

**IN THE MAGISTRATES' COURT
OF VICTORIA
AT BROADMEADOWS**

No. N01349311

BETWEEN:

MACEDON RANGES SHIRE COUNCIL

Plaintiff

and

GLEN THOMPSON

First Defendant

CHERYL THOMPSON

Second Defendant

PLAINTIFF'S OUTLINE OF SUBMISSIONS

A. Court Book

1. The Plaintiff has produced a Court Book ("CB") to assist the Court in the Hearing of this matter.
2. CB (**Tab 6**) contains an Affidavit of Jacqueline Sue Partridge sworn 26 November 2008 ("the Partridge Affidavit") with exhibits (**Tabs 6.1 to 6.25**) which was filed by the Plaintiff in support of the Plaintiff's successful Application to have a stay of this proceeding lifted and for the Plaintiff to Amend its Complaint.
3. The Court Book contains other relevant documents which shall be relied on by the Plaintiff.

B. Amended Complaint

4. The Plaintiff issued a Complaint on 27 June 2000 (**Tab 6.1**) against the Defendants in respect of outstanding Rates, Charges and Interest pertaining to a property owned by the Defendants being all that land contained Lot 1 on Plan of Subdivision 134684 more particularly described in Certificate of Title Volume

9408 Folio 064 commonly known as The Tylden Road Industrial Land ("the Industrial Land").

5. The Complaint was amended pursuant to the Order of Registrar Horsburgh made 4 February 2009 to amend the amount claimed from \$13,943.14 to \$25,161.07 (*Tab 1*).
6. The Defendants have been the registered proprietors of the Industrial Land since 4 September 1981. The CB contains Certificate of Titles (*Tabs 8 and 9*). The Plaintiff's rely where necessary on section 6 of the *Transfer of Land Act 1958* (*Tab 27*).
7. The Defendants have been issued with Rate Notices in respect of the Industrial Land and since 1983 have failed and or refused to pay any of the amounts contained in the said Rate Notices.
8. Section 242(1) of the *Local Government Act 1989* (the 1989 Act) (*Tab 25*) provides:

Until evidence is given to the contrary proof is not required as to any of the following –

- (h) *the authority to bring proceedings;*
- (k) *that a document purporting to be issued by a Council was issued by the Council;*
- (l) *the declaration of any rate or charge;*
- (m) *the validity of the contents of any Council records or minutes;*

9. Section 242(2) of the *Local Government Act 1989* (the 1989 Act) provides:

A certificate certifying any matter relating to the contents of any document kept by a Council and purporting to be signed by the Chief Executive Officer is admissible in any proceedings as evidence of the matters appearing in the certificate.

10. Section 242(3) of the 1989 provides:

All courts, judges and people acting judicially must take judicial notice of such a signature and must presume that the certificate was properly signed until the contrary is proved.

11. Mr. Peter Johnson the CEO of the Plaintiff has signed a Certificate dated 30 November 2009 (*Tab 10*) certifying that:
 - (a) Notices of Rates and Charges and Extracts from the Rates Books of the Council in respect of the Industrial Land and attached to the certificate are true copies;
 - (b) The amounts in the Notices and Extracts remain unpaid.
12. The Plaintiff is entitled to charge interest on unpaid rates (s. 172 of the 1989 Act) (*Tab 24*).
13. The Plaintiff may commence proceedings to recover:
 - (a) unpaid rates or charges as a debt (s.180 of the 1989 Act)
 - (b) interest due to it on rates and charges (S. 172(4) of the 1989 Act) (*Tab 24*).
14. The Defendants remain indebted to the Plaintiff in the sum of \$26,637.13 which includes interest up to and including 16 December 2009.
15. In this regard the sum of \$1,873.50 being legal costs charged to the Defendants as detailed in the evidence of Lisa Kennedy of the Plaintiff has been allowed for.

C. Amended Defence

16. The Defendants seek to rely on a Final Defence dated 21 September 2009 May 2009 (*Tab 4*).
17. The Plaintiff has filed a Reply to the Final Defence dated 23 October 2009 (*Tab 4A*)
18. The Plaintiff submits that as Cheryl M. Thompson (the Second Defendant) is unrepresented that judgment ought to be entered against her for the full amount of the Plaintiff's claim together with costs.

18. The Final Defence raises a number of allegations, which the Plaintiff deals with below.
19. The Final Defence concerns two distinct parcels of land, commonly referred to as:
 - (a) the Woodleigh Heights Land ("WHL") that was owned by the Defendant up to November 1989 when the mortgagee in possession sold the WHL and accounted to the Plaintiff for outstanding rates owing to the Plaintiff from the Defendants on the WHL.
 - (b) the Tylden Road Land ("TL") of which the Defendants still own the Industrial Land which is the subject of the Plaintiff's Complaint for outstanding arrears of Rates and Charges.
20. The TL land can be separated into the Industrial Land and the Tylden Road Residential Allotments ("the residential allotments").

a. Paragraphs 1 to 23 of the Final Defence.

