

Form 9A

Rule 9.01(2)

IN THE MAGISTRATES' COURT
OF VICTORIA
AT BROADMEADOWS

No. N01349311

BETWEEN

MACEDON RANGES SHIRE COUNCIL

Plaintiff

and

GLENN THOMPSON

First Defendant

and

CHERYL THOMPSON

Second Defendant

REPLY TO FINAL DEFENCE

Filed on behalf of: The Plaintiff

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Attention: Suzanne Tinkler

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To the Defendants' Final Defence dated 21 September 2009 (**the Final Defence**), the Plaintiff says the following by way of reply:

1. Save for any admissions made by the defendants to the matters pleaded in the Plaintiff's Amended Complaint dated 11 March 2009, and other than specifically pleaded herein, the plaintiff joins issue with each and every allegation made in the Final Defence.
2. As to paragraphs 1 to 23 and 29 to 33 of the Final Defence, and insofar as the land described as 'Tylden Rd' relates to the land described in certificate of title volume 9408 folio 064 (**the Tylden Road Land**), and the land described as 'Woodleigh Heights' relates to lots 1, 2, 7, 10, 12, 14, 15, 18, and 27 on plan of cluster subdivision CS1134

and being all of the land described in certificates of title volume 9171 folios 687, 688, 693, 696, 698, 700, 701, 704, and 713 respectively (**the Woodley Heights Land**), the plaintiff says as follows:

- (a) the plaintiff relies on section 5 of the *Limitation of Actions Act* 1958 and says that the claims made in the Final Defence are statute barred;
- (b) the plaintiff relies upon the doctrine of issue estoppel and says that the defendants are estopped from raising their defence as the matters raised in the Final Defence were finally determined by the judgment of the Honourable Justice Osborn on 29 November 2005 in the Supreme Court of Victoria proceedings by the defendants against the plaintiff and the Coliban Region Water Authority (being proceedings 6231 of 2005) (**the 2005 Supreme Court Proceeding**);
- (c) further or in the alternative, the plaintiff relies upon the doctrine of Anshun estoppel and says that the defendants are barred and estopped from raising their defence as:
 - (i) the matters raised in the Final Defence might have been brought forward in the 2005 Supreme Court Proceeding;
 - (ii) the defendants have been unreasonable in refraining from raising the matters now raised in the Final Defence in the 2005 Supreme Court Proceeding; and
 - (iii) the matters raised in the Final Defence were so closely connected with the subject matter of the 2005 Supreme Court Proceeding that it was to be expected that the defendants would raise these matters in that action.

- (d) further or in the alternative, the defendants are estopped from raising the matters raised in the Final Defence by way of a release previously provided by the defendants in relation to the Tylden Road Land.

Particulars

- (i) By proceeding number 880949 of 1988 in the County Court of Victoria at Melbourne issued on 7 November 1988 (**the 1988 County Court Proceeding**), the defendants claimed damages in relation to the Tylden Road Land from the plaintiff and another;
- (ii) On 14 June 1991, the defendants compromised the 1988 County Court Proceeding by entering into terms of settlement with the plaintiff and another defendant to those proceedings which provided that upon payment of the sum of \$40,000 by the plaintiff and another defendant, the proceedings would be struck out and the defendants would release the plaintiff as follows :
- A. The Plaintiffs release the Defendants from all claims, suits and demands whatsoever the subject matter of this proceeding.
- (iii) On 29 November 2006, the Honourable Justice Osborn found in the 2005 Supreme Court Proceeding that the defendants' claim with respect to the Tylden Road Land was the subject of the release provided for in the terms of settlement to the 1988 County Court Proceeding.

- (e) further or in the alternative, the defendants are estopped from raising the matters raised in the Final Defence by way of a release previously provided by the defendants in relation to the Woodleigh Heights Land.

Particulars

- (i) By proceeding number 7966 of 1995 in the Supreme Court of Victoria at Melbourne issued on 26 October 1995 (**the 1995 Supreme Court Proceeding**), the defendants claimed damages in relation to the Woodleigh Heights Land from the plaintiff and another;
- (ii) On 29 July 1999, the defendants compromised the 1995 Supreme Court Proceeding by entering into terms of settlement with the plaintiff and another defendant to those proceedings which provided that the defendant would discontinue the proceedings upon the payment of the sum of \$25,000 from the plaintiff and another defendant and that the defendants would release the plaintiff as follows:
- A. The Plaintiffs and the Defendants agree to release each other from all actions, suits, demands and costs arising out of, or in any way related to the subject matter of the proceedings.
- (iii) On 1 September 1999, the Honourable Justice Beach of the Supreme Court ordered that the terms of settlement ought be specifically performed;
- (iv) On 29 November 2005, the Honourable Justice Osborn found in the 2005 Supreme Court Proceeding that the release provided for in the terms of settlement to the 1995 Supreme Court Proceeding was a

complete bar to the cause of action involving the Woodleigh Heights Land.

