settlement dated 29 July 1999.³⁰

32. By the 1999 Terms of Settlement:

(a) the Defendants agreed to pay \$25,000 to the plaintiffs;

(b) the parties provided mutual releases as follows:

"The plaintiffs and the Defendants agree to release each other from all actions, suits, demands and costs arising out of, or in any way related to the subject matter of the proceedings."

33. The plaintiffs unsuccessfully contested the enforceability of the 1999 Terms of Settlement. In *Thompson v Macedon Ranges Shire Council*³¹, Beach J declared that "the terms of settlement of these proceedings dated 29 July 1999 and executed by or on behalf of the parties herein ought be specifically performed."³²

34. The "subject matter" of the prior Woodleigh Heights proceeding was the Woodleigh Heights land. The 1991 terms of settlement are a complete defence to the plaintiffs' claims concerning the Woodleigh Heights land. By reason of the fact of the settlement and the terms of the 1991 release, the plaintiffs are precluded from making the claims they now seek to advance concerning the Woodleigh Heights land.

³⁰ See para 53 of the first Dixon summary judgment affidavit and tab 29 of the exhibit folder
³¹ [1999] VSC 338

³² See para 55 of the first Dixon summary judgment affidavit and tab 31 of the exhibit folder

(g) The Tylden Road industrial land: Anshun estoppel

35. The plaintiffs have not previously sought relief in respect of or sued the Council concerning the Tylden Road industrial land. However, the subject matter of the present Tylden Road industrial land claim is so closely connected with the subject matter of the prior Tylden Road proceeding that, if they wished to sue, the Plaintiffs should have done so in that action. That is, in 1988. They are estopped from doing so now³³. With the exercise of reasonable diligence, they could have brought such a claim in 1989 or, at the latest, 1991³⁴. As much is plain from Mr Thompson's own affidavit evidence filed in relation to this application.

How is
this
supported

36. As discussed below in respect of the Tylden Road land, the "critical document" from the black folder which led Mr Thompson to reach the conclusions which are said by him to underpin the "fresh allegations" he now wishes to advance (which relate to both the Residential land and the Industrial land) was the copy of the complete version of the plans. On his own evidence, he has had a copy of the complete version of such plans since 1991. Further, as the objective documentary material exhibited to the first Dixon summary judgment affidavit and the 3 November Edward affidavit establish, in fact:

Where
does Glen
say this.

- (a) a copy of the complete version of such plans was provided to the plaintiffs solicitors in the prior Tylden Road proceeding in May 1989;
- (b) when Mr Edward undertook inspection of the plaintiffs' discovered documents in March 1999 in respect of the prior Woodleigh Heights proceedings one of the documents in Mr Thompson's possession was a copy of the complete version of the plans for the industrial allotments.

Wrong.

Although Mr Thompson has responded to the affidavits to which reference is made, he has not sought to contradict those statements of fact.

³³ Anshun at 602 per Gibbs CJ, Mason and Aickin JJ
³⁴ See Gibbs v Kinna [1999] 2 VR 19; [1988] VSCA 52

37. The claims relating to the two categories of Tylden Road land are so closely connected that the document said to be critical to the claim concerning the industrial land was discovered in the prior proceeding concerning the residential land.

38. Further, as the plaintiffs had a copy of the complete version of the plan for the industrial allotments since 1989 it was open to them to amend their claim in the prior Tylden Road proceeding to include the Industrial land claims, particularly given that the prior Tylden Road proceeding did not settle until June 1991.

(g) Claims made in the current proceeding are manifestly statute barred

39. Section 5 of the *Limitation of Actions Act* 1958 provides that proceedings in tort shall not be brought after the expiration of six years from the date that the cause of action accrued. It is trite to say that a cause of action in tort accrues when loss and damage is suffered by reason of the tortious act.³⁵ On the plaintiffs' own pleading, the most recent cause of action accrued in 1984.

Tylden Road land – Limitation Period

40. In the statement of claim the plaintiffs allege that they purchased the Industrial land in or around September 1980 (para T17) and that the Residential land was acquired by them in December 1980 (para T18). Mr Thompson's own evidence is that loss and damage was sustained from the date he purchased both the Residential land and the Industrial land.³⁶ If he is correct, then the six year limitation period in respect of the Tylden Road land claims (comprising both the Residential land and the Industrial land) had expired by the end of 1986.

41. The particulars of loss and damage found in the amended statement of claim³⁷ specify different dates on which it is said the cause of action accrued from those set out in the Affidavit sworn by Mr Thompson. In respect of the Industrial land the current pleading asserts that the plaintiffs' loss is to be calculated from December

³⁵ See eg *Hawkins v Clayton* (1988) 164 CLR 539 at 561, 587 and 599.

³⁶ See para 55(a) of the Thompson summary judgment affidavit.

³⁷ See amended statement of claim pages 35 and 36.

1980³⁸. On this basis, the six year limitation period in relation to the Industrial land claim expired in December 1986.