21. In short the Defendants assert:
 - (a) that the WHL was incorrectly rated by the Plaintiff so that the Rates and Charges levied by the Plaintiff on the WHL were excessive and hence the Plaintiff was overpaid by the mortgagee when the WHL was sold. The Defendants seek to set off this overcharge against any rates that may be found owing on the property ("the WHL set off claim"). See particularly paragraphs 13 to 23 of the Final Defence.
 - (b) that as a result of the Plaintiff's actions the Industrial Land was not subject to a lawful 6 lot Plan of Subdivision, rather they only obtained a one lot allotment and as such they suffered a loss in that they did not receive what

they had bargained for and/or that due to the calling up of Bank Guarantees to secure the construction of Road and water supply they were forced to sell the Residential Allotments as one parcel of land and not as individual allotments resulting in a loss to them. ("the TL set off claim")

22. Accordingly, the set off claims made by the Defendants are akin to an equitable set- off as the claim is unrelated to the Plaintiff's claim for outstanding Rates and Charges on the property.
23. The Plaintiff submits that the Defendants set off claims are hopeless and cannot succeed on a number of grounds as set out in the Reply dated 16 September 2009 (*Tab 4A*).

Previous Supreme Court Claims

24. The subject matter of the WHL set off claim has been the subject of two previous Supreme Court Proceedings:
 - (i) Supreme Court Proceeding No.7966 of 1995 (*the 1995 Claim Tab 14*).
 - (ii) Supreme Court Proceeding No.6231 of 2005 (*the 2005 Claim Tab 6.17*).
25. The subject matter of the TL set off claim has been the subject of the 2005 Claim and also a County Court Proceeding Court No. 1988/880949 (*the 1988 Claim Tab 19*)
26. The Defendants in the Final Defence rely on the causes of action, claims and damages pleaded in the 2005 Claim to support the WHL set off claim and the TL set off claim. (See paragraphs 1(a), 2, 3, 4, 5, 6, 8, 10, 11 and 17)

A. the 1988 Claim.

27. The 1988 Claim was settled by execution of Terms of Settlement dated 14 June 1991. (*Tab 20*)

B. the 1995 Claim.

28. The 1995 Claim was settled at a Mediation held on 29 July 1999 and Terms of Settlement executed (**Tab 17**).
29. The Defendants (as Plaintiffs in the 1995 Claim) refused to file a notice of discontinuance as required by the Terms of Settlement. The Defendants to the 1995 Claim brought an application to have the Terms of Settlement specifically performed and the action dismissed. Justice Beach delivered his Judgment on 1 September 1999 (**Tab 18**) declaring that the Terms of Settlement be specifically performed and further ordering that 1995 Claim stand dismissed.

C. the 2005 Claim

30. The Plaintiff brought an Application seeking to dismiss the 2005 Claim principally on the same grounds as now set out in the Reply.
31. The 2005 Claim was dismissed firstly by Order made 19 May 2006 by Master Efthim (as he then was) (**Tab 6.19**) (Efthim's decision) with such decision being upheld on Appeal by Justice Osborn (**Tab 6.21**) on 29 November 2006 (Justice Osborn's decision).
32. The Defendants sought to appeal Justice Osborn's decision and filed an Appeal to the Court of Appeal (**Tab 6.23**) but discontinued that Appeal on 23 June 2008 (**Tab 6.24**).
33. An application for Indemnity Costs against the Defendants was refused by the Court of Appeal in its Judgment handed down on 24 September 2009 (**Tab 30**).

(i) The WHL set off claim

34. Paragraphs 1 to 10, W1 to W71 and D1, D5 and D6 of the Statement of Claim in the 2005 Claim detail the Defendants claims in respect of the WHL set off claim.
35. Paragraphs 17 to 22, 63 to 84, 94 to 100 and 102 of Justice Osborn's decision aptly summarizes the issues concerning the WHL claim and the defences raised by the Council.
36. Paragraphs 144 to 184 of Justice Osborn's decision sets out his conclusions and findings in respect of the WHL claim and the defences raised by the Council.

(ii) The TL set off claim

37. Paragraphs 1 to 10, T1 to T34 and D1, D2 and D4 of the Statement of Claim in the 2005 Claim detail the Defendants claims in respect of the TL set off claim.
38. Paragraphs 3 to 16, 23 to 62, 82 to 84, 94 to 100 and 101 of Justice Osborn's decision aptly summarizes the issues concerning the TL set off claim and the defences raised by the Council.
39. Paragraphs 103 to 143 and 182 to 184 of Justice Osborn's decision sets out his conclusions and findings in respect of the TL set off claim and the defences raised by the Council.

