

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE

No. 7966 of 1995

BETWEEN:

GLENN ALEXANDER THOMPSON and CHERYL MAREE THOMPSON Plaintiffs

and:

THE MACEDON RANGES SHIRE COUNCIL and OTHERS (as set out

in the Schedule attached hereto)

Defendants

AMENDED FURTHER STATEMENT OF CLAIM

~~(pursuant to the Order of Mr. Justice Ashley made 31st July 1998 and further Order made 20 August 1998)~~

(pursuant to the Order of Mr. Justice Ashley made 26th February 1999)

Date of Document	28/8/98 17/3/99
Filed on behalf of:	The Plaintiffs
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1. The Firstnamed Defendant:

- a) is a body corporate duly incorporated pursuant to the provisions of the Local Government Act 1989 (and more particularly pursuant to order of the Governor in Council published in the Government Gazette 19.1.95);
- b) is the successor of the former Council called the "Kyneton Shire Council" ("KSC");
- c) is liable for all liabilities of the KSC.

2. The Secondnamed Defendant:

- a) is a body corporate duly incorporated pursuant to the provisions of the Water Act 1989 (and more particularly pursuant to Order of the Minister for Water Resources published in the Government Gazette 25.3.92);
- b) as and from 30.3.92 took over the whole of the property, rights, liabilities, obligations, powers and functions of the "Kyneton Water Board" ("KWB"). The KWB was itself constituted on 1.10.83 by Order of the Governor in Council, published in the Government Gazette 21.9.83. The predecessor of the KWB was the "Kyneton Shire Water Works Trust". ("KSWWT") As and from 1.10.83, all of the liabilities of the KSWWT were transferred to the KWB.

3. The Thirdnamed Defendant was:

- a) at all relevant times employed as the Secretary of both the KSC and the KWB;
- b) at all relevant times acting for and on behalf of the KSC and KWB.

4. The Fourthnamed Defendant was:

- a) at all relevant times employed as the Shire Engineer of the KSC;
- b) at all relevant times acting for and on behalf of the KSC.

5. By Terms Contract of Sale of Land dated 1.11.79 the Plaintiffs ~~purchased~~ entered into a contract to purchase certain land within the "Woodleigh Heights Estate", located at Edgecombe Road, Kyneton in the State of Victoria.

PARTICULARS

The relevant land consisted of Lots 1, 2, 7, 10, 12 and 27 on Plan of Cluster Subdivision CS1134 and being all of the land more particularly described in Certificates of Title Volume 9171 Folios 687, 688, 693, 696, 698 and 713 respectively ("the Plaintiffs' land").

6. The Woodleigh Heights Estate:
- a) was, as at 1978, owned by Kenneth Raymond Buchanan and his wife Yvonne Rae Buchanan ("the Buchanans");
 - b) was within the municipal district of the KSC as designated pursuant to the provisions of the Local Government Act 1958;
 - c) was in 1978 part within and part without the Waterworks District of the KSWWT designated pursuant to the provisions of the Water Act 1958;
 - d) was in 1978 outside both the Urban District and the Rural District of the KSWWT as designated pursuant to the provisions of the Water Act 1958.
7. By Application dated 22 November 1978 the Buchanans applied to the KSC to develop the Woodleigh Heights Estate by subdividing it pursuant to the provisions of the Cluster Titles Act 1974, such subdivision consisting of 45 allotments averaging approximately 2 acres in size, together with substantial areas of common property and provision for the installation of a privately owned and operated water supply and

reticulation system forming part of the common property ("the Application for Cluster Subdivision").

PARTICULARS

The application for Cluster Subdivision consisted of the following relevant documents.

- a) Application for Permit dated 10th November 1978.
 - b) Submission dated 3.11.78, prepared by James A. Harris & Associates Pty. Ltd. ("the Submission").
8. The proposal for the privately owned and operated water supply and reticulation system (as contained within the Submission), consisted of:
- a) a storage reservoir with a surface area of $4\frac{1}{2}$ acres and a capacity of 8,500,000 gallons;
 - b) a high level header tank of 100,000 gallon capacity;
 - c) rising main between the reservoir and high level tank;
 - d) a reticulation system comprising main pipes from the tank through the estate and smaller pipes from the main pipe to the individual allotments;
 - e) household drinking and bathroom water was to be supplied by means of roof rainwater tanks which were to be installed concurrently with the construction of houses.
 - f) the reticulated water supply was for non-domestic uses only.

PARTICULARS

The proposed water supply and reticulation system was detailed in the Submission in an engineering report by Garlick & Stewart dated 2.11.78. The Report consisted of a letter and plans entitled "Water Supply and Reticulation Layout Plan" and further described in the sections of the Submission entitled "Planning Objectives", "The Development" and "Summary".

9. On or about 15 November 1978 the KSC issued to the Buchanans Planning Permit No. 2191 ("PP2191") dated 15th November 1978 authorising them to develop the Woodleigh Heights Estate in accordance with the said Planning Permit.
10. It was a condition of PP2191 that the Woodleigh Heights Estate be developed in accordance with the Plans and Submissions comprising the Application for Cluster Subdivision, including the constructions and installation by the Buchanans of the water supply and reticulation system as set out in the Submission.

PARTICULARS

The Plaintiffs refer to provision 8 of PP2191 which states;

- (a) "The development to be carried out in accordance with the plans and submission which formed part of this application"
11. KSC alone approved the Private Water Supply and reticulation system as set out in the submission. KSC did not refer the plans of subdivision to KSWWT pursuant to S11(1) of the Cluster Titles Act 1974 and S569B(2)(ac) of the Local Government Act 1958.
12. On 9 August 1979 the Cluster Subdivision was registered by the Registrar of Titles, as Plan of Cluster Subdivision No. CS1134 ("CS1134").

13. At the time of registration of CS1134 the following relevant works had been carried out in relation to the construction and installation of the water supply and reticulation system:

- a) The lake referred to in the Submission had been constructed and was near full of water.
- b) Two 50,000 gallon concrete high level water tanks had been constructed in lieu of the single 100,000 gallon high level tank referred to in the Submission.
- c) The rising main had been laid between and connecting the lake and the high level tanks as referred to in the Submission.
- d) Primary reticulation pipes had been laid in the common property and connected to the concrete high level tanks to convey non domestic water from the tanks to the allotments as referred to in the Submission.
- e) The high level tanks contained water.

14. By reason of the matters referred to in paragraphs 5 - 13 above the Plaintiffs, as ~~beneficial owners of the land purchased by them~~ holders of an equitable interest in the land;

- a) had a right of access and an entitlement to the water supply and reticulation system within CS1134.

- b) had a right to install roof rainwater tanks to provide drinking and bathroom water.

15. (Deleted).

16. (Deleted).

17. In or about November 1980 the Buchanans made application to the KSC for a cluster redevelopment of CS1134 dividing each allotment of CS1134 into three smaller allotments.

18. KSC approved the application for cluster redevelopment and issued planning permit 2784 (PP2784) in or about November 1980.

19. KSC did not refer the plans for cluster redevelopment to KSWWT pursuant to S11(1) of the Cluster Titles Act 1974 and S569B(2)(ac) of the Local Government Act 1958.