42. As to the Residential land, the particulars of loss and damage³⁹ assert that loss and damage is to be calculated from April 1983 being the date that the plaintiffs were forced to sell the Residential land. On this basis, the six year limitation period in respect of the Residential land expired in April 1989.
43. Leaving to one side the previous proceedings and releases and the insurmountable Anshun problems which infect the case, on no view are the claims made by the plaintiffs relating to the Tylden Road land other than manifestly statute barred. The Limitation of Actions Act – section 5, provides a complete defence and a bar to the plaintiffs' claim to which there is no arguable answer.

The Woodleigh Heights lands – Limitation period

44. The pleading concerning Woodleigh Heights alleges that the cause of action was complete when damage was sustained in 1984⁴⁰.
45. Whilst the Woodleigh Heights land claim alleged loss is calculated as and from November 1984⁴¹, it is to be noted that the very latest date that the plaintiffs could conceivably have suffered loss and damage in respect of such land is 1989. That is, when Esanda Limited allegedly exercised its rights over the plaintiffs' land and sold the land to Deckwood Pty Limited.⁴²
46. Accordingly, taking an extremely generous view of the limitation issue, at the very latest, the six year limitation period concerning the Woodleigh Heights land expired in 1995. The claim had been statute barred by ten years when it was issued in 2005.

³⁸ The earlier version alleged a date in 1984.

³⁹ See amended statement of claim pages 35 and 36.

⁴⁰ Refer to footnote 20 above

⁴¹ See paragraph D5 of the statement of claim on page 39.

⁴² Paragraph W71 of the statement of claim.

Failed attempts to extend the Limitation Period

47. After the proceeding was served, the Council put the plaintiffs on notice that, if the same was not obvious, the claims sought to be made were all statute barred. In anticipation of this defence being taken, Mr Thompson has sworn affidavits which seek to find a path around the limitation point which is clearly fatal to all claims sought to be made. His attempt to do so and the anticipated reliance by the plaintiffs upon section 27 of the Limitation of Actions Act does not disclose an arguable "defence" to the section 5 limitation point. That is, so as to postpone time running as the section provides.

48. Section 27 is in the following terms:

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

- (a) the act 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."

Tylden Road

49. The plaintiffs seek to overcome the statute of limitations hurdle (and it would seem the "release hurdle" in respect of the Tylden Residential land) by asserting that:

- (a) the claim in the current proceeding contains allegations not made in the prior Tylden Road proceeding. These allegations are said to be contained in paragraphs T5, T6, T8, T9, T10, T11, T12, T14, T15 and T18 of the

amended statement of claim. Mr Thompson refers to these paragraphs as "the omitted paragraphs"⁴³;

- (b) the facts and circumstances referred to in the omitted paragraphs were concealed from Mr Thompson by the Council until August 2000.

50. Presumably, the plaintiffs contend that the omitted paragraphs ground the alleged claim against the Council (and the Water Authority) for misfeasance in public office. Certainly, Mr Thompson states that the matters pleaded in the omitted paragraphs were the "true cause" of his loss and damage. In this regard, Mr Thompson asserts the following:⁴⁴

"I say that the omitted paragraphs relate to the true cause of my loss and damage in respect of the Tylden Road land and the facts and circumstances set out in those paragraphs were not pleaded in the 1988 proceedings [being the prior Tylden Road proceeding] because they were concealed from me by the defendants conduct until August 2000".

51. Whilst it is asserted by Mr Thompson that the facts and circumstances set out in the omitted paragraphs were concealed from him by the defendant's conduct until August 2000, such assertion is not supported by the plaintiffs' own affidavit evidence. Further, the serious allegations made by the plaintiffs in the Thompson summary judgment affidavit concerning the non-disclosure of documents on the part of the Council are simply not supported by the objective documentary evidence.

52. What is clear from the plaintiffs' own affidavit evidence is that the facts and circumstances set out in the omitted paragraphs emanated from a review undertaken by Mr Thompson of documents provided, *on a voluntary basis*, to Mr Thompson by the Council and the Water Authority on 14 June 1991. Taking Mr Thompson's affidavit at face value, whatever "fraudulent concealment" or fraud is said to have occurred, the documents now relied upon to seek to establish the cause of action for misfeasance in public office have been in the physical possession of Mr Thompson since 1991 – more than 14 years before this proceeding was instituted. Section 27 does not provide for a fourteen year postponement. At best, for Mr Thompson, the limitation period started to run on 14 June 1991 and expired in 1997.

⁴³ See para 42(a) of the Thompson summary judgment affidavit.

⁴⁴ In paragraph 42(a) of the Thompson summary judgment affidavit.

