MR MIDDLETON: I appear for the plaintiff with my learned friend Mr Adams.

MR DELANY: I appear with Mr Ahern for the first defendant, Macedon Shire.

MS BURCHILL: I appear with Mr Garde who is not here at the moment.

MASTER: Can I tell the parties what I've read? I've read the statement of claim, I've read the plaintiff's submissions - sorry, Mr Delany, I haven't read your submissions yet - second defendant's submissions. I've read five affidavits from Mr Thompson, one goes to I think it's security for costs, I've read two affidavits of Mr Edward. I've read four affidavits of Michelle Dixon, I've glanced at the exhibits.

MR DELANY: Perhaps I might check you have all of the affidavits. I think there are only four from Ms Dixon so you have those and I understand that there's a working copy of the exhibit folder exhibit MED1.

MASTER: I've got an MED1 exhibits folder.

MR DELANY: That Ms Dixon's affidavits.

MASTER: The fourth one relates to security for costs I think dated 23 December, 28 October, 10 November and I have two of 23 September.

MR DELANY: The one of 10 November exhibits correspondence relating to security for costs. Then Mr Thompson I think you mentioned you had five affidavits. The last of those and the most recent of those is sworn 10 November.

MASTER: Yes, the third is 7 November, et cetera.

MR DELANY: At the same time we received that one we received one sworn by Brendan Smith on 9 November.

MASTER: I have not that one.

MR MIDDLETON: If I could hand one up to the Master.

MR DELANY: I understand that's all of them. Mr Edward has in fact sworn three affidavits and the third one - - -

MASTER: I've got two - no, I've read three. I've read three.

MR DELANY: The third one is dated 11 November.

MASTER: Yes, I have that.

MR DELANY: Now, the other document I should enquire about is does the Master have the amended statement of claim dated 4 November 2005?

MASTER: That's the first document I read.

MR DELANY: Submissions have been filed by each of the parties.

MASTER: Where are yours? I couldn't find yours. That's the only reason I didn't read them.

MR DELANY: We'll hand you up a copy of those.

MASTER: Thank you. I've got the three sets now. I also read the defence of the first statement of claim.

MR DELANY: As the Master will see our client hasn't put in a defence and we say what should happen is that the proceeding should be dismissed summarily. Just to briefly before going to the outline if I could indicate why we say that's the case. The first point we make is that the proceeding is a rerun of claims previously made which were not only settled but were the subject of court orders.

MASTER: The terms of settlement went before the Supreme

Court.

MR DELANY: It's a little more complex than that but there were two proceedings previously which I'll come to in the outline, one is called the Tylden Road proceedings that was a County Court proceeding and Judge Howden made orders striking out the proceeding. The second proceeding is called the Woodleigh Heights proceeding. It was resolved and terms of settlement required the following notice of discontinuous by the plaintiffs. The plaintiffs didn't do that and so specific performance of the terms were ordered by Justice Beach and he ordered specific performance of the terms. So that one was discontinued.

MASTER: There was a mediation held in that one.

MR DELANY: That's correct, Master. The first ground we rely on are the claims that are made are a rerun of those claims which were settled and the subject of earlier orders. Secondly, to the extent any claim is now made were not precisely covered by those earlier proceedings, we say that they are closely connected with them that an Anshun estoppel arises so in other words they should have brought any such claims at the same time as one or other of the earlier proceedings. That relates in particular, the Master will see, to two issues one is in relation to the Tylden Road land that I'll come to, the plaintiff previously sued the counsel and the water authority in relation to what's called the residential land but he didn't sue in relation the to the industrial land. So we say he should have sued. If he had a cause of action he

should have sued in relation to the industrial land as well.

Secondly, the amended statement of claim in particular seeks to in effect rejig the damages claimed to try and draw some distinction between the damages claimed in the earlier two proceedings and there are various reasons why and we'll take the Master to why it was not successful but assuming it was successful, again there's an Anshun defence to that that should have been articulated in the earlier proceeding.

The third matter we rely on is the release in the two actions in favour of the council from earlier claims arising out of the same subject matter and we'll take the Master to those terms shortly.

The final matter, and one to which I think a lot of the affidavit material is in truth devoted, is that we say and I know the water authority has pleaded in its defence that each of the claims that are sought to be made are statute barred. There doesn't seem to be a dispute between our learned friends that the claims are statute barred but what they seek to set up, as we read the material, is some sort of case suggesting that s.27B of the Limitation of Actions Act applies so as to postpone the running of the limitation period.

Now, I just enquire whether the Master's had an opportunity to look at s.27.

MASTER: Not yet.

MR DELANY: I might ask that you have a copy available and I might point out the hurdles that the plaintiff would

have to overcome, assuming it jumped the other ones that I've mentioned, the hurdles it would need to establish in order to be permitted to go - they would need to establish in order to be permitted to go forward with their case.

S.27 is headed "Postponement of limitation periods in case of fraud or mistake" and then relevantly, "Wherein the case of any ... (reads) ... in public office", so it's a six year limitation period for tort from the time the damage was suffered, "(b) the right of action" that's the right of action in tort, "is concealed by the fraud of any such person". First of all there has to be concealment and there is a large quantity of affidavit material in this case but what it comes down to in terms of this postponement argument is that Mr Thompson says, "In 1991 I was handed a document, a folder, a black folder, and within the black folder I found a document and in 2000 I read the document nine years after it was handed to me, and then I worked out I might have a cause of action". So there's an enormous amount of material but it seems to us that's what it comes down to and what's critical is that the particular document that he refers to was discovered in an earlier proceeding and there's no - although Mr Thompson has sworn I think five affidavits, he doesn't contradict that proposition. It was discovered.

The evidence disclosed that he personally inspected the discovered documents and copies including that document were provided. That was in

the late 1980s.

If you look at 27B we say that any claim to extend the limitation period falls at the hurdle of concealment because there wasn't any, it was discovered. I'll take you to the cases later that show that this case is nothing like the typical concealment cases.

Secondly, it has to be, in order for there to be postponement available, there has to be a concealment by fraud of a person. It really goes without saying that if you discover a document you can't be being fraudulent in concealing something and there's no evidence anywhere in the material on the part of the plaintiffs that there's been fraud in the relevant sense and certainly if there was any fraud, it ceased when the black folder was handed up over in 1991. So on the best case, assuming there was concealment and assuming there was fraud, it stopped in 1991. There can't have been any concealment after that.

Let's assume against our case that there was concealment and there was fraud until 1991, then in order to avail themselves of the postponement provision the plaintiffs have to show that they could not, with reasonable diligence, have discovered the cause of action at a date prior to 31 May 1999. The reason for that date is it's six years after that the proceedings were issued and the short version of the evidence is that Mr Thompson was handed the mysterious black folder by a member of counsel, he found the critical document, or rather it had the critical

document in it. It seems he put it in his cupboard or under the bed or wherever he put it, and he chose not to look at it until 2000.

There's no evidence at all in that circumstance that he exercised reasonable diligence and there are two plaintiffs in this case and the other plaintiff is not on affidavit at all about what she did or didn't do in terms of exercising reasonable diligence so that she could have discovered the document which I think Mr Thompson says puts the puzzle together.

It is important to this issue of whether or not, with reasonable diligence, the plaintiffs could have discovered that they had the cause of action that right back in 1998 the plaintiffs regarded the council was a body which acted unlawfully and sued for unlawful conduct and also for negligence and breach of duty and in October of 1995 the plaintiffs had such a poor view of the council and I think also of the water authority, that they instituted General an action alleging fraud. In 1995 when the plaintiffs were alleging fraud against the council they already had the black folder and they already had the critical document.

The onus is on the plaintiffs, if they're going to rely on 27 B, to show that they could not with reasonable diligence have discovered the piece of paper in the black folder which by that stage they'd already held for four years.

Our case is that even if it comes down to the question of postponement of limitation period, that

there's no arguable basis for extending the time to 1999 as is required to enable the action not to be statute barred.

Now, Master, there is a lot of material and in some ways it's probably not a bad thing you haven't read the submissions because it probably makes it more attractive in that sense for me to go through them and to amplify the submissions where I go through as I think necessary.

What I would invite you to do is have the outline and I will talk to the outline and hopefully in the course of doing so also take you to what I think are the more critical documents. There aren't a lot of them but as you'll gather from what I've just said the pleadings in the other two actions are important.

MASTER: I'll need the exhibits to Ms Dixon, won't I?

MR DELANY: You will, not immediately though. I just take you to the start of the outline you'll see that we outline in para 2 that the primary relief that we seek is an order for summary judgment and in the alternative if that's not successful then we seek the provision for security for costs. I won't for the moment open the security for costs application. I'll come back to that a little later.

We've set out in para 3 the orders we seek which is judgment pursuant to Rule 23.03 or alternatively a permanent stay or judgment pursuant to Rule 23.01 or the inherent jurisdiction to prevent an abuse of process. Then in para (c) on the second page we set out the orders we seek in relation to the security for

costs but that's very much an alternative and only requires determination if the court does not dismiss the claim which we say should occur.

In para 4 we've identified the affidavits which were in existence at the time of this outline and I think we've gone through the additional affidavits so I won't elaborate on those.

If I can then take the Master to para 6 on p.3. What we say in para 6 is that in relation to the application under Rule 23.03 or alternatively 23.01 the grounds we rely upon are that the plaintiffs seek to agitate issues which were raised and resolved on settlement of the earlier proceedings between the plaintiffs and the council and orders made by the court.

Can I interpose there and say that we agree with the written submissions of the water authority that once orders are made, and we don't think there's any dispute about this, but once orders are made by a court pursuant to or in consequence of a settlement, then to permit a party to then again relitigate is not open because an estopple arises and to permit the plaintiffs to relitigate amounts to an abuse of process.

If I just briefly take the Master to one of the cases. Hopefully you might have a folder of cases or we'll hand it forward if you haven't. If I could take the Master to tab 15 which is the case of Neil Pearson & Co v. Customs. The passage I wanted to briefly take the Master to is at p.450. This is a New South Wales

Court of Appeal decision and the judgment I'm going to is the judgment of Justice Kirby who was at that time the acting Chief Justice of New South Wales, and the other two judges agreed with his statements.

Under the heeding "Preclusive Effect of Prior Judicial Determinations", His Honour says, "Issue estoppel and the ... (reads) ... for a change in semantics". The last just between (f) and (g), "The original form of estopple ... (reads) ... is by issue estopple" and I won't read the discussion of that. If I go down to paragraph just before (f), "The third and most ... (reads) ... be so adjudged". It might be argued against us in this case, well, look, there was no final hearing and therefore no reasons for judgment in either of the earlier two cases. All that happened was the court made orders and we would submit that in those circumstances and the court doesn't need to decide this but if it doesn't amount to estopple by record in the sense of res judicata, it certainly falls in the third category referred to by His Honour where the party should be adjudged to be bound by the earlier determination and we had here, as I mentioned, and I'll give you the detailed references to them shortly but decision of Judge Howden where he made orders striking out the proceeding and the filing of discontinuous in the other proceeding. That's all I wanted to take the Master to in that decision.

If you go back to the outline at para 6 you'll see in 6(a)(ii) we also say, as I've mentioned earlier, that the plaintiffs seek to agitate issues

which were the subject of releases in favour of the council at the time of settlement, so we rely on the terms of those releases which we'll come to shortly. (b), "To the extent any of the claims ... (reads) ... they should've been raised in them", and that's the decision in Port of Melbourne v. Anshun and it's not open to the plaintiffs now to bring such claims. I'll take you to Anshun a little later.

The third matter we rely on as I mentioned earlier is the plaintiffs' claims are manifestly statute barred and we say that 27B of the Limitation of Actions Act that I've taken the Master to on now view operates arguably to postpone the time until 31 May 1999.

As the Master will be aware, although recently a visitor to this jurisdiction, 23.03 entitles a defendant has a good defence on the merits to obtain summary judgment.

MASTER: Yes, I've seen hundreds of them over the last three months.

MR DELANY: Yes, and 23.01 is a rule which entitles the court to consider both the pleading and the evidence and the case is established that the rule is an appropriate one to be relied upon whereas here there's a clear defence under the Limitation of Actions Act and we've footnoted the cases and copies of them are in the folder but I don't propose to take the Master to them.

It's our case that leaving aside pleading deficiencies, of which there are plenty in this case,

to permit the case to go forward in light of the grounds that we set out, the three matters I've really already mentioned, would be to permit injustice and unfairness to the council and perpetrated via the legal process and it needs to be borne in mind here that the factual matters raised, apart from having been raised en earlier proceedings, there are events in the early 1980s and one of the key persons who's said to have engaged in conduct which is - is deceased.

We acknowledge in para 8 that the court will be wary to shut out a bona fide claim but we also make the point, which I'm sure is perhaps not so attractive to the court, is that the fact that the transaction is intricate will not entitle the court from seeing where the proceeding amounts to an abuse of process or vexatious and the fact Mr Thompson has sworn five affidavits is unfortunately not an opportunity for the court to say, well, look, it's all too hard. I'll let it go forward to trial.

MASTER: That's the argument you get in statutory demand cases. Because we've got heaps of material, we must have a case, is that what you're saying?

MR DELANY: Yes, that's the one. In terms of what the test is we say in the last sentence of eight that the case can be permitted to go no further whereas here it's inevitable that a trial at court would find for the council and we say this is such a case and I just need to take you I think to the authorities.

MASTER: I think I've seen them many times before but go

ahead.

MR DELANY: I think the decision in Camberfield, which is footnote 5, should be in tab 2 of the folder. I'm just going to, before going to that, hand to the Master extracts from a couple of other cases that are referred to in Justice of Appeal Batt's decision in Camberfield. The one I wanted to go to is Webster v. Lampard and I'll hand copies of the relevant extract around.

Page 602 at about .4 of the page. Their Honours said, "It's important to know ... (reads) ... that it must fail". Then the passage is set out from Justice Dixon in Dey v. Victorian Railway that I'm sure the Master is familiar with.

