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| Loss to the business   | 67A | D4 |
| Loss calculated from November 1984 when AGC cancelled the proposed public auction. | 67A | D5 |
| Exemplary damages  |     | D6 |

#### **The Plans for the Industrial Allotment at Tylden Road**

45. The plaintiffs claim that until August 2000, he had no reason to suspect the existence of any of the conduct complained of in the current pleading. He claims that it was only on examining the folder of documents in August 2000 that he alleges was given to him at the settlement of the County Court proceeding in June 1991 that caused him to issue the current proceedings.
46. In the previous Woodleigh Heights proceedings the first named plaintiff filed and served a Further Affidavit of Documents sworn by the first named plaintiff on 22 December 1998. The Third Schedule of that Further Affidavit of Documents lists at item 93 "Plans of Subdivision Tylden Road Property": Item 66 listed in exhibit SME 2 Volume 3.
47. In Steven Edward's further affidavit sworn on 3 November 2005, he deposes that on 4 and 5 February 1999, he attended Orange, New South Wales, to inspect documents discovered by the plaintiffs. According to notes made at the time of inspection, the surveyor's plan of subdivision for Tylden Road was one of 25 items in a pile of documents.
48. On 23, 24, 25 and 26 March 1999, Mr Edwards again attended at the plaintiffs' solicitor's premises at Orange photocopied all of the documents then produced by the plaintiffs for the purpose of discovery, amongst the documents were several pages being plans of subdivision of the Tylden Road property: SME 3 copy of the said plans of subdivision photocopied in Orange in March 1999. The documents relied on by the plaintiffs, being exhibit GAT-7, appear to identical to the items numbered 2, 3 and 4 in exhibit SME 3.
49. Further, in item 43 of SME 1 Volume 2 is exhibited a true copy of the plaintiffs' document entitled "book of pleadings" in the County Court proceeding, undated. The handwritten notes contained in that document traverse the same subject matter as what the plaintiffs are seeking to agitate in the current proceeding: see

pages 5 to 9, 12 and 20. The handwritten notes reflect what the first plaintiff has deposed to in his affidavit in opposition in this proceeding.

### **Costs**

50. The Court should exercise its discretion to award costs over and above the ordinary, as this is a case where the plaintiffs have engaged in unmeritorious and improper conduct such as to warrant the court showing its disapproval and at the same time preventing the defendants being left out-of-pocket.

51. In *Fountain Selected Meats (Sales) Pty Ltd v International Produce Merchants Pty Ltd* (1988) 81 ALR 397 at 401 (Fed C of A), Woodward J said:

*I believe that it is appropriate to consider awarding "solicitor and client" or "indemnity" costs, whenever it appears that an action had been commenced or continued in circumstances where the applicant, properly advised, should have known that he had no chance of success. In such cases the action must be presumed to have been commenced or continued for some ulterior motive, or because of some wilful disregard of the known facts or the clearly established law. Such cases are, fortunately, rare. But when they occur, the court will need to consider how it should exercise its unfettered discretion.*

52. The court will require some evidence of unreasonable conduct, albeit that it need not rise as high as vexation: *Rosnlak v GIO* (1997) 41 NSWLR 808 at 616. In *Ugly Tribe Co Pty Ltd v Sikola*; [2001] VSC 189 at [7], Harper J said that circumstances in which it had been held proper to order indemnity costs, characterised as special circumstances, included the following (citations omitted):

- (i) *The making of an allegation, known to be false, that the opposite party is guilty of fraud.*
- (ii) *The making of an irrelevant allegation of fraud.*
- (iii) *Conduct which causes loss of time to the court and to other parties.*
- (iv) *The commencement or continuation of proceedings for an ulterior motive.*
- (v) *Conduct which amounts to a contempt of court.*
- (vi) *The commencement or continuation of proceedings in wilful disregard of known facts or clearly established law.*
- *The failure until after the commencement of the trial, and without explanation, to discover documents the timely discovery of which would have considerably shortened, and very possibly avoided, the trial. [Emphasis added]*

It is submitted that this is an appropriate case in which indemnity costs should be awarded to the second defendant.