

1 HIS HONOUR: Mr Thompson?

2 MR THOMPSON: Thank you, Your Honour.

3 HIS HONOUR: Just before we go to your submissions, I should

4 just make sure that I have clear in my own mind the

5 framework of things. Essentially you make complaint

6 about the sequence of subdivision of the Tylden Road

7 land, is that right? That's the first thing?

8 MR THOMPSON: Yes. The sequence of subdivision, I'm not sure I

9 term it that, no sir.

10 HIS HONOUR: Well you say that the land was initially approved

11 for subdivision as a whole - - -

12 MR THOMPSON: Yes.

13 HIS HONOUR: But not in fact subdivided in accordance with that

14 initial approval.

15 MR THOMPSON: Yes, sir. That occurred but that's not my

16 allegation here sir.

17 HIS HONOUR: Well just let me make - go through them and let me

18 tell you what I understand to be the underlying matters.

19 MR THOMPSON: Yes, sir.

20 HIS HONOUR: Not what your allegations are about them but

21 that's the first area of concern as I understand it. The

22 second as I understand it relates to guarantees called up

23 by both the council and the Water Authority relating to

24 the Tylden Road land, is that right?

25 MR THOMPSON: Again, no sir. That matter was dealt with - - -

26 HIS HONOUR: Not in this case? Not in this case?

27 MR THOMPSON: Not in this case. It's not even relevant.

28 HIS HONOUR: Right. The third area as I understand it that's

29 been the subject of complaint relates to the approval of

30 cluster subdivision plans relating to the Woodleigh Road

31 land, is that right?

1 MR THOMPSON: Yes, it's related to the sealing rather than the
2 approval.
3 HIS HONOUR: Yes.
4 MR THOMPSON: Yes, sir.
5 HIS HONOUR: And the fourth area relates to the refusal of
6 water supply to the Woodleigh Road land, is that right?
7 Again not in this case?
8 MR THOMPSON: Again not in this case. The water of course is
9 relevant but not in this case.
10 HIS HONOUR: Right, well - - -
11 MR THOMPSON: It doesn't form the core issue.
12 HIS HONOUR: Yes, all right. Well I'm not attempting to define
13 the issues, I'm just indicating to you that it's within
14 the framework of events relating to those matters that
15 you seek to raise issues.
16 MR THOMPSON: Yes.
17 HIS HONOUR: And I'm really inviting you to confirm that in the
18 broad, that's the framework of events in which you've
19 made allegations and you - - -
20 MR THOMPSON: That's - - -
21 HIS HONOUR: And you now wish to raise what you say are new
22 allegations?
23 MR THOMPSON: That's correct.
24 HIS HONOUR: Yes, all right. Now take me to your case as you
25 wish?
26 MR THOMPSON: Sir, if you wouldn't mind, I've already handed up
27 a - - -
28 HIS HONOUR: Yes, I see.
29 MR THOMPSON: And I'll just - my friends here with a copy as
30 well. This is only a first half. Sir, what I'd like to
31 do, I know the - I'm sorry? Yes. I thought I had five

1 copies - yes, that's all. Sir what I've done here, I've
2 prepared a fairly substantial submission, it's in fact in
3 two parts. The second part is yet to come. While the
4 other side provided an outline of submissions and then
5 fill it in. I'm hoping to do it in reverse, basically
6 I've provided a fairly complete submission and I'm hoping
7 to outline it rather than reading it all directly. Now
8 just to put it in the picture, what this - the present
9 allegation is in reality is a conspiracy to avoid s.9 of
10 the effect of s.9 of the Sale of Land Act. Now the thing
11 that I should point out initially, right at the very
12 start is that as I now know, avoidance of the section,
13 s.9 of the Sale of Land Act has zero to do with unlawful
14 plans. Now the other side have made great weight of
15 unlawful plans and so on but they're simply irrelevant to
16 what occurred and I'm sorry, sir I'm - - -

17 HIS HONOUR: But didn't Mr Delany take me to your notes in
18 which you copied sub-s.9?

19 MR THOMPSON: Yes, in the book of pleadings, yes.

20 HIS HONOUR: Yes and those pleadings did relate to unlawful
21 plans?

22 MR THOMPSON: Sorry?

23 HIS HONOUR: Those pleadings did relate to unlawful plans,
24 didn't they?

25 MR THOMPSON: Yes, sir, yes. But you can't avoid s.9 of the
26 Sale of Land Act by means of unlawful plans, two lot
27 subdivisions. They do not enable or facilitate avoidance
28 of s.9.

29 HIS HONOUR: Yes, well that's probably - I have to remind
30 myself as to what s.9 says but that is probably correct.
31 Where does that take me?

1 MR THOMPSON: Well sir there is in fact, unfortunately to
2 answer the question I should jump through my, through my
3 submission and I'll just find the heading on the page.
4 It explains it I think quite simply. First of all, I'll
5 just - on p.11 - sorry, I'll do this a little bit in
6 sequence if I can? To answer your question.

7 HIS HONOUR: Yes, perhaps you'd better stay with the sequence
8 in your submissions. Yes, you take me through it? Just
9 take me through your submission, I don't want to knock
10 you off your track.

11 MR THOMPSON: No that's OK. I can take you know reasonably
12 quickly to this section so you - - -

13 HIS HONOUR: Yes.

14 MR THOMPSON: - - so perhaps you'll understand. On p.2 of my
15 submission at Paragraph 8C I say "at Paragraph 55B of my
16 affidavit of 18 October 2005, I also say 'My present
17 cause of action is that the Council did in breach of its
18 specific duty, seal the residential series of plans and
19 the industrial series of plans and the plans of cluster
20 subdivision in full knowledge that the allotments thereby
21 created were unusable due to a lack of services and in
22 full knowledge that there was no lawful means to compel
23 or cause construction of those services in order to make
24 the allotments usable'". As I then say underneath that
25 there was, "These things have nothing to do with unlawful
26 plans".

27 Now the fact is that this is the method of avoiding
28 the s.9, the effect of s.9 of the Sale of Land Act. Sir,
29 with regard to the book of pleadings that was shown to -
30 leaked yesterday, you'll find that on a proper, and I'll
31 go through it a little bit later, on a proper reading of

1 the book of pleadings it is quite clear that while the -
2 Ken Buchanan, the initial subdivider had the intent or
3 the purpose of avoiding s.9 of the Sale of Land Act with
4 his two lot plans, that did not occur, and what's - what
5 is more, it could not occur, and that's in fact clear in
6 the book of pleadings.

7 So there was, back then, while I had knowledge of
8 Buchanan's purpose and intent, back then it's quite clear
9 from the book of pleadings that that is not what
10 happened. Because the fact is in relation to the
11 unlawful two lot plans, the Council had sealed them with
12 a s.569E(3) I think it is, endorsement. And so of course
13 the Registrar of Titles could not approve the plans. So
14 no sale could occur.

15 HIS HONOUR: But he did approve the plans, because he was told
16 the requirement had been withdrawn, isn't that right?

17 MR THOMPSON: Yes, that's correct.

18 HIS HONOUR: Well he was perfectly entitled to seal them,
19 wasn't he?

20 MR THOMPSON: Yes he was. Absolutely, but you see that's the
21 point, it did not enable avoidance of s.9 of the Sale of
22 Land Act.

23 HIS HONOUR: Well Mr Thompson, I must say that I find this
24 confusing, and I think perhaps you'd better go back to
25 your submissions and just take me through.

26 MR THOMPSON: OK. And it is I understand - now - - -

27 HIS HONOUR: Can I say this to you - - -

28 MR THOMPSON: Yes.

29 HIS HONOUR: - - - I understand the proposition that the two
30 lot plans of subdivision were unlawfully sealed.

31 MR THOMPSON: Yes.

1 HIS HONOUR: And it follows that if that were the case, then
2 they were ultimately registered as - in consequence of
3 that unlawful sealing?
4 MR THOMPSON: Yes.
5 HIS HONOUR: What that means in terms of s.9 might be
6 debatable, but you can explain to me what you do or don't
7 say.
8 MR THOMPSON: Perhaps let's look at it another way. I also
9 make at Paragraph - sorry, W8 of the amended statement of
10 claim - - -
11 HIS HONOUR: Yes.
12 MR THOMPSON: - - - I also make the allegation that s.9 of the
13 Sale of - the effect of s.9 of the Sale of Land Act was
14 also avoided in relation to the Woodleigh Heights
15 subdivision. Now what's interesting about the Woodleigh
16 Heights subdivision, and this sort of places it in
17 context - - -
18 HIS HONOUR: But that's the same proposition in a sense, isn't
19 it? What you say about the cluster subdivision is that
20 on your interpretation of the planning permit it was
21 unlawful that Council would seal it?
22 MR THOMPSON: No, no that's not what I say sir.
23 HIS HONOUR: That you say - - -
24 MR THOMPSON: That's not what I say at all. No, what I say is
25 that - now first of all I'll just make the point that in
26 relation to a cluster subdivision there is no such thing
27 as unlawful two lots plans of subdivision, you can't do
28 the same thing as what was done in respect of Tylden
29 Road.
30 HIS HONOUR: Yes, that's not what I was putting to you
31 Mr Thompson. You say it was in breach of the planning

1 permit because - as I understand it, because there was no
2 articulated water supply.

3 MR THOMPSON: Yes. Yes, that's correct.

4 HIS HONOUR: Yes.

5 MR THOMPSON: It was in breach of the planning permit.

6 HIS HONOUR: That's what you say.

7 MR THOMPSON: Yes.

8 HIS HONOUR: Yes, and it depends on construction of the
9 planning permit as to whether that's right, but that's
10 not the sort of question that would be resolved at this
11 stage.

12 MR THOMPSON: No, that's quite right, and I understand that.
13 See the thing in question here is, at the moment is
14 whether or not my allegations on the face of it, were
15 fraudulently concealed and/or res judicata and Anshun
16 apply is my understanding of the situation. Is
17 that - - -

18 HIS HONOUR: Well I think it's simpler than that.

19 MR THOMPSON: Sorry?

20 HIS HONOUR: In relation to Woodleigh it seems to me on the
21 face of it the release is a complete bar to your claims.

22 MR THOMPSON: On the face of it yes. However, you see what is
23 interesting here is that in respect to the present
24 statement of claim at Paragraph W10 I say that the water
25 supply was not there and - - -

26 HIS HONOUR: It doesn't matter.

27 MR THOMPSON: - - - in respect to Woodleigh Heights this is and
28 all - - -

29 HIS HONOUR: How does that matter?

30 MR THOMPSON: Well all else in the present statement of claim
31 in respect to Woodleigh Heights flows from that. In the

1 previous statement of claim at Paragraph W14 I think it
2 was, it says the water supply was there and all flowed
3 from that in respect to the previous one but you see the
4 fact is that the defendants concealed the fact that it
5 was not there.

6 HIS HONOUR: Yes.

7 MR THOMPSON: Now during the entire course of the previous
8 proceeding which ran for years, they had the option to
9 say, in reply to Paragraph W14 of the previous statement
10 of claim, that the water supply was not fair but they did
11 not do so.

12 HIS HONOUR: I probably shouldn't ask this but I take it you
13 went to the Woodleigh Heights land, you say that in your
14 affidavit.

15 MR THOMPSON: Sorry, I which?

16 HIS HONOUR: You went there before you bought it?

17 MR THOMPSON: Yes absolutely.

18 HIS HONOUR: Did you see there were no roads?

19 MR THOMPSON: No, the roads were there, that's the Tylden Road
20 land sir.

21 HIS HONOUR: I'm sorry. I'm confused.

22 MR THOMPSON: In respect to the Woodleigh Heights land, the
23 roads were there, the lake was there, the very large
24 concrete tanks, 100,000 gallon - two, there was in fact
25 two of them. Initially approved was a 100,000 gallon
26 tank, there was two 50,000 gallon tanks.

27 HIS HONOUR: Mr Thompson, what I put to you was that on the
28 face of it the release is a complete part of the
29 Woodleigh Heights claim, right?

30 MR THOMPSON: Yes.

31 HIS HONOUR: You say that - you previously claimed on the basis

1 that water was there - - -
2 MR THOMPSON: Yes that's right.
3 HIS HONOUR: - - - and you now claim on the basis that water
4 wasn't there.
5 MR THOMPSON: That's correct.
6 HIS HONOUR: I ask you, did you go to the Woodleigh Heights
7 land before you bought it? I take it you did.
8 MR THOMPSON: Yes I did - - -
9 HIS HONOUR: Yes, you say you did.
10 MR THOMPSON: Yes that's correct.
11 HIS HONOUR: And I ask you - you could see that the roads
12 weren't there - - -
13 MR THOMPSON: No they were there on the Woodleigh Heights land.
14 HIS HONOUR: They were there?
15 MR THOMPSON: Yes.
16 HIS HONOUR: I see.
17 MR THOMPSON: You see in respect to the Woodleigh Heights land,
18 the roads were there.
19 HIS HONOUR: Yes.
20 MR THOMPSON: The lake was there, it was full of water, it was
21 6 acres large, you can't not see it. The tanks were
22 there, you can't not see them, they were two
23 50,000 gallon tanks on the very highest level of the
24 subdivision. There was a house there. They were
25 advertised as usable blocks of land on - if I could take
26 you to my Exhibit GAT1.
27 HIS HONOUR: You say you sued on the basis water was
28 connected - - -
29 MR THOMPSON: Absolutely.
30 HIS HONOUR: - - - and you now sue on the basis it's not
31 connected?

1 MR THOMPSON: Yes sir.

2 HIS HONOUR: At the date of purchase.

3 MR THOMPSON: Yes that's correct.

4 HIS HONOUR: And you say that means that the release doesn't
5 cover you?

6 MR THOMPSON: Yes I do. See the previous action, sir, was
7 entirely based - see when - to go back and as you say I
8 don't think, see the point's here at the moment to argue
9 the actual planning permit but back - in respect to the
10 previous proceeding, the central, the most - it all
11 flowed from the allegation in Paragraph W14 from memory,
12 that the water supply was present. Now you see, sir, in
13 respect to Woodleigh Heights, there is only two
14 possibilities, it either was present or it was not
15 present.

16 HIS HONOUR: Yes.

17 MR THOMPSON: Now the defendants knew which of those two things
18 was true at all times. In the previous proceeding it was
19 entirely predicated on the issue that it was present.
20 Now during the entire proceeding of the last - back in,
21 starting in 1995 and went through until 1999, the
22 defendants did not say it wasn't present. So that
23 proceeding then continued for four years at great cost to
24 them and myself during which time they knew full well it
25 was not present. They could well have at any time and
26 should have done it, they should have - in reply to
27 Paragraph W14, said "Mr Thompson and Your Honour, the
28 water is not there" but they didn't do it.

29 HIS HONOUR: Well Mr Thompson, Mr Garde took me to a letter
30 yesterday which appeared to me to demonstrate quite
31 clearly that you did know the water wasn't connected at

1 the time of these proceedings.

2 MR THOMPSON: Sir, that's very interesting and I attended to
3 that in great detail. You see there are two different
4 water supplies here, there is the one that's described in
5 Paragraph W2 of the present amended statement of claim
6 and that is the water supply that is referred to in the
7 submission dated 3/11/98. It's a private reticulated
8 water supply. It consists of the lake, the header tanks
9 and the internal reticulation system. The water supply
10 Mr Garde took you to yesterday was a water supply
11 provided by the second defendant in 1982. It is not the
12 water supply we're talking about, they're irrelevant.
13 The two cannot be confused with one another.

14 HIS HONOUR: No Mr Thompson, that's not right. The 1982 supply
15 is the type of supply contemplated by the planning
16 permit, isn't it?

17 MR THOMPSON: No sir, it is not.

18 HIS HONOUR: I see. Why do you say that?

19 MR THOMPSON: Well, sir, in the planning permit - OK we'll go
20 back a little bit. Up at Kyneton under the then Shire of
21 Kyneton Planning Scheme, subdivision into 6 acres,
22 subdivision into allotments of less than 6 acres was
23 prevented unless the land was provided with a reticulated
24 water supply. Now that area simply was not serviced by a
25 reticulated water supply at all. So in the submission
26 dated 3/11/78, which is referred to in Paragraph W2 of
27 the amended statement of claim, the then subdivider,
28 Ken Buchanan, made a very substantial submission which
29 pointed out the fact that there was no water supply out
30 there.

31 HIS HONOUR: Yes.

1 MR THOMPSON: And that as a consequence of the then planning
2 scheme, he proposed a private reticulation system which
3 was to be present at the time that the plans were sealed.
4 That is fully described in that submission including the
5 plans which show the reticulation, the lake, the header
6 tanks and so on. That was the basis that it was sealed
7 on in 1978 and then what happened was - and just to put
8 you in the picture, that was - the subdivision was
9 initially I forget now, some 30 or 40 odd blocks of three
10 acres each.

11 A little bit later on, what happened was it was re-
12 subdivided because they wanted to build a time share
13 resort there. At that point in time, on my understanding
14 later was that it was necessary to augment the supply
15 that was out there initially. The supply that was
16 provided by the Kyneton Water Board by the second
17 defendant cannot be confused with the supply that should
18 have been there in 1978. Sorry, 1979 at the time of the
19 sealing. The one, the one is contained entirely in the
20 subdivision and is the property of the body corporate and
21 should have been (indistinct) in 1979. The one that was
22 bought in 1982 was bought pursuant I might say to an
23 unlawful water supply agreement. Nobody in fact could
24 establish as it was some - the defendants' allegations at
25 the moment say that at that particular point in time when
26 I knew of the second water supply that my right of action
27 accrued from then. Well it didn't because it was an
28 unlawful water supply and no right to that water supply
29 existed. Nobody had a right to it, it was simply
30 unlawful. Now it did not and cannot be said to replace
31 the water supply that should have been out there in 1979.

1 The two cannot be confused. The bringing of the 1982
2 water supply cannot be said to be knowledge of the first
3 instance of any aspect of this water supply that should
4 have existed in 1979 but did not.

5 HIS HONOUR: Well then the situation is, it's never been
6 connected. Is that right?

7 MR THOMPSON: Now - - -

8 HIS HONOUR: Contrary to what I've been told.

9 MR THOMPSON: Now who knows at this point. The defendants
10 would be the only ones who know. The point is - the
11 point here is that when I purchased the land in 1979 like
12 all people who buy land in this state because of the laws
13 of this state, wants - wants to buy usable land that's
14 been lawfully approved. That was what I firmly believed.
15 And then - - -

16 HIS HONOUR: Well that simply comes down to a question of fact.
17 Well firstly a question of law perhaps, what was required
18 pursuant to the planning permit.

19 MR THOMPSON: Yes.

20 HIS HONOUR: And secondly a question of fact, whether it was
21 there.

22 MR THOMPSON: I'm sorry, I missed that sir.

23 HIS HONOUR: And secondly a question of fact, whether it was
24 there.

25 MR THOMPSON: Yes, that's right.

26 HIS HONOUR: Well - - -

27 MR THOMPSON: Sir, the defendants have admitted that it wasn't
28 there I might say at this point.

29 HIS HONOUR: Yes. Well I think I understand what you're saying
30 but - - -

31 MR THOMPSON: Sir with respect I - - -

1 HIS HONOUR: Are you telling me that in the previous proceeding
2 you did not allege that the subdivision was unlawful?
3 MR THOMPSON: No.
4 HIS HONOUR: Well what was the basis that you previously
5 alleged it was unlawful?
6 MR THOMPSON: I didn't allege that the Woodleigh Heights was
7 unlawful ever. This is the first time.
8 HIS HONOUR: I see.
9 MR THOMPSON: Sir, in relation to the previous Woodleigh
10 Heights proceeding, I discovered as my submissions will
11 show in 1995 and this is why I wasn't knocked out then on
12 the Statute of Limitations. It was in 1995 that I
13 discovered the facts of it being hidden from me until -
14 from 1979. And in the 1995 proceeding, it was firm - at
15 paragraph - and I'm quite sure it was probably brought
16 even, I'm sure Mr Garde will correct me if it wasn't.
17 It's where I allege that the water supply was complete.
18 I say the lake was there, the (indistinct) were there and
19 the principal water mains were there. That's the
20 essential allegation in the previous 1995 proceeding, the
21 Woodleigh Heights one.
22 HIS HONOUR: Just wait until I find the statement of claim in
23 that. Do you know where that is?
24 MR THOMPSON: It's probably in MED2 Volume 1 at a guess. Sorry
25 SME2, Volume 1 at a guess.
26 HIS HONOUR: I was looking at ME - - -
27 MR GARDE: You'll find it, SME Volume 2 at Tab 42, is the
28 further amended statement of claim.
29 HIS HONOUR: Yes, I think - - -
30 MR THOMPSON: It's in SM - - -
31 HIS HONOUR: I think I found it in MED1, Tab 16.