53. Putting them at their highest, the circumstances alleged by the plaintiffs to constitute "concealment" are as follows:

- (a) at the time of signing the terms of settlement in respect of the prior Tylden Road proceeding (*being 14 June 1991*) Counsel for the Council and the Water Authority handed to Mr Thompson a large black folder containing copies of various documents (**"the black folder"**);⁴⁵
- (b) Mr Thompson took the black folder home and *"gave it a cursory glance but because I considered the matter to be at an end, I archived the folder and did not look again at its contents until August 2000"*. That is, he left it in the cupboard for 9 years and now, after fourteen years, wishes to sue relying upon its contents;⁴⁶
- (c) in August 2000, Mr Thompson, for the purpose of preparing a defence and counterclaim against the Council in respect of a rates dispute, re-examined the contents of the black folder;⁴⁷
- (d) upon examining the documents in the black folder it became apparent to Mr Thompson that there were two versions of the plans for the Industrial land component of the Tylden Road land, being "complete" versions and "clipped" versions;⁴⁸
- (e) Mr Thompson recognised the clipped versions as being the same as those which had been admitted into evidence by Wilson (of the Council) in the 1987 Magistrates Court proceeding⁴⁹;
- (f) Mr Thompson noticed that the clipped versions of the plans had been clipped in copying in such a manner as to remove or omit the identifying number which was present on the complete version;⁵⁰

⁴⁵ See para 26 of the Thompson summary judgment affidavit.

⁴⁶ See para 26 of the Thompson summary judgment affidavit.

⁴⁷ See para 53(a) of the Thompson summary judgment affidavit.

⁴⁸ See para 53(b) of the Thompson summary judgment affidavit.

⁴⁹ Being the proceeding referred to in para 23 of the Thompson summary judgment affidavit whereby the Council sought to recover from the plaintiffs the overrun of road construction costs in respect of the Tylden Road land. See para 53(b) of the Thompson summary judgment affidavit.

- (g) Mr Thompson noticed that the black folder also contained copies of "the residential series of the Tylden Road plans of subdivision", that those plans had also been clipped and that Mr Thompson recognised such clipped plans as being identical to those admitted into evidence in the 1987 Magistrates Court proceeding and the related Supreme Court Appeal;⁵¹
- (h) it was a result of reviewing the documents in the black folder and reflecting upon the evidence given in previous proceedings that Mr Thompson reached certain conclusions which now form the basis of the allegations pleaded in the omitted paragraphs.⁵²

54. It is apparent from the Thompson summary judgment affidavit that the "critical document" from the black folder which led Mr Thompson to reach the conclusions which now *underpin* the allegations in the omitted paragraphs was the copy of the "complete version" of the plans for the industrial allotments. No other documents from the black folder are mentioned by Mr Thompson in his affidavit as assisting him in reaching the conclusions he did.

How does
she reach
this
conclusion

55. The complete version of the plans for the industrial allotments is considered by Mr Thompson to be the "critical piece of the puzzle" which enabled Mr Thompson to comprehend fully the events which he now alleges took place twenty five years ago, in 1980.⁵³

56. It is apparent from a review of the relevant authorities on the issue of fraudulent concealment that the period between 14 June 1991 and August 2000 can not be viewed as being a "period of concealment" for the purposes of section 27(b) of the *Limitation of Actions Act*.

57. In *Hamilton v Kaljo*,⁵⁴ McLelland J considered what was meant by the expression "fraudulently concealed" for the purpose of section 55 of the *Limitation Act 1969* (NSW)⁵⁵. After considering the English authorities on this issue, His Honour stated:

⁵⁰ See para 53(b) of the Thompson summary judgment affidavit, and exhibit "GAT-7" to that affidavit, being a bundle of the "complete" version of the plans.

⁵¹ See para 53(c) of the Thompson summary judgment affidavit.

⁵² See para 53 (c)-(h) of the Thompson affidavit.

⁵³ See para 53 of the Thompson summary judgment affidavit.

⁵⁴ (1989) 17 NSWLR 38.

*"For my own part, I would regard it as a misuse of language, and unsound, to apply the statutory expression 'fraudulently' in s 55 to any conduct which did not involve some form of dishonesty or moral turpitude."*⁵⁶

58. In *CE Heath Underwriting and Insurance (Australia) Pty Ltd v Daraway Constructions*,⁵⁷ Batt J gave consideration to the meaning of "fraud" for the purposes of section 27(b) of the Victorian Act and following his review of the relevant authorities stated:

*"I prefer the reasoning of McLelland J and therefore proceed on the footing that (leaving aside equitable claims) 'fraud' means common law fraud and that intentional concealment is requisite."*⁵⁸

59. In *Seymour v Seymour*,⁵⁹ a decision of the New South Wales Court of Appeal, Mahoney A-CJ (with whom Meagher JA and Abadee AJA agreed) expressed in the following terms what was required in order to establish fraudulent concealment.

"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 that is so in the generality of cases. (There is in this as in 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)."

60. In *Skrijel v Mengler*,⁶⁰ Eames J observed that "fraud" for the purposes of section 27(b):

"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 sort 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."