The other case I wanted to take the court to briefly and really because these are mentioned by Justice Batt, is the decision in Lindon v. Commonwealth. Has that been handed forward?

MASTER: Yes, I have that.

MR DELANY: This is a helpful judgment because His Honour sets out, starting at 544, the approach to be taken to summary relief and the - over at 545, His Honour says in the left-hand column at about three-quarters of the way down, "The guiding principle is ... (reads) ... which have legal merit." The reason that passage is referred to is because as His Honour makes clear on application such as this, and we accept you don't take a precise view of the pleading but you look at the concept of the pleading and see whether or not it's doomed to fail and here one does that by looking at

the amended statement of claim and also looking at how it's been amended and looking at the affidavits and then the more recent decision, which is in the folder at tab 2 is the decision of the Court of Appeal in Camberfield and the relevant passage is at para 26 which is on page 12. His Honour says, "It was pointed out... (reads) ... and Lindon v. Commonwealth" and His Honour says, "As will be apparent I accept the proposition". That's the test and we say that this case is one where it is inevitable that the court would find.

On returning to the outline of para 9 and that might be a repetitive but it's your statutory demand point, the fact there's a whole lot of material and maybe two days to deal with the matter doesn't mean one shouldn't engage in the exercise and make a determination.

MASTER: All it means is I've got to analyse the material.

MR DELANY: That's right and what we say as was said by Chief Justice Barwick in General Steel Industries, in footnote 6, says it's better to spend two days now than many dollars upon interlocutory - estimate for security for costs to the setting down for trial stage for the council alone is $160,000 and on a party/party basis so it would be a very expensive case if it proceeded to trial and that's before we have an actual trial.

Can I then go to the first general proposition we rely on on p.5, namely that the plaintiffs seek to litigate issues to the earlier proceedings and I'll

mention to the Master, as I said before, that the plaintiffs make two claims against the council and they all relate really to subdivisional land and the first one relates to parcels of land described as the Tylden Road land and the Tylden Road land is made up of land which is both residential land and industrial land and the second claim relates to parcels of land called the Woodleigh Heights land.

The allegations made by the plaintiffs against the counsel is in tort and that's important because claims in tort were made against the council in both earlier proceedings and in each claim it's said the council engaged in misfeasance in public office and we've noted that following the High Court's decision in Mengel, the circumstances where one can succeed in such a case are very narrow. It's a deliberate tort and Justice Dean identified the elements as being "invalid or unauthorised ... (reads) ... which causes harm" and the nature of the claim means there's a heavy onus of proof upon the plaintiffs at trial and it's relevant to take into account when looking at whether or not this is a case where it's inevitable the court will find for the council, to consider how high the barrier is that the plaintiffs must jump in order to be successful.

The public officer, for the most part the reference in our case is to Mr Porter, must be shown to have acted in bad faith and to have committed the unlawful acts complained of with the improper motive.

If I can pause there and say this. The first

Tylden Road proceedings we'll come to in a moment, actually identified in the course of the proceeding itself in interrogatories and answers, that Mr Porter was the person who acted on behalf of the council in relation to the subdivision of the Tylden Road land. So the plaintiffs knew at the time of interrogatories and answers, and I'll tell the Master that's interrogatory 16 and answer, I won't go to it, but they're at tab 11 of the Dixon exhibit folder MED1, the questions asked, "Was Mr porter the person who acted ... (reads) ... yes", and he's the same person in relation to the same subdivision that now there's a complaint about. The difference is it was earlier said concerning the same subdivisional land that he acted unlawfully but now it's said that he acted not just unlawfully but also in bad faith. That's the additional gloss.

Now, what we go on to say about line 5 of the outline is to establish the tort, "either malice or knowledge of the absence of power ... (reads) ... must be both pleaded and proved", and when the Master looks at the amended statement of claim you'll find no particulars at all of malice on the part of the council and, as we say in the outline, the Three Rivers case, there are two different form that could be alleged. One is targeted malice, in other words that Mr Porter specifically intended to injury the plaintiffs. The other arises where an officer here for the most part said to Porter, acted knowingly, that he had no power to do the act complained of and

the act will probably injure the plaintiffs.

Now, our learned friends have chosen in terms of affidavit material to not put forward any evidence an affidavit that might be relied on at trial to show that the requisite intent that they'll need to prove at trial is able to be made out and they've given no particulars in the pleading and they know that this is a contested application for judgment.

Now, in para 14 we set out a passage from Justice Brennan's judgment in Mengel that is important because His Honour says, "Malice knowledge and reckless ... (reads) ... the cause of action is complete". On the plaintiffs' case as pleaded the causes of action were complete. In 1980, that's 25 years ago, in the case of the Tylden Road industrial land, so this is no - well, limitation period's been exceeded by a year, I'd like a bit of a hand, thanks very much, this is 25 years old in the case of the Tylden Road industrial land.

In 1983 in the case of the Tylden Road residential land and 1984 in the case of the Woodleigh Heights land, so that's when the cause of action was complete on the cases pleaded and articulated in the affidavits and so it's obvious that given that the claim is one in tort, that the limitation period otherwise for Tylden Road is 1986, for industrial land it's 1989, for the residential land, and it's 1990 for Woodleigh Heights.

I won't read para 15 but in essence we say that at the end of that paragraph, it's difficult to conceive a case which more clearly exhibits the

hallmarks of abuse of process and one which is appropriate for summary disposition.

Now, if we then look at these individual proceedings that were previously brought, in para 16 we deal with the prior Tylden Road proceeding and make the proper concession that it concerned only the residential land. But whilst that's so, essentially the same facts are relied upon here as were the subject of the earlier County Court proceeding.

MASTER: The same facts relied here for the industrial hand.

MR DELANY: Yes, that's also the case. I think it's important for the Master to appreciate that the prior Tylden Road proceeding as we defined it in para 16 of the outline followed and relied upon a judgment given by Justice Kaye between the parties in the Supreme Court at 11 July 1988 - I think I've got the wrong date in my note. If I could take the Master to that judgment and reasons for judgment and it's exhibited to tab 3 to Mr Thompson's exhibits. We've been briefed with it and - it's 1988. GAT3 to the affidavit sworn 18 October 2005.

MASTER: I don't think I've got it.

MR DELANY: It looks like this, GAT1 tab 3.

MASTER: It's the one I said. It's GAT3. The judgment I have.

MR DELANY: So the Master is aware of what happened here, you'll probably have picked up from the material that you've had a chance to look at, that in relation to the Tylden Road land, the council required that a bank

guarantee of $25,000 - - -

MASTER: The judgment related to over and above that.

MR DELANY: That's right, so they sued in the Magistrates' Court for $3,708. They might be thinking now they wished they never had, but they did and then Mr Thompson took a proceeding to review the magistrate's decision so this was an order nisi proceeding and there were two grounds that Justice Kaye dealt with and ground (a) was that Mr Thompson was not the owner of land under the relevant provision of the Local Government Act so the council had no power to require him to give a guarantee, so that was the first ground.

The second ground which was ground (e) in His Honour's reasons for decision, was that the council had no power to substitute a guarantee to make the roads and provide water and services and that it should not have - it had no power to substitute a guarantee for the obligation to actually do the work and it should not have either sealed the plan of subdivision, and these are critical matters as the cases against the council developed, shouldn't have sealed the plan of subdivision and it shouldn't have lodged the plan of subdivision with the titles office.

Now, if I just - I don't think it's necessary to spend much time on the first ground namely that the Thompsons' were not the owner of the land but if I take the Master to p.3 of the judgment, at about .6 of the page His Honour says, "By letter of 23 October 1980 ... (reads) ... the waterworks trust" which is

the predecessor in law, at least it's pleaded to be. I'm not sure whether it's submitted to be, but it's pleaded to be the predecessor in law of the water authority.

That was the resolution that the council made in 1980. Presumably the trust gave its approval for on 24 November 1980 the council gave notice to the registrar of titles that the subdivider had compiled with the conditions of the requirement.

Then at the foot of p.4, the next page, His Honour says, "Of the several grounds... (reads) ... grounds (a) and (e)", and I've already told the Master that (a) dealt with not being the owner within the definition.

If I then take the Master over to p.7, "It is asserted by ground (e) of ... (reads) ... Local Government Act". If I then ask the Master to turn over to p.8, His Honour said, starting the last paragraph near the foot of that page, "It is performance ... (reads) ... of sub-s.3", and there's an error in the judgement here, it should be of s.369E, "it's provided as follows", and what the section says, "Where pursuant to this section ... (reads) ... if the council is" and it's not well set out here "if the council is satisfied ... (reads) ... it may withdraw the requirement". What His Honour found, as the Master will see in a moment, His Honour says, well, that gives you the council power to withdraw the requirement that Mr Buchanan construct the roads and provide the water supplies and sewerage

and drainage, but it doesn't permit the substitution of a guarantee requirement for requirement to build.

His Honour says as much in the next few lines in p.9 where he says, "the significance of this ... (reads) ... para (c)(a)", and then the last paragraph, about four lines from the bottom, "Consequently upon the plan of subdivision ... (reads) ... under the terms of requirement". So that's what had happened in relation to the Tylden Road land and His Honour so found way back in 1988.

MASTER: Just a moment and I'll have a kick quick look at that passage again.

MR DELANY: I'll just hand up - I'm not asking you to trawl through it but I'll hand it up in case you want to later have a look at it just a photocopy of the relevant provisions of the Local Government Act 1958, as they were at the time and it includes, I trust, the up-dates - this is from as at 1988 so it includes some up-dates afterwards and I won't go to all the provisions but I mentioned 569E which is referred to in the judgment and E3(c)(a) and the Master will find that section set out on p.366. It's a bit more clearly set out in the section than it's reproduced in the judgment.

MASTER: Yes, it is, isn't it.

MR DELANY: Just while we're there, you'll see that CA says, "If the council is satisfied ... (reads) ... may withdraw the requirement" and then D, "When every requirement has ... (reads) ... to that effect" and then E, "The registrar of titles shall not... (reads)

... in the office of titles". That was what the relevant legislation provided.

MASTER: At the time.

MR DELANY: Yes. The judgment of Justice Kaye provoked the plaintiffs to bring the first Tylden Road proceeding and as we say in para 17 of the outline - but I'll take the Master to the pleading, the comparative table that's set out in para 22 of Ms Dixon's summary judgment affidavit shows clearly that the same allegations of fact made in that prior Tylden Road proceeding are sought to be relied upon in this proceeding and in particular, as the Master will see in a moment, the amended statement of claim in the prior proceeding allege that the council should not have sealed or lodged the plan of subdivision and it alleged that in doing so it was in breach of the duty owed to the plaintiffs which caused loss.

Now, I think it's important to look at the pleading in the earlier case and see how the case is put because certainly my reading of it doesn't accord with the description of the cause of action which the first plaintiff gives in his affidavit and obviously it's a matter for the Master to look at the pleading to see whether or not the cause of action is as we say it is and what it incorporates.

The particular amended statement of claim, if I can ask the Master to go back to Ms Dixon's folder of exhibits that I think we started with, and the amended statement of claim in the Tylden Road proceeding is I think at tab 3 of that folder. If I start by taking

the Master to para 18 which is on p.8.

MASTER: This is written all over.

MR DELANY: I don't think you have to worry about that. I suspect Warren Garde, a member of council was noting up where the admissions and denials were in the pleading.

MASTER: And comments.

MR DELANY: That's right, but what's important is what's pleaded is, "On or about 19 November 1980, the council", the first defendant, "withdrew the requirement on the land ... (reads) ... of the requirement". That's the two acts that are pleaded there, namely the resolution to withdraw the requirement and the notification to the registrar of titles that the requirement had been complied with and the requirement in question was the requirement to construct the roads.

Then if we go to para 20 it's said "The first defendant", that's the council, "wasn't entitled to retain ... (reads) ... for the following reasons" and it's the reasons that matter. If we go to p.10, (v), the purported requirements had been withdrawn by the council. (vi) on p.10, "In contravention of 569E3(d) the first-named defendant", that's the council, "caused to be lodged with the office of titles ... (reads) ... had not been complied with", and the first-named defendant knew, so it's said that not only did it act wrongfully but it did so knowingly, "knew that such ... (reads) ... or call up the guarantee".

Then in para 21 is said, "By reason of the

matters detailed in para 20", so the matters detailed in para 20 include the lodging of the offending plan of subdivision at the office of titles notifying them that all was okay. It's said that those matters were actions on the part of the council which were contrary to law, so they're unlawful, and breaches and warranties and they were negligent and in breach of duty.

Then if we go to para 25 we find that, "At the time it caused representations ... (reads) ... rely on them", and knew that they'd do that. Para 29 sets out they suffered loss and damage. If we go to p.15 you'll see that (C), "Consequence or losses sustained by the plaintiffs ... (reads) ... give you particulars before trial". They did that and the particulars before trial appear at the next tab of the folder at tab 4.

MASTER: Yes.

MR DELANY: What's alleged in those particulars in para 5 is that the lots were sold for $269,000-odd and (6), "had the sum not been requested... (reads) ... in the region of $200,000." Now, the same claim, and perhaps if I can ask the Master just to go to para 22 of Ms Dixon's affidavit.

MASTER: Which one?

MR DELANY: That's the first one, the main one, para 22, sworn on 23 September. It's the large one. There's two that day.

MASTER: It's a whole 24 pages?

MR DELANY: That's the one. My suggestion is if you put it

at the front of the folder with the exhibits you'll never lose it.

MASTER: Yes, we've looked at the particulars of loss.

MR DELANY: We have and some of the key facts pleaded in that earlier action. If the Master goes to p.4 of the affidavit para 16, you'll see that the deponent describes the documents which were filed and served in the proceeding and I don't need to go to any others of those, we've already been there.