20. There was no alteration to the water supply or reticulation requirements within CS1134 pursuant to PP2784 and the water supply and reticulation requirements remained identical to that described in the Submission and set out in paragraph 8 above.

20A By Deed of Absolute Assignment dated 27th June 1977 and by further agreement dated 20th November 1979 between Kenneth Raymond Buchanan and Yvonne Rae Buchanan of the one part and General Credits Limited of the other part the terms

contract of sale referred to in paragraph 5 hereof and the land subject to the said contract was assigned to General Credits Limited.

PARTICULARS

The Plaintiffs were given notice in writing by Notice of Assignment dated 20th November 1979 and by a Form of Notice to Purchasers also dated on or about 20th November 1979. General Credits Limited also lodged a Caveat dated 20th November 1979 over the subject land which recorded the interest of General Credits Limited in the said land subject to the interest of the Plaintiffs as purchasers. A copy of the Notice of Assignment and an undated copy of the Form of Notice to Purchasers and a copy of the Caveat may be inspected at the offices of Nevile & Co 100 Collins St Melbourne by appointment.

- 20B The terms contract was due for completion on 1st November 1981
- 20C By Deed of Cancellation dated 19th May 1983 and executed by General Credits Limited of the one part and the Plaintiffs of the other part the terms contract was cancelled.

PARTICULARS

- (a) Before 1st November 1981 the Plaintiffs applied to General Credits Limited for finance to complete the said contract and take title to the land, finance was approved however the required documentation had not been completed by General Credits Limited by the due date and remained incomplete as at about March 1982. In or about March of 1982 by chance the Plaintiffs discovered that lot 28 being one of the allotments subject to the terms contract had been again sold by Kenneth Raymond Buchanan and Yvonne Rae Buchanan during the currency of the terms contract and of the assignment referred to in paragraph 20A hereof. Lot 28 had been sold by further contract dated 12th August 1981. The Plaintiffs also discovered that General Credits Limited had executed a partial withdrawal of caveat dated 16th December 1981 under the hand of William Gordon Maclean ("Bill Maclean") the manager of the Reservoir branch of General Credits Limited. The Plaintiffs also discovered that the Firm of Solicitors Palmer Stevens & Rennick of Kyneton had acted for both vendor and purchaser in the contract dated 12th August 1981 and that Palmer Stevens & Rennick ("PS&R") had lodged the abovementioned partial

withdrawal of caveat along with a transfer of land prepared by them also dated 16th December 1981 and which transferred Lot 28 to the purchaser named in the contract dated 12th August 1981. The Certificate of Title to Lot 28 shows that P. S. & R. Nominees Pty. Ltd. a company associated with PS&R registered a Mortgage over Lot 28 on 17th December 1981. When the Plaintiffs advised General Credits Limited and in particular Bill Maclean of their discoveries the Plaintiffs learned that General Credits was recently previously aware of the above matters having themselves conducted an appropriate title search but had failed to so advise the Plaintiffs. The Plaintiffs understand that Bill Maclean prepared an undated partial withdrawal of caveat at the request of PS&R in or about September of 1981 in order to facilitate subdivisional work and that Bill Maclean was at that time unaware of the further sale of Lot 28.

- (b) As a result of the above matters General Credits Limited could not and never would be capable of completing the terms contract and consequently the loan which had been approved for the purpose did not proceed.
- (c) The Plaintiffs subsequently arranged finance with General Credits Limited for the purpose of paying the monies due in respect to and taking title to the remaining nine allotments subject to the terms contract including the six allotments comprising the land. It was however necessary to execute a Deed of Cancellation in respect to the terms contract before such an arrangement could proceed.
- (d) Copies of the Contract of sale dated 12th August 1981, the partial withdrawal of caveat dated 16th December 1981, the transfer of land dated 16th December 1981, the duplicate Certificate of Title to Lot 28 and the Deed of Cancellation dated 19th May 1983 are available for inspection at the offices of Nevile & Co 100 Collins Street Melbourne by appointment.

20D Some time before the execution of the Deed of Cancellation referred to in the last preceeding paragraph the plaintiffs organised finance with General Credits Limited so as to enable the Plaintiffs to pay the monies due in relation to the nine remaining allotments and take title to the same.

PARTICULARS

While the loan had been approved and General Credits Limited had agreed to the Deed of Cancellation referred to in the last preceeding paragraph General Credits Limited required securities to a value greater than that which the Plaintiffs could provide and for reasons related to the unusual nature of the circumstances as set out in the particulars to the last preceeding paragraph the Plaintiffs found that they could not obtain finance elsewhere.

20E By reason of certain assistance given to the Plaintiffs by a Mr. John Willmott and his wife ("the Willmotts") in relation to the said finance referred to in the last preceeding paragraph it was arranged as between General Credits Limited, the Plaintiffs and the Willmotts that the land be transferred into the name of Woodleigh Heights Marketing Pty. Ltd ("WHM").

PARTICULARS

- (a) For the reasons set out in the particulars to the last preceeding paragraph the Plaintiffs remained unable to take title to the remaining nine allotments including the six allotments comprising the land.
- (b) The Willmotts were, with the Plaintiffs, co-owners of WHM and the First Plaintiff was a co-director of WHM The Plaintiffs held approximately 48% of the shares of WHM and the Willmotts the balance.
- (c) Mr. Willmott advised the Plaintiffs that he would provide whatever security was necessary to enable the Plaintiffs to secure the loan referred to in the last preceeding paragraph.
- (d) As a result of the offer of the Willmotts the Plaintiffs arranged a meeting wherein Mr. Willmott and the First Plaintiff met with General Credits Limited and in particular Bill Maclean in the office of Bill Maclean.
- (e) At this meeting Mr. Willmott advised Bill Maclean that the Willmotts would provide whatever additional security as was necessary to secure the loan referred to in the last preceeding paragraph.
- (f) At that meeting it was agreed that the said loan could proceed using in addition to the land and other securities provided by the Plaintiffs including their family home, the family home of the Willmotts.
- (g) During that meeting and for the sole reason that the Willmotts were providing their family home as security it was discussed and agreed that the Willmotts should have some control over

the risk to their family home and it was concluded and agreed between all parties present that the best method of achieving this would be to transfer the land into the name of WHM rather than the name of the Plaintiffs. It was also agreed and understood that notwithstanding the terms of any Mortgage documents the Plaintiffs would bear responsibility for all costs and repayments

- 20F Pursuant to the arrangements set out in the last preceeding paragraph on the 19th May 1983 a Deed of Cancellation dated 19th May 1983 in respect to the terms contract was executed between the Plaintiffs and General Credits Limited and concurrently a Transfer of Land was executed which transferred the remaining nine allotments including the six allotments comprising the land to WHM and also concurrently Mortgage documents were executed by WHM.

PARTICULARS

The execution of the transfer of land is to be implied from the fact of the transfer of the land into the name of WHM. A copy of the Deed of Cancellation dated 19th May 1983 and a copy of the Mortgage may be inspected at the offices of Neville & Co 100 Collins St Melbourne by appointment.

- 20G On or about August 1983 General Credits Limited (which by that time had been taken over by Australian Guarantee Corporation) agreed to the release of the family home of the Willmotts without consideration.