61. In *Di Sante v Camando Nominees*,⁶¹ Warren J (as she then was) was required to consider the operation of section 27(a) of the *Limitation of Actions Act* (which relates

⁵⁵ The New South Wales' equivalent of section 27(b)

⁵⁶ At 386.

⁵⁷ Supreme Court of Victoria, Batt J, 3 August 1995.

⁵⁸ At [80].

⁵⁹ (1996) 40 NSWLR. Mahoney A-CJ also observed, that in his opinion, the words "fraudulent concealment" in section 55 of the NSW *Limitation Act* was not confined to common law fraud.

⁶⁰ Supreme Court of Victoria, Eames J, 5 October 1998, unreported.

⁶¹ Supreme Court of Victoria, Warren J, 25 May 2000, unreported.

to circumstances where the action is based on the fraud of the defendant). In so doing, her Honour approved the approaches adopted by McLelland J in *Hamilton v Kaljo* and Mahoney A-CJ in *Seymour v Seymour*.

"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."

62. These authorities demonstrate that fraudulent concealment for the purposes of section 27(b) of the *Limitation of Actions Act*:

- (a) requires intentional concealment;
- (b) involves a consciousness of wrongdoing;
- (c) involves some sort of dishonesty or moral turpitude.

Here, there is no evidence of any such conduct on the part of the Council, or for that matter, on the part of the Water Authority.

63. However, there is no need for the Council to rely on that point to demonstrate there is no arguable basis for a section 27 postponement of the limitation period in this case. Mr Thompson's own affidavit evidence demonstrates it to be so.

64. By reference to the matters deposed in the Thompson summary judgment affidavit it is clear that whatever may or may not have happened prior to 14 June 1991, after the black folder containing the "critical document" was handed to Mr Thompson by Counsel acting for the Council and the Water Authority there could not be and was no intentional concealment thereafter of any relevant material on the part of the Council.
65. In the context of section 27 and what must be established, it is important to note that the handing of the black folder to Mr Thompson was a voluntary act on the part of the Council and the Water Authority. The terms of settlement in the prior Tylden Road proceeding did not provide for the provision of any documents to the plaintiffs. This is not action consistent with intentional concealment, quite the opposite.
66. It is apparent that the Council's conduct in voluntarily providing to Mr Thompson the black folder containing "the critical piece of the puzzle" is not conduct evidencing a consciousness of wrongdoing or involving dishonesty or moral turpitude. From the time Mr Thompson received the black folder, he had in his possession the information required to make the claims sought to be advanced in the current proceeding. If the limitation period in respect of the tort of misfeasance in public office had not already begun to run, it certainly commenced running from 14 June 1991 (and thus expired in June 1997).
67. There is high authority for the proposition that once the relevant party has the documents, there can thereafter be no fraudulent concealment. In *Mann v Commonwealth*,⁶² the New South Wales Court of Appeal held that the service of an affidavit on the plaintiff by a defendant in a prior proceeding which listed certain documents and which stated that such documents had been disclosed to the defendant by various Commonwealth and State public servants was sufficient to inform the plaintiff of the existence of a claim against the Commonwealth and the relevant States in respect of the disclosure of those documents. Accordingly the Court of Appeal held that the time for limitation began to run from the date of service of the affidavit and not from the later date asserted by the plaintiff as being the date that he became aware of the cause of action.

⁶² New South Wales Court of Appeal, Handley, Powell and Stein JJA, 13 July 2001, unreported.

68. So to in the present case, putting the plaintiffs' case at its highest, the provision of the black folder on 14 June 1991 containing the "critical document" relevantly placed Mr Thompson on notice of the claims he now seeks to advance in the statement of claim some 15 years later. Further, the "first seen in 1991" point is not factually correct as the second Dixon summary judgment affidavit reveals.
69. Mr Thompson goes to great lengths in the Thompson summary judgment affidavit to seek to establish fraudulent concealment on the part of the Council and the Water Board. However, Mr Thompson *fails* to mention certain critical facts, the existence of which clearly demonstrate that his allegation of fraudulent concealment prior to 1991 is in any event completely without foundation.
70. As stated above, the critical piece of the puzzle which led Mr Thompson, according to him, to the conclusions which now underpin the matters pleaded in the omitted paragraphs is said to be the copy, contained in the black folder, of the complete versions of the plans for the industrial allotments. The picture Mr Thompson seeks to paint in his summary judgment affidavit is that the first time the complete version of the plans was made available to him was when they were supplied to him in the black folder in June 1991 after the Terms of Settlement in the prior Tylden Road proceedings were signed. That is not so.
71. What Mr Thompson fails to disclose in the Thompson summary judgment affidavit is that:
- (a) the complete version of such plans *were discovered* in the prior Tylden Road proceeding by way of a supplementary affidavit of documents sworn 23 May 1989;⁶³
 - (b) a copy of the complete version of such plans *was provided* to Mr Thompson's solicitors in the prior Tylden Road proceeding, Neville & Co, during the currency of that proceeding by the Council's solicitors (Maddock Lonie & Chisholm) under cover of a letter dated 15 May 1989;⁶⁴

⁶³ See paragraph 9 of the second Dixon summary judgment affidavit and exhibits MED-8, MED-11 and MED-12 to that affidavit.