If we then go to para 22, which is on p.5, you'll see the common allegations made in both proceedings. I didn't take you to all of them in the Tylden Road one but you'll see in both actions it's said that Mr Buchanan had lodged some notices of intention to subdivide the Tylden Road land and next, that the council had resolved to serve notice on Buchanan under 569E; next that the council, on 29 May 1980 sealed seven residential plans of subdivision; next that the notice related to requirement to construct specified works; that in 1980 there was the bank guarantee request and the provision of the guarantee, and then (vi), "On about 24 November 1980 ... (reads) ... of subdivision". Then 1980 the plaintiffs became the owners or were entitled to become the registered proprietors of 15 of the 18 lots being the residential land component, and the council called up the guarantee. Then (xi), in March/April 2003 the plaintiffs sold their interest in the 15 allotments comprising the residential land and then in (xii) the council caused a road to be constructed between

February '83 and March '84 in connection with the subdivision.

MASTER: They relate to the comparison.

MR DELANY: Those allegations are in both proceedings.

MASTER: Yes, that's prior to the statement of claim being amended in this proceeding. There wouldn't be much difference though except for the damages mainly.

MR DELANY: Yes, and I'll come to the damages point. In 23 there's discussion of the earlier proceeding - I'm sorry but in (xii) on p.7 you might change that to between - there's a reference to 2003 in (xi) and it should be 1983.

MASTER: I won't change it because it's an affidavit but I'll take a note of it.

MR DELANY: If the Master goes to p.8, para 25, what's set out there in full is the amended statement of claim loss and damage in the first action and then in para 26 the further and better particulars of loss which we've just gone to, and then if one goes to p.11 in para 30, reproduced are the original loss and damage particulars as claimed in this proceeding and the Master will see immediately that the first roman numeral pleads there was financial hardship so they were forced to sell the 15 lots. They entered into a contract with Chelmantau which is the same contract referred to and particularised in the earlier particulars, and they had a threat loss, down towards the bottom of the page, of $237,000. So the same loss precisely.

The situation is that the loss was sustained

because when the plaintiffs came to sell the Tylden Road land, it didn't have the services and roads that it was supposed to have and that's what has caused the - and the reason it's said that happened is because the council had wrongfully sealed and lodged the plan of subdivision.

Now, Master, as you'd be aware damage is obviously the gist of the action in tort. That's so whether it's for negligence, as was part of the earlier Tylden Road claim, or for misfeasance in public office. What's happened here is that once our learned friends receive the affidavit of Ms Dixon they thought that's a bit of a problem, we're claiming the same damage. We better go away and have another shot at it and see if we can move the goal post a little bit and that's why we got the amended statement of claim. The only amendment that happened was the amendment to particulars of loss,

MASTER: Which is at the back.

MR DELANY: That's right. What you'll see on p.35 is a bit of crossing out which is to try and move away from the earlier claim and now the allegation in D3(i), is that "As bona fide purchasers for without notice ... (reads) ... legally enforceable right to such services. Well, that's no doubt information that was available to them when they draw their previous proceeding because they complained that the council shouldn't have withdrawn or rather notified the titles office that the lots were okay, and as a result of the misfeasance, the plaintiffs instead received

indefeasible title to 15 allotments without services and without any legal enforceable means to compel the construction and the loss is now differently quantified in the first instance. It's been added in that it's the difference between the market value of the date of purchase without services and the market value of the same with services.

If one goes down to the last paragraph on the page which was previously (v), the claim continues to be made for $237,000 so the claim is still there. It's just an additional claim made.

We would just say this in relation to this attempt to move the goal post: The first thing we would say is that the plaintiffs in this case in relation to 15 lots saw their loss crystallised, if they ever suffered one, when they sold the lots. That's the proper and the only basis to calculate any damages and the inclusion of the new paragraph, (i), doesn't change the situation. They still claim the same amount of $237,000 and it's still the same case.

Secondly, if by some highly skilled advocacy Mr Middleton is able to persuade you it's marginally different, doesn't help him because those facts pleaded in (i) were well and truly known to the plaintiffs back then in 1988 after Justice Kaye's decision, if not before, and they're so closely connected that they should have been relied on in that case.

MASTER: Yes, I understand.

MR DELANY: Now, I should also deal, while I'm dealing with

this Tylden Road claim, with what Mr Thompson describes in his affidavit, his first affidavit, as the omitted paragraphs so he says these are the ones which he says are new. I need to ask for the Master to have available Mr Thompson's first long affidavit, summary judgment affidavit.

MASTER: Date of that affidavit being?

MR DELANY: 18 November.

MASTER: Yes, I have that.

MR DELANY: If I just take the Master to para 42(a) which is on p.9.

MASTER: Yes.

MR DELANY: He says in 42(a), "I refer to the Dixon summary ... (reads) ... in para 22", deposes that the cause of action is the same, "I deny this. I note the table ... (reads) ... omitted paragraphs". He goes on to say "The facts and circumstances set out in those ... (reads) ... until August 2000". I need to just take the Master to those paragraphs and so if we can go back to the amended statement of claim.

MASTER: They're the same, really, aren't they?

MR DELANY: Sorry, they're not amended, no, the Master is right.

MASTER: There's a couple of words like a local government or just a couple of minor acts, Cluster Titles Act, those sorts of things.

MR DELANY: If I ask the Master to go to p.6 of the statement of claim.

MASTER: Yes, I'm there.

MR DELANY: What's said in para T5, this is said to be new,

"Between February '80 and April '80 the council ... (reads) ... contrary to its statutory duty under 569E", that's the very same section he relied on in the other action, "In furtherance of its ... (reads) ... out of the road works and Aboriginal services", it's the same thing, "in willful and reckless disregard of ... (reads) ... first residential plan". I'll come back to that in a minute, "And maliciously intending to cause ... (reads) ... of the Transfer of Land Act".

Then in para T9, knew that Buchanan had not complied with 569(1) and 569A and then further on in 10 pleads - says that, "No planning permit ... (reads) ... series of industrial plans", so here the industrial plans are included, "represents to all persons ... (reads) ... steps and proceedings had been taken".

Then 10 is said to be a new paragraph which pleads reckless disregard on the part of the council. 11 is a new one which pleads malice "causing to be placed on each of the plans ... (reads) ... 569E notices had ever been served". Then T12 alleges that the council fabricated the notices of requirement. T14 says that the person who did those things was Porter. T15 says that the council, "by sealing the parent plan ... (reads) ... approved by the council", and goes on to say the representations were false. Then T16 says "Between May 1980" and this isn't new and this is why this is important.

MASTER: T16 isn't knew.

.VTS:DT 14/11/05

MR DELANY: It's not new, it was there before.

MASTER: What do you say about T14, 15?

MR DELANY: Yes, they're said to be new and we agree they weren't pleaded in those terms in the earlier pleading. So 16 is not new. Relying on the representations the registrar of titles accepted for lodgement the parent plan, accepted the three plans, did all these things, and then the plaintiff purchased the land and the titles issued.

Really, what's gone on here in these amendments is that just step back for a moment and have a think about the case. After Justice Kaye's decision, what happened is the plaintiffs issued a proceeding saying look, I ended up having to sell land which didn't have all the services. Didn't have roads and so on and I lost $200,000. The reason I lost that money is because you, the council, acted improperly and unlawfully in the powers of the Local Government Act. You purported to withdraw notice, and so on and you didn't have power to do so. You acted unlawfully and the result of it was there were no services and the result of that was when the lots were sold I suffered a loss. Now, that's essentially what the case is.

Now what's been identified is more naughty behaviour, more wrongful conduct, but leading to exactly the same result, the result being the registration of the plans of subdivision and no doubt my learned friends will say, look, it's not the same plan of subdivision. What happened is there was this fraudulent document that made it look as if the same

plan of subdivision had the conditions that had been approved but what we say is that doesn't matter. That doesn't give you a new cause of action. It's like saying I ran a case, I knew they'd been very badly behaved, and I knew they'd committed breach of contract, didn't know that they'd also committed breach of the Trade Practices Act. The damages are the same. Now I want it come back and plead my trade practices case.

Here it's not as clear cut as that. Here is they acted in breach of duty and I pleaded an action in tort and I pleaded loss of $200,000-something and now I want to plead an action in tort for exactly the same loss. Here are I want to call their actions misfeasance in public office. It's another aspect, if you like, of wrongful behaviour but it doesn't amount to a new case at all.

All it is, when one looks at these paragraphs, called the omitted paragraphs, is there's simply another reason why it's said that the council acted wrongly when it sealed the plan of subdivision and lodged or gave the clearance to the registrar of titles that's why I took you to the subparas and para 20 which were relied on in the earlier action namely notifying the registrar of titles that everything was okay. That's really what caused the loss relied on in the first case and what's caused the loss relied on in this case.

MASTER: I'll still have to go through the statement of claim and compare it to the other one.

MR DELANY: You will but it's not a matter of just saying its got a different paragraph as would be obvious, because if that were the case everyone could come back and say, Your Honour, I just had a case last week. I want to add a new paragraph.

MASTER: It's a point of looking at the causes of action.

MR DELANY: That's right but the causes of action are in tort and as I said earlier if the damage is the gist of the cause of action, it's the same damage.

MASTER: Not being as simple but you've got tort action of both the same damage really based on the same facts therefore that's the ends of it, that's what you're saying.

MR DELANY: I won't take you to it but you might want to make a note that when you have a look at my friend's outline at p.12 where they deal with this Tylden Road proceeding, they refer to the new acts and starting with a paragraph that starts moreover. Now, that's a fair classification. In other words, we knew it before but moreover there's more, forgot to tell you about the other bits and here they now are but they lead to the same result.

That's really the Tylden Road proceeding pleadings and going back to our outline at p.8, para 20, as we discussed below that proceeding was compromised in 1991 and we haven't made a note in the outline but the settlement and the order of Judge Howden, which ordered the proceeding be struck out, you might just want to make a note of it if the Master wants to look at the order. It's at tab 15 of the

Dixon exhibit folder, MED1.

MASTER: Thank you.

MR DELANY: Now, if we then go to the next proceeding which is the Woodleigh Heights proceeding. So what happened is having compromised the Tylden Road proceeding in 1991, the plaintiffs decided they'd bring another proceeding against the council and the water authority in relation to some other land, the Woodleigh Heights land and that proceeding is discussed in para 21 of the outline. What was alleged in that proceeding by Mr Thompson was fraud on the part of the council and we say that it's noteworthy that Mr Thompson now concedes in his main affidavit, the one we looked at earlier, that when he made the allegation of fraud in the earlier Woodleigh Heights proceeding, he says he could not say or demonstrate what the fraud was or who was responsible for it.

That's a pretty extraordinary admission but notwithstanding that's now acknowledged by him to be the case, he nevertheless was happy to bring a case alleging fraud which was against the council and I think against the water authority. I'm told yes, against the water authority. Now, his present case is one which alleges deliberate misconduct, misfeasance in public office in lieu of the fraud plead previously.

What the position is in relation to the Woodleigh Heights proceeding is this, the Woodleigh Heights statement of claim, which is exhibited to the - in the Dixon folder, is quite a long and complicated pleading

which alleges various misrepresentations. Essentially what they come down to is this; when the plaintiffs - sorry, the plaintiffs purchased some land in the Woodleigh Heights subdivision. They got into financial bother and the mortgagee came to sell the land. Now, when the mortgagee came to sell the land, both the plaintiffs and the mortgagee sought advice from the council as to whether or not when they sold the land they could do so on the basis that the lots in the subdivision had access to water so that a purchaser could get a permit to build.

Essentially what they were saying was tell us, council, if we sell these lands to a purchaser can we represent to the purchasers that, yes, you can go ahead and build because you'll have water? What the pleading in the earlier proceedings discloses is that whilst the plaintiffs had purchased a large number of the lots in the Woodleigh Heights subdivision, there was one particular lot they didn't own and the owner of that lot, who I think might have been associated with Mr Buchanan who probably is the person who should probably be being served, or his estate.

So a company associate of Mr Buchanan was asserting that he controlled the water system via a private water system in the subdivision saying you can't have access to my water supply. The plaintiffs were saying to the council, look, can we sell these lots on the basis they have access to water and therefore you can build, and what was alleged in the earlier proceeding concerning Woodleigh Heights is

that the council wrongfully advised the lots had no access to water and because of that incorrect advice, which was negligent and breach of conduct and so on, the plaintiffs proceeded on the basis they could only sell the lots as lots that didn't have water. It said the advice from the council was wrong, that it acted fraudulently.

MASTER: Any particulars of fraud given?

MR DELANY: No, I think it got struck out the fraud allegation in the amended statement of claim. It's not there. I've a feeling Justice Ashley might have struck it out but I may be incorrect about that, but there were no particulars of the fraud given.

In the present case, the complaint that seems to be made is about the council sealing the plans and saying by this further wrongful act, that is sealing the plans without making sure that water would be available to the lots, this meant that when the lots were sold by the mortgagee, there was no water available so they sold for less.

The first case was I asked for advice and I was wrongfully told that there wouldn't be water available so I had to sell them on the basis there wouldn't be water available. The present case is I still had to sell them on the basis there wasn't water available but it's your fault not because you gave me wrongful advice but for different and other reason but because you didn't act properly when you went about sealing the plans of subdivision. Yet again it's another gloss or fact or twist that's being brought forward 20

years after the event to say it also caused the same damage.

I think it's probably helpful to go to Ms Dixon's summary judgment affidavit, para 45, to show that the same facts and matters are pleaded in the two actions. I'm not going to take you to the pleading in the original Woodleigh Heights action because it's quite long and, frankly, pretty hard to follow.

MASTER: I'll have to do it myself.

MR DELANY: You might have to but Mr Middleton can take you to it.

MASTER: No, I'm happy to read it.