PARTICULARS

The agreement and fact of the release of the family home of the Willmotts situated at 9 Barton Crt Kyneton is evidenced by a letter of consent dated 19th August 1983 and addressed to General Credits Limited. A copy of the letter may be inspected at the offices of Neville & Co 100 Collins Street Melbourne by appointment.

- 20H By reason of the release of the family home of the Willmotts without consideration from forming part of the security to the loan referred to in paragraph 20D the assistance provided by the Willmotts came to an end.

201 In severing the financial and legal relationships which existed between the Willmotts and the Plaintiffs in relation to the land the following things were done;

- (a) On or about 23rd December 1983 the Plaintiffs sold their remaining shareholding in WHM to the Willmotts. The consideration for the same did not include any consideration whatsoever for the land held in the name of WHM;
- (b) On or about 23rd December 1983 a document entitled "Declaration of Trust" was executed between WHM on the one part and the Plaintiffs on the other part the terms of which included:
 - (i) That no consideration had been paid to the plaintiffs for the land;
 - (ii) The Plaintiffs were responsible for the various mortgages and had made all payments made in respect of the same;
 - (iii) That WHM would execute transfers of land in respect to the land at the request of the Plaintiffs;
 - (iv) That the Plaintiffs were appointed attorneys for the purpose of effecting transfer of the land;
 - (v) That the Plaintiffs would bear all costs associated with any transfers;
- (c) On or about 28th February 1984 a Deed of Assignment was executed wherein certain contracts of sale and all of the land was assigned to the plaintiffs. The terms of the Deed of Assignment included;

- (i) That the discount payment paid in consideration of the Deed of Assignment was the Declaration of Trust referred to in the last preceeding subparagraph;
 - (ii) That WHM absolutely assigned to the Plaintiffs all of its right, title, interest, benefit, property, advantage, claim, and demand in and to the contracts and in and to all monies due and to become due under the contracts and in and to the land to the Plaintiffs.
 - (iii) That WHM would deliver to the Plaintiffs the contracts set out in the schedule and the duplicate Certificates of Title to the land.
 - (iv) That the Plaintiffs were irrevocably appointed Attorneys of WHM to act in all matters and things related to the contracts and/or the land.
- (d) On or about 1st June 1984 a Notice of Assignment dated 1st June 1984 was served upon the Purchasers named in the contracts subject to the Deed of Assignment referred to in the last preceeding subparagraph.

PARTICULARS

A copy of the Declaration of Trust dated 23rd December 1983 and a copy of the Deed of Assignment dated 28th February 1984 may be inspected at the offices of Nevile & Co 100 Collins Street Melbourne by appointment.

20J On or about 31st January 1984 the Plaintiffs organised two loans with Stateside Credit Corporation Pty. Ltd using various properties of the Plaintiffs as security for the said loan and also using the land as Collateral Security.

PARTICULARS

- (a) The two loans were for \$90,000 and \$100,000 respectively
- (b) Primary Security for the said loans were the family home of the Plaintiffs and a charge over a leasehold held by the Plaintiffs and a bill of sale over trading stock owned by the plaintiffs
- (c) Stateside Credit Corporation assigned each of the said loans to The Associates Pty. Ltd. and notified the Plaintiffs by two notices of assignment dated 31st January 1984 that the Plaintiffs were to pay all monies falling due under the loans to The Associates.
- (d) At the request and direction of the Plaintiffs WHM executed two mortgage documents over the land in order to provide collateral security for the above loans. The said mortgages are now referred to in paragraphs 35(b) and 35(c) hereof.
- (e) The Plaintiffs paid all costs and fees related to the above loans and mortgages and it was the Plaintiffs who were responsible for the repayments falling due under the said loans.
- (f) The above loans were advanced to the benefit and direction of the Plaintiffs alone and WHM received no monies whatsoever and bore no costs.
- (g) Copies of the Notices of Assignment and copies of the Mortgages executed by WHM are available for inspection at the offices of Nevile & Co 100 Collins St Melbourne by appointment.

20K As and from the date of the Deed of Assignment referred to in subparagraph 20I(c) WHM, save for it being registered as proprietor of the land, had no right, interest, obligation or involvement in or with respect to the land and save as directed by the Plaintiffs had no right to deal in the land and at no time did WHM make any financial contribution thereto.

PARTICULARS

- (a) The Plaintiffs refer to paragraph 20F hereof;
- (b) As the discount payment made to WHM in consideration of the Deed of Assignment was the Declaration of Trust referred to in paragraph 20I(b) hereof WHM was relieved of any duties it may have had as trustee up until the date of the assignment of

the contracts and land to the Plaintiffs. As a result the trust was at an end.

21-31. (Deleted).

31A By April 1984 a company, Woodleigh Heights Resort Developments Pty. Ltd ("WHRD") were developing a Timeshare Resort on CS1134, it had purchased much of the land within CS1134 and had entered into contracts of sale to purchase all of the Plaintiffs' land but had defaulted upon those contracts. The said contracts and the land subject thereto had been assigned to the Plaintiffs pursuant to the Deed of Assignment referred to in subparagraph 20I(c).

31B. WHRD advised the Plaintiffs that if the Plaintiffs attempted to rescind the contracts and sell to anyone other than WHRD then WHRD would prevent the Plaintiffs' land from having access to water and thereby render the land worthless.

PARTICULARS

- (a) The advice from WHRD was contained within conversations between the Firstnamed Plaintiff and a Director of WHRD, Mr. Brian Murphy in or about March and April of 1984.
- (b) WHRD advised the Firstnamed Plaintiff;
 - (i) That WHRD had a Private Water Supply Agreement between itself and KSWWT ("the water agreement") for the supply of water to all of CS1134 including the Plaintiffs' land;
 - (ii) That under the water agreement WHRD controlled the supply of water within CS1134 including the supply of water to the Plaintiffs' land;
 - (iii) That under the water agreement WHRD were in a position to render the Plaintiffs' land valueless by denying a supply of water to it and thereby preventing the issue of building permits in respect of the Plaintiffs' land.

32. In April 1984 the Plaintiffs made enquiries of the KSC and the KWB to ascertain whether the matters communicated to the Plaintiffs by WHRD (refer Paragraph 31B) were correct.

PARTICULARS

The enquiries were oral and contained in a telephone conversation in or about April 1984 between the Firstnamed Plaintiff and Mr. Stan Porter who was known to the Plaintiffs and known by the Plaintiffs to be the Secretary of both KWB and KSC.

33. In response to the Plaintiffs' enquiries the KSC and KWB represented to the Plaintiffs that:

- a) CS1134 was outside the Kyneton Water Trust area and in an area where under the provisions of the Water Act 1958 water was supplied under private agreements at the discretion of the Trust;
- b) There was under the provisions of the Water Act 1958 a legally valid water agreement in existence between the KWB and WHRD Pty. Ltd.;
- c) that under the water agreement WHRD Pty. Ltd. owned and operated the water supply and reticulation system within CS1134;
- d) the Plaintiffs' land;
 - (i) was not entitled to the water supply or reticulation system within CS1134;
 - (ii) could not obtain access to the water supply and reticulation system without the agreement and consent of WHRD Pty. Ltd.