1 MR THOMPSON: Yes, that's fine.

2 HIS HONOUR: Well - - -

3 MR THOMPSON: Mr Garde sorry, what was that reference please?

4 HIS HONOUR: MED 16.

5 MR GARDE: Tab 16.

6 MR THOMPSON: MED.

7 MR GARDE: One.

8 MR THOMPSON: MED1, tab - - -

9 HIS HONOUR: And in that proceeding, what you set out at

10 Paragraph 7 was the proposal for privately owned and

11 operated water supply and reticulation, is that right?

12 MR THOMPSON: OK, it's in - OK, sorry it's on the amended

13 further statement of claim, it's in Paragraph 11 in fact.

14 HIS HONOUR: No. The proposal is at Paragraph 7 - - -

15 MR THOMPSON: But what I say was there is that Paragraph 11 is

16 there.

17 HIS HONOUR: Yes, the proposal - - -

18 MR THOMPSON: Yes?

19 HIS HONOUR: For privately owned water supply and reticulation

20 which you've described to me is set out, is that right?

21 MR THOMPSON: Yes, yes. Yes.

22 HIS HONOUR: And what was done is set out at Paragraph 11.

23 MR THOMPSON: Yes.

24 HIS HONOUR: And that's right isn't it?

25 MR THOMPSON: Yes. That's what I thought to be right then.

26 But I now know it's wrong.

27 HIS HONOUR: Well the lake's there, you tell me that.

28 MR THOMPSON: Yes, absolutely.

29 HIS HONOUR: The gallon, 50,000 gallon water tanks are there.

30 MR THOMPSON: Yes sir.

31 HIS HONOUR: The rising main there?

1 MR THOMPSON: I think so.

2 HIS HONOUR: Well what's wrong - - -

3 MR THOMPSON: But the principal water mains were not there.

4 The water supply was not there - a reticulated water

5 supply consists of three component parts, the water

6 supply, a - like there is a reservoir, the reticulation

7 system, and the water flowing within that reticulation

8 system. In the absence of any one of those parts it's

9 now present. Now the fact is that in this instance the

10 reticulation system was not complete.

11 HIS HONOUR: Yes, so it's 11D that's not there, is that right?

12 MR THOMPSON: Yes, that's correct sir. And that fact is now

13 admitted by the defendants. You see sir, and the point

14 I'm making here is that at the - this 1995 proceeding was

15 entirely predicated upon this fact.

16 HIS HONOUR: Well that doesn't sound correct to me at all.

17 It's predicated on a whole series of facts.

18 MR THOMPSON: Yes, but the principal one is that there was a

19 water supply there, and I had right and entitlement to

20 it.

21 HIS HONOUR: Yes.

22 MR THOMPSON: And that back then in 1995 the representations of

23 the defendants to the effect that I did not have

24 entitlement to this reticulated water supply was

25 fraudulent. That was the allegation back then.

26 HIS HONOUR: Yes. Well what you ultimately claim was it was

27 sold for \$135,000 and if it had had been entitled to an

28 approved water supply reticulation system it would have

29 been worth \$431,500.

30 MR THOMPSON: Yes, whatever the numbers were, sir.

31 HIS HONOUR: Well that's exactly what you say now, isn't it?

1 MR THOMPSON: No it's not sir.

2 HIS HONOUR: You just say it on the basis that in fact some of

3 the pipes weren't there, instead of - - -

4 MR THOMPSON: No, no, that's not what I say at all sir.

5 HIS HONOUR: What do you say now?

6 MR THOMPSON: Sir what I say now, you see back then I knew

7 nothing of this conspiracy to avoid s.9 of the Sale of

8 Land Act, which I shall explain a little bit later on.

9 Now first of all back at this proceeding let's - the

10 central point here is that I made this allegation that

11 the water supply was fair, and that I was entitled to it,

12 and their representations at the time were fraudulent

13 misrepresentations which denied me access to that

14 reticulated water supply. I now find that the water

15 supply in fact was not there at all. Now in my view the

16 difference is quite radical, and the - they now admit to

17 that fact.

18 HIS HONOUR: Don't you suffer the same damage necessarily?

19 MR THOMPSON: No, no sir.

20 HIS HONOUR: You're denied access to it if it's not in the

21 ground, and you're denied access to it if they don't

22 allow you access to it. What you were complaining of was

23 that you had no access to the reticulated water supply

24 that you should have had. It's the same complaint.

25 MR THOMPSON: Sir I'm not - pardon, sorry. I'm not sure that

26 it is the same complaint at all.

27 HIS HONOUR: Well what hurts you is no access to reticulated

28 water, as you should have had, you say, if your reading

29 of the permit's right.

30 MR THOMPSON: I'm sorry, say again?

31 HIS HONOUR: You say that the correct interpretation of the

1 permit is that this had to be done before the plan was
2 sealed.

3 MR THOMPSON: Yes sir.

4 HIS HONOUR: Before there was any common property.

5 MR THOMPSON: Yes.

6 HIS HONOUR: Before there were any lots.

7 MR THOMPSON: Yes.

8 HIS HONOUR: You say that it requires that, it doesn't just
9 permit it.

10 MR THOMPSON: Yes it did require it, yes.

11 HIS HONOUR: Well I have some trouble with that reading the
12 words. It doesn't require it by any particular date,
13 does it?

14 MR THOMPSON: Certainly by the time it was sealed.

15 HIS HONOUR: That's not what the condition says.

16 MR THOMPSON: Sir the Local Government Act requires the Council
17 to refuse to seal plans unless they're useable. Here
18 they were unusable.

19 HIS HONOUR: Well - - -

20 MR THOMPSON: As I now know.

21 HIS HONOUR: Mr Thompson your allegation is that the statement
22 that the development be in accordance with the proposal
23 imposed a precondition to sealing of the plans, that's
24 right?

25 MR THOMPSON: Yes, yes, it had to be complied with. The
26 allotments had to be usable.

27 HIS HONOUR: Yes, all right.

28 MR THOMPSON: They should not have suffered - they should not
29 have had related to them a loss causing deficiency, which
30 was known only to the defendants, could not be known to
31 me, or to any other innocent purchaser that may have come

1 along.

2 HIS HONOUR: Yes, well let me put it another way. The reason

3 you did - that the mortgagee doesn't get the right price

4 is, as you say, MCL sold the land on the basis it did not

5 have access to a water supply and reticulation service.

6 MR THOMPSON: Yes sir.

7 HIS HONOUR: And now what you're saying to me is "no, it

8 didn't". It's precisely what you alleged last time.

9 MR THOMPSON: No, not quite. You see sir - - -

10 HIS HONOUR: They were right, but they were right for a

11 different reason, that's what you're saying. They were

12 right because - they were absolutely right not because

13 the reason they gave, but because the pipes weren't in

14 the ground.

15 MR THOMPSON: That MCL sold it - - -

16 HIS HONOUR: On the basis that it doesn't have a right to

17 reticulated water.

18 MR THOMPSON: No sir.

19 HIS HONOUR: They were right, weren't they?

20 MR THOMPSON: No sir, the difference is greatly different. On

21 this occasion sir - - -

22 HIS HONOUR: Mr Thompson, just answer me. They were right to

23 sell the land on the basis that it did not have an

24 entitlement to a reticulated water supply, weren't they?

25 MR THOMPSON: On the representation of the council at the time,

26 yes and the Water Board.

27 HIS HONOUR: No, in fact it had no access to a reticulated

28 system. They were right, weren't they? For the wrong

29 reason.

30 MR THOMPSON: For the wrong reason because then we didn't know.

31 HIS HONOUR: Yes, yes.

1 MR THOMPSON: Then we did not know the true reason which we now
2 know.
3 HIS HONOUR: Yes. Yes, well what do you say next?
4 MR THOMPSON: OK, one of the great difference here sir is you
5 know, now a thing can happen for a particular reason or
6 whatever. The cause of action depends upon intent, now
7 this particular instance, what I say here and my
8 allegation is in the present statement of claim is that
9 there was a conspiracy against the state for that matter
10 and any person that may have come along. I now know, now
11 just to try and draw perhaps a poor analogy, I now know
12 it wasn't simply an accidental - that I didn't walk into
13 their knife or this sort of thing. I know that before I
14 came along, they held the knife up and intended to stab
15 me or whoever came along. You see there is a distinctly
16 different purpose here. A vastly different, a vastly
17 different cause of action. But the last proceeding - the
18 central issue here is that at the time of the last
19 proceeding, this - each went for five years from 1995
20 until 1994, 1999 - sorry four years. During the entire
21 period, the defendants knew full well that they were
22 maintaining this proceeding on foot for the purpose of
23 concealing what I presently know, what I presently know.
24 Back then there was in fact no proceeding, my allegations
25 in here are simply based upon the fraudulent
26 representations of the defendants. This previous
27 proceeding is entirely based in the fraud of the
28 defendants. There is in fact no subject other than the
29 fraud of the defendants in this previous proceeding.
30 HIS HONOUR: Mr Thompson when your vendors supply was provided
31 in 1982, didn't it connect to anything?

1 MR THOMPSON: Sorry, say again sir?

2 HIS HONOUR: Are you saying that an augmented supply was

3 provided and there was nothing, no reticulation -

4 nothing, there were no mains on site, nothing, just what

5 happened was a supply main went down to the site, didn't

6 plug into anything?

7 MR THOMPSON: No, sir what I'm saying is that when I knew about

8 this 1982 one, I just sort of hooked into the pipes, you

9 see like - for example when I - - -

10 HIS HONOUR: Well why do you say it didn't?

11 MR THOMPSON: I don't. I say that back then I thought that it

12 did.

13 HIS HONOUR: Yes, well why - what, we're going around in

14 circles.

15 MR THOMPSON: I thought that - I - - -

16 HIS HONOUR: What you're really, are you saying that you don't

17 know what's on site now do you? You don't know what's

18 been on site since 1982, is that right?

19 MR THOMPSON: No, sir. I know that the water tanks were there.

20 The lake was there, the water tanks were there. 1979 I

21 thought the reticulation system was there. In 1982 I

22 thought that this water supply of the second defendant

23 simply plugged into the reticulation system that was

24 there in 1979.

25 HIS HONOUR: What it may have done is plugged into the

26 reticulation supply then.

27 MR THOMPSON: It may have plugged into which sir? The

28 reticulation - - -

29 HIS HONOUR: The reticulation supplied then.

30 MR THOMPSON: Supplied then?

31 HIS HONOUR: Yes. You say nothing was supplied then? What

1 happened? I mean - - -

2 MR THOMPSON: Well as I now know, as I now know and this is

3 what I've just discovered is that they in fact laid the

4 reticulation system within the subdivision.

5 HIS HONOUR: Yes.

6 MR THOMPSON: In 1982.

7 HIS HONOUR: All right well that's what - OK. Now we've

8 finally got to where I thought we were half an hour ago.

9 In other words, a reticulated supply was provided in

10 1982.

11 MR THOMPSON: No, sir. No.

12 HIS HONOUR: It was augmented and laid into the subdivision by

13 the Authority, is that right? As distinct from the

14 subdivider, is that what happened?

15 MR THOMPSON: There are ways of looking at this sir. Now the -

16 the way to look at it in my view is that the - in 1979

17 the private reticulated water supply was supposed to be

18 there. I bought what I thought was usable land. I find

19 that due to the conspiracy to avoid s.9, that was not the

20 case but I didn't know it.

21 HIS HONOUR: Yes.

22 MR THOMPSON: In 1982, the second defendant entered into an

23 unlawful water supply agreement with Woodleigh Heights

24 Resort Developments.

25 HIS HONOUR: Yes.

26 MR THOMPSON: And they laid a pipe up Edgecombe Road and they

27 put a water main - sorry a water metre at the boundary,

28 at the gate way as happens with all houses and so on and

29 so forth.

30 HIS HONOUR: Yes.

31 MR THOMPSON: And I thought they connected into the internal

1 reticulation system that already existed. I now know
2 that of course the reticulation system did not exist. It
3 was in fact constructed in 1982 so I now know - - -
4 HIS HONOUR: Just stop there?
5 MR THOMPSON: Yes.
6 HIS HONOUR: In 1982 a reticulation system was constructed, is
7 that what you're saying to me?
8 MR THOMPSON: Yes, that's what I'm saying.
9 HIS HONOUR: All right. Well that point - isn't the
10 subdivision being brought into compliance with the
11 proposal in the planning scheme in terms of what's on the
12 ground?
13 MR THOMPSON: It has become lawful in 1982, no question.
14 HIS HONOUR: At that point isn't what you said at Paragraph 11
15 simply wrong as to date - in other words it happened in
16 1982 whereas the plan was registered in 1979, is that
17 right?
18 MR THOMPSON: That's correct.
19 HIS HONOUR: I see. And that's a big change, is it?
20 MR THOMPSON: No sir.
21 HIS HONOUR: That's why you say this is an entirely new set of
22 facts?
23 MR THOMPSON: No sir, no. The reason why it's an entirely new
24 set of facts is that I now find that the - you see sir,
25 here one way or the other, I was defrauded by these
26 people. It's become a question of finding out what the
27 correct fraud was.
28 HIS HONOUR: Well when you say these people, you haven't
29 proceeded against Buchanan and you haven't proceeded
30 against Porter.
31 MR THOMPSON: Interestingly enough the defendants are the only

1 people who can do these things. Buchanan couldn't do it,
2 he could not do the things what these people have done
3 and interestingly enough, nor could Porter. You see sir,
4 in respect to - and I heard your comment yesterday with
5 regard to misfeasance. Now interestingly enough - - -
6 HIS HONOUR: It's a live topic you might say - - -
7 MR THOMPSON: No doubt, no doubt.
8 HIS HONOUR: - - - in our proceedings and it's one of some
9 significance as to whether a statutory authority is to be
10 fixed by something that's done by an officer that clearly
11 go beyond their proper role.
12 MR THOMPSON: Yes, sir I understand that. You see here - and
13 just to make a point of course, I mean the - - -
14 HIS HONOUR: It would be all right if you had a resolution of
15 the authority saying "do this", but you haven't got that.
16 MR THOMPSON: No, however I do. You see sir, in respect
17 to - - -
18 HIS HONOUR: You do?
19 MR THOMPSON: Yes sir, I do and I have far, far more than that
20 and in fact we'll go to the August 1987 letter for that
21 purpose amongst other things.
22 HIS HONOUR: Well in your annotations that I was taken to and
23 you're going to come back to you specifically say that
24 Porter wasn't authorised, don't you?
25 MR THOMPSON: But we're talking about different things sir.
26 HIS HONOUR: All right.
27 MR THOMPSON: That sir is not related, the stuff in the book of
28 pleadings is essentially irrelevant to the present
29 matter.
30 HIS HONOUR: All right. Yes?
31 MR THOMPSON: Sir, in respect to that question of misfeasance

1 there, the two entities themselves - they themselves hold
2 public office, the corporate entities. Now in this
3 particular instance the matters of things went for years.
4 Now during this period and Mr Garde has spoken about my
5 voluminous writings, I wrote to every councillor and
6 water board member on numerous occasions. I twice
7 addressed joint sitting of the council and the water
8 board. If one goes to Hansard of 1985, it was raised in
9 parliament.

10 Now the fact is that every single solitary
11 councillor and water board member and their officers knew
12 what was occurring here. The council sealed the plans as
13 a corporate body, these were not things done by
14 Mr Porter. Back at the time that I wrote the book of
15 pleadings, I had no idea of all of these things and back
16 then I blamed Mr Porter alone.

17 HIS HONOUR: Yes.

18 MR THOMPSON: I now know that that's different. You see they
19 did occur - - -

20 HIS HONOUR: You say every single councillor for instance in
21 the present case was aware in 1979 that although the
22 header tanks, the lake and the mains had gone in,
23 articulated pipes hadn't gone in?

24 MR THOMPSON: Yes sir.

25 HIS HONOUR: Every councillor knew that?

26 MR THOMPSON: Yes and I can in fact take you to a reference a
27 little later on. Sir what I did and interestingly enough
28 once I locate it, in 1998 or 9 I addressed a joint
29 meeting - 1989 - - -

30 HIS HONOUR: It doesn't seem to me to have much to do with it,
31 Mr Thompson.

1 MR THOMPSON: Well you see sir, in the - the council after I
2 addressed it they wrote a transcript of it. The
3 transcript is in evidence here. The significance of it
4 is just this, I said to them about the reticulated water
5 supply - sorry the water reticulation system that was
6 present in 1979. This is quite - all part of my
7 submission.

8 HIS HONOUR: Yes but it was present save for one component.

9 MR THOMPSON: No, in 1979 I said and the - - -

10 HIS HONOUR: You've told me everything was there but for part
11 of it, you have told me that you have gone to
12 Paragraph 11, the lake was there, two 50,000 gallon
13 concrete high level water tanks were there, the rising
14 main had been laid between the lake and the high level
15 tanks. The high level tanks contained water. There's
16 one sub-paragraph that's wrong and that's primary
17 reticulation pipes have been laid in the common property.

18 MR THOMPSON: Yes.

19 HIS HONOUR: Now so how's the water (indistinct).

20 MR THOMPSON: Sir, is a fraud rectified by the paying back of
21 money?

22 HIS HONOUR: Mr Thompson, the situation is that yes, there were
23 water supply facilities constructed but no, they were not
24 completely constructed.

25 MR THOMPSON: That's right.

26 HIS HONOUR: So the fact there's a discussion about water
27 supply being there in 1979 would not have struck anyone
28 as odd, would it? Why would they think that was odd when
29 there was all this work done?

30 MR THOMPSON: Wouldn't think it was odd that it wasn't there?

31 HIS HONOUR: Everything was there except one component, which

1 has since been supplied in 1982. You're not suggesting
2 that councillors sit around seven years later, knowing
3 which pipes were laid where. That would be ridiculous.
4 MR THOMPSON: No, they knew full well though - you see when it
5 came to denying me water, you see they purported, they
6 came to this 1982 water supply agreement - - -
7 HIS HONOUR: Can you tell me that you're not proceeding on the
8 basis of denial of water in this case, is that right?
9 MR THOMPSON: No, I'm talking about their knowledge at the
10 moment.
11 HIS HONOUR: It's all been litigated.
12 MR THOMPSON: I'm talking about their knowledge at the moment.
13 HIS HONOUR: Yes.
14 MR THOMPSON: The knowledge of the councillors.
15 HIS HONOUR: Yes.
16 MR THOMPSON: You see sir in 1984 - 83, when I threatened - I
17 wished to sell the land to somebody else and Woodleigh
18 Heights Resort Developments said to me "we will have -
19 prevent your land from having access to water", they made
20 this allegation, or this threat rather, claiming in full
21 knowledge that the Council and the Water Board would
22 carry it out and they did then carry it out.
23 HIS HONOUR: But this is all - - -
24 MR THOMPSON: Now one of the bases - - -
25 HIS HONOUR: But this is all, this is all post 82 isn't it?
26 MR THOMPSON: Sorry?
27 HIS HONOUR: When's this happened?
28 MR THOMPSON: Well that happened in 1984. I tried to fill in
29 the picture of what occurred - - -
30 HIS HONOUR: But at that point it's all there, the system's
31 there. The only question is whether you've got a right

1 to it, and you've litigation about that. As I understand
2 it they've given you some money. You've taken the money,
3 settled for value, you've said that you released them
4 from all claims in any way related to the subject matter
5 of the proceeding - - -

6 MR THOMPSON: Yes sir.

7 HIS HONOUR: - - - and you're now trying to tell me that one
8 pipe, one set of pipes out of the supply wasn't put in
9 till 82 as distinct from 79 it's a new cause of action.