3. In relation to paragraphs 24 to 27, the plaintiff says as follows:

- (a) all unpaid rates and interest due to the plaintiff remain a charge upon the Tylden Road Land pursuant to section 156(6) of the *Local Government Act* 1989 (Vic) and section 387 of the *Local Government Act* 1958 (Vic); and
- (b) pursuant to section 20(4) of the *Limitation of Actions Act* 1958, there is no limitation on recovery by the plaintiff of any rates owing which are, and until paid, remain a charge on land.

4. Further, in relation to paragraphs 14 to 23 and also in respect of paragraph 34, the plaintiff says as follows:

- (a) the rates levied on the defendants in relation to the Woodleigh Heights Land have not been quashed by any other proceedings;
- (b) accordingly, pursuant to section 179 of the *Local Government Act* 1989, the defendants are not entitled to dispute the invalidity of those rate notices;
- (c) by reason of sections 183 or 184 of the *Local Government Act* 1989, the Magistrates' Court lacks jurisdiction to hear the matters the subject of the defendants' defence concerning the valuing or rating of the land referred to in paragraphs 14 to 23 and 34 of the Final Defence;
- (d) by reason of sections 183(2) or 184(1B) of the *Local Government Act* 1989 the defendants are now barred from bringing any proceeding in the Victorian Civil and Administrative Tribunal or in the County Court of Victoria concerning the

valuing or rating of the land referred to in paragraphs 14 to 23 and 34 of the Final Defence.

5. Further, in relation to paragraph 34(c), the plaintiff says as follows:

- (a) the land described by the plaintiff in the rates notices issued between 1983 and 1991 as Lot 1 LP 135199, Lot 2 LP 135200 and lots 3 to 6 LP 135201 relates to the land described in certificate of title volume 9408 folio 064;
- (b) the land described by the plaintiff in the rates notices issued from 1991 until present as Lot 1 LP 134684 also relates to the land described in certificate of title volume 9408 folio 064;
- (c) further and in the alternative, if, (which is denied), the Tylden Road Land was misdescribed in the rates notices issued between 1983 and 1991, pursuant to section 345(2) of the *Local Government Act* 1958 (Vic), this does not prevent recovery of the outstanding rates.

6. Further in relation to paragraph 34(l), the plaintiff says as follows:

- (a) proceeding D32 of 1988 was issued in the Bendigo Magistrates' Court on 4 December 1987 as Proceeding 873291 by the President, Councillors and Ratepayers of the Shire of Kyneton (**the Shire**), a predecessor of the plaintiff against the defendant, and was later transferred to the Magistrates' Court of Kyneton and became proceeding D32 of 1988 (**the 1988 proceedings**);
- (b) the 1988 proceedings were discontinued by the plaintiff on 16 February 2001 and were not finally determined and therefore the plaintiff is not prevented from pursuing the claim in this proceeding;

- (c) further and in the alternative, if, (which is denied), the discontinuance of the 1988 proceedings prevents the plaintiff from pursuing a claim made in those proceedings, that claim was confined to rates due and payable by the defendant to the plaintiff up to 23 November 1987 calculated then as \$4,426.36 and cannot apply to the balance of the plaintiff's claim;
- (d) proceeding 212 of 1991 (**the 1991 proceedings**) were issued in the Magistrates' Court at Bendigo on 17 July 1991 by the Shire against the defendant, and were later transferred to the Magistrates' Court of Kyneton;
- (e) the 1991 proceedings were withdrawn by the Shire on 12 December 1991 and not finally determined and therefore the plaintiff is not prevented from pursuing the claim in this proceeding;
- (f) further and in the alternative, if, (which is denied), the withdrawal of the 1991 proceedings prevents the plaintiff from pursuing a claim made in those proceedings, that claim was confined to rates due and payable by the defendant to the plaintiff up to 17 July 1991 and calculated then as \$3,385.65 and cannot apply to the balance of the plaintiff's claim;

7. Further, in relation to paragraphs 34(m) and (n), the plaintiff says as follows:

- (a) the Magistrates' Court has jurisdiction to hear the plaintiff's complaint as the validity of the plaintiff's exercise of its powers to rate the Tylden Land pursuant to the *Local Government Act* 1958 (Vic) is not sought to be determined or declared in this proceeding.

FILED: 23 October 2009

Maddocks

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Solicitors for the Plaintiff

Richard A Harris