- e) the body corporate of CS1134 was not entitled to the water supply or reticulation system within CS1134;
 - f) KWB would not;
 - (i) transfer the existing Water Agreement to the body corporate of CS1134 except with the agreement of WHRD Pty. Ltd.;
 - (ii) enter into a separate water supply agreement with the body corporate of CS1134 except with the agreement of WHRD Pty. Ltd.;
 - g) Unless the Plaintiffs had access to a reticulated water supply the KSC would not issue building permits to build upon the Plaintiffs' land.
- ("the first representations").

PARTICULARS

The first representations were oral and contained in a telephone conversation between the Firstnamed Plaintiff and Mr. Stan Porter in or about April 1984.

34. In April 1984 the Plaintiffs requested the KSC, the KWB and WHRD Pty. Ltd. for a copy of the said water agreement, however each of the said parties failed and/or refused to either give the Plaintiffs access to the water agreement, or to supply them with a copy of the same.

PARTICULARS

- (a) The request of the KSC and KWB by the Plaintiffs for a copy of the water agreement was verbal and was contained in a telephone conversation in or about April 1984 between the Firstnamed Plaintiff and Mr. Stan Porter, the joint KSC and KWB Secretary
 - (b) Mr. Porter for the KSC and KWB advised the Plaintiffs that the water agreement was a private agreement between the KWB and WHRD Pty. Ltd. and that any request by the Plaintiffs for a copy of the water agreement should be directed to WHRD Pty. Ltd.
 - (c) The request of WHRD Pty. Ltd. by the Plaintiffs for a copy of the water agreement was verbal and was contained in conversation between the Firstnamed Plaintiff and Mr. Brian Murphy for WHRD Pty. Ltd.
 - (d) Mr. Murphy for WHRD Pty. Ltd. advised the Plaintiffs that WHRD Pty. Ltd. would not give the Plaintiffs a copy of the water agreement.
 - (e) At that time neither KWB, KSC nor WHRD Pty. Ltd. provided the Plaintiffs with a copy of the water agreement.
35. As at August 1984 the Plaintiffs' land was encumbered by various mortgages including the following:
- a) First Mortgage to General Credits Limited registered number K379135 in the principal sum of \$40,000.00.
 - b) Second Mortgage to The Associates Pty. Ltd. registered number K814538 in the principal sum of \$100,000.00
 - c) Third Mortgage to Stateside Credit Corporation Pty. Ltd. registered number K814539 in the principal sum of \$90,000.00 and which mortgage had been assigned to The Associates Pty. Ltd.
 - d) The Associates Pty. Ltd. during the currency of the mortgages set out in subparagraphs b) and c) changed its name to "Mercantile Credits Limited" ("MCL")

PARTICULARS

- (a) In relation to the Mortgage to General Credits Limited the Plaintiffs refer to paragraph 20E hereof.
- (b) In relation to the Mortgages to The Associates Pty. Ltd. the Plaintiffs refer to paragraph 20J hereof.

36. As at August 1984 the First Mortgagee General Credits Limited had been taken over / acquired by or otherwise merged with Australian Guarantee Corporation Limited such that the conduct and management of the First Mortgage was from then on conducted by Australian Guarantee Corporation Limited. ("AGC")

37. As at August, 1984, the Plaintiffs were in default in respect to each of the mortgages detailed above and it was agreed between the Plaintiffs and AGC for the First Mortgagee that the Plaintiffs' land would be sold by public auction.

PARTICULARS

- a) Each of the mortgages had been defaulted upon as the Plaintiffs had made no payments due under the various mortgages since about April of 1984.
- b) The agreement between the Plaintiffs and AGC to sell the Plaintiffs' land by public auction was partly oral and partly to be implied.
- c) Insofar as the agreement between the Plaintiffs and AGC was oral it was contained within the following discussions:
 - i) The Plaintiffs had informed each of the Mortgagees of the default of WHRD Pty Limited under the contracts of sale detailed above;
 - ii) The Plaintiffs had informed each of the Mortgagees of the representations of KWB and KSC and the threats of WHRD Pty Limited in respect to the supply of water to the Plaintiffs' land .
 - iii) The Plaintiffs had informed each of the Mortgagees that the Plaintiffs had as a result of the representations of KWB and KSC and the threats of WHRD Pty. Limited elected to seek specific performance by WHRD Pty. Limited of

the contracts of sale and that the Plaintiffs had in May, 1984, issued proceedings to that effect in Supreme Court proceeding No. 2360 of 1984.

iv) In respect to the management of the First Mortgage the Plaintiffs from time to time held discussions with Mr. Des Roberts, a property finance officer of AGC. In or about September of 1984, Mr. Roberts enquired of the Plaintiffs as to the existence of official documentation setting out the representations of either or both KWB or KSC and also enquired as to the Plaintiffs' attitude should an attempt to sell the land by mortgagees auction be made. The Plaintiffs advised Mr. Roberts:

- (a) that the representations had all been verbal;
- (b) that it was also in the Plaintiffs' interests to realise upon the land as soon as possible;
- (c) that if AGC wished to sell the land that the Plaintiffs would not attempt to hinder or stop that sale on condition that the Plaintiffs' land could be expected to sell at a price reflecting entitlement to and access to water and entitlement to the issue of building permits.
- (d) Mr Roberts for AGC then advised the Plaintiffs that in the absence of official written advice to the contrary AGC continued to rely upon the valuation obtained by it in 1983 in respect to the Plaintiffs' land and which valuation advised that each allotment was entitled to a reticulated water supply and the issue of a building permit.

v) In the circumstances the Plaintiffs agreed with the wish of AGC to conduct a public auction of the Plaintiffs' land at that time.

- d) Insofar as the agreement between the Plaintiffs and AGC was implied it was implied from the said discussions and from the facts and circumstances surrounding the same and or from the law.

38. L.J. Hooker, real estate agents of Kyneton were appointed by AGC as agents to sell the Plaintiffs' land, and the auction date of 17 November 1984 was fixed.

PARTICULARS

- a) AGC retained L.J. Hooker of Kyneton to sell the Plaintiffs' land at mortgagees auction.
- b) L.J. Hooker erected advertising hoardings adjacent to the main entrance to Woodleigh Heights Estate. The hoarding provided a map or plan of CS1134 with the Plaintiffs' land delineated and the 17th November 1984 set and advertised as the auction date.

- c) Advertisements of the auction of the ~~Plaintiffs'~~ land were published in Melbourne newspapers advising that the date of the auction was 17th November 1984.

39. (Deleted)

- 39A. On or about 13th November 1984 KWB represented to L.J. Hooker Kyneton and AGC that water and sewerage were denied to the ~~Plaintiffs'~~ land and could not be obtained. ("the second representation").

PARTICULARS

The second representation is to be implied from the content of a letter dated 11th September 1985 from AGC to the First Plaintiff and further implied from the facts and circumstances surrounding and subsequent to the proposed auction of the ~~Plaintiffs'~~ land.

- 39B On or about 13th November 1984 Mr. Stan Porter for and on behalf of KWB repeated the second representation to AGC.

PARTICULARS

The repeating of the second representation is to be implied from the content of a letter dated 11th September 1985 from AGC to the First Plaintiff and further implied from the facts and circumstances surrounding and subsequent to the proposed auction of the ~~Plaintiffs'~~ land.

