IN THE SUPREME COURT OF VICTORIA AT MELBOURNE.
COURT OF APPEAL.
CIVIL DIVISION.

Court Number: **6321 of 2005**

B E T W E E N :

GLENN ALEXANDER THOMPSON
& CHERYL MAREE THOMPSON *Appellants*

- and -

MACEDON RANGES SHIRE COUNCIL *First Respondent*

- and -

THE COLIBAN REGION WATER AUTHORITY *Second Respondent*

APPELLANTS' AFFIDAVIT AND SUBMISSION IN REPLY TO THE SECOND RESPONENT'S APPLICATION FOR INDEMNITY COSTS.

Date of Document: - 2nd September 2008
Filed on behalf of: The Appellants
Prepared by: The Appellants

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1) I Glenn Alexander Thompson, formerly of 68 Summer St Orange but now of 1/42 March Street Orange in the state of New South Wales and of 14 Coutts Street Bulimba in the state of Queensland make affirmation and say as follows.

2) I was, until the Appeal was discontinued, the First Appellant in the Appeal and I make this affidavit from my own knowledge, beliefs and opinions.

3) Steven Mark Edward, Solicitor for the Second Respondent, has made application for indemnity costs in the Appeal.

4) In support of the application, at paragraph 30 of his affidavit of 22nd July 2008, Mr. Edward alleges:

   a) That I made "numerous **unfounded** allegations of fraud, scandalisation and vilification of the Court and legal representatives" (my emphasis); and

   b) "The Appellants have now abandoned their appeal ….. without explanation or apology."

5) The Application is supported by the Outline of Submissions authored by Major General Garde Q.C. and co-signed by Ms. Sharon Burchell.

6) At this point I repeat and reassert each and every allegation made by me.

7) I deny that my allegations are unfounded or constitute either scandalisation or vilification and I require this Court to adjudicate on this issue.

8) My allegations, if proven are extremely serious however the present hearing is not to prove or disprove my allegations, the present hearing is merely to determine whether my allegations are unfounded or not unfounded. Having said that, my allegations remain extremely serious even if merely not unfounded.

9) For reasons set out below I abandoned the appeal however the Second Respondent, via its legal representatives have now forced this further stage upon me. For the purpose of defending the present application I must address, and the Court must consider, the facts which I say provide grounds for a belief as to my allegations and that is all I do here. Notwithstanding that some of the points which may have been addressed at Appeal must now be addressed, this is not and is not intended by me to be a quasi appeal.

10) The Appellants admit and say that it is possible that a court would properly find against them on the facts however to date this has not occurred. Master Efthim, as a matter of fact, was misled and did not adjudicate on the relevant facts and I say that Justice Osborn, as a matter of fact, manufactured his own set of facts.

11) I further say that the present application, purportedly by the Second Respondent is itself unfounded.

12) I say that each and every one of my allegations is grounded in fact sufficient that my numerous allegations are **not unfounded** and I say that this Court cannot find otherwise.

13) Now produced and shown to me and marked with the letters "GlennAT" is a folder containing true copies of the documents referenced herein.

My allegations.

14) At the outset I say that, although the allegations are ostensibly allegations of the Appellants, the fact is that they are my personal allegations, made by me alone.

15) At the time of bringing the proceeding my allegations were limited to allegations of fraud as against the Respondents. Due to the conduct, or as I allege misconduct, of proceedings in this Court my allegations, alleged to be unfounded, are now far more serious and as set out below

include allegations that there are grounds for a belief that Justice Osborn fabricated his Reasons for Judgment.

16) My allegations are:

a) That the Respondents had committed a fraud against the Appellants.

b) That Counsel for the Respondents brought strike out proceedings which alleged that the rights of action offended either one or more of res judicata, Anshun and the Limitation of Actions Act.

c) That the strike out grounds did not deny any of the things alleged.

d) That essential to such an application and the defence of such an application is the precise and accurate identification of those matters and things constituting or giving rise to those rights of action.

e) That Counsel for the Respondents did not identify the rights of action complained of by them but instead, to the specific exclusion of the matters and things giving rise to the rights of action, they either carelessly or deliberately misled Master Efthim into wrongly believing:

i) In relation to Tylden Rd that unlawful plans and unlawful sealing of those plans constituted the right of action.