⁶⁴ See paras 11, 12.4 and 12.5 of the second Dixon summary judgment affidavit and page 5 of the exhibit MED-14 to that affidavit.

- (c) as evidenced by the correspondence passing between Neville & Co and Maddock Lonie & Chisholm, the provision of a copy of the complete version of such plans followed an inspection by Neville & Co of the documents referred to in Council's supplementary affidavit of documents sworn 23 May 1989.⁶⁵ Neville & Co attended at the offices of Maddock Lonie & Chisholm on 19 July 1989 for the purposes of inspecting documents discovered by the Council in the prior Tylden Road proceeding;⁶⁶
- (d) further and of some significance, on 20 July 1989, Mr Thompson *personally* inspected documents discovered by the Council in the prior Tylden Road proceeding⁶⁷, a fact not disputed by Mr Thompson;
- (e) in March 1999, Mr Edward of the second defendant's solicitors undertook inspection of documents discovered by the plaintiffs in earlier proceedings. Those documents included a copy of the "complete" version of the plans for the industrial allotments.⁶⁸

72. Accordingly, the objective documentary evidence which Mr Thompson failed to depose to in his first affidavit clearly demonstrates that Mr Thompson's assertion of fraudulent concealment has no basis in fact. There simply was no concealment.
73. Further, in Thompson 2 sworn 7 November 2005, Mr Thompson adopts a contradictory position concerning the discovery in the prior Tylden Road proceeding of the "complete" version of the plans for the industrial land.
74. First, Mr Thompson appears to assert in that affidavit that the "complete" version of the plans were not "properly" discovered in the supplementary affidavit of documents sworn 23 May 1989 because the plans were not described by their title in that affidavit⁶⁹. However, whether or not such plans were described as such they were nevertheless included in the documents discovered by the Council, made available for inspection by the plaintiffs and copies of such plans were provided to them. None

⁶⁵ See paras 12.4 and 12.5 of the second Dixon summary judgment affidavit and page 4 of exhibit MED-14 to that affidavit.

⁶⁶ See para 12.6 and page 6 of exhibit MED-14 to that affidavit.

⁶⁷ See paras 12.7 and 12.8 of the second Dixon summary judgment affidavit and pages 7 and 8 of exhibit MED-14 to that affidavit.

⁶⁸ See paras 6 and 7 of the affidavit of Steven Edward sworn 3 November 2005.

⁶⁹ See Thompson 2 para 11

of these matters are disputed by Mr Thompson in Thompson 2 and must be taken and acted upon as uncontested facts.

75. Further, having asserted that the complete version of the plans were not discovered on the ground of misdescription, Mr Thompson then concedes that a copy of the "complete" version of the plans were attachments to documents which "formed part of discovered item 1 of the said Supplementary Affidavit of Documents"⁷⁰. That is, he concedes they were discovered – hence no arguable case for "concealment", fraudulent or otherwise.

76. Following the service of the second Dixon summary judgment affidavit, the plaintiffs filed and served Thompson 2. In paragraph 4 of that affidavit, Mr Thompson states that:

"Ms Dixon's "understanding" in paragraph 4 of the Further Dixon Affidavit that the first time I had viewed any complete plans was the time that I was first given the black folder is incorrect."

This was not Ms Dixon's understanding. What Ms Dixon stated in paragraph 4 of her affidavit was that:

"Based on my review of the Thompson affidavit I understand Mr Thompson to be saying that:

...

4.2 the first time that the complete version of the plans was made available to him was when they were supplied to him in the black folder"

77. Ms Dixon deposes to the fact that a copy of document number 1 was provided to Mr Thompson's solicitors in May 1989⁷¹. Mr Thompson has not disputed this fact in Thompson 2. Accordingly, it is beyond doubt that a copy of the "complete" version of the plans of the industrial land, those upon which Mr Thompson's "concealment" point hinges, were not only discovered in the prior Tylden Road proceeding but that a copy of such plans were provided to Mr Thompson's solicitors in May 1989. He has had

⁷⁰ See Thompson 2 para 13

⁷¹ See paras 11, 12.4 and 12.5 of the second Dixon summary judgment affidavit and page 5 of the exhibit MED-14 to that affidavit

the plans upon which he wishes to rely in the 2005 proceeding for sixteen years before issuing the proceeding. There can be no doubt the Tylden Road land claims are statute barred.

Woodleigh Heights land

78. As with the Tylden Road land claims, the plaintiffs seek to overcome the statute of limitation hurdle (as well as the release hurdle) in relation to Woodleigh Heights by asserting that:

(a) the claim in the current proceeding contains allegations not made in the prior Woodleigh Heights proceeding. These allegations are said to be contained in paragraphs W8, W9, W10, W11, W12 and W14 of the amended statement of claim.⁷² Mr Thompson refers to these paragraphs as the "further omitted paragraphs";

(b) the facts and circumstances referred to in the "further omitted paragraphs" were concealed from Mr Thompson by the Council until August 2000.