10 MR THOMPSON: No sir, what I tried to tell you is that there
11 was in fact a fraud occurred that I did not know about,
12 and that fraud was deliberate, and it was done for the
13 purpose of avoiding the laws of this State and I became a
14 victim of it. I did not know of this fraud - - -

15 HIS HONOUR: Yes.

16 MR THOMPSON: - - - until just now.

17 HIS HONOUR: Well it doesn't matter whether it's, whether you
18 call it a fraud or what you call it, the question is
19 whether it related to the subject matter of the preceding
20 action and it seems to me it clearly did.

21 MR THOMPSON: Yes, sir the subject matter of the preceding
22 action was the fraud of the defendants. You see I relied
23 - when they sealed the plans they asserted that all
24 things had been done.

25 HIS HONOUR: Yes.

26 MR THOMPSON: I in fact now know that it was not done.

27 HIS HONOUR: Yes.

28 MR THOMPSON: Relying upon their assertion that all things were
29 done, that is that the water supply was present in 1979,
30 I issued the 1995 proceeding.

31 HIS HONOUR: Yes.

1 MR THOMPSON: The defendants could have in one second come
2 along to this court and said "Your Honour the water
3 supply was not there. We did not complete it". But they
4 didn't do that.

5 HIS HONOUR: Well it wasn't for them to complete it.

6 MR THOMPSON: It was up to them to ensure that it had been
7 completed, and the reason we were there is because they
8 were saying I had no right of access to water.

9 HIS HONOUR: I understand.

10 MR THOMPSON: That's why we were there.

11 HIS HONOUR: Yet it seems to me that that presumed that as at
12 the date of the proceeding the system was in, and in fact
13 it was in, as you've told me. But it didn't make any -
14 it didn't turn on the terms of the planning permit. I
15 mean I understand what you're - you're saying that
16 because one part of the supply wasn't in the ground at
17 the time the plan was sealed - - -

18 MR THOMPSON: Yes.

19 HIS HONOUR: - - - the sealing was unlawful.

20 MR THOMPSON: Yes.

21 HIS HONOUR: You also now say, and that was done as part of
22 some fraudulent conspiracy.

23 MR THOMPSON: Yes.

24 HIS HONOUR: Yes, all right, well I understand that. It still
25 seems to me to relate to the subject matter of the
26 preceding action.

27 MR THOMPSON: Sir with respect to the subject matter of
28 preceding action - - -

29 HIS HONOUR: It's not the same claim, but it's related to it.

30 MR THOMPSON: Yes, but the question is what is the subject
31 matter of the previous proceeding.

1 HIS HONOUR: No, that's the question in the other matter. In
2 this matter the release is in far broader terms, as you
3 well know. Perhaps we should - perhaps find the exact
4 words. But in this matter, what Mr Golvan evidently
5 wrote in, presumably in an effort to finalise things, the
6 very broad words which you then signed and then tried to
7 get out of and Justice Kaye said you were held by it.
8 That's right, isn't it?

9 MR THOMPSON: Sir with respect I didn't try to get out of it
10 per se.

11 HIS HONOUR: Yes, you tried to get out of the settlement. They
12 had to go to court didn't they, to get specific
13 performance?

14 MR THOMPSON: Yes, they did.

15 HIS HONOUR: Well, when do I find the release in the documents?

16 MR DELANY: It's reproduced at Paragraph 53 of your submissions
17 Your Honour. It's Tab 29 of Exhibit MED1 is the
18 document.

19 HIS HONOUR: "Arising out of or in any way related to the
20 subject matter of the proceeding".

21 MR THOMPSON: Yes sir, so it becomes a question of what is the
22 subject matter of these proceedings.

23 HIS HONOUR: No, the question is in, whether it's in any way
24 related to the subject matter.

25 MR THOMPSON: Yes sir. So in order to be related to a subject
26 matter, the subject matter must exist to determine their
27 relationship.

28 HIS HONOUR: Yes.

29 MR THOMPSON: OK, now having said that, what I say here is that
30 in respect to the previous statement of claim the subject
31 matter was the fraud of the defendants. That is that the

1 1995 proceeding was bought on the basis, the predicated
2 basis of the representation of the defendants that the
3 land had been sealed lawfully, and that the water supply
4 existed. Now that was as I now know a fraudulent
5 representation of the defendants. I relied upon it, and
6 I relied upon it at the time of bringing this proceeding.
7 They could then have come and said "Mr Thompson, the
8 water supply did not exist", but they did not do so.
9 They allowed the proceeding to continue. The subject
10 matter of the previous proceeding is nothing more than
11 the fraud of the defendants.

12 HIS HONOUR: Well as I read it, the subject matter of the
13 proceeding is the fact that as a result of lack of access
14 to water, the land was sold for a lesser price than it
15 would have had if it had access and that's the basis on
16 which the damage is claimed.

17 MR THOMPSON: Sir - - -

18 HIS HONOUR: And it seems to me that this is precisely the same
19 allegation in terms of the ultimate outcome.

20 MR THOMPSON: No, sir it wasn't sold in the previous
21 proceeding. The difference here is that it wasn't sold
22 because it didn't water, chiefly, it was sold on the
23 fraudulent representation that it did not have water.
24 The basis of this proceeding is that it did have water.
25 That was the fundamental misrepresentation of the council
26 and the Water Board upon which this action was brought.

27 HIS HONOUR: No, well I'll put it as - I'll put it in another
28 way. I understand that you say that you're now suing on
29 the basis that it didn't have water at the time of
30 subdivision and that therefore what flowed thereafter was
31 tainted if you like. Whereas in the previous claim, it

1 was a subsequent denial of access that formed the basis
2 of your claim but the fact of the matter is whichever
3 action is looked at, the ultimate result is that it's
4 sold for a price which does not reflect land with access
5 to water. So in other words, it has a lesser value.

6 MR THOMPSON: Yes, that was the ultimate - the ultimate end
7 result because - - -

8 HIS HONOUR: It's still the ultimate end result. It's still
9 the ultimate end result isn't it?

10 MR THOMPSON: Yes, yes, it's the ultimate end result. The
11 question is, the reason.

12 HIS HONOUR: Yes.

13 MR THOMPSON: Now in this particular - in respect to the
14 previous proceeding, it is a proceeding which was based
15 upon the fraudulent representations of the defendants.
16 The subject matter of the proceeding cannot rise above
17 that. It is limited to that. There is no subject matter
18 outside of the fraud of the defendants. Nothing within
19 the previous statement of claim can rise higher than
20 that. They were released from nothing more than the
21 fraud upon which the fraudulent misrepresentations upon
22 which the previous proceeding was based.

23 HIS HONOUR: Well Mr Thompson, I've already said to you, I
24 simply don't accept that. That would be so if the
25 release had not included the words, "Or in any way
26 related to the subject matter". Now the fact is that
27 it's quite clear that this claim is related in some way
28 to the subject matter of the proceedings. This part of
29 the subject matter of the proceedings was that you
30 suffered damage because the value of the land was less
31 than it should have been because it didn't have

1 reticulated water and that is precisely what you say now.

2 MR THOMPSON: Sir, what I say now which is - - -

3 HIS HONOUR: On a different basis. But that's precisely the

4 same loss. You can't get the same - - -

5 MR THOMPSON: Sir, we're not arguing the loss here. You see

6 sir, here - - -

7 HIS HONOUR: All right well you say you're not arguing the

8 loss, you are arguing the loss. You've made a claim for

9 loss and it's the same loss, isn't it?

10 MR THOMPSON: Sir, the difference here between the present

11 proceeding and the previous proceeding is the question as

12 to whether or not the subject matter is, existed - of the

13 present proceeding, existed in the previous proceeding

14 and it did not.

15 HIS HONOUR: Well I accept that and I've told you what I think

16 the next problem is and you've told me what you say about

17 the next problem. Do you want to move on?

18 MR THOMPSON: OK, well in respect of the next problem then, you

19 see the subject matter relating to fraud, that is the

20 fraud here, that also cannot rise higher than that. But

21 it cannot be related to the fraud which we have agreed

22 upon of this initial, of this statement of claim, the

23 related subject matter cannot then become valid.

24 HIS HONOUR: Yes. I think I should say to counsel that - when

25 we come to reply I would like Mr Ahern and Ms Burchell to

26 have identified the authorities relating to the words,

27 "Or in any way related to the subject matter of the

28 proceedings" because I'm sure there are some.

29 MR THOMPSON: Sir, just on that point, can we agree on the

30 subject matter of the proceedings. That the - this, the

31 previous 1995 proceeding was based upon the fraudulent

1 misrepresentations of the defendants and those
2 representations were made upon the sealing of the plans
3 which was a representation to all people that the plans
4 had been sealed lawfully and that when a person upon
5 becoming aware of the submission, that representation
6 also included an assertion as to the fact that the water
7 supply was present.

8 HIS HONOUR: Yes.

9 MR THOMPSON: Now that as we now know was a fraudulent
10 misrepresentation and the previous proceedings were based
11 upon that fraudulent misrepresentation.

12 HIS HONOUR: Well we don't know it was a - we don't know it was
13 a fraudulent misrepresentation.

14 MR THOMPSON: Well I assert that it was.

15 HIS HONOUR: It's certainly, one might say, prima facie it was
16 on the part of Buchanan but - - -

17 MR THOMPSON: Sir - - -

18 HIS HONOUR: You've yet to show me that as at 1979 there's any
19 evidence that the council, I'm sorry the council did know
20 - knew that there was no - there were no pipes in the
21 ground.

22 MR THOMPSON: Sir that's where I've been trying to move. When
23 the time came to deny me water, they knew full well that
24 they were denying it to me because they said that I did
25 not have - he had no entitlement to the water mains and
26 the water supply. They knew full well that it had been
27 purportedly laid in 1982 at the cost of Woodleigh
28 Heights.

29 HIS HONOUR: That's a different question. Forget about what
30 happened in 1982. To show that the council acted
31 fraudulently, you have to have some evidence that the

1 council knew that Buchanan had not laid the reticulated
2 pipes. And there's no evidence or documents of that at
3 all.

4 MR THOMPSON: Sir if the council was of the - - -

5 HIS HONOUR: I mean it's almost a truism in local government,
6 if you've got a choice between a conspiracy and
7 incompetence, 99 times out of 100, it's incompetence.
8 Now that's from a long experience of practitioners in the
9 area. That's what they're - - -

10 MR THOMPSON: Sir I have no doubt - - -

11 HIS HONOUR: That's what led in part to the council
12 amalgamation process. You had rural shires that were run
13 by one officer and if he wasn't up to it, there were real
14 problems.

15 MR THOMPSON: Yes, I'm familiar with this - - -

16 HIS HONOUR: It happened all over Victoria. There were
17 extraordinary situations in some situations, some areas
18 in the country. Just extraordinary.

19 MR THOMPSON: Yes.

20 HIS HONOUR: And was a great, well was a great part of my life
21 and Mr Garde's life for some years, that process of
22 review of council amalgamations. But look, it's just not
23 enough to say they must have known.

24 MR THOMPSON: No, sir I'm not saying they must have known. I
25 say they did know. You see - - -

26 HIS HONOUR: Yes. Well where's the evidence that council knew
27 that the reticulated pipes weren't in the ground.
28 Everything that they could see, everything that was above
29 ground was visible, it looks like it's done. Where's the
30 evidence that in 1979 they knew it wasn't done.

31 MR THOMPSON: Well sir if they thought that the water supply

1 was there they would never have said to me, you don't
2 have entitlement to it.

3 HIS HONOUR: Nonsense. That's a different question altogether.

4 MR THOMPSON: No.

5 HIS HONOUR: That's what happens after 1982 when it's augmented
6 and that's what happens after, as you told me, that's
7 what happens, it's augmented because there's going to be
8 a different form of development there. There's been a
9 second subdivision.

10 MR THOMPSON: Sir, in respect of the augmentation, what I was
11 pointing out there was that it was impossible to confuse
12 the water supply provided by the second defendant with
13 the water supply that should have been there in 1979.
14 What I was saying there was that - - -

15 HIS HONOUR: I think that's right - - -

16 MR THOMPSON: - - - it was impossible to confuse it if the 1982
17 water supply is not and could not be seen to be a first
18 instance of a water supply there by anybody. And so I
19 did not confuse it and nor did the council and the Water
20 Board. But when it came time to say to me that I did not
21 have right of access to water, they used the basis of
22 that 1982 water supply agreement. Had they - which the -
23 they had knowledge that the 1979 water supply should have
24 been there, had they believed it was there they would
25 never have said to me, "You don't have that water".

26 HIS HONOUR: That might be right.

27 MR THOMPSON: That fundamental thing that they said there was
28 reliant upon the knowledge that the 79 water did not
29 exist.

30 HIS HONOUR: Yes, that's knowledge as at the mid 80s. What I'm
31 saying is, you can't infer from that that they knew the

1 situation in 1979. Of course they knew the situation
2 after the 82 works were done. Presumably Mr Buchanan
3 came along in 1982 and said, "I want to augment it". And
4 they said, "Yes, well what needs to be done?" And it was
5 all done. And at that stage the situation's rectified on
6 the ground and then as you say, instead of giving you
7 access to it, they deny you access. And that's the
8 previous proceeding.

9 MR THOMPSON: Yes, sir, that was - sir, the denying, the denial
10 of access was reliant upon their knowledge that it did
11 not exist. They could not have said it otherwise.

12 HIS HONOUR: No, that's not right.

13 MR THOMPSON: Sir had they believed the 79 water supply was
14 there and that was mine by right, there was no basis for
15 their statement.

16 HIS HONOUR: No, the denial of access cannot post 1982 cannot
17 lead to an inference as to the state of mind in 1979.

18 MR THOMPSON: Yes, sir - - -

19 HIS HONOUR: The denial of access post 1982 reflects the
20 understanding of the situation post 92.

21 MR THOMPSON: OK sir, sir - - -

22 HIS HONOUR: And that must be so.

23 MR THOMPSON: I understand what you're saying here. I've in
24 fact attended to it in detail in my submission.

25 HIS HONOUR: All right, do you want to take me to that?

26 MR THOMPSON: You see - well if you like, I'll just explain to
27 you briefly for the moment. What we have here and I
28 didn't bring this action lightly, what we have is this
29 Ken Buchanan fellow. We know he intended to avoid s.9 of
30 the Sale of Land Act. He made these two lot plans of
31 subdivision for that purpose. They didn't work as we now

1 know and the reasons for that I in fact set out in the
2 book of pleadings. The book of pleadings only shows
3 knowledge of Buchanan's intent in respect to those two
4 lot plans. With respect to the Tylden Road land, what
5 then occurred was that the council and the Water Board
6 because the Water Board in fact is party to the issue of
7 s.569E notices, pursuant to 569E(1)(a) of course. And
8 they in fact did not process the 18 lot plan. They then
9 processed the series of two lot plans but in addition to
10 that, what they did not do was to issue lawful s.569E
11 notices. So then when the time came with regard to the
12 Tylden Road land

13 The council and the Water Board - well first of all
14 they took guarantees but that's not related to the
15 particular issue here. They knew full well that they
16 couldn't proceed against Buchanan or Buchanan simply
17 refused to do the works or whatever. So they proceeded
18 against me, now what happened there was we had Buchanan
19 who intended - and this is quite clear, to avoid s.9 of
20 the Sale of Land Act. We have the council in respect to
21 - and when I say council I include the Water Board.

22 We have the council and the Water Board processing
23 these two lot plans but without a water supply, without
24 roads and water supply and in full knowledge that there
25 was no lawful meanings to compel provision of those
26 services. They then, subsequently in the manner set out
27 in the present proceeding and what was thought to be in
28 the previous one, proceeded against me. But the fact -
29 you see avoidance of s.9 of the Sale of Land Act is the
30 processing of a subdivision in full knowledge that the
31 services don't exist and that there is no lawful means to

1 compel those services.

2 Now this is what happened in respect to Tylden Road.
3 We had Buchanan's intention - this in fact happened in
4 respect to Tylden Road and it in fact happened in respect
5 to Woodleigh Heights. Now on each occasion - I as I
6 mentioned in my - it's in the book of pleadings, I
7 discovered these unlawful transactions and so on that
8 were going on and things then began to immediately occur.
9 They only immediately occurred because of the Council and
10 the Water Board's knowledge of the pre-existing state.
11 The pre-existing state in respect to Tylden Road for
12 example - in the first place rather, was that the water
13 supply, the road water was not there.

14 I was not liable but they took this action against
15 me, that is to force me to pay for the construction.

16 That only occurred because of the circumstances which did
17 exist and were known by them to exist and then - - -

18 HIS HONOUR: Well Mr Thompson, I don't think that's - surely
19 they called on the guarantees just to get the services
20 supplied.

21 MR THOMPSON: Yes, that's exactly what I say, exactly what I
22 say but they knew full well - you see this is the Council
23 and the Water Board. They've been overseeing these acts
24 for years and years and years. They know what it's all
25 about, they knew full well that I was not the person
26 liable but they did proceed against me. And the reason
27 they proceeded against me was because the land had as a
28 matter of fact been sealed without services and with no
29 lawful means of compelling those services.

30 HIS HONOUR: Well surely the reason they proceeded against you
31 was that you'd executed guarantees. Now it may be that

1 as a matter of law they couldn't have - those guarantees
2 couldn't have been extracted but the reason they
3 proceeded against you is that you were the person who'd
4 guaranteed the construction of these things.

5 MR THOMPSON: No, sir that is - yes that is true but you see
6 the interesting part's here, you see, is that they knew
7 full well there was nothing to be guaranteed. You see I
8 put up the guarantees for what I thought to be Buchanan's
9 lawful obligation - - -

10 HIS HONOUR: I understand that.

11 MR THOMPSON: - - - to construct the roads.

12 HIS HONOUR: Yes I understand that.

13 MR THOMPSON: The Council and the Water Board as I now know
14 knew but didn't know at the - back at the County Court
15 proceeding. The Council and the Water Board knew full
16 well that that lawful obligation did not exist.
17 Interestingly before calling up my guarantees and
18 pretending to me that I was liable, they did not request
19 Buchanan to.

20 HIS HONOUR: Well let's assume that's all correct. You've
21 already sued and you've got your money back on the
22 guarantees, haven't you? That claim's been settled.

23 MR THOMPSON: On the guarantees, yes sir, not on the loss of my
24 land.

25 HIS HONOUR: All right. Well I'm having difficulty following
26 where we're going, Mr Thompson.

27 MR THOMPSON: Yes I understand that, sir.

28 HIS HONOUR: At the moment. Do you want me to go out and read
29 your submission before you go on, would that be useful if
30 I just went off the Bench for 15 minutes and read it? I
31 mean you've given me - - -

1 MR THOMPSON: Possibly sir, it may be, it may take a little bit
2 longer than - - -
3 HIS HONOUR: You've given me 58 pages.
4 MR THOMPSON: It may take a little bit longer than 15 minutes
5 to read it, unfortunately.
6 HIS HONOUR: Well it may and it may not because - well I'll,
7 let's say it takes 15 to 20 minutes. I'll know what
8 you're saying then and then you'll be a bit more
9 comfortable if I ask you questions - - -
10 MR THOMPSON: Yes sir, I'm happy to answer any - - -
11 HIS HONOUR: - - - because I won't be, I'll understand the
12 framework in which you're trying to put things.
13 MR THOMPSON: Yes, sir - - -
14 HIS HONOUR: So I think I might do that because that would be
15 fair to you and I'm a bit worried that I may miss the
16 significance of some of the things you've said in terms
17 of the way you've put the case as a whole.
18 MR THOMPSON: Yes.
19 HIS HONOUR: So I think what I'll do is I'll leave the Bench
20 for 15 to 20 minutes, I'll read it and we'll come back
21 and we'll proceed on.
22 MR THOMPSON: OK. Sir, I draw your attention to a particular
23 paragraph which hopefully will explain avoiding s.9. You
24 see here just in the statement of claim what's important
25 to recognise is that I do not say it was for avoiding
26 s.9, I say it's for avoiding the effect of s.9.
27 HIS HONOUR: Yes I understand.
28 MR THOMPSON: There's a very significant difference. Unlawful
29 plans of subdivision are simply not relevant, they do not
30 and cannot facilitate avoidance of s.9 of the Sale of
31 Land Act. On p.27 I think it is, no sorry - - -

1 HIS HONOUR: It really starts at 25 doesn't it?

2 MR THOMPSON: Yes at p.29 sir - - -

3 HIS HONOUR: It really starts at 25, avoiding s.9 and it goes

4 on from there, is that right?