MR DELANY: The key paragraphs are the same as set out on para 47 on p.15. So first of all the Woodleigh Heights land was part of a larger parcel of land, that in 1978 it was owned by Buchanan, was within the council's municipal district and in 1978 part of it was within and part was outside the water works district, the water authority, and part - it was outside both the urban district and the rural district of the water authority, that in November 198 Buchanan applied to develop the Woodleigh Heights estate and the application provided for the installation of a privately owned and operated water supply and reticulation system forming part of the common property.

If you want to see a diagram for your interest of what the Woodleigh Heights estate looked like there's a brochure which is I think the first exhibit in Mr Thompson's affidavit. It might be something for

light relief when you're looking at the pleadings.

(v), "On 15 November '78 the ... (reads) ... to develop the estate on conditions" and (vi), "It was a condition of the permit that the ... (reads) ... and reticulation system". Then a cluster subdivision plan was registered and in 1979 the plaintiffs entered into a terms contract with Buchanan to purchase Woodleigh Heights. (x), the council did not refer the cluster subdivision to the water authority so they've breached their duty. Then 11, "Buchanan's made application to the council ... (reads) ... cluster redevelopment", and then starts - sorry, then there was an assignment by Buchanan of his rights to general credits.

Then (xiv), the plaintiffs became aware that lot 28 had been sold to a company called Woodleigh Heights. Now, that's the lot that I think had the water supply on it and then the plaintiff's incorporated their own company and then (xvi), "In May '83 the nine lots comprising ... (reads) ... were transferred by the plaintiffs to their company", and so they maintained an interest in it. They say that in 1983 they executed a declaration of trust, or the company did, and then in 18, the company associated with Buchanan "entered into contracts with the plaintiffs ... (reads) ... but it failed to complete", and in (xx), Buchanan's company represented the plaintiffs, that if they attempted to rescind the contracts and sell to someone other than that company, then Buchanan's company would prevent them from having access to water, rendering the land worthless. They

made enquiries of the council to see whether what Buchanan's company told them was correct.

Then 22, "The council and the water authority told them it was outside the ... (reads) ... of WHRD", that's Buchanan's company, "and the body corporate was not entitled to access the water supply or reticulation system". Then pleaded the mortgage - they were in default.

Over at p.20, the fourth box, "On about 13 November 1984 ... (reads) ... would be cancelled". The last paragraph on that page, "The water authority advised ... (reads) ... without agreement". Then in the second last paragraph on 21, "In reliance on the representation ... (reads) ... it's right of sale".

In para 48, an instructor proposed, "In the prior Woodleigh Heights ... (reads) ... was to the contrary".

All of those paragraphs that you've just read at some length are in this new statement of claim. If this was a new case, one might ask what have they got to do with anything. They're all still in there, they're all still relied on. All that's happened is there's more bad behaviour said to have happened and the additional bad behaviour is what's in the former omitted paragraphs and we need to have a look at those and if the Master has the amended statement of claim.

MASTER: Where are they referred to?

MR DELANY: He refers to them in para 42(b).

MASTER: Yes, I've got it.

MR DELANY: It's W8 to 12 and W14. Now, W8 says - sorry,

W7, which is common to both pleadings, says "In November '78 ... (reads) ... the first cluster plan" and then a complaint is made in W8 that in August '79, that's 26 years ago, "The council for an ulterior purpose ... (reads) ... of the Sale of Land Act". Just to fill you in a little bit because there are a few references to s.9 of the Sale of Land Act which provided at the time that you could tell - I think it's that you could sell two lots on a plan of subdivision - I'll tell you what it is "Where a proprietor subdivided any land" - I'll start again.

Essentially, you can lodge a two lot plan of subdivision and you don't have to show roads, streets and so on on the plan and you can get it approved and off you go. But if you want to subdivide into more than two you have to show the roads and so on on the plan of subdivision. They have to be all marked. That's, as I understand it, the short version.

What's said is to get around having to show roads or water on the plan, Mr Buchanan put forward to the council a series of plans. So whereas previously he might have had an 18 lot plan, he said, we'll do it in a slightly different way. What we'll do is we'll have two nine lot plans and then we don't have to show any roads - sorry, nine two lot plans, I think that's the complaint as I understand it.

There were further plans lodged and it's said this was an ulterior purpose of getting around s.9 of the Sale of Land Act and that the council did it maliciously and in para W10 that when sealing the or

dealing with the first cluster plan, "The council knew", and this is important in W10(a), "all of the facts and circumstances ... (reads) ... 2, 3, 4, 5 and 6". Now, the reason that's important is that those facts are the same facts pleaded and relied on in the old case.

The next thing that's pleaded in (b) is that the council knew that no reticulated water supply systems had been installed and it hadn't complied with the Local Government Act and (b), "Having regard to the facts and circumstances ... (reads) ... disregarded its obligations". Then in W12, "The council by sealing the ... (reads) ... discharge of council's obligations under the Local Government Act".

Then in W13 which is not new because it's not the further omitted paragraphs, "Relying on the representations ... (reads) ... and register the first cluster plan", and then W14, which is new, "On 1 November '79 the plaintiffs entered ... (reads) ... end vendor terms contract", and over on the next page, "The time purchasing ... (reads) ... they wouldn't have purchased the allotments".

What we do know is that both pleadings refer to plans of cluster subdivision and both cases rely on the one critical fact that when it came to the sale of the land there was no reticulated water. This one says for an additional reason as well as all of the other said to be wrongful conduct.

I'm just going back to the outline. I don't think I need to take you to the original Woodleigh

Heights statement of claim, as I've mentioned.

MASTER: As I said, I'm happy to read it later.

MR DELANY: What's happened is just like the Tylden Road claim, once ou learned friends received the affidavit and the outlines and said it's the same loss and you can't bring the same case twice, they have sought to do a bit of ducking and weaving and we've got a revised plea of loss and damage. This one it's p.36 - this time they've decided to scratch the earlier claim that they would have sold it for a higher amount of money between November '84 and December '87 and come back and say, well, it's - they weren't serviced by water so a loss is the difference between market value at the date of purchase of the unusual lots and market value had they been supplied with water at the date of purchase.

MASTER: I notice that the particulars of the previous damage were given, not full but what's now being said is they'll be giving you new particulars.

MR DELANY: That's right.

MASTER: Obviously different amounts is what I'm thinking.

MR DELANY: Yes, they might be. There are two problems, the first problem is that the plaintiffs' claim pleads that the land was sold by the mortgagee and sold in circumstances where there was no water. The fact is that if they suffered a loss, the loss crystallised and was quantified when that land was sold. So we say if they've got an arguable case it can only by an arguable case for the loss they previously claimed.

MASTER: You're saying it has to be the same loss, can't be

the other loss is what you're saying.

MR DELANY: That's right because the loss crystallised once and for all when they sold their land. If we're wrong about that and it would have been open to them to put their loss differently, they've got an Anshun problem because as in the case of the Tylden Road land, they had the opportunity to put forward this basis for loss and damage previously because in the previous case they set out the same facts in relation to their purchase of the land. They pleaded the contract of sale and when it was settled and so on.

If I go back to the outline at the foot of p.8, what we set out is that the Woodleigh Heights proceeding was settled in 1999 and that it's not open to the plaintiffs to bring a second proceeding based on the same facts alleging the same damage ten years after the first proceeding was instituted six years after it was compromised and I think I've already discussed with you, Master, that the compromise required the plaintiffs to file a notice of discontinuous.

Justice Beach ordered specific performance of that term and if you wanted to note I'll tell you that Mr Justice Beach's reasons for judgment are at tab 41 of Ms Dixon's exhibit folder and that he required specific performance of that obligation. It appears at pp.5 and 6 of His Honour's reasons.

MASTER: Okay.

MR DELANY: If I just touch for the moment briefly on the Tylden Road industrial land which is dealt with in p.9

of the outline, the claims made relate to both the residential and the industrial land now and the council acknowledges that the prior Tylden Road proceedings only related to residential land. But we, in relation to the Tylden Road industrial land, rely on Anshun because it's so closely related to the other claims should have been made then and secondly the claim is manifestly statute barred. I'll come back to dealing with the industrial land claim shortly.

First while we're still dealing with Tylden Road proceeding if I could move to the release. What we say is that the court orders mean that it's an abuse of process to bring forward the claim based on the same matters.

Secondly we say that when one looks at the terms of the releases in the two cases, leaving aside the industrial land claim, no further claims are open to the plaintiffs in relation to either the Tylden Road residential land or the Woodleigh Heights land.

On p.9 we've set out the terms of settlement and clause 5 of the terms says, "Subject to the defendants ... (reads) ... the subject matter of this proceeding".

MASTER: A standard release.

MR DELANY: That's right but the release is of the subject matter of the proceeding and when one looks at what was the subject matter of the proceeding it's quite plain that the subject matter is the claim in tort in the case of Tylden Road, by reason of the value of the land being less because of the failure to have the

services and it's the $200,000 that's still claimed.

The pleading analysis of the Tylden Road proceeding shows that - in particular para 20 that I took you to - shows that the subject matter includes actions said to be unlawful on the part of the council, that's what para 21 says, in respect of events in para 20, including the sealing and lodging of the plan of subdivision and that sealing and lodging of the plan of subdivision caused the same loss as is now sought to be claimed.

I should say and I don't think I mentioned this earlier, that in respect of the Tylden Road proceeding, the current Tylden Road claim also makes an allegation that the council included a condition on one lot of plans of subdivision but didn't carry it forward to the next one and it's not the same plan of subdivision. There's sort of a little twist on additional aspect of the council's wrongful behaviour, but the plan of subdivision that's been complained of in the first place as being sealed by the titles office, is the same one that's relied on here.

There's an additional fact put forward saying you shouldn't have broken it up into more than - it should've been one plan and not a whole series of little plans to get around the Sale of Land Act provisions. But it's the same plan of subdivision that is relied upon and the loss we say is the same and the events the same so we say it's the same subject matter and the reference to subject matter is more than wide enough to release the council from

claims now sought to be made in the present case.

If I just go to para 30 of the outline, what we say is, "The subject matter of the ... (reads) ... regarding the same plan". What we say is that it's a complaint about the same person, first of all. Mr Porter and his behaviour. Secondly it's a complaint about the same plan. Thirdly it's a complaint about the same land and finally it's a complaint about the same loss. If one says, are you released by release from all claims, suits and demands, whatsoever the subject matter of the proceeding we would say we have been and that's a complete defence and that's the end of the matter.

MASTER: That's for the residential land.

MR DELANY: That's right. If we look at the release from the Woodleigh Heights proceeding, once again we had some terms of settlement and I think the Master has read the material that indicates that after Mr Thompson signed the terms of settlement he went and spoke to his friend, Mr Tiernan, who'd drawn the statement of claim. Mr Tiernan said gee, you shouldn't have settled for that amount, mate and so mate said, I'll see if we can not perform them.

What happened is he refused to perform and that's the realty. There's a whole lot of argument that says, look, really, it's because I didn't get the cheque on the very day and time is not of the essence and so on. But you only have to read Mr Thompson's affidavit to see and Justice Beach's judgment, if any of it matters to see that what happened is that after

he settled

Mr Thompson decided he wasn't happy he'd settled and so he thought he'd try and get out of it.

He unsuccessfully contested the enforceability of the terms of settlement and we've given the reference to Justice Beach's judgment in which he said that the terms were to be specifically performed.

When we look at those terms there was a release set out in para 32(b), "The plaintiffs agree to release each other ... (reads) ... demands and costs", and it might be said that this is wider than the other because it's arising out of or in any way related to the subject matter of the proceedings.

Now, in the prior Woodleigh Heights proceeding there was unlawful conduct relating to the sealing of the plan of subdivision and lodging at the titles office and again we say it's essentially the same loss.

If I can just in passing deal with an point in our learned friends's submissions, does the Master have the plaintiffs' submissions?

MASTER: Yes, I do.

MR DELANY: I'd like to just go to para 3.5 on p.14 and in that paragraph what is set out in two cases, or extracts from two cases which our learned friends rely on to say, look you've got to read these releases down. You can't possibly release us from these things /in the first part of 3.5 reference is made to a quote from Justice Campbell and what's highlighted is, "Even words in general terms are ... (reads) ... intended to

be released". Then the next quote from Justice Heary(?), after referring to Grant and John Grant, "In that case the ... (reads) ... to which the deed recited".

Let's assume that one takes a very generous view of how one should construe terms of settlement. The fundamental problem our learned friends' clients have is that in each case, that is the Tylden Road land and the Woodleigh Heights land, their client knew, so they said, that the council had caused plans of subdivision to be put forward to the titles office and approved and issue in breach of law. They knew that. It's still the same complaint.

They knew, according to them, in the case of both lots of land, that they suffered loss on sale. Again, same complaint. There's nothing that's critical to the claims that they make or important to them even that they didn't know about or have in mind. There's a difference, we would say, between a little piece of evidence that might give you a better chance of success than you previously thought, and if you give a release and you later find out about that little piece of evidence, that's not enough.

It might be different if it's a wholly different case arising out of wholly different facts causing wholly different loss. One would say, well, you go and construe the terms of settlement just like any contract and if it's no way related to anything, well, perhaps the release doesn't cover it but here we say that in each of the cases the releases are wide enough

to cover the new claims and that the authorities that are set out don't change the position.

If one looks at the final page of our learned friend's outline they've highlighted a passage from a further part of the quote from Justice Heary where His Honour says, "I do not accept ... (reads) ... in this regard". We say that's accurate. You just look at these release clauses and see how they should be properly and fairly construed and we say on a fair and proper construction of both then the terms of settlement provide a complete defence.

If I then go back to the outline and now turn, on p.11, to this what we agree is a new claim for Tylden Road industrial land. We will invite Mr Middleton to articulate what this claim is because quite frankly I have some difficulty understanding it.

MASTER: Which one is it?

MR DELANY: It's at p.11 of our outline. I'll tell you how we understand it.

MASTER: You're at para 35, are you?