- 39C The second representation was made and repeated with the intention that the Plaintiffs act upon it.

40. (Deleted)

- 40A. The second representation was communicated by L.J. Hooker Kyneton and AGC to the Plaintiffs.

PARTICULARS

(a) Mr. Kevin Sheppard, the Proprietor of L.J. Hooker was a friend of the Firstnamed Plaintiff and the second representation was initially communicated to the Firstnamed Plaintiff by telephone on or about 13th November 1984.

(b) In pursuance of the agreement between AGC and the Plaintiffs that the Plaintiffs' land would only be sold in the circumstances set out in paragraph 37 Mr. Des Roberts for AGC communicated the second representation to the Firstnamed Plaintiff in a telephone conversation.

40B In reliance upon the second representation the Plaintiffs and AGC agreed that the proposed auction of the Plaintiffs' land set down for 17th November 1984 be cancelled and they instructed L.J. Hooker Kyneton to do so.

PARTICULARS

In pursuance of the agreement between AGC and the Plaintiffs that the Plaintiffs' land would only be sold in the circumstances set out in paragraph 37 the Plaintiffs and AGC agreed to cancel the proposed auction. Pursuant to the agreement between the Plaintiffs and AGC to cancel the proposed auction AGC instructed L.J. Hooker to cancel.

41. By letters dated 29th November, 1984, AGC requested advice from KWB and KSC;

- a) as to the availability of sewerage and mains reticulated water to the Plaintiffs' land;
- b) as to the acceptability to KSC and/or KWB of the alternatives of tank water/bore water and septic sewerage.

42. (Deleted)

42A By letter dated 20 December 1984, KSC responded to AGC's said letter of 29th November, in which it represented that in accordance with previous planning

approvals the issue of building permits was conditional upon the development (inclusive of the Plaintiffs' land) being serviced by reticulated sewerage ("the third representation")

42B The third representation was made by KSC with the intention that the Plaintiffs act upon it.

43. (Deleted)

44. (Delete)

44A By letter dated 3rd May 1985, KWB responded to AGC's said letter of 29th November 1984 (and a subsequent letter by AGC dated 9th April 1985), in which it represented that the KWB was not in a position to supply water to the Plaintiffs' land. ("the fourth representation")

44B The fourth representation was made by KWB with the intention that the Plaintiffs act upon it.

45. By further letter dated 7th May, 1985, KWB further represented to AGC that;

- a) Water had been supplied to WHRD Pty. Limited as an outside of the water area agreement on the basis that all costs for construction of the mains were paid for by that company;
- b) The board therefore has no mechanism by which the allotments referred to may be supplied with water except with the agreement of WHRD Pty. Limited;

- c) That AGC would be aware that a shire permit to build within CA41 will not be issued unless the blocks are supplied with water. ("CA41" is a reference to Crown Allotment 41 where CA1134 was located).
- d) That WHRD Pty. Limited either or all of owns, operates, and or controls the water mains referred to in sub-paragraph a).

("the fifth representations")

PARTICULARS

- i) Those parts of the fifth representations set out in sub paragraphs a), b), and c) are express and contained in the letter dated 7th May, 1985;
- ii) That part of the fifth representations set out in paragraph d) is implied from the content of the letter dated 7th May, 1985.

46. (Deleted)

47. (Deleted)

48. By October 1985 the ~~Plaintiffs'~~ land had been re-developed.

PARTICULARS

- i) Each of the ~~Plaintiffs'~~ lots comprising the land had been re-subdivided into three allotments and the ~~Plaintiffs'~~ land was now 18 lots namely lots 46, 47, 48, 49, 50, 54, 63, 64, 65, 72, 73, 74, 78, 79, 80, 130, 131 and 132 of CS1134 being the land more particularly described in Certificates of Title Volume 9596 Folios 163 to 177 inclusive and Volume 9596 Folios 187 to 189 inclusive.

49. (Deleted)

50. In or about October 1985 the Plaintiffs engaged the estate agents, L.J. Hooker Kyneton to sell the Plaintiffs' land, and the date for a public auction was fixed for 23 November 1985.

PARTICULARS

- a) The engagement was in writing in that the Firstnamed Plaintiff signed a document supplied by L. J. Hooker Kyneton and retained by L.J. Hooker Kyneton and which gave L. J. Hooker Kyneton exclusive right to sell and auction the Plaintiffs' land.
51. (Deleted)
52. (Deleted)
- 52A. On 11th November 1985 the Fourth Defendant during the course of a discussion with the Firstnamed Plaintiff concerning the proposed auction on 23rd November 1985;
- a) Repeated the first representations, the second, third, fourth and fifth representations, and;
- b) Represented:
- i) That the Plaintiffs' land never did have an approved reticulated water supply available to it;
 - ii) That the Plaintiffs' land never was entitled to access to an approved reticulated water supply;
 - iii) That KWB would not supply water to the Plaintiffs' land;
 - iv) That the Plaintiffs' land was not entitled to a water supply;
 - v) That without a reticulated water supply building permits from KSC were not available to the Plaintiffs' land;

- vi) That the Fourthnamed Defendant knew that WHRD wanted to purchase the ~~Plaintiffs'~~ land and that the Plaintiffs had refused to sell to WHRD without going to auction;
- vii) That Council's unofficial position was that the auction should not go ahead and that the Plaintiffs should sell their land to WHRD;
- viii) That in 1978 at the time of the application for cluster subdivision the subdivison was for KSC planning purposes considered to be outside the Kyneton Waterworks District of the KWB and the Plan of Cluster Subdivision was not referred to the KWB;
- ix) That the subdivision was now inside the Kyneton Waterworks district of the KWB;
- x) That the Body Corporate of CS1134 was not entitled to the water supply or reticulation system within CS1134;
- xi) That KWB would not enter into a water supply agreement with the Body Corporate of CS1134;
- xii) That KWB and KSC had been advised by WHRD Pty. Ltd. of the recent court action between the Plaintiffs and WHRD Pty. Ltd. and the terms of settlement;
- xiii) That with or without the agreement of WHRD Pty. Ltd. water would not be made available to the ~~Plaintiffs'~~ land;
- xiv) That without a reticulated water supply building permits were not available to the ~~Plaintiffs'~~ land.
- ("the sixth representations")

PARTICULARS

The Firstnamed Plaintiff in company with Mr. Max McDonald M.L.A. for Whittlesea and Mr. Graeme Anderson a friend of the Firstnamed Plaintiff met with the Fourthnamed Defendant in the Shire of Kyneton Offices at Kyneton at about midday on 11th November 1985. This meeting went for approximately one hour.