5 MR THOMPSON: Yes, yes basically and p.29, Paragraph 62,

6 avoidance of s.9, the holistic view. I'm rather hoping

7 you'll find it interesting.

8 HIS HONOUR: Yes. Well do I understand that you say that - - -

9 MR THOMPSON: Sir may I just - - -

10 HIS HONOUR: That it, that what was done was motivated by a

11 misunderstanding of s.9 is that what - - -

12 MR THOMPSON: No, no, no. Not at all.

13 HIS HONOUR: You don't. I see.

14 MR THOMPSON: No, no, sir. What I'm saying here is that the

15 council and the Water Board knew full well that by the

16 unlawful sealing of the plans, they were facilitating the

17 unlawful sale of land without services being present.

18 HIS HONOUR: Yes, yes.

19 MR THOMPSON: It just so happens whether or not they were aware

20 of it or not it in fact effected avoidance of s.9. A

21 significant thing here sir if you wouldn't mind - - -

22 HIS HONOUR: Well the reason I said what I said to you is that

23 on p.3 and I have got that far in the submission, you say

24 the facts are (e) that the unlawful plans were contrived

25 to avoid what I now know to be a mistaken understanding

26 of s.9 of the Sale of Land Act.

27 MR THOMPSON: Yes, a mistaken understanding, yes.

28 HIS HONOUR: Yes.

29 MR THOMPSON: Yes, sir.

30 HIS HONOUR: It was known to me since the early 1980s.

31 MR THOMPSON: Yes sir. That's the mistaken understanding.

1 HIS HONOUR: "And the fact of this knowledge was set out at
2 Paragraph 51 of my affidavit and additionally set out in
3 my email of 11 October 2005".

4 MR THOMPSON: Yes.

5 HIS HONOUR: And set out in a document entitled, "Book of
6 pleadings".

7 MR THOMPSON: Yes.

8 HIS HONOUR: Yes.

9 MR THOMPSON: Yes and you see, but in the book of pleadings it
10 quite clearly says that it did not occur. You see the
11 avoidance did not occur. We know it was the intention of
12 Buchanan. But that method did not occur - - -

13 HIS HONOUR: Well that's what I was seeking to put to you a
14 moment ago.

15 MR THOMPSON: Yes.

16 HIS HONOUR: But I probably didn't express it with sufficient
17 precision. But I understand what's said in Sub-paragraph
18 E.

19 MR THOMPSON: Yes.

20 HIS HONOUR: And I look forward to reading Paragraph 59
21 following and in particular the paragraph that you've
22 mentioned to me. I am going to leave the Bench rather
23 than prolong this discussion. It's obvious you've put a
24 lot of work into this and I want to be sure I have in my,
25 clear in my own mind where you are going before we go on.

26 MR THOMPSON: Yes. Sir, could I just - - -

27 HIS HONOUR: These proceedings Mr Thompson effectively, I don't
28 know what the figure is but it may be in the order of
29 20,000 or so that you're putting on the table every day
30 coming here - - -

31 MR THOMPSON: I'm aware of that sir.

1 HIS HONOUR: - - - and we want to expedite this discussion if
2 we can.

3 MR THOMPSON: Yes, I'm aware of that sir.

4 HIS HONOUR: If we really can, if we're able to, I would like
5 to conclude this hearing today because I am
6 troubled - - -

7 MR THOMPSON: As we - sir.

8 HIS HONOUR: I'm troubled by the costs that are involved in it
9 and you see, you were represented by senior counsel on
10 the last occasion.

11 MR THOMPSON: Yes, I was.

12 HIS HONOUR: It's not surprising that the other parties are
13 here with senior counsel but a consequence of that will
14 be that if you lose, the costs are going to be very
15 substantial.

16 MR THOMPSON: I understand that sir.

17 HIS HONOUR: So we, I want to read this, then I want you to try
18 and focus and see if we can get through things this
19 afternoon.

20 MR THOMPSON: Sir, on the alternate side of course, if I didn't
21 stand here I couldn't live with myself anyway. You see.

22 HIS HONOUR: Well Mr Thompson unfortunately the law is that
23 imperfect mechanism for resolving - - -

24 MR THOMPSON: I understand that.

25 HIS HONOUR: - - - people's feelings about themselves and
26 that's something that we're confronted with when we sit
27 in the criminal jurisdiction particularly. The law is
28 not a perfect vehicle for redress in every situation and
29 I must say that I think that these transactions were
30 originally commercial. These subdivisions were
31 commercial subdivisions.

1 MR THOMPSON: Absolutely.

2 HIS HONOUR: Yes, well what I'd urge on you is to think about
3 this litigation as a commercial piece of litigation. It
4 arises out of commercial transactions. If it doesn't
5 make sense in dollar terms, you shouldn't be here.
6 Because it's a crazy thing to do to pursue a commercial
7 transaction through this court unless you have rational
8 grounds for believing that it makes some commercial
9 sense.

10 MR THOMPSON: Yes.

11 HIS HONOUR: But I'm not going to pursue that any further, I'm
12 going to leave the Bench.

13 LUNCHEON ADJOURNMENT

1

2 UPON RESUMING AT 2.16 P.M.:

3 HIS HONOUR: Mr Thompson, yes I have looked at the submissions.

4 There are perhaps two things I wanted to say to you, the
5 first was that as you have said at one point in the
6 submissions, this is an appeal de novo and in the end I
7 hope it's apparent from what I've already asked you. I'm
8 really seeking to grapple the substance of the case - - -

9 MR THOMPSON: I understand that sir.

10 HIS HONOUR: - - - not what's been said or done previously.

11 MR THOMPSON: Yes I understand that.

12 HIS HONOUR: Now it may be that you can illuminate the
13 substance of the case by reference to previous debate,
14 I'm not seeking to shut you out in that regard - - -

15 MR THOMPSON: I understand that sir.

16 HIS HONOUR: - - - but the whole purpose of having an appeal de
17 novo is, if you like, to give the parties and in
18 particular you, the chance to do it again on the merits.

19 MR THOMPSON: Quite.

20 HIS HONOUR: And that's what we're really here to do, so that's
21 the first thing.

22 MR THOMPSON: And unfortunately in that regard, sir, the
23 defendants have put up essentially the same arguments as
24 in the previous hearing.

25 HIS HONOUR: Well that's not - that's perhaps not surprising
26 but it's a matter for you to give me your answer now, not
27 the answer that may have been given previously or not the
28 answer as the master understood.

29 MR THOMPSON: Yes quite.

30 HIS HONOUR: But what you say is the correct answer. Now the
31 other thing which I did want you to clarify for me was

1 that when we come to the essence of your case about
2 concealment of fact, as I understand it, the essential
3 concealment with respect to the Woodleigh Heights land is
4 the one that you addressed this morning and that we've
5 had some discussion about. That's the question of
6 whether the land was properly serviced with articulated
7 water supply in 1979.

8 MR THOMPSON: Correct.

9 HIS HONOUR: And that's what you identify as the critical fact
10 that was concealed in relation to Woodleigh.

11 MR THOMPSON: That's correct.

12 HIS HONOUR: Yes, now as I understand the critical fact that
13 you identify with respect to Tylden Road, as you put it
14 in the latter part of your submission, it is that no
15 569E notice was served.

16 MR THOMPSON: Section 569E notice.

17 HIS HONOUR: Now I may be confused about this but I had thought
18 what occurred was rather that no valid notice was served.
19 I thought that - - -

20 MR THOMPSON: No you see sir, just to enlighten you there,
21 there's - - -

22 HIS HONOUR: What do you mean by saying no notice was served?
23 What happened was that the subdivider gave notice of
24 intention to subdivide the whole of the land.

25 MR THOMPSON: Yes.

26 HIS HONOUR: A permit is granted for the subdivision of the
27 whole of the land and a resolution is made to approve
28 plans.

29 MR THOMPSON: Yes.

30 HIS HONOUR: Subject to a 569E requirement?

31 MR THOMPSON: Yes.

1 HIS HONOUR: The subdivider then lodges a two lot plan.

2 MR THOMPSON: Seven of them, yes.

3 HIS HONOUR: Yes but initially a two lot plan?

4 MR THOMPSON: Yes initially to divide the residential part from

5 the industrial part.

6 HIS HONOUR: And doesn't the Council then impose the 569E

7 requirement, isn't that what happens?

8 MR THOMPSON: They impose it - no they give a resolution sir,

9 to impose it in respect to both the residential portion

10 and in respect to the industrial portion, one in respect

11 to each portion.

12 HIS HONOUR: Yes.

13 MR THOMPSON: That was the resolution sir.

14 HIS HONOUR: That's the original resolution, isn't it?

15 MR THOMPSON: That's correct.

16 HIS HONOUR: Yes but when they lodged the two lot plan it's -

17 the Council deals with it on the basis that the 569E

18 requirement applies to that, don't they? That's what

19 they tell the registrar and then subsequently they

20 purport to withdraw it.

21 MR THOMPSON: No sir, you see what happens here, a s.569E

22 notice of course applies to a plan - or to the road shown

23 on a plan and so in respect to the resolution of

24 20 February they did not issue a s.569E notice. Now in

25 respect to the 569E notice, by its specific terms, it

26 required roads to be built - see there, I'm just

27 explaining the two aspects to it. Now there was

28 therefore no lawful notice permitting the giving and

29 receiving of guarantees - - -

30 HIS HONOUR: Well I understand that argument.

31 MR THOMPSON: - - - which is quite distinct from, of course, no

1 notice at all. OK.

2 HIS HONOUR: Exactly. I'm just trying to get it clear in my
3 own mind, what happened was that the Council make a
4 requirement with respect to the global subdivision, is
5 that right?

6 MR THOMPSON: Sir, if it was a global subdivision that would be
7 the case and I understand with regard to the latter
8 law - - -

9 HIS HONOUR: Well you say it's in two parts but - to the whole
10 of the two parts.

11 MR THOMPSON: If we could perhaps constrain ourselves for the
12 sake of the discussion to say just the residential
13 portion.

14 HIS HONOUR: Yes.

15 MR THOMPSON: Being one part.

16 HIS HONOUR: Yes and they say - they initially impose - there
17 initially is a resolution to make requirements under
18 569E, is that not right?

19 MR THOMPSON: That's correct, yes.

20 HIS HONOUR: Yes.

21 MR THOMPSON: In relation to that plan.

22 HIS HONOUR: And then it seems to me what's happened is that in
23 fact a further - the plans have been lodged as if they
24 were a stage of that.

25 MR THOMPSON: Yes.

26 HIS HONOUR: The registrar's been notified that there is a 569E
27 requirement.

28 MR THOMPSON: Yes.

29 HIS HONOUR: Then he's been notified that it's withdrawn.

30 MR THOMPSON: Yes.

31 HIS HONOUR: And then he seals it.

1 MR THOMPSON: Yes.

2 HIS HONOUR: Well how do you say there was no notice ever
3 served?

4 MR THOMPSON: Well you see sir the notice of requirement
5 relates to a plan. It - now the Council made a
6 resolution on 20 February 1980 with regard to the single
7 plan subdivisions showing all 18 allotments.

8 HIS HONOUR: Yes.

9 MR THOMPSON: Subsequently Buchanan filed the - what we call a
10 series of plans.

11 HIS HONOUR: Right.

12 MR THOMPSON: Now we know the purpose of Buchanan there, but
13 that's essentially irrelevant, it just goes to mala fides
14 later on. Now there was in fact no resolution in respect
15 to any of those plans - - -

16 HIS HONOUR: Well I understand - - -

17 MR THOMPSON: - - - to issue a notice or anything else.

18 HIS HONOUR: I understand that.

19 MR THOMPSON: Now, so then that being the case what then
20 happened in the Magistrates' Court, the Council being
21 fully aware of this fact, they then went to the
22 Magistrates' Court for the purpose of suing me for \$3,708
23 at which - - -

24 HIS HONOUR: Yes.

25 MR THOMPSON: - - - time I understood that I was liable because
26 of the representations that were made. In the
27 Magistrates' Court as I now know, they clipped rather
28 than poorly photocopied the - their series of plans, and
29 they lied to the magistrate and said that "we have issued
30 a single notice pursuant to our resolution of 20 February
31 in relation to this subdivision showing all 18

1 allotments".

2 HIS HONOUR: But isn't that in fact what they did do

3 Mr Thompson?

4 MR THOMPSON: No. No it's not. You see if - - -

5 HIS HONOUR: Where's the notice that they did issue?

6 MR THOMPSON: I'm sorry?

7 HIS HONOUR: Where's the notice they did issue?

8 MR THOMPSON: They're - - -

9 HIS HONOUR: See I quite understand you saying that this was

10 all irregular, that the requirement was invalid. What I

11 don't understand is saying notice was never served.

12 MR THOMPSON: Well you see sir - - -

13 HIS HONOUR: You understand the difference, you articulated it

14 a moment ago.

15 MR THOMPSON: Yes I do, absolutely. What happened was - - -

16 HIS HONOUR: And what you're saying to me is the fact that was

17 concealed was that notice was never served.

18 MR THOMPSON: No, the - yes that's precisely what I say. I say

19 that the s.569E notice pursuant to the resolution of

20 20 February relating to the 18 lot plan of subdivision

21 was never served. What I further say is that

22 subsequently upon the Council processing the unlawful

23 series of plans, which they knew full well to be

24 unlawful, they in fact fabricated a series of notices of

25 requirement which simply had no authority at law at all.

26 HIS HONOUR: Yes, well another way of characterising that is

27 that notice was served, but they were irregular notices,

28 is that right?

29 MR THOMPSON: Well, to the point I suppose that a counterfeit

30 dollar bill can be called a dollar bill, yes.

31 HIS HONOUR: Yes, all right, well perhaps you - what do you

1 want to say in addition? I'm not going to press you any
2 further, I think I understand how you put it, and what do
3 you want to say in addition to it about the case.

4 MR THOMPSON: I'm sorry sir?

5 HIS HONOUR: What do you want to say further - - -

6 MR THOMPSON: About the case?

7 HIS HONOUR: - - - in support of your case?

8 MR THOMPSON: Yes. Sir with - well first of all I'd like to
9 say of course I note that the Part 2 of my submissions
10 has also been handed to Your Honour.

11 HIS HONOUR: Yes.

12 MR THOMPSON: And so for the sake of the record I refer to and
13 read the entire submissions into the record.

14 HIS HONOUR: Yes.

15 MR THOMPSON: Now, the hearing today is with respect to the
16 applications of the defendants. Now, yesterday they
17 essentially put up two arguments - two I think anyway.
18 The first was that I was aware of the unlawful plans.
19 Well of course I was aware of them, I always was, I never
20 do deny that. They made no argument at all in respect to
21 the fundamentals of my claim here, which was that the -
22 to put it in broader terms with respect to those
23 subdivisions, that the Council and the Water - that the
24 Council sealed the plans with the Water Board's collusion
25 - that it sealed the plans in full knowledge that there
26 was no services present, and in full knowledge that the -
27 that there was no lawful means of compelling any person
28 subsequently to provide those services.

29 Now I have to say that the defendants simply did not
30 address that issue at all yesterday. The other issue
31 that they address - rely upon is the terms of settlement.

1 Now sir in respect of the terms of settlement, they
2 simply did not address the question as to whether or not
3 the previous proceedings were predicated on their fraud.
4 Now the fact that the previous proceedings were
5 predicated on their fraud is quite apparent. You see the
6 sealing of the plans is an assertion or representation to
7 all people that it's been done according to law, and here
8 I saw that the law operates with the planning permit, the
9 interim - the relevant order and so on to require that
10 the water supply was complete and the allotments were
11 usable in respect to Woodleigh Heights.

12 In respect to Tylden Road I say that - and sorry the
13 1995 proceeding was based upon that representation. So
14 having - being based upon that representation, it was in
15 fact based upon the fraudulent representation of the
16 defendants. I bought that proceeding on the fraud of the
17 defendants, and then they allowed it to continue for four
18 years, whereas they could have bought this action and
19 simply said Your Honour "Look it wasn't completed". Now
20 they knew that at this time, but they didn't do it. They
21 continued to conceal it. In addition to that - - -

22 HIS HONOUR: Well I still haven't seen any evidence that they
23 did know that it was not completed at the time.

24 MR THOMPSON: Sir in their submission they admit to the fact.

25 On - the submission on behalf of the first
26 defendant - - -

27 HIS HONOUR: I may be confusing you when I say at the time, but
28 we've been through this argument and - - -

29 MR THOMPSON: See with regard - - -

30 HIS HONOUR: I haven't seen any evidence that at the time that
31 the approval of cluster subdivision was given - - -

1 MR THOMPSON: Yes.

2 HIS HONOUR: - - - they knew that - - -

3 MR THOMPSON: Sir I wasn't expecting - - -

4 HIS HONOUR: - - - the reticulated water wasn't there.

5 MR THOMPSON: No, I wasn't expecting to essentially go to the

6 trialable issues at this time. I have ample evidence of

7 this including handwritten notes by the - sorry,

8 typewritten notes by the then shire engineer and the

9 transcripts that I - of the, my addresses to the Water

10 Board and the council. The fact of my August - - -

11 HIS HONOUR: But they're all years later aren't they?

12 MR THOMPSON: Sorry?

13 HIS HONOUR: They're all years later.

14 MR THOMPSON: Yes, they are. However you see, what I, the

15 point I'm making here is that whether or not the entire

16 council knew at the time, the certain fact is that the

17 employees of theirs did. They were vicariously liable

18 and subsequently I can demonstrate that each and every

19 councillor and Water Board member became aware.

20 HIS HONOUR: Why is it entirely consistent with the evidence

21 that Buchanan lied to the Authority? Took him out, said

22 you would put in the water, all the water, there's the

23 tank. There's the dam, there's this, there's that. No

24 one looked under the ground.

25 MR THOMPSON: No, well they certainly did in 1982 when they put

26 the water pipe in - - -

27 HIS HONOUR: Yes, I know that but that's not the point as I

28 keep saying.

29 MR THOMPSON: No, no, the point is that they concealed - had

30 they let me know of that fact back then, I could have

31 sued them then and I could have applied my right to

1 water.

2 HIS HONOUR: Sued who?

3 MR THOMPSON: And I could have then sold my land for its true

4 value. The fact is that they concealed it from me.

5 Right from the time that they did know. Now the fact is

6 that what occurred, whether or not they were aware of it

7 was in fact a breach, it facilitated a breach of s.9 of

8 the Sale of Land Act. It was certainly in breach of the

9 various other things - various other legislation

10 particularly the Local Government Act.

11 HIS HONOUR: Mr Thompson, unless, unless the council knew that

12 the articulated water supply was not in the ground then

13 it's impossible to say that there was anything wrong with

14 their resolution at all, isn't it?

15 MR THOMPSON: Yes, there is. I believe that I can show so at

16 trial.

17 HIS HONOUR: Well you've yet to identify a single piece of

18 evidence that indicates that to me.

19 MR THOMPSON: Sir, I wasn't expecting - - -

20 HIS HONOUR: A single - - -

21 MR THOMPSON: I wasn't expecting to go to that here. I was

22 expecting to answer the application of the defendants.

23 HIS HONOUR: Well as I understand it, your answer to the

24 application of the defendants is, no, despite three days

25 in front of the master, in which your case was fully

26 argued. They haven't understood the new facts on which

27 you rely. You say the new fact on which you rely is that

28 one part of the water works required by the planning

29 permit was not in the ground at the time they approved

30 the cluster plan of subdivision. Now what I'm saying to

31 you is you say that to me but there is simply no evidence

1 that they knew that at all.

2 MR THOMPSON: Sir, with respect there is, there is ample

3 evidence of that. You see - - -

4 HIS HONOUR: Not as at 1979.

5 MR THOMPSON: At 1979, well they certainly knew it in 1982.

6 They, what they did was they exploited the situation that

7 occurred in 1979. Now and they literally exploited that

8 by saying to me and that - - -

9 HIS HONOUR: They may have exploited the situation in 1982 but

10 that is not the new fact on which you rely, is it?