MR DELANY: Yes, but it doesn't deal with how we understand it, but what I understand to be the position is this, the plaintiff says, look, I now own a piece of industrial land and it's all in one title, it's one lot and in fact I should own six lots of industrial land. My loss is the difference between the position if I now own six lots to what I actually do which is I still only own one.

If that is the complaint, and it seems to be, then the fact is that the plaintiff knew about that at

least as early as when they became registered on the title of the land which was 4 September 1981, and the reason for that is pretty simple, because they only got one title, not six. There's no great rocket science about it but the complaint to us does seem to be I should have six lots on the plan of subdivision and therefore six lots capable of separate sale and I've only got one. The search of the title is actually exhibit MED2 to Ms Dixon's security for costs affidavit. I don't need to take you to it but that's where you'll find it.

MASTER: Yes.

MR DELANY: Can I take you to the amended statement of claim. If I take you to para 34 - p.34, D2.

MASTER: It hasn't been amended.

MR DELANY: No, and D2(i) I think makes good the proposition that I put to you earlier about what the claim is because it says, "The plaintiffs' bargain ... (reads) ... to no more than the parent allotment". They knew about that in 1981 when the title issued and what we say is that "First of all the subject matter of the claim is so closely ... (reads) ... in that action". That's in 1988. They're estopped from doing so now.

I think I should just take you briefly to the passage in Anshun. It's tab 17 of our folder.

MASTER: Yes, I have it.

MR DELANY: It's p.602. It's the third paragraph. This is in the joint judgment of Chief Justice Gibbs and Justices Mason and Aitken, "In these cases in ...

(reads) ... in the one proceeding". Now, essentially what we say is that it would be unreasonable and is unreasonable not for the plaintiffs not to have pleaded those earlier claims - sorry, not to have pleaded the industrial land claims in that earlier proceeding.

Further, we say that assuming that the new discovery of the industrial land case relates to the critical document, then - and that is the plaintiff's argument - the exercise of reasonable diligence that the plaintiffs could have brought such a claim in 1989 or at the latest in 1991. We say that so much is plain from Mr Thompson's own affidavit evidence filed in relation to the application and the current pleading and quite frankly, Mr Thompson's initial affidavit dealing with this industrial land issue is misleading. I think I just need to take you to this or can I take you to paragraph 44(a) of his main affidavit.

MASTER: Yes, I have it. It's at p.9.

MR DELANY: In 44(a) what the deponent says is correct in the first paragraph that it makes no claim in relation to the industrial land. Then if we go to para 57 and if we go to sub-para 8(c) which is on p.19, he says this, starting at para 8 at the top of the page this is for further discovery, "In response to my request ... (reads) ... dated 4 March 1980", so he's saying no relevant plans.

If one took a view to discovery that said in the action concerning Tylden Road there was no claim

relating to industrial land therefore it would be irrelevant to provide or attach to a notice a plan of subdivision relating to the industrial land, strictly speaking, para 8(c) is correct. But what happened is this council has a habit of engaging in fraud and misfeasance actually discovered too much. It discovered the irrelevant plan, it discovered the Tylden Road industrial land plan. Where we find this to be the case is in Mr Thompson's second affidavit where he confirms, in para 13 of the affidavit which is the second affidavit of Glenn Thompson.

MASTER: Yes, I've got it.

MR DELANY: That the relevant industrial terms were discovered and he says in para 13, "The complete industrial plans ... (reads) ... which formed part of discovered item". The fact of the matter is that when we come to concealment it's common ground that the council, being overgenerous in its discovery in the residential land proceeding, discovered the irrelevant industrial land plan and it was therefore clearly open to Mr Thompson and his wife to have amended from the time of that supplementary affidavit of documents in May 1989, to bring such a claim or at the latest in 1991 when the so-called critical document which completed the puzzle, was handed over.

As we say in para 36, the critical document from the black folder is said to be a copy of the complete version of plans but that is plans concerning the residential land - sorry, critical document concerning industrial land, and that's a document that the

plaintiffs have had since 1991 and it's the very document that's described in para 13 of the second affidavit.

Just so it's clear, the critical document is the complete industrial plans, the complete industrial plans were discovered in the supplementary affidavit of documents dated 23 May 1989 even though paragraph 8(c) of the first affidavit said no relevant plans were attached.

There's no contradiction of these matters in para 36, first that in (a) a complete version of the plans was provided to the plaintiffs' solicitors in the prior Tylden Road proceeding in May 1989. Secondly, that when Mr Edward, the solicitor for the second defendant, under took inspection of the plaintiffs' documents in 1999, that's in March of '99, in relation to the prior Woodleigh Heights proceeding, one of the documents that Mr Thompson had was a complete version of those plans. So not only were they discovered but ten years later when the solicitor for the second defendant was looking at documents, they were in possession and made available as part of discovery in that process. Although Mr Thompson has responded many times on affidavit he hasn't sought to contradict those propositions.

The critical document that he says he first read in 2000 and that's the document which should let him have extensions of time or rather the limitation period not run, has been shown to him, made available, copies provided and so on, way back in 1989. So if we

then come to topic (g) on p.12, which is the limitation period and it might be helpful to continue after lunch.

MASTER: How long will this take?

MR DELANY: I'm hopeful to finish at 3 this afternoon.

MASTER: Mr Garde, will he - - -

MR DELANY: I can't speak for Mr Garde how long he'll be.

MASTER: We'll see when he comes after lunch. Are you going to make any submissions for security.

MR DELANY: We'll make them. It's really a matter for the Master when it's convenient to do that. Either the Master hears all the argument about the substantive matters and then we separately address the security point - we haven't actually discussed how we do tis a the Bar table, or alternatively we await the ruling in relation to the substantive matter. It won't be necessary for us to come back on our case, other than to get the orders. Whatever is more convenient to the Master.

MASTER: Whatever is more convenient to you.

MR DELANY: I don't frankly see a lot of point arguing security for costs issue. If the Master rules in our favour there'll be no need to decide it so perhaps we can discuss that between ourselves.

MASTER: If you want it done we'll do it.

MR DELANY: I'm not sure how long Mr Middleton think hs he'll be or how long Mr Garde thinks he'll be.

MR MIDDLETON: The easiest thing would be to see how it pans out because if we finish and we've got two days, we'll use the two days usefully.

MASTER: I just want to save costs for the parties. I'll adjourn until 2.15 p.m.. I think there's been a lot of costs spent already in this case.

LUNCHEON ADJOURNMENT

UPON RESUMING AT 2.15 P.M.:

MR DELANY: We were up to concealment, Master.

MASTER: I thought you'd finished concealment.

MR DELANY: No, we've just discussed how the plaintiff had been engaged in some. If we go to p.14 of the outline you'll see we've reproduced the Limitation of Action Act.

MASTER: I've already read through that.

MR DELANY: If we turn to p.16. Now, this really sets out at the highest the case that's put forward for concealment on behalf of the plaintiffs and this is the case really that was put forward which ignores the fact, which I'll come back to in a moment, that the very document that's the critical document, was the subject of discovery, production, inspection and copying in 1989. This is the best case before the further affidavit material that's gone unanswered went in and it says that "At the time of ... (reads) ... counsel for our client", the council, "and the water authority handed to Mr Thompson a large black folder ... (reads) ... until August 2000".

That evidence is he left it in the cupboard for nine years and then after 14 years he decided he wanted to sue relying on its contents. Then in August 2000, for the purpose of preparing a defence and counterclaim against the council, who had the temerity to sue him for rates, he re-examined the contents of the black folder, and upon examining the contents of the black folder it became apparent to him there were

two versions of the plan, and this is important "The industrial land component ... (reads) ... the clipped version".

He says that he recognised the clipped version as being the same as those admitted into evidence by Wilson of the council in the original 1987 Magistrates' Court proceeding, and that the plans, he says, "have been clipped in copying ... (reads) ... Supreme Court appeal". He went on then to say in his affidavit that because he reviewed the documents in the black folder and reflected on the evidence in the previous proceedings, that he's now able to reach conclusions that form the basis of the allegations in the omitted paragraphs.

It all comes down to the critical document from the black folder which led him to reach the conclusions which underpin the allegations in the omitted paragraphs. It's important that no documents from the black folder are exhibited other than the one critical document which is the complete version of plans for the industrial allotment and which he really deposes to be the critical piece in the puzzle that enables him to fully comprehend events that he asserts took place 25 years ago in 1980.

His case is, in 2000 I first saw the document. Now, that was his case and before lunch I mentioned the problem and I just want to go back to reiterate this because this isn't a matter that's the subject of contested evidence. Can I take you back again to Mr Thompson's second affidavit sworn on 7 November

2005.

MASTER: What paragraph?

MR DELANY: Para 13.

MASTER: Yes, I have that.

MR DELANY: He says - I started to read this before lunch, "The complete industrial plans ... (reads) ... discovered item 1". So that means they were discovered but they weren't called, something or other. He then says in small (i) in para 13, "In relation to the certificate ... (reads) ... copy of inward correspondence", and he then produces those documents. What he's saying is council didn't have an obligation to discover the industrial plans but they were in fact discovered. Although the passage of our outline refers to the argument of Mr Thompson where he says he didn't look at its contents until August 2000, the affidavit evidence of Mr Edward says, and I should just take you to this even though it's not one of our affidavits. This is in paragraph - this is the further affidavit sworn

3 November 2005.

MASTER: Yes, got it.

MR DELANY: Mr Edward says in para 5, "I went to the plaintiffs' ... (reads) ... by the plaintiffs", so this is in relation to the Woodleigh Heights proceeding, "I didn't have enough time to ... (reads) ... of the Tylden Road property". He then says in para 7 he's carefully examined the documents in folder SME3 and compared them to the exhibits. Now, exhibit 8 is exhibit which the plaintiff says is the complete

version of the plans and - sorry, it's 7 - and he says that "Documents being 7 referred to the ... (reads) ... in exhibit 3". That is that the documents that were obtained - inspected and copies of which were obtained by Mr Edward in March of 1999, which is more than six years before 31 May 2006, at the solicitor's office held on behalf of the plaintiff included the critical document.

MASTER: He must have got that before March 1999.

MR DELANY: That's right.

MASTER: Yes, I understand.

MR DELANY: That's right but if we're talking about concealment, the evidence discloses first, we say, a complete version of the industrial land plans were included in the supplementary affidavit of documents sworn on 30 May '89 and that appears from para 9 of the second Dixon summary judgment affidavit. Secondly - - -

MASTER: Second affidavit of whom, did you say?

MR DELANY: Of our instructing solicitor. That's the one - so she deposes to the plans being included in the affidavit of documents. It's one of 28 October. Secondly, that the plaintiffs' solicitors in the prior Tylden Road proceeding, Nevile & Co, conducted an inspection of the council's discovered documents on 19 July 1989, so that's after the second - after the supplementary affidavit of documents which discovered the documents so they were there for inspection by the solicitors and that's deposed to in para 12.6 of the same second summary judgment affidavit sworn by our

instructor.

Thirdly, and this really gets over any suggestion that you're not bound by what your agents or servants do, Mr Thompson personally inspected the documents discovered by the council in the prior Tylden Road proceedings on 20 July 1989.

MASTER: That's three ways.

MR DELANY: Yes, that appears in paras 12.7 and 12.8 of our instructor's second affidavit. You've had inspection of documents by the former solicitor and by Mr Thompson personally, and copies were also provided to Mr Thompson's solicitors in May 1989 and that appears in paras 11, 12.4 and 12.5 in Dixon's summary judgment affidavit and that's actually noted in para 76 of our outline.

What we say in para 76 on our - I may have the wrong paragraph numbers. It's para 77 on p.23 and we say this is an accurate summary of the factual position. The copy document was provided to Mr Thompson's solicitors in May '89 and Mr Thompson hasn't disputed that fact, and there can't be any doubt that a complete version of the plans of the industrial land upon which his concealment point hinges, were not only discovered in those prior proceedings, but copy was provided to solicitors in May '89 and really we say that's really the end of the matter.

MASTER: Statute barred.

MR DELANY: Yes, and if we go back to the outline where we've reproduced s.27, there's no concealment. Let me

just deal with the authorities about that because there's just no concealment at all and I'll jump about a bit, if I can, in our outline and go to para 57 and the decision in Hamilton is in the folder of authorities and can I take you to that briefly. I think it's at tab 10.

MASTER: Yes.

MR DELANY: The Master will see from the headnote this is a case where some former directors of a company forgot to tell the shareholders that they'd entered into a side deal between themselves and the company and headnote 2 refers to - reads, "The postponement of the ... (reads) ... or moral turpitude". Then at 386 just above (b), the trial judge says, "It's been submitted on behalf ... (reads) ... failure to reveal is enough". We think our learned friends might want to try and fasten on that sentence. Then the His Honour says "If this is indeed how the ... (reads) ... the New South Wales Act". So in other words it's not enough there's a failure to reveal. There's no positive duty to reveal. There has to be concealment and here even if it were an obligation to reveal there's been what might be described as show and tell back in 1989 and what's more the recipient of that exercise has taken their own copy home with them and been able to produce it ten years later so they haven't really lost it.

Further down in that judgment in (f), the trial judge said, "For my own part ... (reads) ... or moral turpitude". Not only must there be concealing but

there must be some form of fraud involving some form of moral turpitude. If you have the folder there can I just take you to the next case in chronological order which is a decision of Justice Batt in C. Heath Underwriting and that's at tab 3. I'll not read the whole of the judgment.

Just to tell you what it was about because it is a case about concealment although it wasn't made out on the facts. What happened is a worker's compensation premium had been calculated based on an employer's estimate and as is the entitlement of the insurer they can come along and ask someone to have a look at the original wage records and do an audit and see whether or not the estimate has been made out and whether there should or should not be an adjustment to the worker's comp premium. Mr Kronborg swore an affidavit that the wage records were, he said, lost or destroyed. So the question for the trial judge was whether there was a fraudulent concealment which hinged on the question of whether they were lost or destroyed after the auditor asked for them or beforehand.

