

69) The 1982 Water Supply Agreement and the works constructed in purported pursuance of it and the water supply provided in purported pursuance of it were all unlawful.

- a) The land provided was outside the Waterworks District and the approval of the Governor in Council was neither sought nor obtained, the supply therefore was unlawful. (s.186)
- b) The Approval of the Minister for the plans and specifications for the construction of the main along Edgcombe Road was neither sought nor obtained. S.307AA(5)
- c) The purported agreement was unlawful because by its specific terms it provided for water supply to land not owned by WHRD, namely the common property and the allotments not owned by WHRD and including the Appellants' Allotments.
- d) The purpose and effect of the agreement known to the Second Respondent was to enforce the "proviso" in company or conspiracy with others, namely WHRD and the First Respondent.

The scheme of the Respondents to give effect to the "proviso"

70) The Respondents:

- a) Represented that the private water supply and reticulation system was merely a private system and was not an "approved" water supply for the purpose of obtaining building permits.
- b) Represented that the Water Supply Agreement between itself and WHRD was a lawful and enforceable agreement.
- c) Represented that neither the Body Corporate nor the Appellants/Appellants land had a right to an approved reticulated water supply.
- d) Concealed the Submission referred to in condition 8 of Planning Permit 2191. They concealed it until 8th August 1995.²⁴ Such concealment was essential to their scheme.
- e) Gave effect to the "proviso" By making these representations.

Background to Justice Osborn's Reasons for Judgment.

71) The matter came on before Justice Osborn, presumably after he had read what is on the face of it a strong and correct judgment by Master Eftim

72) The Respondents repeated the **irrelevancies** which had misled Master Eftim. During these submissions Justice Osborn said: "*what has to be concealed is the existence of the cause of action, in a sense that begs the question, what the cause of action is - - -*"²⁵ (my emphasis) after which the following exchange took place:.

²⁴ See Indorsement of Claim at Appeal Book page D-460

²⁵ Transcript 31/10/06 page 43. lines 29 to 31.

MR DELANY: Well **we've assumed that the cause of action is there.** 

HIS HONOUR: Yes. As pleaded.

MR DELANY: Well, as pleaded, or in the affidavits.

HIS HONOUR: Yes.


MR DELANY: So really taken the view - - -

HIS HONOUR: The complaint is that made in the affidavits?

MR DELANY: Yes.


73) So Mr. Delaney not only did not know what the rights of action were but he didn't even know where to find them, so little wonder the Master was misled.

74) After hearing from Counsel for both Respondents, Justice Osborn, like Master Efthim before him, had no idea as to what he was required to adjudicate upon. On the morning of 1st November 2006 it was time for the Appellants' submissions.


75) On the morning of 1st November 2006, when the following exchange took place it became apparent that Justice Osborn had been misled in essentially identical manner as Master Efthim was misled. From the following exchange it is apparent that after listening to Counsel for the Respondents for a whole day, Justice Osborn, like Master Efthim before him, had no inkling as to the true right of action and thought that it was something to do with the "sequence of subdivision" or in other words, plans, **exactly as Master Efthim had been misled**²⁶: 

HIS HONOUR: Mr Thompson?

MR THOMPSON: Thank you, Your Honour.

HIS HONOUR: Just before we go to your submissions, I should just make sure that I have clear in my own mind the framework of things. **Essentially you make complaint about the sequence of subdivision of the Tylden Road land**, is that right? That's the first thing? 

MR THOMPSON: Yes. The sequence of subdivision, I'm not sure I term it that, no sir.

HIS HONOUR: Well you say that the land was **initially approved for subdivision as a whole** - - 

MR THOMPSON: Yes.

HIS HONOUR: **But not in fact subdivided in accordance with that initial approval.** 

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

HIS HONOUR: Well just let me make - go through them and let me tell you what I understand to be the underlying matters.

MR THOMPSON: Yes, sir.

HIS HONOUR: Not what your allegations are about them but that's the first area of concern as I understand it. The second as I understand it relates to guarantees called up by both the council and the Water Authority relating to the Tylden Road land, is that right?

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

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

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


HIS HONOUR: Right. The third area as I understand it that's been the subject of complaint relates to the approval of cluster subdivision plans relating to the Woodleigh Road land, is that right?

MR THOMPSON: Yes, it's related to the sealing rather than the approval.

HIS HONOUR: Yes.

MR THOMPSON: Yes, sir.

²⁶ Appellants Appeal Submission Part 1, paragraph 30)a) at Appeal Book page G-64

HIS HONOUR: And the fourth area relates to the refusal of water supply to the Woodleigh Road land, is that right? Again not in this case? 

MR THOMPSON: Again not in this case. The water of course is relevant but not in this case.

HIS HONOUR: Right, well - - -

MR THOMPSON: It doesn't form the core issue.

HIS HONOUR: Yes, all right. Well I'm not attempting to define the issues, I'm just indicating to you that it's within the framework of events relating to those matters that you seek to raise issues.

MR THOMPSON: Yes.



HIS HONOUR: And I'm really inviting you to confirm that in the broad, that's the framework of events in which you've made allegations and you - - -

MR THOMPSON: That's - - -

HIS HONOUR: And you now wish to raise what you say are new allegations?

MR THOMPSON: That's correct.

HIS HONOUR: Yes, all right. Now take me to your case as you wish?

 76) So – from his own words, the fact is that, after hearing from Counsel for the Respondents, Justice Osborn, had no idea whatsoever as to the rights of action but in relation to Tylden Rd he understood it to be exactly as wrongly understood by Master Efthim – **unlawful subdivision**. 

77) Then after discussion with myself, Justice Osborn understood that, in relation to Woodleigh Heights, the issue was related to condition 8 of the Planning Permit not having been complied with. At transcript page 108 and 109 the following exchange took place.

HIS HONOUR: Yes, that's not what I was putting to you Mr Thompson. You say it was in breach of the planning permit because - as I understand it, because there was no articulated water supply.

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

HIS HONOUR: Yes.

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

HIS HONOUR: That's what you say.

MR THOMPSON: Yes.

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

78) Page 113 lines 2 to 16

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

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

MR THOMPSON: No sir, it is not.