11 MR THOMPSON: No, I rely upon the fact that they did seal the

12 plan of subdivision in full knowledge that the services

13 were not present and in full knowledge that there was no

14 lawful means of providing those services. Now with

15 respect sir, I believe that on the substantial material

16 that I have, I can show that beyond doubt. I wasn't

17 expecting to have to argue these things today. In

18 respect to Tylden Road I can show that for sure.

19 HIS HONOUR: But in relation to Tylden Road, that's not the

20 point. The point relating to Tylden Road as you say, is

21 that there was no 569E notice served or as you recently

22 clarified perhaps more accurately, there was no valid

23 notice served.

24 MR THOMPSON: That's correct.

25 HIS HONOUR: And you say you didn't know that they were invalid

26 notices until 2000, is that what you're telling me?

27 MR THOMPSON: Yes, I - no, no. What I was saying is that I at

28 all times believed that the s.569E notice relating to the

29 18 allotments had been served. The other ones were at

30 all times irrelevant as far as I was concerned.

31 HIS HONOUR: Well how could that be when that's - the other

1 ones are - it's pursuant to those that the title was
2 issued.

3 MR THOMPSON: Well you see - - -

4 HIS HONOUR: How could they possibly be irrelevant?

5 MR THOMPSON: Well much as Your Honour started to say before.

6 I understood the first plan to be the global plan and the
7 rest to be merely processed in stages but I now know that
8 that was not the case. And I understood that the first
9 s.569E notice was issued. That was the evidence given in
10 the Magistrates' Court. They also admitted to that four
11 times in the County Court. I thoroughly believed it but
12 I now know it was not the case. They lied to the
13 magistrate and they made four times, false admissions in
14 the County Court.

15 HIS HONOUR: But Mr Thompson, how can that be?

16 MR THOMPSON: Well they simply - - -

17 HIS HONOUR: Isn't the only notice of which there was actual
18 evidence the one that was imposed with respect to the two
19 lot subdivision?

20 MR THOMPSON: Sir, they made these representations under oath
21 in the Magistrates' Court. They then went to the Supreme
22 Court before Justice Kaye and said the same thing.

23 HIS HONOUR: Yes.

24 MR THOMPSON: They then made admissions four times in the
25 County Court. I simply believed them. I now know that
26 they lied to the magistrate, the evidence of Justice Kaye
27 was wrong and they - in addition to that, made four false
28 admissions in the County Court. I believed them, why
29 should I not? I now know that they were false. And I
30 can't see how I could have believed otherwise. The
31 magistrate didn't believe otherwise, he wouldn't have

1 found against me if that were the case. And Justice Kaye
2 with respect would have thrown it out in two minutes.
3 There's no 569E notice because the one that was in
4 evidence as we now know related to 79305G which only
5 showed part of the road. Had they brought that to
6 Justice Kaye and had Justice Kaye realised, he would have
7 said "But it's only part of the road".

8 HIS HONOUR: No, that's not right. You may get a title to a
9 first stage of a subdivision.

10 MR THOMPSON: Yes.

11 HIS HONOUR: And the requirements can still relate to the whole
12 of the road.

13 MR THOMPSON: Certainly. With respect a plan, a s.569E notice
14 relates to the plan, the specific terms of the 569E
15 notice state, "To the roads shown on the plan marked
16 79305G". It does not relate to any other plan and cannot
17 relate to any other plan. That's why they clipped the
18 plans.

19 HIS HONOUR: All right. So you say they clipped the
20 plans - - -

21 MR THOMPSON: To conceal the fact that the one pursuant to the
22 20 February resolution was never ever issued or served.

23 HIS HONOUR: But the plan itself only showed part of the road
24 as you've told me.

25 MR THOMPSON: No, no. That - the 20 February one showed all of
26 the roads because it was a single plan with all
27 18 allotments.

28 HIS HONOUR: Yes.

29 MR THOMPSON: I simply believed what they said in court sir and
30 it was wrong, they lied.

31 HIS HONOUR: Yes, right.

1 MR THOMPSON: That's why they clipped the plans of course.

2 HIS HONOUR: Yes. Now what else do you want to say?

3 MR THOMPSON: With respect sir, I don't believe that the

4 defendants have put up any argument at all on the issues.

5 That is they have not, simply not addressed the fact of

6 the sealing of the plans without services and without any

7 lawful means. They haven't addressed that at all. They

8 have not said that it wasn't concealed. They simply did

9 not address that issue. With respect to the terms of

10 settlement, I simply say the terms - at both previous

11 proceedings were based upon the fraudulent

12 representations of the defendants and the proceedings

13 themselves can rise no higher than that. The subject

14 matter of those proceedings was the fraud of the

15 defendants and those proceedings were also subject to the

16 fraud of the defendants. No terms of settlement can go

17 beyond that, they cannot arise, rise above that fraud.

18 HIS HONOUR: Yes.

19 MR THOMPSON: In respect to the previous Tylden Road proceeding

20 of course, it's at Paragraph 7 of the statement of claim,

21 the amended statement of claim and there are four

22 admissions, admit to that and it was wrong.

23 HIS HONOUR: Yes. Just pardon me for a moment. I'm just

24 looking at your affidavit Mr Thompson?

25 MR THOMPSON: Yes.

26 HIS HONOUR: I'm just making sure that what you're saying now

27 fits with what you deposed to.

28 MR THOMPSON: Yes.

29 HIS HONOUR: And I think I understand how you would say that it

30 does. I think that both defendants and I had understood

31 from Paragraph 53(f) - - -

1 MR THOMPSON: 53F.

2 HIS HONOUR: That it was at p.14, that it was as a result of

3 perusing the documents in the black folder - - -

4 MR THOMPSON: Sir, I explained it in my - - -

5 HIS HONOUR: - - - you came to those conclusions.

6 MR THOMPSON: Yes.

7 HIS HONOUR: And one of those conclusions was that the notice

8 of requirement had in fact been fabricated, is that

9 right?

10 MR THOMPSON: Sir, what I say is that - sorry 53F?

11 HIS HONOUR: You say that you realised all those things as a

12 result of what was in the black folder, is that right?

13 MR THOMPSON: No, no I don't. The second page says, "And

14 reviewing the documents tendered in the Magistrates'

15 Court and the evidence given by Wilson in that court. I

16 came to a number of conclusions.

17 HIS HONOUR: Yes but that happened prior to perusing the

18 documents in the black folder. The evidence - what

19 happens is you'd review the documents that you'd

20 previously received, consider the evidence you'd

21 previously heard and perused the documents in the black

22 folder, put it all together and realised these things.

23 MR THOMPSON: No. Sir, with respect, no discovery at all comes

24 about without preconceptions and so on. Now over the

25 years your preconceptions about various things change,

26 one of which was my understanding of the law and I note

27 that there appears to be misunderstanding here. The

28 people thought it was to do with two lot plans of

29 subdivision but that simply cannot occur. Then what

30 happened was, in the practice court I was shown a plan of

31 subdivision - sorry a reticulation plan. While

1 considering this I came to certain conclusions about the
2 law. I looked at the black folder - - -
3 HIS HONOUR: No this is Tylden Road we're talking about here.
4 MR THOMPSON: Yes.
5 HIS HONOUR: And what you say at F as I understand it is that
6 the last piece of the jigsaw in terms of the evidence
7 that enabled you to reach your current state of mind was
8 perusing the documents in the black folder, is that
9 right?
10 MR THOMPSON: Sir, that's not what that Paragraph F says. It
11 says as a result of perusing the documents in the black
12 folder referred to in Paragraph 26 of this affidavit and
13 reviewing the documents tendered in the Magistrates'
14 Court and the evidence given by Wilson in that court, I
15 came to a number of conclusions. Now - - - -
16 HIS HONOUR: And of those three facts, the last in time of
17 which you are aware is the documents in the folder?
18 MR THOMPSON: Yes.
19 HIS HONOUR: All right.
20 MR THOMPSON: OK. Now the only thing, the only thing I
21 perceived from the folder - and this may never occur. I
22 have the black folder here and - if anybody wishes to
23 have a look at it. You could look at it a thousand
24 times, you know you could look at poorly photocopied
25 plans and then one day you think maybe - maybe they were
26 clipped. That's all that happened, nothing more. There
27 is no evidence at all in the black folder and I say that
28 quite clearly and plainly. There is no evidence and the
29 black folder is here if the defendants care to have a
30 look at it.
31 You see sir, this was a leaping concept, a

1 possibility, a probability - maybe they were clipped.
2 Nothing more and nothing has happened. Now you can look
3 at it a thousand times without that perception. One can
4 simply see poorly photocopied plans and think nothing of
5 it. You see it's like any discovery at all, it requires
6 the preconceptions leading up to it, new thoughts and so
7 on and so forth and this is true of any discovery. And
8 quite clearly, you know, over the years my mind had
9 evolved, other things had evolved and so on and so forth.
10 I did not view the black folder with a blank mind.

11 The preconceptions and so on that evolved over the
12 years were all party to it. You can't make a discovery
13 of any type without preconceptions and theories and so on
14 and so forth. It simply cannot occur and in this
15 instance, in respect to the black folder, the only thing
16 that occurred was I thought, "Aha, maybe they were
17 clipped" because what was there, in sequence as one
18 leafed through the folder was some poorly photocopied
19 plans followed by complete ones - right, maybe they've
20 been clipped. That's all that happened.

21 There is no evidence at all of anything other than
22 that in that black folder and the black folder is here
23 and it is complete and I defy the defendants to show a
24 thing in it other than the possible - the arriving at a
25 possibility of a conclusion that they were clipped.
26 There is zero evidence of anything in there. You see and
27 I notice during their extensive submissions they were
28 talking about the black folder and it was all revealed.
29 Not once did they say what was revealed, not once because
30 they of course were relying upon the misconception that
31 it was related to unlawful two lot plans.

1 Sure, they're in there but they're in there for
2 everybody to see. I knew that forever.

3 HIS HONOUR: Yes. And if I go to Woodleigh Heights, what you
4 say at Paragraph 54 is that after reaching your
5 conclusions relating to Tylden Road, what you did was
6 reflect on the Woodleigh Heights land and realised, if
7 you like, the true meaning of what you'd previously been
8 told, is that right?

9 MR THOMPSON: Yes, see the sequence was that I was given the or
10 shown the reticulation plan in the practice court. I had
11 no explanation at law for this and this procedure - in
12 my, it seemed here, that procedure as a matter of fact.
13 I was troubled greatly and in fact in my letter to the
14 defendants back then I - back in 1999 I told them that
15 while I wouldn't be pursuing that particular matter, I
16 would pursue their fraud because I continued to believe
17 there was one. It was a only matter of discovering it,
18 how it really did occur. And so then as I say, reviewing
19 the legislation I came to this realisation as to the true
20 effect of s.9 of the Sale of Land Act and it occurred to
21 me that that's what may have happened in regard to
22 Woodleigh Heights. I looked at all the things, I
23 reviewed the plans and so on and so forth. Once
24 concluding with regard to Tylden Road well then it
25 essentially followed that this is what also happened in
26 relation to Woodleigh Heights. It all fell together like
27 this jigsaw puzzle that I'd been attempting to put
28 together for some 20 odd years. And everything suddenly
29 fell into place. There were no further mysteries.

30 HIS HONOUR: Yes, I see.

31 MR THOMPSON: So of course, you know, nothing in the black

1 folder led me to that. But it did, it happened in that
2 sequence, it all fell together as a consequence.

3 HIS HONOUR: Yes, thank you. Is there anything else you want
4 to say?

5 MR THOMPSON: I'm terribly sorry, I did have one thing and it
6 has avoided me for the moment. I'm terribly sorry Your
7 Honour, I did have something in mind but that's
8 essentially my argument is that the present right of
9 action was concealed.

10 HIS HONOUR: Yes.

11 MR THOMPSON: The previous proceedings, the subject matter of
12 the previous proceedings do not relate to this at all.
13 And consequently the terms of settlement do not relate
14 and I am not barred by the Statute of Limitations.

15 HIS HONOUR: Yes, thank you.

16 MR THOMPSON: Except with respect, if I do think of this other
17 thing if you wouldn't mind.

18 HIS HONOUR: Well it depends what it is but if you think of it
19 soon, you better indicate that to me. I think we've been
20 through some different angles. What you say in your
21 submissions and what you say in your affidavit, I think I
22 understand how you put the case.

23 MR THOMPSON: I'm sorry Your Honour, I didn't - - -

24 HIS HONOUR: I think I understand how you put your case
25 Mr Thompson.

26 MR THOMPSON: Thank you.

27 HIS HONOUR: Yes? Mr Delany?

28 MR DELANY: Yes, Your Honour.

29 MR THOMPSON: Sorry sir, if you wouldn't mind, I do recollect.

30 HIS HONOUR: Yes?

31 MR THOMPSON: I'm terribly sorry. You asked the gentleman to

1 find precedent on the terms of settlement, wording on the
2 terms of settlement and how things expand.

3 HIS HONOUR: Yes.

4 MR THOMPSON: The point that I wish to assert there of course
5 is to, assuming that there is a precedent where the prior
6 proceeding was in fact predicated upon the fraud and then
7 the reference then shows that it can extend beyond the
8 fraud, you know, to the new thing. I will be arguing
9 against any precedent which does not take into account my
10 position that the previous proceedings were specifically
11 based upon the fraud and were therefore subject to and
12 the subject of the fraud of the defendants. Thank you.

13 HIS HONOUR: Thank you. Yes, Mr Delany?

14 MR DELANY: Your Honour having read the written submissions
15 from Mr Thompson, there is an allegation of frauds and
16 the first or primary frauds are referred to at Paragraph
17 58(e) as being in relation to the subdivision and
18 conspiracy between the defendants and Buchanan for the
19 purpose of enabling him to sell allotments before he was
20 lawfully entitled for the purpose of the effect and
21 purpose which was to facilitate avoidance of the effect
22 of s.9 of the Sale of Land Act. It's then said that the
23 method used had nothing to do with the two lot plans of
24 subdivision or any other form of unlawful plans and
25 that's said at Paragraph 58(g).

26 HIS HONOUR: Yes.

27 MR DELANY: And it said that the scheme which was the bargain
28 between the thieves was notwithstanding there was no
29 compulsion at law, Buchanan would complete the services
30 once having sold a few allotments and thereby having
31 raised the capital to pay for the missing services.

1 Buchanan in turn as a consequence would carry out
2 development which might otherwise not occur. That's in
3 Paragraph 58(i) and then it was said that it may be that
4 Buchanan reneged on the above mentioned thieves bargain
5 or it may be that the defendants colluded with Buchanan,
6 it doesn't matter which. The fact is the defendant had
7 two subdivisions without services, no lawful means at all
8 of compelling Buchanan or anyone else to provide the
9 services. If Buchanan did not or would not provide those
10 services, the defendants were left with no means other
11 than fraudulent means to secure a construction of the
12 services, that's at Paragraph 58(o) and (p).

13 And then it's said that the fraudulent means used to
14 secure construction of the services constituted the two
15 secondary frauds, and in the case of Tylden Road it was
16 said that that was by falsely representing the 569E
17 notice of requirement being served on Mr Thompson -
18 served and Mr Thompson was the owner liable to construct
19 them, and at his costs and in default call up the
20 guarantee. And in the case of Woodleigh Heights the
21 secondary fraud was to induce Woodleigh Heights Marketing
22 to complete the reticulation system and reward it by
23 entering into a partly illegal 1982 Water Supply
24 Agreement to give control of the water supply within the
25 subdivisions of that company, and that's at Paragraphs 58
26 - I beg your pardon, yes 58Q to S - - -

27 HIS HONOUR: Yes.

28 MR DELANY: - - - of the outline. Now that's - just responding
29 to those, there is no pleading and no evidence to support
30 a conspiracy allegation in the form of an agreement for
31 acting in concert between the Council and the water

1 authority and Buchanan, and what's in this amended
2 statement of claim isn't a case of that nature, and it's
3 not articulated or established and there's no basis for
4 it in the affidavit either.

5 As to the secondary fraud points, the 569E notice
6 point as it's been put - can I ask Your Honour to have
7 available exhibit - the book of pleadings, which is Tab
8 43 in Mr Edwards' Volume 2, SME1, Volume 2?

9 HIS HONOUR: Yes.

10 MR DELANY: If Your Honour goes to p.C9 which is towards the
11 back of that tab, but before the WB tabs.

12 HIS HONOUR: Yes.

13 MR DELANY: Your Honour will see there is a photocopy of a
14 Council minute, and it refers to the owner Mr Buchanan
15 "This plan has been submitted in three parts and
16 requirement is being served upon the owner in respect to
17 supply of water and sewerage. Recommendations: The
18 following plans be sealed with an endorsement placed
19 thereon staying the requirement under sub-section 1(a) of
20 569 of the Local Government Act has been made by the
21 Council in respect of these plans".

22 I would anticipate that being a reference back to
23 the earlier requirement, given that it has been made and
24 the words recorded and the three plans are referred to,
25 and then in relation to the residential "Again a plan has
26 been submitted in seven parts and a requirement has been
27 served on the owner in respect of water supply and part
28 street construction. We recommend that plans be sealed
29 with an endorsement placed on restraining that
30 requirement of 569E1(1)(a) of the Local Government Act
31 has been made with the Council in respect of these

1 plans".

2 The plans are then set out, and if one turns back
3 then Your Honour to p.5 the notes made by Mr Thompson on
4 p.5 say, above a plan of part of the residential
5 subdivision "In order to avoid the provisions of s.9 of
6 the Sale of Land Act which at that time prevented the
7 sale of lots on subdivision or more than two allotments
8 et cetera Buchanan then lodged seven separate plans which
9 were contrived to create several subdivisions of two lots
10 each". On the next page "Buchanan lodged 30th schedule
11 notices in relation to these new contrived plans. The
12 new notices are dated 4 March 1980 which is also the day
13 the notices of disposition as given us the date of
14 possession passing to the purchasers".

15 On the next page, p. 7 "The Council served a
16 separate notice of requirement in relation to each of the
17 contrived plans, which were numbered 79305E to K. The
18 service of the notice of requirement were dated
19 20 February 1980 but served by registered mail
20 06/03/1980, two days after the contrived plans were
21 lodged". And what's underneath then is a photocopy of
22 the notice requirement, and this one at p.7 refers to
23 plan of subdivision reference number 79305 - I think it's
24 F.

25 But what we say Your Honour is that if the complaint
26 that is now sought to be made is that no valid 569E
27 notice was served, then that's the very complaint in
28 relation to the documents that are here referred to in
29 the book of pleadings, and to which the notes made by
30 Mr Thompson as he confirms in his written outline, were
31 made prior to the amended statement of claim in the

1 proceeding concerning Tylden Road.

2 So we say assuming for the moment that there's an
3 arguable case about fraud or misbehaviour, no matter how
4 you put it, it's a case of which Mr Thompson first had
5 the relevant documents, and secondly had the knowledge or
6 came to a view about the documents, which is essentially
7 the view he now seeks to run many, many years later and
8 we say that whether the case is won in fraud or whether
9 it's for some other purpose, it's a cause of action of
10 which he was aware back then, and he had all the relevant
11 documents for it so there's been no fraudulent
12 concealment.

13 I should say Your Honour that we found one case that
14 - Your Honour asked the question I think yesterday, or
15 the question came up about what fraud meant under s.27(a)
16 of the Act.

17 HIS HONOUR: Yes.

18 MR DELANY: And there's a decision, we've only got one copy but
19 I'll hand it to Your Honour's associate shortly. A
20 decision of Justice Smith in Tahche, T-a-h-c-h-e v.
21 Abboud, A-b-b-o-u-d, No.1 which is 2002, V.S.C. 36. That
22 was an application to amend pleadings and it was a claim
23 for misfeasance in public office and at Paragraph 40,
24 what His Honour said is that it was arguable that a claim
25 for misfeasance in public office fell within the word,
26 "Fraud" in sub-s.A, that's at Paragraphs 40 and
27 following. But we say assuming that to be the case, that
28 whatever the fraud was, it was either known or could
29 reasonably have been known by the plaintiffs back in,
30 prior to - sorry prior to 1991 when the statement of
31 claim was amended.