(a) *Limitations of Action Defence*

40. The Plaintiff asserts that the WHL and TL set off claims sought to be raised by the Defendants as a defence in this proceeding are Statute Barred by reason of the operation of section 5(1) of the *Limitations of Actions Act 1958*.
41. Paragraphs 32 to 36 of Efthim's decision concisely set out the Defendants' argument as to why in the 2005 claim the WHL claims were not Statute Barred.

42. In essence the Defendants advanced an argument (paragraph 36) that it was not until August 2000 that the First Defendant became aware of the facts which enabled him to reconcile the true position in respect of the WHL and the TL.
43. In both Master Efthim decision (paragraphs 50 to 62) and Justice Osborn's decision (paragraphs 108 to 144 to 174) it is made clear that the Defendants had knowledge of all of the facts that gave rise to the claims raised in those proceedings in the later part of 1987 if not before.
44. In respect of the WHL set off claim the Defendants knew from at least August 1987 that a reticulated potable water supply was provided for in 1982. The WHL was sold in November 1989 and accordingly the cause of action at the latest arose at this time. It must be remembered that the Defendants have not owned the WHL since November 1989.
45. The same must be said for the WHL set off claim alleged by the Defendants in this proceeding.
46. Both the 1995 Claim and the 2005 Claim were based on the premise that the WHL was at all times entitled to a reticulated water supply yet the Council represented that it was not and hence when the WHL was sold by the mortgagee in possession in 1989 it was sold undervalue.
47. The Defendants now assert that because the WHL was never entitled to a reticulated water supply the Plaintiff has somehow levied the Rates and Charges based on the WHL having water available to it and as such the Plaintiff has had and received monies to the use of the Defendants (paragraphs 13 to 23 of the Final Defence).
48. The Defendants assert that they could not and did not challenge the rates at the time levied because of the Plaintiff's concealment.

49. The Plaintiff submits that by reason of Justice Osborn's finding as to the Defendants knowledge of the WHL set off claim any such argument is not sustainable and as such the Plaintiff submits it was always open to the Defendants to plead such a claim in the alternative in the 1995 and 2005 Claims.
50. Further, this cause of action was identified by the Defendants as being available to them as far back as 2 August 2000 in a Notice of Defence filed in this proceeding. (*Tab 6.2 paragraphs 37 to 40*).
51. The Plaintiff submits that the Defendants WHL and TL set- off claims are Statute Barred.

(b) Releases

52. Justice Osborn found that the Release given by the parties in the 1995 Claim (*Tab 17*) ("the 1999 Release") was an effective bar to any further claims in respect to the WHL. (See paragraphs 175 to 179 of the Osborn decision).
53. Similarly, the Plaintiff submits that it must be found that the 1999 Release is an effective bar to any further claim that the Defendants now seek to raise in respect of the WHL.
54. Justice Osborn found that the Release given by the parties in the 1988 Claim (*Tab 20*) ("the 1991 Release") was an effective bar to any further claims in respect to the TL. (See paragraphs 103 to 107 of the Osborn decision).
55. Similarly, the Plaintiff submits that it must be found that the 1991 Release is an effective bar to any further claim that the Defendants now seek to raise in respect of the TL.

(c) *Estoppel*

56. The Plaintiff submit that the principals of Anshun and Issue Estoppel prevent the Defendant from raising the WHL and TL set- off claims.

(i) *Issue Estoppel*

47. The Osborn decision decided a number of issues against the Defendants and as such this Court is now estopped from the further determination of these issues.

(a) Justice Osborn found that the causes of action pleaded in the 2005 Claim in respect of the WHL and TL were Statute Barred;

(b) Justice Osborn found that the 1999 Release was a bar to any further claim based on the WHL and the 1991 Release was a bar to any further claim based on the TL.

(ii) *Anshun Estoppel*

48. The principle of Anshun Estoppel¹ is succinctly set out in Efthim's decision at paragraph 75.

49. Should this Court find that any of the WHL set off claims and/or the TL set off claims are new claims and are not the subject of the 1999 Release or the 1991 Release (which the Plaintiff denies) then the Plaintiff submits that they could have and ought properly have been agitated in the 1988, 1995 and/or 2005 Claims and hence the Plaintiff now submits that the Defendants are estopped from raising these claims as defences in a subsequent proceeding.