53. (Deleted)

54. (Deleted)

54A On 13th November 1985 the Thirdnamed Defendant, during the course of a telephone discussion with the Firstnamed Plaintiff concerning the proposed auction on 23rd November 1985;

- (a) repeated the first representations, the second, third, fourth, fifth and sixth representations; and
- (b) represented that the private water supply and reticulation system within CS1134 had never been approved by either KSC or KWB ("the seventh representation")

PARTICULARS

- a) The telephone call to the Thirdnamed Defendant was initiated by the Firstnamed Plaintiff from the home of the Firstnamed Plaintiff to the office of the Thirdnamed Defendant. This telephone call lasted for approximately 15 minutes.
- b) During the course of the telephone conversation the Thirdnamed Defendant advised the Firstnamed Plaintiff;
 - i) you do not have water;
 - ii) you will not get water;

- iii) you will not get building permits.
- iv) there never was an approved water supply available to the Plaintiffs' land.
- v) that KSC has no authority to approve water supplies and that any early water supply on the subdivision was a private system which did not have the approval of either KSC or KWB.
- vi) that the body corporate of CS1134 was not entitled to the water supply or reticulation system within CS1134.
- vii) that KWB would not enter into a water supply agreement with the Body Corporate of CS1134
- viii) that WHRD Pty. Ltd owns and operates the water supply and reticulation system within CS1134.
- ix) that notwithstanding the letter of the KWB to the Plaintiffs' solicitor dated 4th October 1985 (as referred to in paragraph 49) the KWB would not resolve to give effect to the terms of settlement.

55. (Deleted)

55A In reliance upon the representations referred to in paragraphs 52A and 54A hereof the Plaintiffs acted by canceling the second proposed auction set down for 23rd November 1985.

PARTICULARS

The Firstnamed Plaintiff instructed Mr. Kevin Sheppard of L.J. Hooker Kyneton to cancel the auction.

56. (Deleted)

56A During the period November 1985 to October 1989 the Defendants repeated to the Plaintiffs the various representations alleged herein;

- a) during further telephone discussions between the Firstnamed Plaintiff and the Thirdnamed Defendant between November 1985 and October 1989.

PARTICULARS

During the period July 1986 through to October 1989 the Plaintiffs made numerous telephone calls to the Thirdnamed Defendant at his office in Kyneton. During the course of these telephone conversations the Thirdnamed Defendant continued to advise the Plaintiffs in the terms set out in paragraph 54A above.

- b) during further telephone discussions between the Fourthnamed Defendant and the Firstnamed Plaintiff between November 1985 and October 1989.

PARTICULARS

During the period July 1986 through to October 1989 the Plaintiffs made numerous telephone calls to the Fourthnamed Defendant at his office in Kyneton. During the course of these telephone conversations the Fourthnamed Defendant continued to advise the Plaintiffs in the terms set out in paragraph 52A above.

- c) During meetings between the Firstnamed Plaintiff and the Thirdnamed Defendant during the period November 1985 to October 1989.

PARTICULARS

During the period November 1985 to October 1989 the Firstnamed Plaintiff made numerous visits to the KSC offices at Kyneton for the purpose of researching the Minute Books of KWB and KSWWT. At the time of these visits the Firstnamed Plaintiff would often speak with the Thirdnamed Defendant and discuss relevant matters including the representations. During these meetings the Thirdnamed Defendant repeated the representations set out in paragraph 54A.

- d) During meetings between the Firstnamed Plaintiff and the Fourthnamed Defendant during the period November 1985 to October 1989.

PARTICULARS

During the period November 1985 to October 1989 the Firstnamed Plaintiff made numerous visits to the KSC offices at Kyneton for the purpose of researching the Minute Books of KWB and KSWWT. At the time of these visits the Firstnamed Plaintiff would often speak with the Fourthnamed Defendant and discuss relevant matters including the representations. During these meetings the Fourthnamed Defendant repeated the representations set out in paragraph 52A.

- e) In a letter dated 30th December 1986 from KWB to the Firstnamed Plaintiff.

PARTICULARS

The repetition of the representations is to be implied from the content of the letter and from the facts and circumstances surrounding the same and from the law.

- f) In a letter dated 18th September 1987 from KWB to the Firstnamed Plaintiff.

PARTICULARS

The repetition of the representations is to be implied from the content of the letter and from the facts and circumstances surrounding the same and from the law.

- g) In or about October 1988 to G. D. Sutherland Pty. Ltd., Registered Valuers.

PARTICULARS

The representations to G.D. Sutherland Pty. Ltd. are implied in that the representations are repeated in part in a letter dated 12th October 1988 from G. D. Sutherland Pty. Ltd. to Mercantile Credits Limited and further particularised in a Valuation by G. D. Sutherland Pty. Ltd. dated 17th March 1992 which addressess the content of the letter dated 12th October 1988 and the status of the Plaintiffs' land as at the 12th October 1988 and which attributes the representations to discussions between G. D. Sutherland Pty. Ltd. and KWB.

- h) During the course of a meeting of the KSC on 4th January 1989 at which time the Firstnamed Plaintiff addressed the assembled Council on relevant matters including the representations.

- i) During the course of telephone conversations between the Firstnamed Plaintiff and Councillor Bill Hickey in or about June and July 1989 during which the Firstnamed Plaintiff raised the various representations.
- j) During the course of a joint meeting of the KSC and the KWB on 4th July 1989 at which time the Firstnamed Plaintiff addressed the assembled KSC and KWB on relevant matters including the representations.

57. (Deleted)

57A The first representations, the second, third, fourth, fifth, sixth and seventh representations (referred to collectively as "the representations"), were false and untrue. In particular:

- a) The representation as set out in subparagraph 33 b) was false and untrue for the following reasons;

- (1) The Water Agreement provided for the supply of water to land which was outside the Kyneton Waterworks District and the approval of the Governor in Council for that supply as required by S.186 of the Water Act 1958. was neither sought by KWB nor obtained by KWB.
- (2) The Water Agreement provided for the construction of certain works and the approval of the Minister for Water as required by S307AA(5) of the Water Act 1958 was neither sought by KWB nor obtained by KWB in respect to the plans and specifications for the works required and carried out under clause 2 of the Water Agreement.

(3) Condition 6 of Planning Permit No 2191 required the Body Corporate of CS1134 to be responsible for all private facilities within CS1134 including water whereas the effect of the Water Agreement as represented by KSWWT and KWB placed that control in respect to Water and the Water Reticulation System with the private company WHRD Pty. Ltd.

b) The representations as set out in subparagraph 33 c), d i), d) ii) and e) were false and untrue for the following reasons:

(1) The Plaintiffs refer to paragraphs 7 - 14 above.

c) The third representation of KSC as set out in paragraph 42A was false and untrue for the following reasons:

(1) The letter by KSC states, inter alia, that in accordance with previous planning approvals the issue of building permits is to remain conditional upon the development being serviced by reticulated water and sewerage, whereas;

(a) sewerage was not a condition of any of the planning approvals issued by KSC in respect to the subdivision or re-subdivision of CS1134;

(b) sewerage was not, under the provisions of either PP2191 or PP2784 a condition to the issue of building permits in respect to lots 1,2, 7, 10, 12 or 27 being the Plaintiffs' land;

(c) Under condition 8 of Planning Permit 2191, as set out in the submission, drinking water and bathroom water were to be supplied to the Plaintiffs' land by roof rainwater tanks;

(d) Under condition 8 of Planning Permit 2191, as set out in the Submission, onsite septic tanks were approved effluent disposal means for each of Lots 1, 2, 7, 10, 12 and 27 being the ~~Plaintiffs'~~ land.