1 HIS HONOUR: So you say (1), it was known.
2 MR DELANY: Yes.
3 HIS HONOUR: And you point to the document, you're pointing,
4 you've just referred me to.
5 MR DELANY: Yes, Your Honour.
6 HIS HONOUR: And (2), it could be reasonably have been known
7 because the black book was in his hands for a long time.
8 MR DELANY: That's right. And the plans had been discovered in
9 1989. The amended statement of claim, I'll just find the
10 date of it Your Honour. The amended statement of claim
11 was in May 1991 so for two years the documents were in
12 the possession of the plaintiffs and their legal advisers
13 as well.
14 HIS HONOUR: Yes.
15 MR DELANY: Now can I just say in passing Your Honour about the
16 clipping of documents. Your Honour doesn't have to make
17 any finding about this but faced with a choice between a
18 conspiracy and an innocent explanation, the obvious
19 innocent explanation Your Honour will immediately work
20 out when Your Honour refers to Exhibit GAT7, it has to be
21 folded out and doesn't fit on an A4 page whereas
22 Exhibit 8 which is the one that's said to be clipped is
23 all you fit on an A4 page on a photocopier. So there
24 might be a sinister explanation but it's equally possible
25 that there's a perfectly innocent explanation. It
26 doesn't matter because the whole of the plans were
27 provided in 1989, that's the whole of the unclipped
28 plans.
29 HIS HONOUR: Yes.
30 MR DELANY: Your Honour the next issue concerns the Woodleigh
31 Heights where it's said the secondary fraud was to induce

1 Woodleigh Heights to complete the reticulation system and
2 reward the company by entering into a part - planning an
3 illegal 1982 water supply agreement. That allegation
4 that the water supply agreement in 1982 was illegal is an
5 allegation that is made by Mr Thompson in correspondence
6 I think back in 1987 or thereabouts to the council so
7 that's not a new matter. And if the allegation is that
8 the land wasn't properly serviced in 1979 and the council
9 knew this to be so, then there's no evidence that
10 indicates the council knew that, that I'm aware of on
11 affidavit or I think elsewhere in relation to that point.
12 And if it is, if assuming it were to be the fact, there's
13 nothing that's changed since the Woodleigh Heights
14 proceeding or certainly not since Mr Thompson was handed
15 the reticulation plan in 1999 that would mean suddenly he
16 should become aware of such a cause of action assuming it
17 were a valid one.

18 HIS HONOUR: And does he get that plan more than six years
19 before he institutes these proceedings or not?

20 MR DELANY: Yes, he gets that plan in - just let me find it
21 Your Honour, it's - in 1999 in the practice court.

22 HIS HONOUR: Yes, on what date?

23 MR DELANY: 1 September 1999 I'm told.

24 HIS HONOUR: When does he issue this proceeding?

25 MR DELANY: 31 May 2005.

26 HIS HONOUR: That's within six years of getting the plans,
27 isn't it?

28 MR DELANY: Would Your Honour just pardon me for a moment? The
29 terms of settlement were signed on 29 July 99. I can't
30 pick up Your Honour precisely when the plan was provided.
31 What Mr - yes, it's in 1999 that he was - the 1 September

1 1999, in the hearing before Justice Beach.

2 HIS HONOUR: Yes.

3 MR DELANY: But we would say Your Honour that the complaint

4 that is sought to be made has got nothing to do with that

5 plan, because the complaint that's sought to be made is

6 that it wasn't in 1979 that there was articulated water

7 supply but in 1982, and that was a matter of which he

8 complained in 1987, so the complaint that he makes about

9 water supply was a complaint that he'd already made

10 several years earlier.

11 HIS HONOUR: Well I understand him to say that what's said in

12 1987 doesn't relate to internal reticulation, but the

13 connection externally.

14 MR DELANY: Well I understand that's what he said to Your

15 Honour, but I don't understand that to be in the

16 affidavit material or in the statement of claim.

17 HIS HONOUR: But isn't it a question of whether the document

18 itself from 87 might bear that construction?

19 MR DELANY: Whether the 87?

20 HIS HONOUR: You say he complained of that in 1987.

21 MR DELANY: Yes, that's right Your Honour, yes.

22 HIS HONOUR: I have to look at the complaint.

23 MR DELANY: Yes, I agree.

24 HIS HONOUR: And see what it means, and if it might mean what

25 he says it means, then it doesn't do what you say.

26 MR DELANY: No, I accept that Your Honour, but the other

27 document to look at is the reticulation plan and the

28 reticulation plan - I'll just locate. Your Honour the

29 water agreement, which is a 1982 Water Agreement is

30 Exhibit 26 to Mr Thompson's affidavit.

31 HIS HONOUR: Yes.

1 MR DELANY: And it provides "The consumer shall at its own
2 expense and to the satisfaction of the trust provide and
3 install all pipes and fittings which may be necessary for
4 obtaining such supply from the trust pipeline at the
5 corner of Edgecombe Road and Dettmanns Lane and shall so
6 long as this agreement remains in force keeps the pipes
7 and fittings within the property in good order and in
8 proper repair to the satisfaction of the trust".

9 Then it goes on "The pipeline installed along
10 Edgecombe Road will be taken over and maintained by the
11 trust on the 1st day of July 1982 subject to it passing
12 the performance tests". So once he had that agreement he
13 knew of the position in relation to the trust, and he
14 also - if I can come back to it this way Your Honour, my
15 understanding of his complaint initially in the first
16 proceeding was "There was water there but I couldn't get
17 to it. I was told that I had no legal right of access to
18 it". Now - and that caused the loss, which was the
19 inability to sell the lots with water.

20 Now the current complaint is that "In 1982 there
21 weren't pipes there and that meant that I couldn't" sell
22 with water - "sell the lots as lots with water
23 available". So we would say Your Honour that whichever
24 way you look at it, it's the same loss and there's no new
25 circumstance or event.

26 HIS HONOUR: Well there's a different cause attributed to him
27 being in that situation. A different - - -

28 MR DELANY: A different cause?

29 HIS HONOUR: Yes. A different cause or element. An additional
30 cause for his predicament if you like.

31 MR DELANY: Well Your Honour I'm just told that the

1 reticulation plan is nowhere in evidence. I had a
2 feeling it was, but I'm told that it's not, so it's
3 really impossible for Your Honour to assess how that
4 might have helped someone who had otherwise exercised
5 reasonable diligence to discover a cause of action, to
6 have learned if you like a different cause, because it -
7 without seeing the plan it's impossible to evaluate.

8 HIS HONOUR: Well Mr Delany I understand the argument about
9 loss, and I think I put that to Mr Thompson himself.

10 MR DELANY: Yes.

11 HIS HONOUR: In relation to the concealment of fact argument,
12 what he says is he gets the plan and issues within six
13 years of having got it, having appreciated its true
14 significance, as I understand it once he's worked
15 out - - -

16 MR DELANY: That's not quite what he says - - -

17 HIS HONOUR: - - - the scheme of things in relation to Tylden
18 Road, isn't it?

19 MR DELANY: He doesn't - he says that - in Paragraph 54 -
20 nothing in Paragraph 54, which is where he deals with his
21 state of knowledge in 2000 is referable back to the -
22 sorry, I withdraw that. What he says in 54 is "Upon
23 reaching the conclusions in relation to Tylden Road I
24 began to consider the Council may have acted unlawfully
25 in relation to Woodleigh Heights".

26 HIS HONOUR: Yes.

27 MR DELANY: "I reconsidered the proceedings and the
28 reticulation plan" - so he says he reconsiders the
29 reticulation plan "and realised Council had sealed the
30 plans of subdivision, the subdivision not being completed
31 according to law and reticulated water supply was not

1 present in 1979 but was laid in 1982 as pointed out to me
2 in the practice court".

3 Well he knew already that it was laid in 1982
4 because he had the agreements. "I'm now able to
5 reconcile that representations made to me with my prior
6 state of knowledge. It was now apparent that the conduct
7 of the Council and the Board was essentially similar to
8 their conduct". But he doesn't go back and look at the
9 plan from 19 - that he was handed in the practice court
10 because as I recollect his affidavit he says that he
11 can't find it anymore.

12 HIS HONOUR: Yes.

13 MR DELANY: I just can't see the paragraph but I think that's
14 what he says in his affidavit.

15 HIS HONOUR: Well you say he has got the agreement - - -

16 MR DELANY: He's got the agreement.

17 HIS HONOUR: And the agreement clearly provides for the
18 provision of the internal works as at 1982?

19 MR DELANY: Yes, that's as we understand it.

20 HIS HONOUR: What do you say as to his statement that the basis
21 on which the proceeding went ahead was an allegation that
22 all the works were done in 1979 which as I understand it
23 was admitted.

24 MR DELANY: Well just going to the pleadings Your Honour went
25 to, in that action.

26 HIS HONOUR: Yes.

27 MR DELANY: What is alleged in Paragraph 17 is that there was a
28 proposal that went in with the application in 1978 for a
29 private water supply.

30 HIS HONOUR: Yes.

31 MR DELANY: Paragraph 8 says in 1978 the permit issued,

1 authorising development in accordance with the permit.
2 Ten says the Council alone can approve the private water
3 supply and reticulation system as set out in the
4 submission and didn't refer the plan to the Water Trust.
5 Eleven says at the time of registration of CS1134 the
6 following relevant works have been carried out. Now
7 CS134 is said to be - I'm just trying to see where it
8 said that that was actually registered. Yes, Your
9 Honour's right because Paragraph 10 says on 9 August 79
10 the cluster plan was registered.

11 HIS HONOUR: Yes.

12 MR DELANY: So the allegation was that the works were completed
13 at that time. Now the amended defence in Paragraph 11
14 admits Paragraph 11, that's of the first defendants of my
15 client, that's at Tab 17 and the second defendant doesn't
16 admit it. Now what the case now depends on is an
17 allegation that my client knew that the internal pipes
18 weren't constructed and we say there's absolutely no
19 evidence to support that, Your Honour.

20 HIS HONOUR: Well that's true as at - there's no evidence that
21 that's - of that as at 9 August 79, I agree with that.

22 MR DELANY: Or at all.

23 HIS HONOUR: But what about as at 99?

24 MR DELANY: Well the affidavit - - -

25 HIS HONOUR: When you admit this.

26 MR DELANY: - - - of Mr Thompson - sorry when we admit it?

27 HIS HONOUR: Yes.

28 MR DELANY: Well on the facts it was there at the time it was
29 admitted.

30 HIS HONOUR: I see.

31 MR DELANY: There doesn't seem any contest that it was there

1 from 1982.

2 HIS HONOUR: Yes.

3 MR DELANY: The paragraph about the handing over of the plan in

4 Mr Thompson's affidavit - - -

5 HIS HONOUR: Well that explains why it might have been admitted

6 but in fact - - -

7 MR DELANY: It might have been incorrect that - - -

8 HIS HONOUR: It was incorrect.

9 MR DELANY: It could well have been incorrect but it wasn't -

10 there's no allegation that the Council knew in 1979 that

11 they hadn't been constructed. The allegation was that it

12 was constructed and that was admitted and it might have

13 been incorrectly admitted but now there's a different

14 argument sought to be made that "the Council admitted it

15 and knew that it was false thereby concealed it", that's

16 in the written submissions. There's no evidence to

17 support that.

18 HIS HONOUR: Well it's admitted in 1999 when as you say the

19 1982 agreement shows that wasn't the fact.

20 MR DELANY: That's right. Now the paragraph of Mr Thompson's

21 affidavit that deals with the plan, that's the - and what

22 happened in the practice court is that he says in

23 Paragraph 40A, "I elected not to appeal because during

24 the course of the practice court here and the Council and

25 Water Board showed me a reticulation plan for the

26 subdivision. The plan clearly showed that the principle

27 water mains were in fact laid in 1982 and not in 1979 as

28 alleged by me and on my understanding as required by

29 law".

30 HIS HONOUR: Yes, so you say at the time it's in the practice

31 court he knows all this?

1 MR DELANY: Yes, because - - -
2 HIS HONOUR: But that - he issues within six years of that date
3 doesn't he?
4 MR DELANY: He does that, that's right, but he already knew
5 Your Honour we say from 1982.
6 HIS HONOUR: Yes, I'm going to take a break for five minutes,
7 but we'll sit through until half past four.
8 (Short adjournment.)
9 HIS HONOUR: Now Mr Delany, these matters relating to the
10 limitations defence haven't been defined by pleadings
11 yet.
12 MR DELANY: No, they haven't.
13 HIS HONOUR: The defendants have gone to the master in effect
14 to take the proceeding out as it were before we get to
15 that stage.
16 MR DELANY: That's right. Yes.
17 HIS HONOUR: And so I'm confronted with the affidavit material.
18 MR DELANY: Yes.
19 HIS HONOUR: And if it's, if there is a view of that material
20 which arguably could circumvent the limitations defence
21 then I'm really bound to give effect to that it seems.
22 MR DELANY: Yes, unless what's sought to be agitated is subject
23 to - is released by the terms.
24 HIS HONOUR: I agree with that.
25 MR DELANY: And here in this instance the terms are very wide
26 and we would say that the critical point really is that
27 the loss is the same because if it's a release in
28 relation to the same loss put in the same way, if it is,
29 then that's the end of the matter. Now we have, or
30 Mr Ahern has been diligently trying to find some cases on
31 this issue of (indistinct) list and I think it's probably

1 easier if he tells Your Honour what he's been able to
2 find. And if I sit down, that's all I want to say Your
3 Honour and help just complete that point.

4 HIS HONOUR: Yes, Mr Ahern.

5 MR AHERN: If Your Honour pleases. May I pass up an extract
6 from the text, "The law and practice of compromise" by
7 David Foskett and one authority referred to in that
8 extract.

9 HIS HONOUR: Thank you, yes?

10 MR AHERN: In relation to the extract from "The law and
11 practice of compromise", could I take Your Honour to p.83
12 which is two pages in?

13 HIS HONOUR: Yes.

14 MR AHERN: To Paragraph 5-22?

15 HIS HONOUR: Yes.

16 MR AHERN: It says, that paragraph says, "It's important to
17 emphasise also the reference to cases in which the court
18 has reached a particular conclusion in relation to a
19 particular word or phrase will be of limited assistance
20 in other cases. In this area in particular authorities
21 must be read in the context of their peculiar facts.
22 That having been said, certain phrases hallowed by long
23 and frequent usage are likely to receive substantially
24 the same response, will have construction in most
25 compromises in which they appear. An obvious example
26 would be the well established formula in full and final
27 settlement of all claims that seem, has or may have
28 arising from the accident. Another example might be
29 where parties agree a settlement ... (reads) ...Here a
30 court is likely to interpret the words 'in respect of' as
31 connoting the widest possible connection between the

1 settlement and the subject matter of the action".

2 That last statement, the footnote, is a decision of
3 the English Court of Appeal, if I hand that, a copy of
4 that - you have that decision.

5 HIS HONOUR: Yes.

6 MR AHERN: That's the decision of Lyon Trust Corporation. Now
7 I've had, I've just copied that from the Supreme Court
8 library in the last half hour. I've made, I've
9 handwritten the numbers on top of the pages because they
10 didn't appear on the print. If I could take you to p.2
11 of that decision? Lord Justice Pettigibson sets out the
12 relevant release in that case in the second paragraph.

13 HIS HONOUR: Yes.

14 MR AHERN: And that release was in relation to a proceeding
15 known as the Frogmore action and the release read that
16 "All parties release all claims which they or any of them
17 have or may have against each other in respect of the
18 subject matter of this action or arising out of these
19 proceedings". Now in this case, the defendants who had
20 given the release then sought in a subsequent proceeding
21 to - brought an action against other defendants. Same -
22 other parties who were also defendants in that previous
23 action and those new defendants said, "Well you've
24 released us from the earlier release". The question then
25 became, well what was the subject matter of that
26 proceeding, of the earlier proceeding. If I can take you
27 to page, first of all to p.9 of that decision.

28 The second paragraph half way down starts,
29 "Mr Steinfeld submitted that the words relating to or
30 connected with were wider than the words 'in respect
31 of'". And then interestingly enough, the court then made

1 a reference at the bottom of the page to a decision of
2 the Chief Justice Mann of this court as to what the
3 words, "In respect of" mean and in the context of what is
4 the action about, Lord Justice Allbooth also referred to
5 the often quoted words of Chief Justice Mann in Trustees
6 Executors v. Reilly 1941, Victorian Law Reports. "The
7 words, in respect of, are difficult of definition but
8 have the widest possible meaning of any expression
9 intended to convey some connection or relation between
10 the true subjects to which the words relate". Then on
11 p.12, the paragraph - in the middle of the page
12 commencing, "In these circumstances", His Honour says,
13 "In these circumstances it is scarcely material whether
14 the words 'in respect of', are given their ordinary wide
15 meaning as denoting some connection ... (reads) ...To my
16 mind those words are at least as wide as the words in
17 Order 16, Rule 8" which relates to notices of
18 contribution, "The words relating to or connected with".

19 HIS HONOUR: Yes.

20 MR AHERN: Your Honour if I can then take you to p.15?

21 HIS HONOUR: Yes.

22 MR AHERN: The decision of Lord Justice Chadwick. He says that
23 the - he agreed and said "The short question in this
24 appeal is whether the judge was right to hold that the
25 release of the claims in the new actions were covered by
26 the release in the old actions". He said "For my part, I
27 find the answer to that question in the present context,
28 by looking at the prayer for relief in the amended
29 statement of claim previously".

30 HIS HONOUR: Re, re, re-amended statement.

31 MR AHERN: That's right, the re, re, re-amended statement of

1 claim endorsed on the writ in that action, and he's then
2 looked at the prayer for relief and that's what Your
3 Honour did this morning, you looked at the said - it's
4 the relief, it's the same loss, and that's the approach
5 that Lord Justice Chadwick took in this case.

6 HIS HONOUR: Yes.

7 MR AHERN: And then at the bottom of the page he stated "In the
8 light of the relief claimed it seems to me that the
9 subject matter of the Frogmore action, which is the
10 previous proceeding, included the share of land
11 investments which were acquired". So that's that the
12 approach that he took, he looked to see what the relief
13 was in the previous proceeding.

14 And then on p.16 second last paragraph "In the
15 circumstances that the terms embodied in the schedule to
16 the Tomlin Order were signed by the legal advisors the
17 following day it seems to me plain that those claims were
18 claims which were thought by the burghers and their
19 advisors to be claims relating to or in connection with
20 the subject matter of the Frogmore action. That is to
21 say claims in relation to or in connection with
22 Mr Jarrod's holdings of the shares.

23 Further having regard to the terms of order 16 Rule
24 8 the words 'in respect of' used in the Tomlin Order must
25 have been understood by Mr Garard and Mr Fielding in a
26 sense which was no more restrictive than the words
27 relating to or connected with. The words 'in respect of'
28 are words of connection. They have been described as
29 words which have the widest possible meaning of an
30 expression intended to convey some connection between the
31 two subject matters to which the word relates", and again

1 a reference is made to the decision of Chief Justice Mann
2 in Trustees and Executors.

3 So Your Honour in that situation - in that case we'd
4 be saying that the same approach should be adopted here,
5 that you look at the relief sought in the previous
6 proceeding, the relief sought in this proceeding to see -
7 in ascertaining the subject matter, and the words used in
8 the release in this case arising out of or in any way
9 relating to the subject matter are the same - have the
10 same possible broad interpretation as "in respect of" had
11 in Lyon Trust Corporation.

12 HIS HONOUR: Thank you. Mr Garde please.

13 MR GARDE: Your Honour we will start by just taking Your Honour
14 back again to the amended further statement of claim in
15 the Woodleigh Heights proceedings, and invite Your Honour
16 to just spend a moment and I'll go through the pleading,
17 but before I do that there are two - there are two of
18 course, types of water supply that are under discussion
19 in this pleading.

20 There is the water supply that was provided on the
21 land, which was of course non-obtainable water - non-
22 drinkable water, and then there was the prospect of water
23 becoming available from the Kyneton Shire Water Works
24 trust. And one has to, in looking at the pleading and
25 therefore looking at what was known at the time, identify
26 the features of the two systems, one existing prior to
27 1982, and one which as we know potentially became
28 available as and from 1982.