ii) In relation to Woodleigh Heights that knowledge of the water supply provided pursuant to the Water Supply and Water Supply Agreement referred to in the Appellants letter of 24th August 1987 was relevant and disclosed knowledge of the right of action as early as that time.

f) That Mr. John Middleton Q.C. (now Justice Middleton of the Federal Court) Counsel for the Appellants also failed to identify the rights of action and either carelessly or negligently, failed to put the Appellants case at all.

g) That as a consequence of being misled by Counsel for the Respondents and the failure of Mr. Middleton, **to the specific exclusion** of the matters giving rise to the rights of action, Master Efthim made judgment in relation to those things set out in subparagraph e)i) and e)ii) above and as far as relevance goes, he may as well have made judgment against the Appellants based upon what they had for breakfast.

h) That due to fact that he was misled Master Efthim did not adjudicate on the rights of action therefore the Appellants appealed before Justice Osborn for the specific purpose of having the matter adjudicated on the true issues and facts.

i) That the Respondents repeated their misleading submissions before Justice Osborn.

j) That the Appellants made submissions to Justice Osborn as to:

   i) Those things set out in sub paragraphs a) to g) above.

   ii) Those things comprising or constituting the true right of action.

k) That after the submissions by the Appellants, Justice Osborn was aware of grounds for a belief by the Appellants and all reasonable people aware of the facts that:

   i) The Respondents had committed acts of fraud,

   ii) Counsel for the Respondents had misled Master Efthim,

   iii) Counsel for the Appellants failed to put the Appellants' case,

   iv) Master Efthim (the court) had made Judgment on entirely irrelevant matters,

   v) Counsel for the Respondents had failed to put any case at all in relation to the true rights of action now known to Justice Osborn.

   vi) Major General Greg Garde had repeatedly misled Courts.

l) That faced with the implications of the truth of these facts giving rise to those beliefs by the Appellants, Justice Osborn did, in the absence of relevant submissions from the Respondents, manufacture and introduce without notice arguments and facts of his own making, and found against the Appellants on each of these arguments and facts manufactured by him.

m) That Justice Osborn did then make and publish Reasons for Judgment which, in substantial part:

   i) Set out reasons personally introduced, without notice, by Justice Osborn and then determined in the complete absence of evidence and relevant submissions; and/or

   ii) Fly in the face of the facts and the law.

n) That Justice Osborn's Reasons for Judgment are constructed in such a manner as to ignore, deny and conceal those things set out in subparagraphs a) to g) and k)vi) above.

o) That the effect of the Judgment of Justice Osborn was to ignore, deny and effectively conceal those things set out in subparagraphs a) to g) and k)vi) above.

p) That after publication of Justice Osborn's Reasons for Judgment and before Justice Osborn made any orders, the Appellants put Justice Osborn on notice that they were aware that his Reasons for Judgment were manifestly wrong.[1]

[1] Plaintiffs' Costs Submission Appeal Book page G-185

q) That in knowledge that his Reasons for Judgment were wrong Justice Osborn made orders purportedly based on those reasons.

r) That in knowledge of things providing reasonable grounds for a belief as to the truth of the matters set out in subparagraphs a) to g) and k)vi) above Justice Osborn made indemnity costs orders against the Appellants, at least in part, for having said those truths.

s) That Justice Osborn subsequently made and published purported Authenticated Orders of this Court which were manifestly wrong and contained "complimentary errors", the effect of which was to make the Appellants appeal out of time and, in full knowledge of the wrongness of these purported Authenticated Orders, the Respondents sought to have the Appeal ruled out of time[2].

t) That by acting in such a manner, Justice Osborn acted to ignore and deny and effectively conceal the truth of each of the things alleged by the Appellants, and now referred to in paragraphs a) to g) and k)vi) above.

17) The Reasons for Judgment published by Justice Osborn do, as detailed below, as a matter of fact, fly in the face of the facts and the law and each and every one of these wrong reasons goes to and has the effect of ignoring, denying and concealing the facts which I say provide grounds for a belief as to the things alleged by me as set out in paragraphs 16)a) to 16)g) and 16)k)vi) above and Justice Osborn's Reasons for Judgment and his purported Authenticated Orders themselves give rise to the balance of my allegations.

18) On the face of it there are grounds for a belief that Justice Osborn has acted as apologist for each of these entities and things or for some other ulterior purpose and in doing so, he has compromised both himself and this Court and has constructed his Reasons for Judgment for an ulterior purpose.