I ask you to turn to, if I use the page reference at the top of the page, p.3 of 65 you'll see at about .3 the five issues, "The principal issues in the case are ... (reads) ... postpone the commencement". So it was a clear case dealing with 27B. Then if we go to page - para 84 which is on p.33 of 65, you'll see in the second paragraph at about line 6 of that paragraph, there's reference to Mr Todd, he was the

person sent out on behalf of the insurer to have a look at the wage records.

Then His Honour says "Mr Kronborg swore in ... (reads) ... lost or destroyed". His Honour says "As I interpret the affidavit before ... (reads) ... after mid August 1986". His Honour goes on under the reference to p.84, "I think I should give the ... (reads) ... or after it". So the plaintiff had said come and have a look at your wage records, get them together, please, and the issue is he got them together and put them in the shredder.

The next one is p.31 of 65. Under (b) it's about .2 of the page, meaning of fraud, "I next turn to the ... (reads) ... relied on by the plaintiff". Then further down, "On the other hand ... (reads) ... of considering s.5". Then in the next major paragraph under 79, Justice McLelland stated, "Misuse of land ... (reads) ... in real property legislation". Then further down, "The plaintiff's counsel acknowledged ... (reads) ... concealment is requisite". I've read that passage because our learned friend's outline indicates a reliance on that passage of Justice Dean and Hawkins and Clayton, and we say it's beside the point is and as much was noted by Justice Batt and we say he was correct in his observations. That's the first thing, that it's not part of the ratio of the case.

Secondly that the decision deals not with the same type of provision but with a different provision and thirdly, if one bothers to go to the decision, the

report of Hawkins and Clayton, what one finds is Justice Dean was alone on this point in the High Court so it's really a piece of dicta of one judge of, I think, five who sat in the court on that case.

S.14(1), which was the subject matter of that case, was about when a cause of action accrued, which is a different issue to when fraudulent concealment is or is not present.

I won't take you to Hawkins and Clayton but just flag in advance that we say that any reliance by our learned friends in that case in relation to these issues would be misplaced.

If we go back to the judgment of Justice Batt on p.32 of the photocopy, in the second paragraph His Honour says, "The plaintiff relied ... (reads) ... on the part of the defendant". What His Honour is saying there is, and the reason I've read that passage will become apparent in a moment, he's saying if you want to argue that the Limitation of Actions Act doesn't apply and you want to argue that the reason for that is some form of fraudulent concealment on the part of the other party, then you either come within s.27 or you don't, and there's no operation for a general equitable jurisdiction which permits an extension of time for unconscionable conduct and that's important because when you go to our learned friend's outline you'll find there are two cases referred to that are based on equitable principles that are said to permit time not to run until equity is a court of conscious decides it should.

Those cases, and I won't go to them now, but they are Bulli Coal mining, and if you're taken to that case we invite our learned friend to take in to 363 where it's expressly stated that the decision has no application to a case where the Limitation of Actions Act applies. That was applied in a later decision our learned friends have referred to also in s.3 of their outline of Beaman v. Arts Ltd which was a fraudulent concealment case because - I'm sorry, it's concealment of existence of a cause of action between two innocent parties.

Just to fill you in on the mystery, the plaintiff put some possessions with the defendant on a bailment situation and they were left there through the second war and she happened to be in Turkey so she couldn't come back and get her goods. The defendant got a bit sick of having these goods they thought were worthless so they took no steps to tell her about it and they disposed of the goods, and in that case the question is whether or not there was concealment that she could reasonably have ascertained and was told there wasn't because until the war was over she couldn't come back and find out that they'd gone missing.

The earlier case of Bulli was followed there. We'd say those cases are not to the point. Here, just looking at s.27 and deciding whether or not there's concealment and if there is concealment whether there's evidence that it's fraudulent. In Justice Batt's judgment again on p.32, at about .5 of the page, His Honour turns to whether or not there was

"concealment by fraud in the common law ... (reads) ... or moral turpitude". His Honour says further down, "I have not found ... (reads) ... my conclusions". But this important, "In doing so I have steadily ... (reads) ... such as an allegation of fraud".

What our learned friends have to do is they have to persuade you that if this case goes forward to trial, they have a realistic prospect, an arguable case of making out there's been fraudulent concealment applying a Briginshaw test of a document which is admitted to have been discovered. We say looking at the matter objectively that's a hopeless proposition. It's never going to happen at trial and it's a good reason to stop the case here and now.

Just while I'm dealing with these authorities about what fraud means in the concealment context, we've set out in our outline at para 59 a decision from the New South Wales Court of Appeal of Justice Mahony where, to be fair, he took a slightly more relaxed view of fraud in the section than did Justice Batt in Daraway. He said, "There must be a consciousness that what's ... (reads) ... of proper standards".

Just pausing there for a moment, it's important that in this area of the application we're not looking at whether or not there was an act of misfeasance in public office in 1980. We're looking at whether acts of concealment involved lack of conscience and wrong-doing. So there has to be evidence first of

concealment but also that while the concealment was happening and for the plaintiff to succeed really up until 2000, there has to have been some immoral, improper fraudulent conduct on behalf of the council and there's no evidence of that. At the highest there's some reference in the affidavit to some evidence given in 1987 in the Magistrates' Court and that doesn't help them because the documents discovered in 1989.

I did mention that Chief Justice or acting Chief Justice Mahony in Seymour took a slightly more relaxed view of what you needed to show to prove fraud than Justice Batt did in Daraway and you'll be interested to know that when the Supreme Court in Di Sante v. Camando Nominees, which is also in the folder, looked at the matter, that distinction wasn't effectively noticed. So in para 61 there's a discussion of part of the judgment of Justice Warren, as she then was, and she says in the passage that we've quoted - sets out what Justice McLelland said was required, said what His Honour said was considered in Seymour and then sets out the passage but if you look at the judgment she also, I think, adopts what Justice Batt said. It really doesn't matter for present purposes, even if you take a generous view of what's needed, we say the material doesn't establish any fraud in relation to any concealment.

I would like to just go back to one other case. I just go back in the outline of para 65 and we've referred there to a decision of I think Skrijel v.

Mengler, a decision of Justice Eames, and the reason I wanted to discuss that case is because it is a case which involved misfeasance in public office and it's a case where there was an allegation of fraudulent concealment. So it's got a few parallels with the present.

So that the Master is aware of the facts, what happened is that the plaintiff was of the opinion that there'd been false evidence given by a fingerprint expert in his criminal trial and that a photograph had been manipulated and his fingerprint was shown as being on a photograph when in fact it wasn't and therefore there was a conspiracy and therefore he had a claim in tort against the officers concerned.

What happened in that case was that the plaintiff complained to the Ombudsman and the Ombudsman's investigator was shown a photograph as part of his investigation and let's say he was shown that in January. He was then given further information probably from the plaintiff, to the effect that this might not be the same photo as shown at trial. So instead of being given the one you've asked for they've given you another dodgy touch-up one. So the investigator of the Ombudsman went back and decided that was probably right. What's important is that when he went back and when he was given the photograph that he identified as the one used at the trial, that's when time stopped.

Now, if you think about that in the context - time stopped running for fraudulent concealment

purposes the moment the investigator was shown the second photograph and I won't take you to the judgment but I think if you look at paras 23 to 26, 29 to 32 and 44 to 51 and 58 and 59 you'll find those points borne out. So what we say in the present case is that if there was some fraudulent concealment at some time up until there was discovery, once the document was available for inspection, because that's exactly what happened there, time then ceases to run to the extent that it might previously have been postponed.

There is another matter that's relevant factually to the fraudulent concealment point and that is that at the time certainly of the second action, that's of the Woodleigh Heights action, it's clear from the pleadings that Mr Porter, who's accused of all the wrong-doing had gone. I'm not sure when he died but he was no longer the relevant council officer. What the plaintiff deposes to in para 27 of his main affidavit is that Mr Porter retired in late 1984. So if he was the person who was prone to fraudulent conduct or wrongful behaviour, he retired in late 1984 and he was replaced by David Parkinson.

When the Master has a look at the pleading in the Woodleigh Heights proceeding you'll observe Mr Parkinson is one of the named defendants in his capacity, I think, as the shire engineer or shire secretary.

It's not really up to my friend to say, look, you should just draw an inference the concealment continued because Porter was still there because he

wasn't, assuming for the moment he was the person who engaged in fraudulent conduct in the first place.

Just on this question of when time might be postponed to, can I just jump forward in our outline to para 67.

MASTER: Yes.

MR DELANY: We rely on this case as well here in relation to fraudulent concealment because in Mann v. Commonwealth, as we say in the outline, the New South Wales Court of Appeal held that, "The service of an affidavit ... (reads) ... in respect of the document". What the plaintiffs's complaint was you breached the duty of confidence you owe me and the reason he was able to find out about that is because there was an affidavit filed that said on such and such a day I disclosed these documents to X and Y. Once he had that information on affidavit it's from that time that the limitation period began to run, so we say it's May 1989, once the affidavit was there or the documents were provided.

MASTER: Yes.

MR DELANY: Or at very worst it's when he got the magical black folder in 1991.

MASTER: Yes, I follow.

MR DELANY: If I just turn then to the question of what elements are required to be shown and in para 62 on p.19 of the outline, we've dealt with these but I think we should probably do it in a slightly clearer fashion than we've done there to make it plain what we're contending. First of all there must be

concealment. Secondly, it must be intentional.

MASTER: Point me to the affidavits.

MR DELANY: Yes, that's right. The next point we don't make here as we should I think, is what you have to conceal is the cause of action. It's not enough, as I said to you earlier, if you just conceal a piece of information that might make a known cause of action stronger. That doesn't get you home. The case we rely on for that is the decision of Justice Eames. I'll take you to these two paragraphs. I'm told it's tab 21 so they all must be right.

Can I take you to para 49 and here His Honour is quoting from a decision of the English Court of Appeal, the citation which appears at 48 on the previous page. The quote that we rely on is in para 49 from the decision of Lord Justice Johnson Neill where again reference is made to Lord Justice Russell's statement where His Lordship states, "In order to give relieve ... (reads) ... the right of action".

At para 69 on p.12, talking about the facts, this is the fingerprinting expert case, the second sentence in the paragraph or rather the last sentence, "If there was concealment ... (reads) ... tendered at the trial", and as I explained earlier that was not known to be arguably the case until there was the second visit by the Ombudsman's investigator.

What we have in each of the cases are claims that were pleaded in tort alleging damage in relation to subdivision. My learned friends might say to you,

look that's all very well but now we know there were two plans of subdivision that had a problem and that's their case. Previously they didn't assert that there was one plan of subdivision in relation to Tylden Road that was the subject of a council resolution and a different one that got put forward to the registrar of titles that got registered. The complaint, no doubt you'll be told, is different because when Justice Kaye, for instance, dealt with whether or not the condition was a valid condition on the permit or rather the withdrawal of it was, he didn't realise it was a different plan to what it had originally been the subject of the first condition.

But we say it doesn't matter because what's said to have caused the loss is the registration of the very plan about which they still complain and the new facts are really antecedent to the critical facts and those that are critical to the cause of action.

We say that the really - and the same applies in the case of the Woodleigh Heights land, there's additional pieces of information that they don't constitute the disclosure of a new cause of action that's been concealed.

I think the other point we would add in in 62 is that time runs once the concealment has ceased and I think that's fairly obvious in the authorities we've been to.

If we go to p.20 of the outline we say in para 65, if one takes Mr Thompson's summary judgment affidavit, it's clear that irrespective of what

happened before June of '91, he did receive the critical document on that day and there could not be any intentional concealment after that so that we say that really because the document was provided in 1989, in order to avail themselves of the postponement provision in s.27B, in reality the plaintiffs have to show that they could not with reasonable diligence have discovered the cause of action from that time when they were given the discovered document all the way through to 31 May 1999. So ten years. The material doesn't provide any explanation about anything that happened prior to 1991.

Let's assume for some reason there's some argument that says, don't worry, don't start until 1991. Again, there's no basis here on the evidence put forward which would entitle the plaintiffs to establish that they'd exercised reasonable diligence in the eight year period between 14 June '91 and 31 May '99. What we say is that the cases establish that the burden of proof as to reasonable diligence lies on the plaintiff. I've got a decision I'd like to hand forward which isn't in our folder. That proposition is accepted.

Secondly, the cases show that reasonable diligence, you don't have to do everything reasonably possible but the test is doing that which ordinary circumstances and with regard to the expense and difficulty could reasonably be required. That appears actually from the same case that I was going to hand forward so I'll hand it forward for that purpose.

It's a decision of Chief Justice Martin in the Northern Territory and the passage where that proposition is stated is at para 22 which is on p.4. At about half-way down the paragraph or a bit further, "As to the meaning ascribed ... (reads) ... could be reasonably required". Our learned friend's outline - I'm sorry, the onus point that's conceded is the top of the next page.

Now, our learned friends' outline refers to the case of Peco Art and that was a case - - -

MASTER: Whereabouts in the outline?

MR DELANY: Perhaps if I take you to the case it might be easier. P.9, I'm told, "On the basis that reasonable diligence ... (reads) ... having record to all the circumstances". Peco Art was where the plaintiff had purchased an artwork which she thought was very valuable as did the vendor who was a reputable art gallery. The plaintiff had the artwork valued, I think by Sotheby's, and they thought it was okay and she insured it accordingly. Then she had it reinspected for a further valuation and the next person who came and inspected it, held it up to the light and found it to be a fraud. So it wasn't a question of fraudulent concealment, it was a question of whether or not what could be reasonably required of her and it was held what she'd done was sufficient.

If one takes the circumstances here, what we would say is important is that first of all from 1988 when Justice Kaye give his judgment, not only did the plaintiff know that in relation to the Tylden Road

land the council had committed unlawful acts, in the same year after the judgment the plaintiff instituted proceedings so they knew unlawful acts had been engaged in.