29 And with that in mind what I would invite Your
30 Honour to do is just to look for a start at Paragraph 6,
31 and in Paragraph 6 on p.3 of the amended further

1 statement of claim of 17 March 1999, Your Honour will see
2 the application referred to. "By application dated
3 22 November 1978 the Buchanan's applied to the Council to
4 develop the Woodleigh Heights estate by subdividing it
5 pursuant to the provisions of the Cluster Titles Act
6 1974, such subdivision consisting of 45 allotments" and
7 so on "with substantial areas of common property and
8 provision for the installation of a privately owned and
9 operated water supply and reticulation system". Have I -
10 this is Your Honour, I'm looking at Tab 16.

11 HIS HONOUR: I've got it in front of me.

12 MR GARDE: I'm sorry Your Honour I - so that was the
13 application and Your Honour will see in the particulars
14 that it contained - the application contained the
15 following relevant documents, the application for the
16 permit of 10 November 1978 and the submission dated
17 3 November 1978 prepared by James A Harris & Associates.
18 And that then takes us to Paragraph 7.

19 HIS HONOUR: Does that submission make clear what the character
20 of this system was in terms of your distinction between
21 non-potable and potable?

22 MR GARDE: It does Your Honour, yes as Paragraph 7 itself
23 illuminates. So that - - -

24 HIS HONOUR: Read on then.

25 MR GARDE: No, no, some guidance to be provided shortly. I
26 just want to go through this, because in fact this
27 pleading is precise in what was there and what was not
28 there.

29 HIS HONOUR: I see.

30 MR GARDE: That's in essence what I'm seeking to do, and so
31 Your Honour will then see that the proposal for the

1 privately owned and operated water supply and

2 reticulation system - - -

3 HIS HONOUR: Yes, I see.

4 MR GARDE: - - - and one might anticipate in the world of

5 regulatory authorities a privately owned system was an

6 object of some discussion - consisted of, now these are

7 the elements of it Your Honour. A storage reservoir in

8 (a). Inevitably a high level header tank of 100,000

9 gallon capacity in (b). Then the rising main to get from

10 one to the other and then (d) a reticulation system

11 comprising main pipes from the tank through the estate.

12 So understandably enough that had to be done. Then there

13 had to be smaller pipes from the main pipe to the

14 individual allotments, which is equally understandable.

15 Then we come to (e). When we talk about household

16 drinking and bathroom water, in other words potable water

17 or water of the appropriate use by humans, and we've got

18 household drinking and bathroom water was to be supplied

19 by means of roof rainwater tanks which were to be

20 installed concurrently with the construction of houses.

21 So the drinking water was actually coming from the roof

22 rainwater tanks for household drinking and bathroom use.

23 Then (f) probably answers I think Your Honour's question.

24 HIS HONOUR: That's right.

25 MR GARDE: The reticulated water supply was for non domestic

26 uses only. So in other words the proposal stood on the

27 somewhat rickety foundations one might say, but

28 nonetheless was approved on this footing, of this system

29 being available for use other than use for human

30 consumption and tank systems being available for water

31 for human use.

1 HIS HONOUR: Yes.

2 MR GARDE: And then we go to p.5, "The proposed water supply
3 and reticulation was detailed in the submission and
4 engineering report by Garlick & Stewart", and that's set
5 out there which I won't read out. Then we have in eight
6 that the council issued the planning permit. Then we
7 have nine that it was a condition of the permit that the
8 estate be developed in accordance with the plans and
9 submissions comprising the application for cluster
10 subdivision including the construction and installation
11 by the Buchanans of the water supply and reticulation
12 system as set out in the submission.

13 HIS HONOUR: Yes.

14 MR GARDE: That of course picks up the reticulation system that
15 is discussed in seven which in turn picks up the approach
16 that it's to be a rainwater tank system that provides the
17 water for human consumption. So the water supply and
18 reticulation system as set out in the submission referred
19 to in nine is reality what I might call for stock,
20 gardening or other non-human use; that's what it's
21 referring to.

22 Then we have ten that the council allow and approve
23 the private water supply and reticulation system as set
24 out in the submission. Now pausing there that's actually
25 unsurprising because it doesn't involve the use of trust
26 water at this juncture. So it's civil engineering works
27 that the council would be expected to approve. Then it
28 says, "The council did not refer the plans of subdivision
29 to the trust pursuant to those provisions". Then the
30 cluster subdivision was registered. So in other words it
31 had nothing to do with the trust at this juncture.

1 Then we see in 11 as to the state of knowledge and
2 state of fact. At the time of registration of Cluster
3 Subdivision 1134 the following relevant works had been
4 carried out. Now one has to just refer these back
5 because we see the things that had been carried out. Now
6 one has to just refer these back because we see the
7 things that had been done and we see the things - and one
8 thing in particular that hadn't been done. So (a) is the
9 lake and that corresponds with (a). In (b) we've now got
10 the two 50,000 gallon concrete high level water tanks
11 were constructed in lieu of a single 100,000 gallon high
12 level tank. So there's a departure and you've got two
13 tanks rather than one.

14 Then we come to (c). We've got a rising main laid
15 between the lake and the high level tanks. Then we come
16 to (d) and (d) says, "Primary reticulation pipes had been
17 laid in the common property and connected to the concrete
18 high level tanks to convey non domestic water from the
19 tanks to the allotments as referred to in the
20 submission".

21 Now the significant matter about that if Your Honour
22 goes back to (b) is that - if I put it this way the big
23 pipes or at least some of them, whatever is meant by the
24 expression "primary reticulation pipes" which isn't
25 coincident with - the main pipes were there.
26 Conspicuously absent are the smaller pipes from the main
27 pipe to the individual allotments and there's no
28 reference to whether by this stage any houses had been
29 constructed with or without rainwater tanks and (e) the
30 high level contained water.

31 So that in Paragraph 11 you've got a careful

1 pleading of what was there and what was not there as at
2 the time of registration of Cluster Subdivision Plan
3 1134.

4 HIS HONOUR: Yes.

5 MR GARDE: So it was obviously known that for example smaller
6 pipes from the main pipe to the individual allotments
7 were not there and it was also obviously known that in
8 lieu of the 100,000 gallon tank there were two 50,000
9 gallon tanks. So in terms of the reticulation system on
10 this estate which was not intended to provide water for
11 human consumption the position is clear in our submission
12 in this pleading.

13 Now nobody is suggesting that at this point of time
14 there was or that there was intended to be any supply of
15 water from the Water Works Trust and obviously if one had
16 a supply of water from the Water Works Trust then you
17 would not need roof rainwater tanks. You would plainly
18 enough use the direct supply of fresh water from the
19 Water Works Trust. So in addition it would be expected
20 that if the trust was involved at this juncture or was
21 intended to be involved in the supply of fresh water.

22 Then the council would refer the plans of
23 subdivision to the Water Works Trust, which it did not
24 do. Then that takes us to 12, and 12 says, "By reason of
25 the matters referred to in Paragraphs 5 - 13, the
26 plaintiffs as holders of an equitable interest in the
27 land", which was the amendment, the previous pleading
28 being, "As beneficial owners of the land purchased by
29 them", "Had a right of access and entitlement to the
30 water supply and reticulation system within CSS1134".

31 Now that is the internal reticulation system, and I might

1 say the internal reticulation system is not at all
2 relevant to the problem that the plaintiffs say they
3 subsequently experienced, because the problem they
4 subsequently experienced related to the availability of
5 fresh water.

6 HIS HONOUR: Yes.

7 MR GARDE: The existence or non existence of small pipes in
8 terms of the estate's own system was of no consequence.
9 So everything so far is consistent with the state of
10 knowledge that in and around 1979, there was no main
11 supply from the Water Works Trust, but if one keeps
12 going, 12A then 12B, "Had a right to install roof
13 rainwater tanks to provide drinking and bathroom water",
14 so 12B confirms again that at the time of the approval of
15 the plan of (indistinct) subdivisional and indeed
16 subsequently, it was the contemplation that it would be -
17 that the property would be supplied with fresh water
18 through the rainwater tank system as distinct from the
19 supply of water from a main from the Water Works Trust.
20 Then we have in 15 that in or about November 1980, the
21 Buchanans made application to the counsel for a cluster
22 redevelopment of cluster Subdivision 1134, dividing each
23 allotment into three smaller allotments, that was
24 approved, and in 17, again it wasn't referred to the
25 Water Works Trust, and again one might have thought,
26 looking at that, that there was no need to refer it to
27 the Water Works Trust, which is again confirmed in
28 Paragraph 18, because 18 pleads there was no alteration
29 to the water supply or reticulation requirements within
30 cluster Subdivision 1134, pursuant to the new plan, which
31 is 2784, and the water supply, and reticulation

1 requirements remained identical to that described in a
2 submission and set out in Paragraph 8 above.

3 HIS HONOUR: Yes.

4 MR GARDE: So that was the position as pleaded following the
5 application now in November 1980. Then, Your Honour,
6 when - if we jump over the pleading of the deed of
7 absolute assignment and come to Paragraph 15, in
8 Paragraph 31A we now have, by April 1984, a company,
9 Woodleigh Heights Resort Developments Pty Ltd were
10 developing a time share resort on cluster Subdivision
11 1134, it had purchased most of the land, entered into
12 contracts of sale to purchase all of the land that had
13 defaulted upon those contracts, and then there's this
14 discussion about Woodleigh Heights Resort Development
15 would prevent the plaintiffs' land or the land from
16 having access to - - -

17 HIS HONOUR: I'm sorry, where we have jumped to?

18 MR GARDE: Sorry, I'm now at 31B, Your Honour, 31B on p.15.

19 HIS HONOUR: Yes.

20 MR GARDE: I left out all the stuff relating to the deed of
21 assignment, Your Honour.

22 HIS HONOUR: Yes.

23 MR GARDE: So in 31B, Woodleigh Heights Resort Development
24 advised the plaintiffs that if the plaintiffs attempted
25 to rescind the contracts and sell to anyone other than
26 Woodleigh Heights Resort Development, then it would
27 prevent the plaintiffs land, which - or the land from
28 having access to water, and thereby render the land
29 worthless, and Your Honour will have noted from the book
30 of pleadings that back on 23 October 1980, this is p.C11,
31 Mr Thompson, Mr and Mrs Thompson, but with the signature

1 of Mr Thompson, wrote to the secretary of the shire of
2 Kyneton, and said, "Dear sir, please find enclosed bank
3 guarantee for subdivision of KR and another initial
4 Buchanan at Tylden Road, Kyneton, this subdivision is now
5 a joint venture between ourselves and Buchanan, and
6 Mr Ken Buchanan is still managing the subdivision for the
7 partnership", but what subsequently happened was that
8 there was a dispute that broke out between the Buchanans
9 and the Thompsons as we apprehend the position with the
10 consequent result that the development company that was
11 controlled by the Buchanans denied any access to the
12 water which that company had procured through the supply
13 agreement to the Thompsons, so the consequence of that
14 was that although, as Your Honour has had discussed
15 earlier, an agreement was made on the first day of
16 January 1982 between the Water Works Trust and Woodleigh
17 Heights Resort Development for the supply of water
18 suitable for domestic purposes by the Water Works Trust,
19 which was the first supply of that water to this land,
20 that supply agreement was made with the development
21 company, and it was as a consequence up to the
22 development company as to whether or not other lot owners
23 gained access to the water that that company was now
24 receiving from the Water Works Trust.

25 HIS HONOUR: Yes.

26 MR GARDE: And Your Honour will have observed in looking at the
27 agreement of 1 January 1982, between the trust and
28 Woodley Heights Resort Development Pty Ltd, that it
29 provided in Clause 1, after referring to the Water Act
30 and the regulations under
31 the - - -

1 HIS HONOUR: Where do I find this in the documents?

2 MR GARDE: That is Mr Thompson's exhibit, GAT26.

3 HIS HONOUR: I have a set of exhibits that goes to GAT21.

4 MR GARDE: Yes. I'm sorry Your Honour, this is the affidavit
5 of 7 November 2005.

6 MR THOMPSON: Your Honour it's in the second book of my
7 exhibits. You should have two of them.

8 HIS HONOUR: Well, I don't.

9 MR GARDE: We'll see if we can - thank you for that. We'll
10 have one handed up Your Honour.

11 HIS HONOUR: Perhaps just wait a moment, we better find out
12 whether we do have that second - - -

13 MR GARDE: Yes.

14 HIS HONOUR: They're original exhibits - yes, so I look at
15 that?

16 MR GARDE: Yes. I invite Your Honour to look at that and if
17 Your Honour goes then to - the heading refers to the
18 Water Works Trust and Woodley Heights Resort Development
19 Pty Ltd and then Your Honour will see in Clause 1 that,
20 "The trust shall, so far as it is able to do so, subject
21 to the provisions hereof and the Water Act 1958 and the
22 regulations made thereunder", and so on, "Supply to the
23 consumer", the term consumer being defined to mean the
24 development company, "and the consumer shall take from
25 the trust water for domestic purposes on the said land as
26 and from 1 October 1981", and Your Honour will see that
27 in Paragraph 2, "The consumer shall at it's own expense
28 and to the satisfaction of the trust provide and install
29 all pipes and fittings which may be necessary for
30 obtaining such supply from the trust's pipeline at the
31 corner of Edgecombe Road and Dettmanns Lane". So to

1 pause there. It was the development company that
2 provided the pipes and fittings that took the supply from
3 the corner of Edgecombe Road and Dettmann's Lane which
4 was some distance from the estate, "and shall so long as
5 this agreement remains in force keep the pipes and
6 fittings within the said property in good order and
7 proper repair to the satisfaction of the trust".

8 So it had the obligation, that's the development
9 company had the obligation of looking after the pipes and
10 fittings. "Any authorised officer of the trust may at
11 any time or times inspect and examine all or any such
12 pipes or fittings and the pipeline installed along
13 Edgecombe Road will be taken over and maintained by the
14 trust on the first day of July 1982, subject to the
15 pipeline passing performance tests to the satisfaction of
16 the trust", so the trust was apparently concerned to
17 ensure that it was of sufficient quality.

18 Having regard to those matters Your Honour in the
19 evidence, I return to the proposition that was advanced
20 as we apprehended it earlier today as to whether the land
21 was properly serviced by an articulated water supply in
22 1979.

23 HIS HONOUR: Well, just before we do that, in the amended
24 statement of claim what's the substance of what then
25 follows?

26 MR GARDE: The substance of what then follows Your Honour is
27 that there are a series of allegations of
28 misrepresentation of different sorts and if I look at - I
29 mentioned 31B but if one continues on, we've got 32, "In
30 April 1984 the plaintiffs made enquiries of the council
31 and the board to ascertain whether the matters

1 communicated to the plaintiffs by the development company
2 were correct". Now those matters said to be
3 communicated, to go back to the particulars, in a
4 conversation between Mr Murphy, a director of the
5 development company and the first named plaintiff in or
6 about March and April of 1984 is particularised and the
7 development company advised first named plaintiff that
8 Woodleigh Heights Resort Development had a private water
9 supply agreement between itself and the trust for the
10 supply of water to all of the - plus the subdivision,
11 including the land. "Two, that under the water agreement
12 the development company controlled a supply of water
13 within the cluster subdivision including the supply of
14 water to the land and that under the water agreement, the
15 development company were in a position to render the land
16 valueless by denying the supply of water to it and
17 thereby preventing the issue of building permits in
18 respect of the plaintiff's land".

19 So following this dispute between the Buchanans and
20 Thompsons as we apprehended, those statements were made
21 back in March or April 1984, so it was alleged. In
22 Paragraph 32, the plaintiff then made enquiries of the
23 council and the board to ascertain whether the matters
24 communicated were correct

25 And there's a reference there to a telephone
26 conversation in April 1984. And then it's said in
27 response to the enquiries, the council and the board
28 represented to the plaintiffs that. And then it's said
29 that the plan of cluster subdivision was outside the
30 water trust area and in an area where under the
31 provisions of the Water Act 1958, water was supplied

1 under private agreement at the discretion of the trust so
2 there was no - it was not an area where the trust had the
3 capacity to service individual allotments. There was
4 under the provisions of the Act a legally valid water
5 agreement in existence between the board and the
6 development company and that under the water agreement,
7 the development company owned and operated the water
8 supply reticulation system within the cluster
9 subdivision. And it's said that it was represented that
10 the land was not entitled to the water supply or
11 reticulation system within CS1134 and could not obtain
12 access to the water supply and reticulation system
13 without the agreement and consent of the development
14 company. So in other words, unless you go and talk to
15 the development company and get their consent then you
16 can't access the system which is controlled by the
17 development company.

18 And then it's said the body corporate was not
19 entitled to the water supply or reticulation system
20 within CS1134 and it's said that the board would not
21 transfer the existing water agreement to the body
22 corporate except with the agreement of the development
23 company. And would not enter into a separate water
24 supply agreement with the body corporate of CS1134 except
25 with the agreement of the development company. And (g)
26 that unless the plaintiffs had access to a reticulated
27 water supply, the council would not issue building
28 permits to build upon the land. That's said to be the
29 first representation. And then one comes to the
30 existence of various mortgages. And default occurring in
31 the mortgages in August 1984. And then the auction of

1 17 November 1984 and then in 39(a) if I invite Your
2 Honour to jump over to p.21, that on or about 13 November
3 1984 the board represented to Hookers and to AGC that
4 water and sewerage were denied to the land and could not
5 be obtained. And if one interpolates here Your Honour,
6 the trust had in place a water agreement as Your Honour
7 has looked at which took the water supplied by the trust
8 to a location from which the development company and its
9 assets took responsibility for the ongoing supply of
10 water and the problem that gave rise to is that if there
11 was a disagreement between the development company and
12 individual lot owners then individual lot owners might
13 not gain that access.

14 And the board itself, according to this, stated that
15 it told Hookers and AGC that water and sewerage were
16 denied to the land and could not be obtained. Then on or
17 about 13 November 1984, Mr Porter repeated this
18 representation, representation was communicated. The
19 plaintiffs and AGC cancelled the auction, that's 40(b).

20 HIS HONOUR: Yes.

21 MR GARDE: And then there's a third representation in 42(a),
22 that the council responded to AGC's said letter in which
23 it represented that in accordance with previous planning
24 approvals, the issue of building permits was conditional
25 upon the development being serviced by reticulated
26 sewerage. And then in 44(a), the fourth representation
27 now, this is 1985, that the board was not in a position
28 to supply water to the plaintiff's land. And then in
29 Paragraph 45 we have the fifth representation

30 Which was to AGC, but water had been supplied to the
31 development company as an outside of the water area

1 agreement on the basis that all costs for construction of
2 the mains were paid for by that company, that company be
3 WHRD. The board therefore has no mechanism by which the
4 allotments referred to maybe supplied with water, except
5 with the agreement of WHRD. That AGC would be aware that
6 a shire permit to build within Crown Allotment 41 will
7 not be issued unless the blocks are supplied with water.
8 And that the development company either or all of, owns,
9 operates and controls the water mains, of which it had
10 apparently Your Honour, installed at its own expense. So
11 those circumstances amounted to the fifth representation.

12 Importantly, Your Honour, if I jump over briefly to
13 Paragraph 58A, Your Honour will observe that all this is
14 said to have transpired fraudulently. And so these are
15 representations said to be fraudulent representations, we
16 have the five different sets of fraudulent
17 representations. There's then a sixth representation
18 pleaded, but 58A is what I will describe as sufficiently
19 conventional pleading of fraud, knowing them to be false
20 and untrue or making them recklessly, not caring whether
21 they were true or false.

22 The particulars of that were that, "The defendants
23 had the subdivision application, the submission, the
24 approval documents, letters, fax, personal knowledge and
25 minutes, and minutes of meeting which evidenced and set
26 out the falsity and untruthfulness of the
27 representations". Then in 58B, the opinion method of
28 pleading fraud, that, "The defendants did not in fact
29 hold such opinion, or knew at the time of expressing such
30 opinion that it was incorrect". So that's of course
31 another allegation of fraud in the context of an opinion.