50. This is especially so when one considers:

(a) the Notice of Defence dated 2 August 2000 (**Tab 6.2**) expressly raised the WHL and TL set off claims that the Defendants now rely on;

¹ Port of Melbourne Authority v. Anshun Pty Ltd [1981] 147 CLR 589, Gibbs, CJ., Mason and Aickin J.J. at 602

- (b) the Defendants issued the 2005 Claim with the clear view of agitating matters which they had contemplated as raising as defences in this proceeding. See letter from the Defendants then solicitors Baldock Stacy & Niven dated 25 August 2004 (Tabs 6.11 to 6.16).

b. Paragraphs 24 to 27 of the Final Defence.

(i) Plaintiffs Claim is not Statute Barred.

51. The Plaintiff denies its claim for unpaid Rate, Charges or Interest is Statute Barred by operation of section 5 of the Limitation of Actions Act 1958.

52. Section 387 of the *Local Government Act* 1958 (the 1958 Act) (**Tab 22**) provided:

s.387(1):

All rates and other moneys which have become or become due under any Act in respect of any property to any municipality by any person whomsoever, shall with interest thereon as in this Act provided be and until paid remain a charge upon such property.

53. Section 156 of the 1989 Act (**Tab 24**) provides:

s.156(6):

A rate or charge which is declared in relation to land and is unpaid and any unpaid interest on such a rate or charge and any costs awarded to a Council by a court or in any proceedings in relation to such a rate or charge or interest are a first charge on the land.

54. Section 20 of the *Limitation of Actions Act* 1958 (**Tab 21**) provides:

s.20(1):

No action shall be brought to recover any principal sum of money secured by a mortgage or other charge on property, whether real or personal, after the expiration of fifteen years from the date when the right to receive the money accrued, notwithstanding that the money is by any Act or instrument expressed to be a charge until paid.

s. 20(4):

Nothing in this section shall apply to-

(a) ...

(b) the recovery by any statutory authority of any rates or other moneys which by any Act are until paid remain a charge on land.

55. Accordingly, the Plaintiff submits that no limitation period applies to the unpaid Rates, Charges and Interest that the Plaintiff now claims against the Defendants.

c. Paragraphs 28 to 33 and 34(m – o) of the Final Defence.

(i) Set- off Already Claimed.

56. The Defendant's allegations have no merit.

57. The Defendant's must substantiate the entitlement to set off any sum against outstanding Rates and Charges.

58. No evidence in this regard has been led by the Defendants as to what loss or damages they have sustained.

59. The Plaintiff's also note the application of section 179 of the 1989 Act

(ii) Lack of Jurisdiction

60. This Court lacks jurisdiction to enquire into whether the sum charged by the Plaintiff on the WHL was correct or not.

61. Sections 183 to 185 of the 1989 Act and where necessary Part III of the *Valuation of Land Act 1960 (Tab 29)* set out the criteria and mode of challenging Rates and Charges levied by Council.

d. Paragraphs 34(a) to (k) of the Final Defence

62. The Defendants assertions are misconceived.

63. The Industrial Land was at all relevant times rateable land within the meaning of section 251 of the 1958 Act **(Tab 22)** and section 154 of the 1989 Act **(Tab 24)**.

64. Further this Defence is now either:

- (a) Statute Barred by operation of section 5 of the Limitation of Actions Act 1958;
- (b) The subject of the 1991 Release.
- (c) Subject to the principle of Anshun Estoppel by reason of the fact that it could of and should have been the subject of the 1998 Claim or the 2005 Claim.
- (d) Subject to the principle of Issue Estoppel in light of the judgment of Justice Osborn as to his findings concerning the matters referred to in 64 (a) – (c).
- (e) Subject to the operation of section 179 of the 1989 Act.

e. Paragraphs 34(l) to (m) of the Final Defence

65. Prior to this proceeding the Plaintiff had issued two other Magistrates Court Complaints seeking outstanding Rates in respect of the property from one or both of the Defendants.

- (i) Default Summons filed 4 December 1987 No D32/88 for \$4,426.36 against the First Defendant (**Tab 12**). This proceeding was discontinued by the Plaintiff filing of a Notice of Discontinuance on 16 February 2001 (**Tab 13**).
- (ii) Complaint filed 17 June 1991 No 212/91 for \$3,385.65 against the Defendants (**Tab 11**). This Complaint was withdrawn on 12 December 1991 as the Complaint bears.

66. The discontinuance or withdrawal of a proceeding is no bar to a subsequent proceeding for the same cause of action unless the discontinuance or withdrawal is by leave and the order giving leave otherwise directs.²

DATED: 16 DECEMBER 2009.

MADDOCKS LAWYERS.

² Volume 1 Civil Procedure paragraph 25.02.30; Volume 3 Civil Procedure O4 r 4.09 to 4.11 and *Lawson v. Wallace* [1968] 3 NSWLR 82