Secondly, when it came to October of 1989 the plaintiffs issued the Woodleigh Heights proceeding and at that stage their view of the activities of our client were so bad they considered it appropriate to plead fraud. In 1995 they knew that in their minds they were dealing with fraudsters.

MASTER: They pleaded fraud but gave no particulars, as you said.

MR DELANY: In terms of looking at what was reasonable to be required, and what in ordinary circumstances a person would do, they had formed the view that they were dealing with fraudsters who they'd known for years had been acting unlawfully and in terms of expense and difficulty all they had to do was open the cupboard. They just can't get there in terms of charging what's required in terms of reasonable diligence and the case is really not like Peco Art. It's quite a different case.

I think in the outline starting at p.21 we go back to deal with the failure by Mr Thompson to disclose that he already had the documents discovered and so on. I've really gone through those matters already.

MASTER: You have.

MR DELANY: Can I go to para 73 where we say that in Mr Thompson's second affidavit he adopts a

contradictory position concerning the discovery of the prior Tylden Road complete plans. Really, what his affidavit does is to say, yes, they were discovered but they weren't properly discovered because they weren't described by their title in the affidavit. We say that's not a particularly noble point assuming it to be right and it doesn't take the plaintiffs anywhere. Whether they were described as such they were included in the documents discovered by the council.

I won't read, although we rely on the other written submissions concerning Woodleigh Heights land and so on starting at p.24 but what's relevant is the whole of the plaintiffs' claim for postponement of limitation period hinges on finding or reading the industrial land complete set of plans and even though they don't relate to the Woodleigh Heights land, he says, well, I read that and I thought goodness me there must be a problem with Woodleigh Heights so I translated across to Woodleigh Heights. It's a bit hard to pick up from the material but that's the way the case is put. For the first time I read the whole set of plans relating to the industrial land, that triggered me to want to have another look at Tylden Road residential as well as the new industrial claim. It also triggered me to bring an a claim in relation to the Woodleigh Heights land.

MASTER: You say it can't be done.

MR DELANY: That's right. There is material which we've referred to in para 85 on p.26 about events said to

have occurred in the Practice Court in 1999 and matters concerning water main but for the moment they don't really seem to relate to any new cause of action and I'm not sure how they're really relied on.

MASTER: I'll find out soon.

MR DELANY: If we go to paragraph - in substance the situation as we understand it is the material seems to assert the dates the waterpipes were laid were important but as a letter which Mr Thompson wrote to the council in 1987 discloses, he knew about those matters in 1987 and we set that out in para 88.

If we go to para 91, because I think I shouldn't spend as much time on this point because it doesn't seem to be as critical, 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 '85, when he was given a copy of the reticulation agreement, that the reticulated water supply was not present in 1979. It was in fact laid down in 1982 and it follows therefore, it's been open to reflect on any legal consequence of those matters since at least August 1987.

I think that's sufficient from me certainly this afternoon. I see Mr Garde has just arrived. I decided not to spend too much time on the Woodleigh Heights matter because as we've seen the material, a lot of the material hinges on the critical document and it's not a document of the Woodleigh Heights material. We do rely on the written submissions.

MASTER: Mr Garde, you want to adopt those written

submissions, do you.

MR GARDE: Can I ask a minute's indulgence because we'll have to reorganise the Bar table.

MASTER: You can have five minutes.

(Short adjournment.)

MR GARDE: Thank you for that, Master. With the assistance of my learned junior I will be alert to any foot being put on the accelerator pedal so I don't repeat what's already been put to you.

MASTER: Mr Delany was faithful to his submissions which you've probably read.

MR GARDE: Yes, they are at some length. Can I just say this that the first two points we wish to make are there really has to be some finality to litigation. It doesn't go on forever and the Thompson matters seems to have impacted itself on me one way or another way for quite a considerable number of years and secondly, it is important, in our submission, that where there are settlements achieved, particularly where judges of this court go to the extent of ordering that there be specific performance of settlement achieved through the mediation process, that they should be upheld and those two principals are, with respect, fundamental.

What we do say is really three-fold and the first is that the present proceedings on the part of the plaintiffs are precluded by the respective terms of settlement so that you just don't get to first base because the release is granted by the terms of settlement preclude the bringing of these proceedings.

The second proposition we advance is even if against our strenuous submission the plaintiffs are

able to point to some way they can get around the edges of the releases then the Anshun principle very clearly stands in their pathway so that even if they can somehow or other persuade you on the construction of the terms of settlement that we say are amply sufficient, Anshun stands fairly and squarely in their path way and thirdly, on any view of this the dates are such that the Limitations of Actions Act precludes the bringing of these proceedings.

Indeed, I have a very distinct sense of déjà vu in that I recall in 1999 arguing before Justice Ashley in relation to proceedings brought in 1995 that they were nonetheless statute barred even at that point of time and I recall Justice Ashley in the exhibits held that it was arguable that the plaintiffs got over the line, in any event it was a tribal issue at that stage.

Here we are now with proceedings issued a decade later and we have the plaintiffs seeking to contend they are not statute barred in circumstances where the relevant limitation period at all material times has been six years. It's perfectly true when you look at limitation matters, that if there's a serious arguable dispute about it, then, as Justice Ashley did you might ultimately say it's sufficiently over the line, it's a trial issue but here the limitation position is, in our respectful submission absolutely hopeless from the plaintiffs' point of view and one only has to have a look at the dates and the dates where loss are said to have occurred, and come to the rapid

conclusion that the limitation period has long since expired in relation to these claims.

Just as was done before Justice Ashley, there's been a rerun in the sense in the way it was sought to get over the line before Justice Ashley was an allegation of concealed fraud and now with another sense of déjà vu with this matter being presented in a similar way and despite the sworn evidence of our instructing solicitor, Mr Edward, which I will come to in due course so there is no substance in, once again, the allegation of concealed fraud and moreover it's not pleaded. It's not actually alleged. It's something which has occurred to the plaintiff's in more recent times but even when you do take that into account it goes nowhere. We put to you all three reason why this matter should go no further are correct and should be upheld.

If I can now take you to the statement of claim which I will - - -

MASTER: The amended one?

MR GARDE: I'm looking at the original statement of claim. Can I say it's also with a sense of déjà vu that you look at multiple amendments because multiple amendments will certainly be the order of the day in earlier proceedings. But we say ultimately doesn't matter which version you look at the same result obtains. The statement of claim is dated 31 May 2005.

MASTER: Yes, I've got the amended one.

MR GARDE: Yes, I imagine this has been referred to at some length already in one version or another. What I

invite you to do is to turn over to para T29 found on p.18 and in particular to look at the allegations as they are made now against the Coliban Region Water Authority which is the successor of the Kyneton Shire Waterworks Trust. You'll see in para T29 that it's alleged in or about October 1980, the trust, it is said, and we're not here on pleading applications, if this matter were to go any further that would be the next step together with the application on our part for security for costs which has been sought and not provided. But if we look at T29 it says, "In or about October 1980 ... (reads) ... water to the subdivision", and I'd expect you'd be aware by now that the backdrop to this is that the plaintiffs and Mr Buchanan were involved in a development, a subdivisional development, at Tylden Road. What took place was that Buchanan - as we understand it from the pleading - requested the plaintiffs to accept responsibility for the bank guarantee in the amount of $11,500. The plaintiffs as against Buchanan agreed to do that. Subsequently there was default in the subdivisional works to the subdivision.

As a consequence of that what took place was the bank guarantee was called up because of a default in the provision of the works and the trust itself had to, because of the default in the provision of necessary subdivisional works of prospective purchasers, had to perform the works itself.

In those circumstances there was a dispute between the Thompsons and Buchanan. The Thompsons

said that it was Buchanan's responsibility to do that and there were proceedings between the Thompsons and Buchanan which went to the Supreme Court and was the subject of heated controversy. Now, we have in this series of paragraphs, an allegation that it said that "because the subdivision ... (reads) ... or to within the waterworks district".

There's then a reference to the receipt to the powers of the council under s.569E(1)(b) of the Local Government Act for service on the owner of a subdivision with a notice of requirement pursuant to s.569E(1)(a), the Local Government Act as it then was, and in substance what that did was to impose an obligation on the subdivider to provide work which is the substance of that Local Government Act provision.

Then you will see that in T31 it was in November 1982 that the trust notified the plaintiffs that it had resolved to commence construction of the waterworks and to call upon the plaintiffs' guarantee to facilitate such construction and the consequence of the trust having to do the work itself was that, "On 10 December 1982 the ... (reads) ... in due course".

The contention that seems to be advanced is that the trust when called upon the guarantee and entered on the subdivision to do the works, apparently well knew there was no lawful authority for it to do so and so the earlier allegations were repeated and it said in relation to that that "the trust conduct in performing the works and ... (reads) ... which included the plaintiffs".

That's the substance of the cause of action as it's pleaded against the trust and one thing is obvious whilst we're looking at this in terms of time, that the calling up of the guarantee was 10 December 1982 when the Westpac bank paid to the trust the sum of $11,500 being the quantum of the guarantee which was called. So when we think about this in terms of time it's reasonable to draw the conclusion that a period of some almost 23 years have elapsed from the alleged wrongful act of entering on to the property to perform the waterworks which were necessary for the subdivision and the calling of the guarantee. So one date is November '82 and the other was 10 December '82 so I just highlight those matters by way of preliminary.

Then if we now turn over to the allegations in this claim made against the trust in the context of the Woodleigh Heights subdivision. I invite you to turn to p.34 and to para W61 and what this says insofar as we can understand it, that, "On October 1985 ... (reads) ... under the terms of settlement", and that we understand was terms of settlement in the Supreme Court proceedings between the plaintiffs and others involved in that dispute and His Honour's orders, according to the letter, requested the board to make a fresh agreement with the body corporate of the plan of subdivision, which was a cluster subdivision, to allow all the owners of the subdivision, in particular the plaintiffs, to the benefit of supply of water.

Then if can I interpolate for a moment, there seems to have been a debate as to whether the developer, Woodleigh Heights Resort Development which was responsible for the cluster subdivisional development, and the body corporate of the cluster subdivisional plan was to be instrumental in the supply of water. So there seems to have been some argument that was advanced that it shouldn't be WHRD but it should be the body corporate of the cluster subdivision.

Then on page 35 you'll see it is alleged that at a meeting of the water board on 31 October 1985 - - -

MASTER: What paragraph?

MR GARDE: P.35, at the top it's numbered one and it's part of W62, "At a meeting of the board on 31 October 1985 ... (reads) ... that developments was the body corporate", which is not the case and so it's said the trust entered into or the water board at that stage entered into a water agreement with the wrong entity and it's said it was in breach of s.6(1)(b)of the Cluster Titles Act and that the water board deliberately failed to either accede to the request or rectify the breach. That seems to be the substance of the allegation that's made.

Then in W64 on 12 November 1985, it's said that, "The board acting maliciously without any lawful ... (reads) ... services to the allotments". So there was a dispute going on between allotment owners and the developer as to the supply of water from the developer, which had water, to individual allotment

owners such as the plaintiffs. We're not sure whether the plaintiffs were the only ones in dispute but there was a dispute going on.

The result of the water board saying, and obviously if the matter was to go any further we would say it's correctly said that water was not available to the plaintiffs' allotments but the result of that was there was an auction which had been scheduled for 23 November 1985 which was cancelled and there was the problem, as subsequently emerges, of default on the mortgage which was with Esanda Pty Ltd with the result that ultimately because of the default in the financing arrangement, Esanda sold the land to a company known as Deckwood. One of the plaintiff's complaints is that Deckwood happens to be a company associated with Mr Buchanan with whom the plaintiffs have had significant disputes and that's W71 where that is set out.

Over the period from 1985 to 1989 this dispute between the developer and the Thompsons and allegations are made here against the water board that it's intentionally and deliberately, and so forth, did all these things. That's the substance of it but again looking at the dates, on any view of these allegations, the auction that was cancelled was an auction that was intended to take place 20 years ago and the sale, the right of sale - that's para W67. Then W71, November '89 in terms of the exercise of the power of sale by the mortgagee that, of course, occurred some 16 years ago. So on the face of the

allegations made in the statement of claim the - any claim by the plaintiffs is well and truly out of time, we would suggest.

You'll notice that there are no allegations of any concealment or anything of that sort in fact made in these documents, in fact nor would they be sustained. Those are the only pleas which are advanced against the second defendant.

In terms of damages, the submissions that we make are that reference to the damages claimed shows that again on any view these - - -

MASTER: Is this the amended damages claims or the - - -

MR GARDE: Doesn't matter which way you go because it was April 1983 that there were contracts made to sell land at Tylden Road, this is para D3 or thereabouts and onwards, to a company called Chelmantau Pty Ltd, those allotments were transferred, residential allotments were transferred. When I say residential allotments there's ambiguity as to what's going to be residential and what's going to be industrial. But 27 July 1983, the land was in fact transferred to Chelmantau in consideration of the sum of $100,000 being an average price of $6,666 per allotment. Chelmantau, in turn on sold these allotments between 1984 and 1987. Any way of looking at that claim for loss and damage it's well out of time.

Similarly when we look at the Woodleigh Heights land, and this is para D5 in the document I'm looking at, Master, but for the conduct of the defendants pleaded in the statement of claim, without reading it

all out, 6 and 9, a three lot subdivision, could have been sold in 1984 and in relation to Woodleigh Heights land it would have been sold on the open market between November 1984 and December 1987, and the loss claimed was the value of the land as at November 1984 when AGC cancelled the proposed public auction.

That's all been deleted you will see into a more mysterious form found in the document in front of you where these more direct and dated allegations suffer from a reformulation which seems to leave out all dates as I read it. So the new D35(i) refers to the fact that, "the plaintiffs as ... (reads) ... serviced by reticulated water supply" and won't read out the balance but we're talking about the same thing and so the crossed out part, (i), which is actually part of the current statement of claim, those are the dates that actually attach to the reformulated dateless version contained in D5(i).