1 So that, Your Honour, was the pleading and if I go
2 back to Paragraphs 11 - - -

3 HIS HONOUR: And the claim as we've previously known, is for
4 the difference between the land as it would have been if
5 serviced and the price achieved.

6 MR GARDE: Yes, yes, Your Honour.

7 HIS HONOUR: And that as I recollect it is a similar basis to
8 the basis of damages now.

9 MR GARDE: Yes, Your Honour, and in Paragraph 67A at p.45, that
10 is set out. By reasons of the matters alleged here in
11 the plaintiffs have suffered loss and damage, particulars
12 of that are simple enough, that the land was sold for a
13 total price of \$135,000, and B, had the land been sold on
14 the basis that there was an entitlement to an approved
15 private water supplying reticulation system, it's sale
16 value would have been \$431,500 and the difference was
17 \$296,500.

18 HIS HONOUR: Yes.

19 MR GARDE: Now to pause there and say this, that in relation to
20 what was said to be the lack of knowledge or the fact it
21 was unknown, it was as I noted that whether the land
22 properly serviced had a articulated water supply in 1979.
23 Now one has to - and that's ambiguous in the sense that
24 you can be referring to water fit for human consumption
25 or you can be referring to water which was not considered
26 to be fit for human consumption. In 1979 the only
27 relevant articulated water supply was that which was not
28 fit for human consumption, and as to that, taking it in
29 that context, the position is very clear in our
30 submission, from - - -

31 HIS HONOUR: They knew exactly what the position was.

1 MR GARDE: Very precisely, and that's concisely pleaded. So
2 that it was well known that you had two 50,000 gallon
3 tanks rather than 100,000, and it was well known that you
4 didn't have four pipes going from the primary
5 reticulation pipes to the individual allotments. And
6 there's a subtle difference between the expression
7 comprising main pipes and primary reticulation pipes.
8 Whether they mean the same thing or whether there's a
9 subtle difference there, it's not entirely clear, but
10 it's very well known, and exactly known as to what the
11 position was. So there is nothing new there in our
12 respectful submission.

13 Then taking it the other way round, if this means
14 water supply for human consumption, this pleading makes
15 it very clear also that it was well known that there was
16 no water fit for human consumption supplied by the board
17 or then the trust, because the pleading refers to
18 household, drinking and bathroom water on a number of
19 occasions, again making it clear that there was no water
20 fit for human consumption supplied by the Water Works
21 Trust.

22 So as one goes through the pleading at the different
23 dates, the position is again clear in our submission,
24 leading up to the discussion in 1984 between Mr Murphy
25 and the first named plaintiff.

26 HIS HONOUR: Before we get to that, it shows that they knew the
27 1982 agreement was for the provision of potable water,
28 not for what was the subject of the 1979 requirement.

29 MR GARDE: That is so.

30 HIS HONOUR: And they knew that what was supplied pursuant to
31 the agreement was not supplied in fact in performance of

1 the 1979 requirement.

2 MR GARDE: That is so, that is so.

3 HIS HONOUR: So all four points are inconsistent with what
4 Mr Thompson's put to me today.

5 MR GARDE: That is so. So we accordingly submit Your Honour
6 that the position in 1979 - from 1979, in 1982 and from
7 1982 was clear and well known, but we also submit that in
8 any event, the terms of settlement and the release that's
9 granted, even if I was wrong in that - even if we were
10 wrong in that submission, nonetheless the words are used
11 in the terms of settlement are more than ample to pick up
12 the - to pick up the current form of claim arising out,
13 or in any way related to the subject matter of the
14 proceedings.

15 The previous claim if one looks at it in terms of
16 subject matter, the subject matter of the previous
17 proceedings must be taken to have embraced the
18 non-potable articulated water supply and it must be taken
19 to have embraced the potable water which was supplied
20 from 1982 by the Waterworks Trust. So both of those
21 topics are clearly embodied in our submission in the
22 Woodleigh Heights proceeding.

23 HIS HONOUR: Yes.

24 MR GARDE: That Your Honour is sufficient on that matter. The
25 second topic, the Tylden Road topic, the 569E notice
26 issue and the use of a sequence of two lot subdivisions
27 and so on. All that needs to be said about that in our
28 submission is that review as our learned friend,
29 Mr Delany has done of the material in the book of
30 pleadings documents, which itself extracts the relevant
31 notices, letters and resolutions, makes it very clear

1 Your Honour that in the context of Tylden Road, all that
2 was well known and indeed pleaded and the subject of the
3 hearing that went to the second day as we understand it,
4 or was stood down and ultimately took two days before
5 Judge Howden, so that the annotations in the book of
6 pleading as we apprehend them are annotations essentially
7 directed at an expansion of the allegations contained in
8 the book of pleading.

9 So review of that book of pleading certainly makes
10 it clear that the 569E positioning was well and truly set
11 out. So whether the formulation is that if no 569E
12 notices were allegedly served in relation to the multiple
13 improvements or whether the position is that the earlier
14 569E requirement was in essence, adopted by the
15 resolution and whether that was valid or not, all that
16 that matters, was well and truly known and in the
17 material. The final matter Your Honour is just to - - -

18 HIS HONOUR: Just one moment, that's if you like a proposition
19 that the plaintiffs were aware of the underlying matrix
20 of fact now relied on. But in addition, insofar as it's
21 said that the black book somehow provided a trigger for
22 understanding that matrix of fact, the plaintiff had the
23 black book for years, and it would be very odd if you
24 could not press the trigger for ten or 20 years and then
25 say "I've now looked at a document the other side gave me
26 voluntarily and I haven't looked at in the meantime
27 because they were fraudulently concealing it from me".
28 It just can't be right can it.

29 MR GARDE: There are the two elements that Your Honour is
30 highlighting, the first is concealment. There must be
31 proof of concealment as a factual matter. Here the

1 evidence that the black folder was handed over and the
2 folder handed over contained, it's acknowledged, these
3 plans. Whether or not they'd been discovered earlier
4 which you've said they had been, but even putting that to
5 one side for the moment and that in itself would be
6 decisive, on no view does the handing by counsel of a
7 folder containing plans to the plaintiff here constitute
8 concealment.

9 It's the reverse is true, it constitutes disclosure.
10 So that the evidence is of disclosure, not concealment
11 and therefore as a matter of fact there is no concealment.
12 And the second aspect which Master Efthim also
13 appropriately addressed in our submission, was this
14 question of fraud, because not only must there be
15 concealment but it must be concealment that is beset with
16 fraud. One can accidentally conceal or deliberately
17 conceal, there was no evidence of fraud. So on both
18 counts, it must fail and on the third count, that's the
19 question of reasonable diligence, it must fail also
20 because it's self evident that if a black folder
21 containing documents is handed over and you don't bother
22 to look at it, then you're not being reasonably diligent.
23 And the final point in the context of our client is that
24 none of this has got anything to do with us.

25 HIS HONOUR: That's what I was about to raise with you, that's
26 what you said to me yesterday, the black book's not - - -

27 MR GARDE: It's got to be under the Act.

28 HIS HONOUR: As far as you're concerned it might be The Black
29 Book written by Orhan Pamuk, it may be a Nobel laureate,
30 it's got nothing to do with you.

31 MR GARDE: No, nothing to do with us, Your Honour, the s.27

1 refers to based - this is A, where the action's based
2 upon the fraud of the defendant or his agent, or of any
3 persons through which he claims or his agent, so it's got
4 to be - fall into that category, and then we come to B,
5 "The right of action is concealed by the fraud of any
6 such person as the (indistinct)", and the words, "Any
7 such person as the (indistinct)", one might anticipate
8 pick up the language of A, and import that language into
9 B, and so the submission stands.

10 HIS HONOUR: Yes.

11 MR GARDE: So those are those matters, Your Honour, my learned
12 junior has been diligent, also, if I can - I can probably
13 do this briefly, Your Honour, I'm now trespassing in the
14 time that Your Honour had indicated, but - - -

15 HIS HONOUR: Well, Mr Garde, I'm not going to make you rush,
16 but if you think you can deal with matters in five or ten
17 minutes, I'd - - -

18 MR GARDE: I can, Your Honour.

19 HIS HONOUR: It's probably in everyone's interests that you do.

20 MR GARDE: I can, and it's - can I say this in advance, that
21 all of these cases, there are a number of them here, and
22 they come from a somewhat different context, but they do
23 address language that is essentially similar to the
24 language under discussion here in the terms of
25 settlement, and they all point to a wide approach being
26 undertaken.

27 HIS HONOUR: Yes.

28 MR GARDE: The first one in this bundle is Strategic Publishing
29 Group Pty Ltd v. Fairfax.

30 HIS HONOUR: Yes.

31 MR GARDE: And in that case which involves some agreements in

1 1999, and it's a decision of Justice Einstein of the
2 Supreme Court of New South Wales in the Equity Division,
3 and those agreements are then set out, which I won't go
4 into, but there was a dispute resolution clause, the
5 debate was about the ambit here of the dispute resolution
6 clause on p.4.

7 HIS HONOUR: Yes, I have that.

8 MR GARDE: Your Honour will see interpreting the breadth of the
9 dispute resolution clause at the bottom, and then we have
10 the relevant clause in the ASA and the SSA is set out at
11 Paragraph 6 above.

12 HIS HONOUR: Yes.

13 MR GARDE: And then we have reference to IBM Australia v.
14 National Distribution Services Ltd, where the Court of
15 Appeal considered a clause which provided any controversy
16 or claim arising out of or related to the agreement or
17 the breach thereof will be settled by arbitration.

18 HIS HONOUR: Yes.

19 MR GARDE: President Kirby regarded the words, "Or related to",
20 as extending the meaning of arising out of, then you've
21 got Justice of Appeal Clarke with whom Justice of Appeal
22 Handley agreed, "Generally, the phrases, 'In relation
23 to', or, 'Related to', are of the widest import, and
24 should not in the absence of compelling reasons to the
25 contrary be read down", then there are some authorities
26 there referred to.

27 HIS HONOUR: Yes, I think that was what I had in the back of my
28 mind.

29 MR GARDE: Yes.

30 HIS HONOUR: That line of authority.

31 MR GARDE: Yes, and one might say, Your Honour, that words like

1 that also appear and with respect to in the arena of
2 constitutional authorities where they are much discussed
3 and considered, and then in - underneath that you've got
4 Justice Handley saying, "However, that may be this clause
5 contains in addition an agreement to refer controversies
6 and claims related to this agreement or the breach
7 thereof, these are wide words which should not be read
8 down in the absence of some compelling reason for doing
9 so", then there's a reference to Perlman v. Perlman in
10 the High Court, 1984.

11 HIS HONOUR: Yes.

12 MR GARDE: And an older case of Inland Revenue, Commissioners
13 of v. Maple in 1908, "These words can only have been
14 added to include within the submission claims other than
15 in contract such as claims in tort, in restitution, or in
16 equity, I can see no basis for excluding claims arising
17 under statutes which grant remedies enforceable
18 (indistinct) confer powers on courts of general
19 jurisdiction", and then at two paragraphs further on,
20 also No. 9, we have a reference to, "Justice Barrett has
21 also noted that the meaning of in any way related to is
22 wide", reference is then given to the Savcor decision in
23 2001, and then we have another New South Wales decision
24 dealing with Virgin Atlantic Airways, where the words
25 were, "Arising out of the contract", and Chief Justice
26 Gleeson, with whom Justices Mahoney and Sheller agreed,
27 said - and then there's a reference to the general
28 approach in such matters, Timmick v. Hammock is then
29 referred to in nine, a decision of Justice Sundberg - - -

30 HIS HONOUR: Well although this is a somewhat different context
31 than the one Chief Justice Gleeson was - - -

1 MR GARDE: It is.

2 HIS HONOUR: Referring to, but the reality is that if I might -
3 if comprehensive settlements are not able to be achieved,
4 you materially inhibit the power of all in - the power of
5 the parties to arrive at a satisfactory all in resolution
6 and all their differences.

7 MR GARDE: Yes.

8 HIS HONOUR: And that's the whole point of this sort of clause.

9 MR GARDE: That's the whole point of the mediation. The
10 parties don't, I might have thought, walk out of a
11 mediation to walk back into court, having achieved a
12 resolution at a mediation so - - -

13 HIS HONOUR: So there is a public purpose if you like, an
14 obvious purpose that one can attribute objectively,
15 that's probably the correct way of looking at it. You
16 can attribute an objective intention to the parties in
17 the circumstance that the words would be given a wide
18 meaning.

19 MR GARDE: Yes, yes. There are many cases as Your Honour is
20 aware which refer to the importance of achieving finality
21 in litigation.

22 HIS HONOUR: Yes.

23 MR GARDE: And one would anticipate that in terms of settlement
24 arrived at following a mediation or in a mediation, the
25 objective of finality was very important.

26 HIS HONOUR: Yes.

27 MR GARDE: We have in this bundle also Your Honour, I won't
28 give other examples there but in this bundle we've got
29 IBM Australia, this is another arbitration clause in an
30 agreement covered by - governed by, or New South Wales,
31 expressed to govern any controversy or claim arising out

1 of or related to this agreement or the breach thereof.

2 HIS HONOUR: Yes.

3 MR GARDE: And if I invite - and this was referred in one of
4 the - in the case I've just taken Your Honour to but if
5 one turns then to p.475?

6 HIS HONOUR: Yes.

7 MR GARDE: And at the foot of that page at Letter F, we have
8 then President Kirby who says, "An important turning
9 point in the course of authority on the meaning to be
10 attributed to arbitration clauses was Heyman v. Darwins.
11 It was there emphasised that the phrase 'arising out of
12 or relating to the agreement' was capable of very wide
13 construction' ... (reads) ...in the appellate division of
14 the Supreme Court of South Africa". And that's there set
15 out. And at the end of the page, "Consequently if the
16 parties intended to submit their disputes arising out of
17 or connecting, their real agreement" sorry, "Or
18 concerning their real agreement to arbitration, it
19 followed a dispute about any term of the agreement will
20 be a dispute arising out of or concerning the agreement"
21 and there's a series of paragraphs there that discuss a
22 wide range of cases that I won't read out. But Your
23 Honour if one then goes to p.483?

24 HIS HONOUR: Yes.

25 MR GARDE: Justice of Appeal Clarke in his reasons for decision
26 is, if anything, even stronger. And he, His Honour says
27 at Letters A and B, "That meaning must be given to the
28 phrase 'related to this agreement or any breach thereof'"
29 a reference then to Ashville Investments, "It's not only
30 claims arising out of the agreement or any breaches of it
31 which are covered ... (reads) ...should not in the

1 absence of compelling reasons to the contrary be read
2 down". Fountain v. Alexander and the other authorities
3 are there listed.

4 HIS HONOUR: Yes.

5 MR GARDE: And His Honour then draws some conclusions and then
6 says in C, "There are no indications in the conflict that
7 the words should be construed narrowly nor in my opinion
8 are there any compelling reasons in favour of reading
9 down the meaning of the phrase. On the contrary there
10 are powerful considerations in favour of the contrary
11 view". A submission which we would in this context also
12 urge.

13 HIS HONOUR: Yes.

14 MR GARDE: And then there is Justice of Appeal Handley and His
15 Honour says at p.487, Letter B, the second sentence in
16 Letter B, "That part of the submission which contained an
17 agreement to refer controversies or claims arising out of
18 the agreement or the breach thereof ... (reads) ... in a
19 particular context the same words may also cover other
20 claims as well". And then His Honour goes on a sentence
21 later, "These are wide words which should not be read
22 down in the absence of some compelling reason for doing
23 so". His Honour then refers to the same authorities,
24 "These words can only have been added to include within a
25 submission claims other than in contract such as claims
26 in tort, in restitution or in equity, I can see no basis
27 for excluding claims arising under statutes which grant
28 remedies enforceable in or confer powers on courts of
29 general jurisdiction".

30 HIS HONOUR: Yes.

31 MR GARDE: So we have that case also Your Honour and then we

1 have in the next one - significantly Your Honour my
2 learned junior when searching for cases on this topic,
3 unearthed Justice Beach's position. So Thompson v.
4 Macedon Ranges Shire Council is to be found under this
5 head.

6 HIS HONOUR: Yes.

7 MR GARDE: So we note that so we've really been - - -

8 HIS HONOUR: Perhaps I should make a note again, that's in the
9 material - - -

10 MR GARDE: Yes, it is Your Honour.

11 HIS HONOUR: The last tab in - - -

12 MR GARDE: Yes.

13 HIS HONOUR: The last tab in the - - -

14 MR GARDE: Yes.

15 HIS HONOUR: In?

16 MR GARDE: In D1.

17 HIS HONOUR: Thank you. Yes.

18 MR GARDE: I can almost say Your Honour, res judicata.
19 But - - -

20 HIS HONOUR: Well yes.

21 MR GARDE: Well indeed Your Honour the position is to the
22 extent that His Honour did resolve the meaning of the
23 terms in, regarding specific performance and in
24 proceeding to dismiss the action. And in the absence of
25 any appeal from that decision, that decision, the outcome
26 of it and the issues resolved in it are binding in
27 accordance with the conventional approach to issue
28 estoppel and res judicata.

29 HIS HONOUR: Yes.

30 MR GARDE: So there is that also. Then in our bundle we've got
31 Roberts v. Hong Kong Bank of Australia Ltd and they're,

1 perhaps a little more to be gained, not I suspect not a
2 lot. That's Justice Lockhart dealing on p.9 with some
3 terms of settlement, Clauses 5 and 6. Six says, this is
4 a release, "Release for ever discharged the bank, its
5 directors, officers, servants, agents, successors and
6 assigned from all suits, causes of actions, claims,
7 demands, damages and costs which Roberts has at any time
8 has or had against the bank or such a persons jointly or
9 severally arising out of or in anyway related to the
10 subject matter of the proceedings".

11 HIS HONOUR: Yes.

12 MR GARDE: And then there's Clause 9 that's referred to and His
13 Honour doesn't say very much about the construction of
14 that but he does say under the quoted paragraphs that
15 Clause 9 "Provides therefore that the terms of settlement
16 shall not be construed as limiting the bank's rights
17 against Mr Roberts".

18 His Honour goes on, "The fact that the bank purports
19 to preserve its rights against Mr Roberts in respect of
20 not only the loan the subject matter of the proceeding
21 and the bank's cross claim" et cetera. I don't think
22 that really says a lot about it and that's not as helpful
23 as it emerges.

24 HIS HONOUR: No.

25 MR GARDE: The final one we had was Savcor, a decision of
26 Justice Barrett. Savcor v. the State of New South Wales
27 in 52 N.S.W.L.R. at 587.

28 HIS HONOUR: Yes.

29 MR GARDE: This is another commercial arbitration matter, an
30 arbitration agreement, and the relevant passage is at
31 p.597 Paragraph 39. There we have a reference to whether

1 it was a claim under or arising out of or in any way
2 related to the contract. Such a claim would to my mind
3 be beyond the scope of the under and arising out of
4 connectors. It was held in the Virgin Atlantic Airways
5 case that a claim based on misleading and deceptive
6 conduct was a claim arising out of a contract where the
7 conduct was engaged in during performance of the
8 contract.

9 Then there's *Hi-Fert v. Kiukiang Maritime Carriers*
10 of Justice Emmett where Justice Emmett is referring to at
11 20 that it's more expansive in connection with a
12 connector, that the matter of construction is wide enough
13 to include a claim alleging contravention of Part V of
14 the Trade Practices Act inducing the contract in
15 question.

16 Then we have in *O'Connor v. Lee Pty Ltd* in 1997
17 Justice Rolfe holding that a clause extending to any
18 dispute or difference concerning this agreement applied
19 to a claim on a quantum meruit. Then there's a reference
20 to Justice Sundberg in *Timmick v. Hammock*. Perhaps the
21 point to be made about all of these Your Honour is that
22 they all take a wide interpretation. It clearly depends
23 on the factual circumstances and the nature of the
24 dispute but all the cases that we've tracked down are
25 cases where the wide approach is confirmed.

26 Your Honour, they're the matters that we would put
27 in reply.

28 HIS HONOUR: Thank you. In this matter I propose to reserve my
29 decision and we'll adjourn sine die.

30 MR THOMPSON: Your Honour, may I address one issue just raised
31 by Mr Garde? He raise the issue of potable water. It's