19) There are grounds for a belief that the proceeding before Justice Osborn was a Kangaroo Court in the true meaning of the term.

The present Application, purportedly by the Second Respondent.

20) Messrs Edward and Garde and Ms. Burchell have made this present application, purportedly on behalf of the Second Respondent.

21) They **do not provide any evidence to show that my allegations are unfounded** but instead provide verisimilitude to their assertions by purporting to rely on the Judgments of both Master Efthim and Justice Osborn.

22) The present application by the Second Respondent relies upon the fact that the truths said by me are ignored, denied and concealed by the Reasons for Judgment of Justice Osborn and the fact that

[2] Exhibit GlennAT at Tab 34

Master Efthim was misled by them and as a consequence delivered what is a nonsense, irrelevant, Judgment.

My allegations are not unfounded.

23) In reply to the Summons of the Second Respondent I now demonstrate that my allegations are not unfounded.

24) I do not intend to completely dissect Justice Osborn's Reasons for Judgment at this time, the old adage "one can't be a little bit pregnant" applies.

25) The evidence is such that there are grounds for a belief that Justice Osborn fabricated his Reasons for Judgment with respect to both the Tylden Rd and the Woodleigh Heights sections of his reasons. For the present purpose I will only demonstrate those grounds with respect to Woodleigh Heights but for completeness I will include snippets from the Tylden Rd section.

26) I will also demonstrate grounds for a belief as to one aspect only of the fraud by the Respondents.

27) I will also demonstrate grounds for a belief that Major General Garde Q.C. does mislead the Courts.

Justice Osborn, Reasons for Judgment in relation to Woodleigh Heights.

Factual Background.

28) By Application dated 10th November 1978 K.R. and Y.R. Buchanan applied to the First Respondent for a Planning Permit for a "Rural Residential" cluster subdivision which subsequently became known as Woodleigh Heights.[3]

29) Under the then Shire of Kyneton Planning Policy, subdivision in the area of the Woodleigh Heights land was restricted to six acre allotments without a reticulated water supply and three acre allotments with a reticulated water supply.[4]

30) At that time (as demonstrated later in this document) the subject land was part within and part without the Water District of the Second Respondent.

31) The subject land and surrounding area was not supplied with water by the Second Respondent and, being partly outside the Water District, the subject land could not be supplied except with permissions of the Governor in Council.[5]

32) Because the land could not be supplied, the First Respondent did not refer the plans to the Second Respondent as it was otherwise required to do.[6]

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[3] Exhibit GlennAT at Tab 1
[4] Exhibit GlennAT at Tab 2 – first paragraph, page 7
[5] S.186 Water Act 1958 at Exhibit GlennAT at Tab 12

33) The proposed Woodleigh Heights subdivision was for 45 two acre allotments together with 30 acres of common property giving an average of approximately 1 allotment for every 2.66 acres or almost three acres and was therefore prohibited by the First Respondent's Planning Policy.

34) The Application for permit was accompanied by plans setting out:

a) The allotment sizes and dimensions

b) The common property dimensions

c) The proposed roads

d) All other necessary things.

35) In recognition of the Planning Policy and the fact that the area was not and could not be supplied with water, the Application was also accompanied by a Submission dated 3rd November 1978[7]. and which submission:

a) Contained a proposal for and plans for a private reticulated water supply including a lake, header tanks and reticulation system.

b) stated "*This application seeks by supplying its own water to comply with the spirit of the three acre minimum .....*".[8]

36) The Application and Submissions both record "Rural Residential".

37) The First Respondent considered that Application. Its working papers[9] in that consideration record the approval conditions and reasons including:

a) "cluster type development including water/open space average lot size 2 ac *" (note asterisk)

b) "* justification for lesser lot size than 3 acs is the fact that recreational fee paid ....." (note asterisk)

38) The First Respondent justified allotment size less than 3 acres which was the minimum with a reticulated water supply. There was no justification for less than 6 acres because the proposed private water supply and reticulation system satisfied the First Respondents planning policy in this regard.

39) Planning Permit 2191[10] was issued on or about 15th November 1978.