79. As in the case of the Tylden road land claims, Mr Thompson asserts that the further omitted paragraphs "*relate to the true cause of my loss and damage in respect to the Woodleigh Heights land*". The plaintiffs seek to advance the same "concealment" argument put by them in relation to the Tylden Road land claims in relation to the Woodleigh Heights land claims.

80. It follows that the response by the Council to the anticipated concealment argument in respect of the Tylden Road land claims applies with equal force to the Woodleigh Heights land claims. Further, whilst Mr Thompson credits the documents in the black folder for making him aware in August 2000 of the facts and circumstances set out in the further "omitted paragraphs" it is important to observe that it was not a particular or identified document in the black folder that led Mr Thompson to reach the conclusion he did in respect of the Woodleigh Heights land. Instead, the argument he seeks to advance is that his review of the black folder, taking it out of the cupboard after nine years prompted Mr Thompson to reflect further on the evidence

⁷² See para 42(a) of the Thompson summary judgment affidavit.

presented in the prior Woodleigh Heights proceeding. There is no element of concealment on the part of the Council involved in that argument.

81. That this is the case sought to be advanced is apparent from the following statements made by Mr Thompson on affidavit:

"Upon reaching the foregoing conclusions in relation to the Tylden Road land I began to consider the possibility that the Council may have acted unlawfully in relation to the Woodleigh Heights land. I reconsidered the failed 1995 proceedings and the reticulation plan which had been shown to me in the Practice Court. I then realised that the Council 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 that the subdivision had not been completed according to law and the reticulated water supply was not present in 1979 as required by law but was instead laid in 1982 as pointed out to me in the Practice Court. I was now able to reconcile the representations made to me in the Practice Court in 1999 with my prior state of knowledge. It was now apparent that the Conduct of the Council and Water Board in relation to the Woodleigh Heights Subdivision was essentially similar to their conduct in relation to the Tylden Road land subsequently the Council and Water Board engaged in an ongoing course of conduct the effect of which was to conceal from me the true facts as now known. In the case of the Woodleigh Heights land this ongoing course of conduct is now set out in paragraphs W14 to W71 inclusive of the present Statement of Claim."⁷³

82. The Practice Court hearing referred to in the extract from the Thompson affidavit above took place on 1 September 1999. The plaintiffs endeavoured unsuccessfully to set aside the Terms of Settlement dated 29 July 1999 entered into in respect of the prior Woodleigh Heights proceeding⁷⁴.
83. As no document contained in the black folder was at all relevant to the conclusions which Mr Thompson apparently reached in August 2000 in respect of the Woodleigh Heights land, the facts and circumstances concerning the provision of the black folder have absolutely no bearing on the claims now sought to be advanced in this proceeding in respect of the Woodleigh Heights land.
84. Further, whilst Mr Thompson alleges that he reached the conclusions referred to in August 2000 it was open to Mr Thompson to have reached the same conclusions back in August 1987 (if not earlier). This is demonstrated by the matters set out below.

85. What Mr Thompson deposes to in respect of the 1999 Practice Court hearing⁷⁵ is as follows:

- (a) that during the course of the hearing the Council and the Water Authority showed Mr Thompson a reticulation plan for the Woodleigh Heights subdivision;
- (b) that the plan showed that the principal water mains were in fact laid in 1982 and not in 1979 as alleged by Mr Thompson and, on Mr Thompson's understanding, as required by law;
- (c) that at the time of showing Mr Thompson the reticulation plan both Counsel and the solicitors for the Council and the Water Authority pointed out that the plan disclosed that the water main was in fact laid in 1982 and not 1979 as alleged by Mr Thompson and said to Mr Thompson words to the effect "How do you explain that"?;
- (d) that Mr Thompson's entire cause of action in the prior Woodleigh Heights proceeding *"hinged upon the assertion that the subdivision had been completed according to law and that therefore a reticulated water supply should have been present in 1979 at the time of sealing of the plans of cluster subdivision"*;
- (e) that because of Mr Thompson's alleged *"ignorance of the facts as now pleaded in paragraphs W1 to W13 of the present Statement of Claim, the evidence disclosed by the reticulation plan that a water main had not been installed until 1982, seemed to me to be fatal to any prospects of ultimate success after appeal."*

86. It was this reticulation plan that Mr Thompson asserts he reflected upon in August 2000 after reviewing the unrelated documents contained in the black folder. It was after reflecting upon the reticulation plan, that Mr Thompson realised that if the *"reticulated water supply was not present in 1979 as required by law but was instead*

⁷³ See para 54(a) of the Thompson summary judgment affidavit. Emphasis added

⁷⁴ See para 55 of the first Dixon summary judgment affidavit and tab 31 of the exhibit folder