Similarly when we go over the page to (ii) you'll observe that the old dated (ii) has been crossed out and now we're advised that "full particulars of the quantification of the loss referred to above will be supplied prior to hearing", so having said all that it's very obvious to anyone who considers what the dated happen to be that they must be at the point of time when the land could have been sold and there is no reason to reject the formulation contained in the statement of claim, the original statement of claim, that the plaintiffs' loss of the value of the land as at 1984 when AGC cancelled the public auction.

They're entitled to say that and give the particulars they have.

If you look at when the loss and damage took place and in the case of contract claims, it's normally the date of the breach and in the case of tort claims, as we're well aware, it's normally the date of the occasion of substantial damage and clearly that must have been in the timeframes that were originally alleged.

That is all I will say for the moment in relation to the statement of claim. We, for our part, then rely on the first affidavit of Stephen Mark Edward. That is sworn on 12 September 2005 and I would invite the Master to look at that. There are voluminous exhibits in this affidavit which I will take you to in due course and try to be selective as I do that.

MASTER: Yes, I have them all here, I believe.

MR GARDE: Yes, I would expect that to be correct.

MASTER: I read the affidavit but I didn't look at the exhibit.

MR GARDE: In that case I will go straight over to paras 10 and 11 and I just want to say to you in relation to para 11 that you will observe that the Tylden Road action, after a lengthy gestation of some three years, with numerous interlocutory steps, came on for trial before His Honour Judge Howden. Mr Tiernan of counsel appeared for the plaintiffs on the instructions of Nevile & Co. Mr Bevan John of counsel appeared for the defendants on instructions from Maddock Delany & Chisholm. The action was part heard for two days so

it was tried in the County Court for two days and then settled on the next day which was 14 June 1991 with terms of settlement signed by counsel for the respective parties. The terms of settlement, in substance, provided for the plaintiff to receive $40,000 and the cost of the action could be agreed or in default of agreement.

If I invite you then to pick up SME1 and I'll make some very selective references to this. If you would open that bundle and go to document number 1. You will there see the form 4 summons in the old form. Turning to the statement of claim inside the summons, what I'm particularly about to highlight is the similarity of the claims that were made then and are made now in the context here of the Tylden Road subdivision. This action was all about the very same Tylden Road subdivision involving the disputes that I sought to summarise with Mr Buchanan, the Thompsons and one might say, the authorities having been dragged into that dispute.

You'll see that talking about the same land, same place, same subdivision, same development. Para 6, now familiar to us, "The allegation the land was not at ... (reads) ... of the second-named defendant which is the water board or its predecessor or trust". Then you'll see s.569E1 and 569E(1)(a) referred to. Then you'll see para 9, "In or about October at the request of the subdivider", that's Mr Buchanan, "the plaintiffs provided a ... (reads) ... of the CBA" which is of course the forerunner of Westpac as it

then was, "at Thomastown for the issue ... (reads) ... with the subdivision of the land". So that's the guarantee provided so far as the first defendant was concerned.

If you then turn to p.13 of that document, para 33 you now have the allegations that were made about the second defendant which is the party we appear for, $11,500, same guarantee, same situation. Then para 36 if I jump to p.14 you'll see, "The water main that was constructed on the land between ... (reads) ... of the Water Act". Then para 37, page 15, "On 10 December 1982 ... (reads) ... the sum of $11,500" and that's particularised. Then there were allegations made of a wide variety and then all in all if you go to para 51 on p.19 you'll see, "By reason of the matters aforesaid the plaintiff has suffered loss and damage".

On p.20, unsurprisingly the guarantee sum of $11,000 emerges, interest and as now, "consequential losses sustained by the ... (reads) ... prior to the hearing and determination of this action". You'll see what are in essence identical allegations made then and now.

P.21 you'll observe that the statement of claim is signed by counsel and that the amount of damages claimed is there listed in the prayer for relief, "Damages not exceeding ... (reads) ... $11,500". So in other words the damages that were claimed were the suggested consequential losses and the fall back position was in the guarantee sum of $11,500. We'll be saying in due course in the terms of the release,

this is the same action in substance as was claimed back in 1988.

Our instructing solicitor, who is a very meticulous solicitor, has included the file which you will read with nostalgia but I won't read it right now, but if I invite you to turn over to tab 23. These are familiar answers to interrogatories. Mr Thompson, who is a computer programmer, swore the answers to interrogatories back in 1989. Very briefly I invite you to look at that. You'll see the answer to interrogatory 1, it's the Tylden Road land, the fact that the plaintiff ceased to be the registered proprietor of the 15 lots in about July 1983. I won't read out any more but it's the same debate.

P.3 answer to interrogatory 4, the second bank guarantee and so forth all there referred to. Similarly p.4 answer to interrogatory 11, same circumstance and debate. P.6, answer to interrogatory 17, same situation once again. P.7, answer to interrogatory 22, where you will see, "The plaintiffs claim loss and damage ... (reads) ... exceeds the sum of $31,500". That's apparently how it was calculated at that time.

I then invite you, all the defences so on are there, but if you jump over to tab 40 you will now have the familiar site of an amended statement of claim. Again I'll do this very briefly, Master. P.2, para 4, Mr Buchanan now appears in February and March 1980. All what I will the usual provisions of the Local Government Act appear and at p.4, low and

behold, we have multiple plans of subdivision being referred to and you'll see para 8, "On 21 May 1980 the council sealed the following plans of subdivision", and are some eight plans of subdivision, so there are multiple plans of subdivision.

Then without reading all the multifarious claims, I would invite you to turn over to p.20, para 42 where it says, "In the premises the defendant ... (reads) ... 569E or at all". There are multiple other bases which I won't refer to. Then you'll see what are in substance the same types of claim for loss and damage from p.26 and onward. It's signed by Mr Power also signed now by Mr Tiernan.

We can now progress to volume 2, SME1 volume 2. Would you now turn to tab 42 which is the orange tab. They are the particulars. We now have the plaintiffs particularising the Tylden Road claim and at para 2 of the particulars you'll see a familiar company now Chelmantau Pty Ltd emerging reference to April 1983. In para 4 on the next page you'll see that very usefully particularised, I might say, Chelmantau selling the allotments as follows and they're all listed by allotments and price. At p.3, para 5, 12 of the 15 allotments were sold and the years of those sales were given, '84, '85, '86 and '87 and it's again asserted there's a claim in relation to loss of profits. We have that additional material indicating the nature of this action.

I will then jump over all the documents, for present purposes, up to tab 46 which is the yellow tab

and we there provide the certificate of the registrar of the County Court as to what proceeded before Judge Howden.

MASTER: Struck out.

MR GARDE: The action by consent was struck out. It was settled. The next document is the terms of settlement, that's document 47. You'll see the terms of settlement which are in a conventional form and if I then go to para 5, subject to - - -

MASTER: Yes, that forms matter of - - -

MR GARDE: Yes, he's referred you to that. What we very simply say is the subject matter of the present proceeding before you is in substance the same as the subject matter of this proceeding. Regardless of anything else, the release is there for effective - - -

MASTER: That's your first ground.

MR GARDE: It is. I'll put those volumes away and we'll now go on to SEM2, volume 1. Now to the endorsement of claim which is tab 1.

MASTER: This is the writ in 1995.

MR GARDE: Yes, the 1995 action by the current plaintiffs and you will see, as we go through this, if I draw your attention to para 4 you'll see that amongst other things there are claims for "fraudulent misrepresentation ... (reads) ... during the period '84 and '92". You'll note, again there's a sense of deja vu about this, that the plaintiff said rights of action were concealed from the plaintiffs by the fraud of the defendants until on or about 8 August 1995.

What's said here is it's alleged here once again there was fraud and this was the method of overcoming the limitation problem, but that - - -

MASTER: You say that's not pleaded in the new pleading.

MR GARDE: It's not in the new pleading and in this pleading it's alleged that not only that - so it's said there was concealment but also that it was discovered on 8 August 1995 from which it inevitably follows that if the fraud, which if course is denied and is not particularised, but if that was the case then ten years have elapsed and on any view of the Limitations Act there is no cause of action. We draw what this says to your attention.

Then on p.3 para 5 we have the mortgage to AGC, the attempted sale of the land at public auction, that's the Woodleigh Heights land in 1985. Allegations of a wide variety of types which I won't attempt to summarise. But on p.6 you'll see at the top particular (I), that, "The defendants concealed from ... (reads) ... until 8 August '95". Then there are allegations of loss and damage of an unsurprising type. That pleading is signed by counsel including Tiernan.

We then go to the next document which is tab 2 and that is now a statement of claim and there were multiple variations of the statement of claim in this proceeding, Master, so that a very wide variety of allegations were given every possible compass in this particular proceeding.

The statement of claim that you next have is

dated 20 September 1996. Very, very briefly we would draw your attention to para 7 which refers once again to the role off Buchanan's in developing the Woodleigh Heights estate with a subdivision of 45 allotments. Para 8 is what I'd describe as the usual subdivisional works are referred to and they're there listed. We would then go to para 15 where it's alleged that, "In or about September 1980 ... (reads) ... all of the allotments owned by them".

Next, to para 31, WHRD Pty Ltd responded by advising the plaintiff that, "WHRD Pty Ltd had entered into a private water ... (reads) ... the Woodleigh Heights estate". To para 33 on p.15 where is a series of allegations of the type that I've read to you earlier relating to the current proceeding are to be found.

Then to para 34 where there's a refusing to give, so it's alleged, the plaintiffs access to the water agreement. Then Deckwood, the Buchanan company, re-emerges at p.43, and then at para 67 of this lengthy a document there are allegations of loss and damage. I won't leave them out - - -

MASTER: I've got pages missing between 16 to 43 but that doesn't matter, does it?

MR GARDE: You are missing those pages, are you?

MASTER: I've got mine stops at page 16 and commences at 43.

MR GARDE: Yes, I follow. Ours does the same.

MASTER: It's not important, is it?

MR GARDE: No, it's not important. As I recollect that's

the way it was served. That's the way it is. There's that.

MASTER: That's the amended statement of claim, the gist of it you say is the same as what's happened?

MR GARDE: We do. That's the reason for taking you to it. We would then in further examination of that document take your the Master to tab 20.

MASTER: Why are the other documents in here?

MR GARDE: The documents are in there so you could have the benefit of the court file.

MASTER: Just in case I need something.

MR GARDE: It provides the sequence of events in terms of the proceeding. It may be very thorough. It's not intended to be oppressive.

Then we're at tab 20. We have an affidavit from Mr Thompson in February 1998 and as you do read through this affidavit you will see that it is of considerable length, going for 33 paragraphs from Mr Thompson describing the proceedings and the factual scenario and back drop and attached to that you have a very significant bundle of exhibited documents including all manner of relevant documents, transcripts, reports and all sorts of things. There's little doubt that Mr Thompson, who still is a computer programmer at this stage, is very, very fully across the claim in this manner.

I'll invite you now to go to tab 24. The point we want to make here is this very simple one that again when you browse through this document and the great array of plans, transcripts, costings and

everything else that's attached to that, including recorded discussion with the council and all sorts of things, almost like a record of interview, but the point is a reading of all that material not only shows the plaintiff to be very fully across all this, but shows the proceedings that are currently sought to be made to be identical in their form. That's all I want to say with volume 1.

If I ask you to look at volume 2. We've only three more of these to go, volume SME2 volume 2. I will jump through this. We do come up to this chronologically. Looking now at tab 35 this is an outline of argument on behalf of the plaintiffs. It's an outline of argument signed by Mr Tiernan dated 22 July 1998. We draw attention to p.3, para 7 where it is said, "In the light of Wardley's case the plaintiffs' ... (reads) ... October 1989". In other words, counsel for the plaintiffs submits that those causes of action accrued a little over 16 years ago from now, "Being the date upon which ... (reads) ... or contingent loss". Reference is then made to Wardley.

Then we have at p.4 para 11 the particular old friend that if the plaintiffs are wrong on the above arguments they say, "Knowledge of the falsity of the ... (reads) ... Limitation of Actions Act". We draw that to your attention.

If I may then jump over some other highlights and go to tab 38. These are then the reasons for decision of Justice Ashley and the page reference of the

reasons for decision of Justice Ashley of 11 August 1998 that I wish to refer you to is p.27. Here His Honour, in reasons for judgment, records, "By their first particulars the plaintiff said ... (reads) ... the para 54(b) representation was correct". His Honour does discuss the limitation situation not least s.27.

Again what we draw attention to is that on any view of this matter with the subsequent elapse of another ten years from 1995 to 2005, without any shadow of a doubt the claim is, we respectfully submit, statute barred.

Then if you jump across to tab 42 and perhaps I'll finish this volume efficiently before we reach 4.15, if that's a convenient way to do this. You'll see another further statement of claim containing similar but varied allegations, multiple representation of claims there to be found a further statement of claim. We note that at p.44 this particular document is a document with a stamp of Nevile & Co Solicitors, so we have Nevile & Co acting in this matter, acting as agent. That's at p.44.

Then to jump over to tab 48 you will there observe an amended reply and again the allegation is repeated that, "The plaintiffs did not discover ... (reads) ... prior to that date". Voluminous particulars are then given and that document is filed in September 1998.

That's the only other document to which I will refer at this time.

MASTER: How long will you be tomorrow.

MR GARDE: I still have a fair way to go. I have two more volumes of this exhibit to refer plus I wish to refer to the later affidavits, but I would hope that we can do this in perhaps no more than an hour and a half in the morning. I'll speed through it.

MASTER: So there'll be ample time for you to respond to that, Mr Middleton.

MR MIDDLETON: If my learned friend Mr Garde is an hour and a half I think that will give me ample time to respond.

MASTER: I'm happy with that.

ADJOURNED UNTIL TUESDAY 15 NOVEMBER 2005