40) Condition 8 of Planning Permit 2191 states:

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[6] See Paragraph 11 of Statement of Claim at Appeal Book page D-473 and First Respondents Defence at Appeal Book page D-491

[7] Appeal Book page D-1984

[8] Appeal Book page D-1991

[9] Exhibit GlennAT at Tab 3

[10] Exhibit GlennAT at Tab 4

"the development to be carried out in accordance with the **plans** and **submission** which formed part of this application" (my emphasis).

41) During the period 15th November 1978 until in or about August 1979 the process of subdivision occurred, in purported accord with the plans and submission referred to in condition 8 of Planning Permit 2191.

42) In or about August 1979 the First Respondent sealed the plans of Cluster Subdivision.

43) On 9th August 1979 the Registrar of Titles registered Cluster Subdivision number CS1134.

44) The Ninth Schedule to the Plans registered by the Registrar of Titles record that allotments 1 to 45, which at that time was all of the allotments, may be used for "Residential and pastoral purposes".[11].

45) The land was then advertised for sale as "Rural Residential".[12].

46) The Appellants purchased their allotments in November 1979.

47) By application dated 19th November 1980[13] K. Buchanan applied to the First Respondent to erect a dwelling on lot 9 of CS1134 being a Woodleigh Heights Allotment.

48) The Application was approved on conditions 1,2,7 of the First Respondents working papers[14] and the additional condition "Water".

49) At that time (as demonstrated later in this document) the land remained part outside the Water District of the Second Respondent and the only available reticulated water supply (to the extent it existed) was the private reticulated water supply.

50) On 19th November 1980 K.R. & Y.R. Buchanan applied to the First Respondent for a Planning Permit for the Cluster Re-Development of the Woodleigh Heights land subdividing each existing allotment into three allotments and to construct a "holiday unit" on each allotment[15].

51) Planning Permit number 2784[16] was issued permitting the cluster re-development and "holiday units".

52) Planning Permit 2784 had no conditions whatsoever relating to water and was permitted on the basis of the then existing (to the extent it existed) private reticulated water supply.

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[11] Appeal Book page 1322
[12] Appeal Book page D-1945
[13] Exhibit GlennAT at Tab 5
[14] Exhibit GlennAT at Tab 5
[15] Exhibit GlennAT at Tab 6
[16] Exhibit GlennAT at Tab 7

53) Planning Permit 2784 was issued with the secret and unlawful "***proviso*** *that the lots would remain as part of the total resort development*" [my emphasis - refer to "*proviso*" detailed in Second Respondents Minutes as detailed in paragraphs 198) to 223) below].

54) At the time of issuing Planning Permit 2784 the land remained outside the Second Respondent's Waterworks District (as demonstrated later in this document).

55) Notwithstanding that the plans of Cluster Re-Development had not yet been sealed by the First Respondent and not registered by the Registrar of Titles, the First Respondent issued Building Permit number 3851 on 6th May 1981 permitting the erection of a "dwelling" on Lot 164.[17]

56) As the plans of Cluster Redevelopment were not yet sealed by the First Respondent, let alone registered by the Registrar of Titles, Building Permit number 2784 in fact applied to the original lot number 41 [18]

57) Building Permit number 2784 was issued on the basis of the private reticulated water supply (to the extent it existed).

58) By letter dated 5th March 1981[19], months after the Planning Permit was issued, K.R. Buchanan requested or made application to the Second Respondent for a supply of water from the Second Defendant to the **body corporate** of CS1134.

59) The Second Respondent requested its engineers to advise on the request/application.

60) By letter dated 26th March 1981[20] the Second Respondents engineers reported on the application.

61) The engineers letter was transcribed into the Second Respondent's Minutes of 1st April 1981.[21]

62) Of relevance the engineers report stated:

a) "*the site is outside the present boundary of the Waterworks District and there are no mains to serve it and consequently extension of both the District and reticulation system will be required if the Trust agrees to provide water*"; and

b) "*.....a tank with a capacity equivalent to at least one days maximum consumption should be provided by the developer*"; and

c) "*The storage would ensure that water is available to the units during periods of peak consumption and would be designed to fill at night so other users are not disadvantaged by the scheme*".

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[17] Refer plan at Appeal Book page D-1294
[18] Refer plan at Appeal Book page D-1293
[19] Exhibit GlennAT at Tab 9
[20] Exhibit GlennAT at Tab 10
[21] Exhibit GlennAT at Tab 11

63) The Second Respondent approved the supply to the Body Corporate of CS1134 but did not provide that supply.