⁷⁵ At para 82 of the Thompson summary judgment affidavit

*laid in 1982" then the Council "had in fact sealed the plans of cluster subdivision in contravention of its statutory duty to refuse to seal them ..."*⁷⁸

87. What Mr Thompson fails to mention and what the objective documentary evidence establishes, is that he was aware and had been aware, at least since August 1987 (if not before), that the "reticulated water supply" had been laid in 1982 and not 1979.
88. The objective documentary evidence, in particular Mr Thompson's own correspondence, establishes that Mr Thompson was aware from at least 1987 that the reticulated water supply was laid in 1982. By a letter dated 24 August 1987, Mr Thompson advised the Council as follows concerning the "reticulated water supply" on the Woodleigh Heights subdivision:

"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.*

⁷⁸ See para 54(a) of the Thompson summary judgment affidavit.

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."*
89. The 24 August 1987 letter is exhibit "GT-1" to the affidavit of Mr Thompson sworn 14 December 1998 in the prior Woodleigh Heights proceeding⁷⁷.
90. The agreement between the Kyneton Water Board and Woodleigh Heights Resort Developments Pty Ltd "for the supply of water to the whole of the Woodleigh Heights Subdivision" was dated 1 January 1982 ("the 1982 water reticulation agreement"). A copy of this agreement is exhibited to Thompson 3⁷⁸. Clauses 1 and 2 of the agreement are in the following terms:
- "1. *The Trust shall (subject as hereinafter provided) so far as it is able to do so subject to the provisions hereof and of the WATER ACT 1958 and regulations made thereunder and any BY-LAWS and REGULATIONS made by the Trust thereunder supply to the Consumer and the Consumer shall take from the Trust water for domestic purposes on the said land as and from the First day of October One thousand nine hundred and eighty-one (hereinafter called "the date of commencement").*
2. *The Consumer shall at its own expense and to the satisfaction of the Trust provide and install all pipes and fittings which may be necessary for obtaining such supply from the Trust's pipeline at the corner of Edgecombe Road and Dettman's Lane, and shall so long as this Agreement remains in force keep the pipes and fittings within the said property in good order and in proper repair to the satisfaction of the Trust. Any authorized Officer of the Trust may at any time or times inspect and examine all or any such pipes or fittings.*
- The pipeline installed along Edgecombe Road will be taken over and maintained by the Trust on the First day of July, 1982 subject to the pipeline passing performance tests to the satisfaction of the Trust."*
91. What the August 1987 letter and the 1982 water reticulation agreement clearly show is that Mr Thompson was aware from at least August 1987 (if not September 1985 when a copy of the 1982 water reticulation agreement was provided to him) that the reticulated water supply was not present in 1979 but was in fact laid down in 1982. It follows that it has been open to Mr Thompson to "reflect" upon any legal consequence of these matters since at least August 1987. No conduct on the part of the Council at any time after August 1987 has prevented Mr Thompson from being

⁷⁷ Tab 26 of the exhibit folder
⁷⁸ See exhibit GAT-26

able to make the allegations he now seeks to advance (some eighteen years later) in respect of the Woodleigh Heights land.

92. It should be noted that a copy of the 1982 water reticulation agreement was discovered by the Water Authority in the prior Woodleigh Heights proceeding⁷⁹

D. SECURITY FOR COSTS APPLICATION

93. In the event that the judgment is not entered in the proceeding in favour of the Council or the proceeding permanently stayed, the Council seeks:

- (a) pursuant to the inherent jurisdiction of the Court;
- (b) alternatively pursuant to Rule 62.02(1)(a),

that the plaintiffs provide security for the Council's costs to trial of this proceeding in the amount of \$162,000.00 or such other amount as may be fixed by the Court.

94. Aside from Rule 62.02(1)(a) which enables a Court to order security in respect of an interstate Plaintiff, the Court has inherent jurisdiction to order security for costs in circumstances where:

- (c) the plaintiffs are impecunious and the prospects of success are poor⁸⁰;
- (d) the plaintiffs are impecunious, the prospects of success are poor and the costs to be incurred by the defendant in defending the proceeding will be substantial⁸¹.

95. The grounds relied upon by the Council in seeking an order for security for costs are set out in paragraph 3 of the Dixon security for costs affidavit. These grounds are set out below.

⁷⁹ See exhibit SME-2 vol 2, tab 32 to the affidavit of Steven Edward sworn 12 September 2005 – document no 22

⁸⁰ See *Knight v Beyond Properties Pty Ltd* [2005] FCA and *Chang v Comcare Australia* [1999] FCA 1677

⁸¹ See *Morris v Handley* [2000] NSWSC 957 and *Knight v Beyond Properties Pty Ltd*, supra

Plaintiffs' claim has poor prospects of success

96. In respect of this ground, the Council relies upon the matters set out above.

The costs to be incurred by the Council in defending the plaintiffs claim will be substantial

97. An estimate of the Council's party/party costs to the commencement of the trial in this matter has been prepared by Hausler & Associates, legal costs consultants. The estimate is approximately \$162,000.00⁸².