(e) KSC failed to advise that rainwater tanks and onsite septic tanks were approved for use in respect to the ~~Plaintiffs'~~ land.

d) The fourth representation set out in paragraph 44A was false and untrue for the following reasons;

- i) The fourth representation set out in paragraph 44A was made in answer to AGC's letters of 29th November 1984 and 9th April 1985 as set out in paragraph 44A;
- ii) AGC's letter of 9th April 1985 sought from KWB information as to the advice of the KWB's engineers to KWB as foreshadowed in the letter to AGC from the KWB dated 7th December 1984;
- iii) The relevant report of the engineers for KWB is set out in the Minutes of the KWB of 6th March 1985;
- iv) The engineers report set out in the Minutes of the KWB of 6th March 1985 sets out that water would be available to the ~~Plaintiffs'~~ land however the private consulting engineers of the KWB recommended against approving a supply to the ~~Plaintiffs'~~ land on the basis of proprietorship rather than engineering considerations;

- v) The KWB was in a position to supply the ~~Plaintiffs'~~ land based upon engineering and water supply considerations.
- e) That part of the fifth representations of the KWB as set out in paragraph 45 b) were false and untrue for the following reasons:
- i) By Minute dated 8th November 1984 the KWB resolved to sign and seal a plan which increased the Kyneton Waterworks District and the Kyneton Urban District to include, inter alia, all of CS1134 including the ~~Plaintiffs'~~ land;
 - ii) On 8th November 1984 the KWB did sign and seal the plan referred to in subparagraph i) above;
 - iii) The plan referred to in subparagraph ii) above was approved by the Governor in Council on 13th March 1985;
 - iv) The plan approved by the Governor in Council on 13th March 1985 was gazetted on page 811 of the Government Gazette of 27th March 1985. As and from that date the ~~Plaintiffs'~~ land was situated within the Kyneton Urban District therefore in addition to any other right of access to the water supply and reticulation system within CS1134 the Plaintiffs and/or the ~~Plaintiffs'~~ land also had a right to the water and the reticulation system of the KWB pursuant to S.208 of the Water Act 1958;
 - v) By Minute dated 1st May 1985 KWB accepted the letter of AGC dated 9th April 1985;

- vi) By further Minute of 1st May 1985 KWB resolved to sign and seal a further plan excising, inter alia, the ~~Plaintiffs'~~ land from the Kyneton Urban District but leaving it within the Kyneton Waterworks District;
- vii) On 1st May 1985 KWB did sign and seal the plan referred to in sub paragraph vi) above;
- viii) The plan referred to in subparagraph vii) above had not been approved by the Governor in Council as at the 7th May 1985;
- ix) By letter dated 6th May 1985 the KWB sent to the Department of Water Resources for subsequent approval of the Governor in Council the plan signed and sealed by the KWB on 1st May 1985;
- x) The plan excising the ~~Plaintiffs'~~ land from the Kyneton Urban District but leaving it within the Kyneton Waterworks district was not approved by the Governor in Council until 25th June 1985 and was not gazetted in the Government Gazette until July 1985;
- xi) As at 7th May 1985 the ~~Plaintiffs'~~ land was within both the Kyneton Urban District and within the Kyneton Waterworks District;
- xii) As at 7th May 1985 the main of the KWB which supplied water to CS1134 was a pipe of the Authority within the meaning of S208 of the Water Act 1958;
- xiii) As at 7th May 1985 in addition to any other rights of the Plaintiffs and/or the ~~Plaintiffs'~~ land to the water supply and reticulation system within CS1134 the

Plaintiffs and/or the ~~Plaintiffs'~~ land had a further right of access to the water and reticulation system of the KWB pursuant to S208 of the Water Act 1958.

f) The implied part of the fifth representation of KWB as set out in paragraph 45 d) was false and untrue for the following reasons:

i) in respect to water mains within CS1134 the Plaintiffs refer to paragraphs 7 - 14 above;

ii) notwithstanding the matters set out in paragraph 57A a) above, any water mains constructed pursuant to Clause 2 of the Water Agreement outside CS1134 were subject to S307AA(8) of the Water Act 1958 and were at all material times the property of KWB and deemed to have been constructed by KWB.

g) That part of the first representations as set out in paragraph 33 b) was false and untrue for the following reasons:

i) The water agreement provided for the supply of water to land which was outside the Kyneton Waterworks District and the approval of the Governor in Council for that supply as required by S.186 of the Water Act 1958 was neither sought by KWB nor obtained by KWB;

ii) The Water Agreement provided for the construction of certain works and the approval of the Minister for Water as required by S307AA(5) was neither sought by KWB nor obtained by KWB in respect to the plans and specifications for the works required and carried out under Clause 2 of the Water Agreement;

- iii) Condition 6 of Planning Permit No 2191 required the Body Corporate of CS1134 to be responsible for all private facilities within CS1134 including water whereas the effect of the Water Agreement as represented by KSWWT and KWB placed that control in respect to water and the water reticulation system with the private company WHRD Pty. Ltd;
- iv) Those parts of the first representations as set out in paragraph 33 c), 33 d) i), 33 d) ii) and 33 e) were false and untrue for the following reasons;
- v) The Plaintiffs refer to paragraphs 7 - 14 above.
- h) The fourth representation set out in paragraph 44A was false and untrue for the following reasons:
- i) The representation set out in paragraph 44A was made in answer to AGC's letters of 29th November 1984 and 9th April 1985;
- ii) AGC's letter 29th November 1984 sought advice as to the availability of mains water to the Plaintiffs' land. KWB responded by letter dated 7th December 1984 and advised AGC that the KWB had referred the matter to its engineers Garlick & Stewart for report;
- iii) The relevant report of the engineers for KWB is set out in the Minutes of the KWB of 6th March 1985;
- iv) The engineers' report set out in the Minutes of the KWB of 6th March 1985 sets out that water would be available to the Plaintiffs' land and sets out how such water could be made available. The private consulting engineers of KWB

recommended against approving a supply of water to the Plaintiffs' land because it was owned by the Plaintiffs but did not recommend against supply for any supply or other engineering consideration;

- v) KWB was in a position to supply the Plaintiffs' land based upon engineering and water supply considerations.
- i) The representation of KSC as set out in paragraph 42A was false and untrue for the following reasons:
- (1) The letter by KSC states, inter alia, that in accordance with previous planning approvals the issue of building permits is to remain conditional upon the development being serviced by reticulated water and sewerage, whereas;
 - (a) sewerage was not a condition of any of the planning approvals issued by KSC in respect to the subdivision or re-subdivision of CS1134;
 - (b) sewerage was not, under the provisions of either PP2191 or PP2784 a condition to the issue of building permits in respect to lots 1,2, 7, 10, 12 or 27 being the Plaintiffs' land;
 - (c) Under condition 8 of Planning Permit 2191, as set out in the Submission, drinking water and bathroom water were to be supplied to the Plaintiffs' land by roof rainwater tanks;
 - (d) Under condition 8 of Planning Permit 2191, as set out in the Submission, onsite septic tanks were approved effluent disposal means for each of lots 1, 2, 7, 10, 12 and 27 being the Plaintiffs' land.

j) The implied representation of KWB as set out in paragraph 45 a) was false and untrue for the following reasons:

- i) Implicit in the representation is a meaning or representation that WHRD Pty. Ltd. either or all of owns or controls or is otherwise responsible for or has authority in respect to the water mains constructed pursuant to the water agreement;
- ii) in respect to water mains within CS1134 the Plaintiffs refer to paragraphs 7 - 14 above;
- iii) notwithstanding the matters set out in paragraph 57 a) above, any water mains constructed pursuant to Clause 2 of the Water Agreement outside CS1134 were subject to S307AA(8) of the Water Act 1958 and were at all material times the property of KWB and deemed to have been constructed by KWB.

k) The representations of the KWB as set out in paragraph 45 b) were false and untrue for the following reasons;

- i) By Minute dated 8th November 1984 the KWB resolved to sign and seal a plan which increased the Kyneton Waterworks District and the Kyneton Urban District to include, inter alia, all of CS1134 including the Plaintiffs' land;
- ii) On 8th November 1984 the KWB did sign and seal the plan referred to in subparagraph i) above;
- iii) The plan referred to in subparagraph ii) above was approved by the Governor in Council on 13th March 1985;

- iv) The plan approved by the Governor in Council on 13th March 1985 was gazetted on page 811 of the Government Gazette of 27th March 1985, as and from that date the Plaintiffs' land was situated within the Kyneton Urban District therefore in addition to any other right of access to the water supply and reticulation system within CS1134 the Plaintiffs and/or the Plaintiffs' land also had a right to the water and the reticulation system of the KWB pursuant to S.208 of the Water Act 1958;
- v) By Minute dated 1st May 1985 KWB accepted the letter of AGC dated 9th April 1985;
- vi) By further Minute of 1st May 1985 KWB resolved to sign and seal a further plan excising, inter alia, the Plaintiffs' land from the Kyneton Urban District but leaving it within the Kyneton Waterworks District;
- vii) On 1st May 1985 KWB did sign and seal the plan referred to in sub paragraph vi) above;
- viii) The plan referred to in subparagraph vii) above had not been approved by the Governor in Council as at the 7th May 1985;
- ix) By letter dated 6th May 1985 the KWB sent to the Department of Water Resources for subsequent approval of the Governor in Council the plan signed and sealed by the KWB on 1st May 1985;
- x) The plan excising the Plaintiffs' land from the Kyneton Urban District but leaving it within the Kyneton Waterworks district was not approved by the

Governor in Council until 25th June 1985 and was not gazetted in the Government Gazette until July 1985;

xi) As at 7th May 1985 the ~~Plaintiffs'~~ land was within both the Kyneton Urban District and within the Kyneton Waterworks District;

xii) As at 7th May 1985 the main of the KWB which supplied water to CS1134 was a pipe of the Authority within the meaning of S208 of the Water Act 1958;

xiii) As at 7th May 1985 in addition to any other rights of the Plaintiffs and/or the ~~Plaintiffs'~~ land to the water supply and reticulation system within CS1134 the Plaintiffs and/or the ~~Plaintiffs'~~ land had a further right of access to the water and reticulation system of the KWB pursuant to S208 of the Water Act 1958.

l) Those parts of the sixth representations set out in paragraphs 52A(b)(i), 52A(b)(ii), 52A(b)(iv), 52A(b)(x), and the seventh representation were false and untrue for the following reasons:

i) The Plaintiffs refer to paragraphs 7 - 14 above.

58. (Deleted)

58A The Defendants at the time when they made or caused to be made, the representations, knew them to be false and untrue or made them recklessly not caring whether they were true or false.

PARTICULARS

i) In respect to each and every representation which is alleged to be untrue each defendant had available to them the Subdivision Application, the Submission, approval documents, letters, facts, personal knowledge and Minutes of Meeting which evidence and set out the falsity and untruthfulness of the representations. Each of the KWB and the KSC shared both officers and some members of the Council & Board.

ii) The Plaintiffs refer to paragraph 57A hereof.

58B Further and/or in the alternative, insofar as any of the representations was an expression of opinion and/or an opinion of law, the Defendants did not in fact hold such opinion and/or knew at the time of expressing such opinion that it was incorrect.

PARTICULARS

The Plaintiffs refer to and repeat the particulars to Paragraph 58A.

59. (Deleted)

60. (Deleted)

61. (Deleted)

61A Further and/or alternatively, by reason of the matters alleged in paragraphs 1 - 56A hereof the Defendants were under a duty of care in making the representations.

62. (Deleted)

63. (Deleted)

63A In breach of the said duty of care the Defendants made the representations negligently and were thereby guilty of negligence in making the representations.

PARTICULARS

The Plaintiffs refer to and repeat paragraph 57A and the particulars to paragraph 58A above.

64. (Deleted)

64A The representations were false and untrue.

PARTICULARS

The Plaintiffs refer to and repeat paragraph 57A and the particulars to paragraph 58A.

65. Following the cancellation of the proposed auction fixed for 23 November 1985;

- a) on or about 19 October 1987, the solicitors acting for the then remaining mortgagee of the ~~Plaintiffs'~~ land, MCL, served Notice to Pay dated 19 October 1987 pursuant to Section 76 of the Transfer of Land Act 1958;
- b) The Plaintiffs were unable to comply with the said Notice and on 7 December 1987 MCL issued Supreme Court proceeding 4762 of 1987 seeking an order for possession of the ~~Plaintiffs'~~ land;
- c) On 22 December 1987 MCL entered judgment ~~against the Plaintiffs~~ in default of appearance and obtained an order for possession;
- d) On 31 October 1989 MCL sold the ~~Plaintiffs'~~ land to a company by the name of Deckwood Pty. Ltd. by private sale for a total sum of \$135,000;

e) MCL sold the ~~Plaintiffs~~ land on the basis that it did not have access to or entitlement to a water supply and reticulation system and that there was no approved private water supply and/or reticulation system pertinent to the ~~Plaintiffs~~ land.

f) MCL sold the ~~Plaintiffs~~ land at a price which reflected the basis upon which it was sold (as set out in subparagraphs d) and e) hereof)

66. (Deleted)

67. (Deleted)

67A By reason of the matters alleged herein the Plaintiffs have suffered loss and damage.

PARTICULARS

(a) The ~~Plaintiffs'~~ land was sold for a total price of \$135,000;

(b) Had the ~~Plaintiffs'~~ land been sold on the basis that there was an entitlement to an approved private water supply and reticulation system its sale value would have been \$431,500;

(c) The Plaintiffs have suffered loss and damage in the sum of \$296,500 being the difference between the abovementioned figures.

AND THE PLAINTIFFS CLAIM:

- A. Damages.
- B. Tax payable upon the award of damages, or alternatively, an indemnity in respect of the same.
- C. Interest pursuant to statute.
- D. Costs.
- E. Such other and further order as the Court deems fit.

Dated:

Baldock Stacy & Niven.

SCHEDULE OF PARTIES

GLENN ALEXANDER THOMPSON

First Plaintiff

and

CHERYL MAREE THOMPSON

Second Plaintiff

and

THE MACEDON RANGES SHIRE COUNCIL

Firstnamed Defendant

and

THE COLIBAN REGIONAL WATER AUTHORITY

Secondnamed Defendant

and

DAVID PARKINSON

Thirdnamed Defendant

and

GRAEME WILSON

Fourthnamed Defendant