64) The Second Respondent was fixed with the knowledge:

a) That the waterworks district had to be extended before the Second Respondent could lawfully provide water"

b) That the application for water had been made for and on behalf of the Body Corporate of CS1134.

c) That the Second Respondent had approved the supply of water to the Body Corporate of CS1134.

d) That the private company Woodleigh Heights Resort Developments P/L ("WHRD") was a private company and was not and never could be the Body Corporate of CS1134

e) Of the "proviso".

f) The provisions of the Water Act 1958 and in particulat s.186, 307AA(2) and 307AA(5)[22]

65) The Second Respondent:

a) Did not extend its Waterworks District.

b) Did not seek or receive the Approval of the Governor in Council.

c) Did not seek or receive the Approval of the Minister

d) Did not enter into an agreement with the Body Corporate.

e) By document (as distinct from lawful agreement) dated 1st January 1982[23] purported to enter into a Water Agreement between itself and WHRD for the supply of water to the whole of the Woodleigh Heights subdivision and which whole was known to the Second Respondent to include the common property and those allotments not owned by WHRD.

66) Then, as alleged in paragraphs W28 to W33 of the Amended Statement of Claim, in 1984 when WHRD defaulted on the contracts of sale to purchase the Appellants' allotments and the Appellants indicated that they would rescind and sell elsewhere, WHRD threatened that it would prevent the supply of water to the Appellants' land and render it valueless and unsaleable.

67) The threat of WHRD was made in the confidence and knowledge that the Respondents would give effect to that threat for the purpose of enforcing the "proviso"

68) The Respondents did then give effect to the "proviso".

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[22] Exhibit GlennAT at Tab 12
[23] Appeal Book page D-2167

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 Edgecombe Road was neither sought not 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 Efthim

72) The Respondents repeated the **irrelevancies** which had misled Master Efthim. 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 known 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.

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[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.

79) The Appellants then submitted their written submissions.[27]

80) The Appellants' submissions carefully articulated the true causes of action.[28]

81) The Appellants' submissions also carefully articulated that Master Efthim had been misled and had made Judgment on completely irrelevant matters.

82) After reading the Appellants' submissions Justice Osborn was aware of grounds for a belief as to those things set out at paragraphs 16)a) to 16)g) above.

83) After reading the Appellants' written submissions Justice Osborn again began raising issues which were not in issue at that time, and those things included the construction of the Planning Permit. At transcript page 156 I said;

> MR THOMPSON: No, I wasn't expecting to essentially go to the trialable issues at this time. I have ample evidence of this including handwritten notes by the - sorry, typewritten notes by the then shire engineer and the transcripts that I - of the, my addresses to the Water Board and the council. The fact of my August - - -

84) Then after Justice Osborn continued to raise things not in issue and not raised by the Respondents, at page 157 I said:

> MR THOMPSON: I wasn't expecting to go to that here. I was expecting to answer the application of the defendants.

85) After these exchanges went on for some time the Respondents were to reply. Major General Garde was apparently prompted by the question personally raised by Justice Osborn as to the 1982 water supply being the type of supply contemplated by the planning permit. Major General Garde then made submissions from page 185 to 202 of the transcript on the issue of the types of supply. Very early in this submission, at page 186 line 19 to 21 of the transcript, Justice Osborn prompted the Major General for the distinction between potable and non-potable.

86) Major General Garde then went on to make submission as prompted by Justice Osborn and fabricated a submission to the effect that the private non-potable reticulated water supply was of no consequence and that the 1982 potable supply was lawful and lawfully controlled by WHRD, at page 197 of the transcript, Mr. Garde said

> "*There was under the provisions of the Act a legally valid water agreement in existence between the board and the development company and that under the water agreement, the development company owned and operated the water supply reticulation system within the cluster subdivision.*"

87) After this submission by Mr.Garde Justice Osborn adjourned however I requested to be heard and the following exchange took place.

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[27] Appellants' Appeal Submission Part 1 and Part 2 at Appeal Book pages G-60 and G-118 respectively
[28] Appellants' Appeal Submission Part 1 at paragraph 63 at Appeal Book page G-89

HIS HONOUR: Thank you. In this matter I propose to reserve my decision and we'll adjourn sine die.