The plaintiffs have insufficient assets to meet a costs order

98. The only parcel of land in Victoria registered in the name of the plaintiffs is the Industrial land referred to in the particulars to paragraph 1A of the statement of claim⁸³.
99. The site value and capital improvement value of the Industrial land for rating purposes, as at 1 January 2004 levels of valuation, is \$67,000.00. Thompson 3 exhibits a hearsay opinion from a real estate agent which purports to value the land at \$195,000⁸⁴. The value is immaterial if there is no equity. If there is equity, the quantum of that equity is what matters⁸⁵.
100. The Industrial land is encumbered by a mortgage to the Commercial Bank of Australia Limited (now Westpac Banking Corporation)⁸⁶.
101. Mr Thompson asserts that any claim by Westpac under the mortgage is statute barred and that it is open to him to "*apply to the Court to have the mortgage discharged and removed from the title*". One would think Westpac would simply provide a discharge without the need for a Court order if Mr Thompson's assertions concerning the views of Westpac are correct. One might also have expected the

⁸² See para 6 of the Dixon security for costs affidavit and exhibit "MED-1" to that affidavit

⁸³ See paragraph 9 of the Dixon security for costs affidavit, exhibit MED-2 to that affidavit and paragraph T16 of the statement of claim

⁸⁴ Thompson 3, exhibit 23

⁸⁵ See para 10 of the Dixon security for costs affidavit

⁸⁶ See para 9 of the Dixon security for costs affidavit, exhibit MED-3 to that affidavit and para 5(a) of the Thompson security for costs affidavit

mortgage to have long since been discharged. The fact it has not been indicates that Westpac:

- (a) continues to have an interest in the land; and
- (b) continues to enjoy and to be entitled to enjoy the benefits of the covenants in the mortgage, including as to repayment of advances⁸⁷.

102. The Council's solicitors have written to the plaintiffs' solicitors (by way of letter dated 31 October 2005) requesting that the plaintiffs obtain a confirmatory letter (with a copy to be provided to the Council's solicitors) from Westpac as to what the pay out figure would be under the mortgage were Westpac to be called upon to provide a discharge. Alternatively in their letter, the Council's solicitors requested that the plaintiffs authorise Westpac to advise the Council's solicitors directly of the pay out figure under the mortgage.

103. As at the date of these submissions, the plaintiffs have not indicated that they are willing or prepared to act upon either of these two alternatives. In the absence of evidence from Westpac, the Court can only proceed on the basis that, whatever its value, there is no equity in the industrial land.

Plaintiffs have no assets in their State of Residence – New South Wales

104. The plaintiffs reside in New South Wales. Mr Thompson resides at 68 Summer Street, Orange. Ms Cheryl Maree Thompson, Mr Thompson's ex wife and the second Plaintiff in this proceeding resides at Unit 8/32 Warrendine Street Orange⁸⁸. Land index searches undertaken by the Council's solicitors reveal that neither Plaintiff is the registered proprietor of any land in New South Wales.

105. It should be noted that in paragraph 1 of the Thompson security for costs affidavit, Mr Thompson states that: *"For the purpose of these proceedings I have provided Maree with an indemnity for costs"*. The Council's solicitors have written to the plaintiffs' solicitors seeking a copy of the indemnity. To date, a copy of the indemnity has not been provided.

The plaintiffs have failed to perform earlier terms of settlement

106. The plaintiffs have in the past, in the case of the prior Woodleigh Heights proceeding, refused to perform their obligations under terms of settlement other than under compulsion of a Court Order for specific performance⁸⁹. Now the plaintiffs seek to bring yet another proceeding relating to the same subject matter as the prior Woodleigh Heights proceeding and the prior Tylden Road proceeding.

Plaintiffs have refused to provide security for costs

107. On 1 August 2005, the Council's solicitors, by hand, sent a letter to the plaintiffs' Victorian solicitors by which it sought the plaintiffs' agreement to provide security for its costs⁹⁰. By letter dated 12 August 2005, the plaintiffs' New South Wales solicitors advised that security for the Council's costs would not be forthcoming from the plaintiffs⁹¹.
108. In the event that the Council is not successful in obtaining judgment in, or a permanent stay of, this proceeding then given the matters set out above, the Council contends that it is appropriate that the security for costs orders set out in paragraph 3 of the Council's summons be made.

DATED: 9 November 2005

J Delany

G J Ahern

MADDOCKS

⁸⁷ See para 5(a) of the Thompson security for costs affidavit
⁸⁸ See para 1 of the Thompson security for costs affidavit.
⁸⁹ See paras 14 and 15 of the Dixon security for costs affidavit
⁹⁰ See para 16 of the Dixon security for costs affidavit and exhibit "MED-5"
⁹¹ See para 19 of the Dixon security for costs affidavit and exhibit "MED-6"