MR THOMPSON: Your Honour, may I address one issue just raised by **Mr Garde? He raise the issue of potable water. It's simply irrelevant**. The question was simply with regard to a reticulated water supply potable or not. **It has zero to do with potable or not** - - -

HIS HONOUR: **Well, I don't accept that, Mr Thompson**.

MR THOMPSON: - - - and the relevant material is found at J24 where the Shire of Kyneton sets out in respect to a question specifically related to whether tank or bore or septic sewerage would be available. The council simply says it's conditional upon reticulated water. Zero to do with potable. That's simply obfuscation, sir.

HIS HONOUR: That's precisely what Mr Garde put to me and I understand it. **In compliance with - the permit had nothing to do with potable water**. Having said that we'll adjourn sine die.

88) From Justice Osborn's somewhat offensive demeanour towards me and the conduct of the trial I fully believed and expected that Justice Osborn intended to come down against the Appellants.

89) The fact is that Major General Garde made no such submission, the issue of "**In compliance with - the permit had nothing to do with potable water**" was introduced by Justice Osborn alone and in the complete absence of evidence and submissions he had, predetermined that issue.

90) The simple undeniable fact is that Justice Osborn himself raised the question as to the terms of the Planning Permit and the question of potable vis a vis non-potable.

91) These things were not at issue between the parties and Justice Osborn had as a matter of fact pre-determined this issue of the planing permit and potable vis a vis non-potable in the complete absence of evidence and prepared submission.

92) He did this in the face of what he had said earlier "***but that's not the sort of question that would be resolved at this stage***".

93) Justice Osborn then constructed his Reasons for Judgment, in relation to Woodleigh Heights, in accord with this specific **unfounded prejudice** and in the absence of sufficient evidence and on-notice submission, and in the face of the facts, and the evidence before him, and in the face of the law.

94) Justice Osborn's Reasons for Judgment are an absolute nonsense which no reasonable, informed person could or would believe however, to the uninformed, they may have the appearance of a reasoned Judgment of a Justice of this Supreme Court.

95) His reasons are notable for the extent to which he has gone to make his reasons credible, the phrase "protest too much" comes to mind, for example,

at paragraph 168 Justice Osborn says "*the water supply pursuant to the agreement could not simply be connected to the non-potable system ..... because ..... it was designed to flow from the far corner of the land towards the roadway and not vice versa*".

96) Whereas the simple fact is that the 1982 water supply was connected to the private non potable system. It was and was required to be so connected for the following reasons;

a) As detailed in the Second Engineers Report of 26th March 1981[29] the Second Respondent's water pressure was too low and therefore, so as not to disadvantage other consumers, the supply pursuant to the so-called water agreement was designed to trickle into the header tanks, particularly at night, and the flow from the header tanks at the "far corner" was in fact what provided the demand supply to the subdivision.

b) Clause 6 of the water supply agreement[30] specifically envisaged connection to the header tanks at the "far corner" for the purpose of measurement and this is what happened in fact.

97) Paragraph 168 was fabricated in the **complete absence of evidence and submissions and with no mention in Court at all**. Justice Osborn thought this up in the privacy of his chambers.

98) At paragraph 160 Justice Osborn states, of the construction of the planning permit which was not to be "*resolved at this stage*";

"*Condition 8 does not impose a requirement which must be met prior to the sealing of the plans of subdivision*".

99) Whereas,

a) immediately upon sealing the developer and the Registrar of Titles are entitled to register the plan of cluster development and issue separate titles.

b) Condition 8 was the condition which required the subdivision to be carried out in accordance with the plans and submission.

c) The plans referred to in condition 8 are the very plans to be sealed by the First Respondent and are the plans setting out the allotment locations, sizes and dimensions, the roads, the lake being the water supply.

100) On Justice Osborn's Reasons a developer can simply file a plan, do nothing, get it sealed by Council and approved by the Registrar of Titles, get the titles and sell unknown useless allotments without roads and services, then disappear with the money. This is precisely what the Local Government Act 1958 together with s.97 of the Transfer of Land Act and s.9 of the Sale of Land

[29] See Second Respondents Minutes at Exhibit GlennAT Tab 11
[30] At appeal book page D-2168

Act 1962 was intended to prevent. This is nonsense. On Justice Osborn's published reason one wonders when these things would have to be complied with, one week, one year, perhaps never because the developer has gone broke. I am led to believe Justice Osborn is the Supreme Courts resident expert in Local Government. **There are grounds for a belief that this statement is fabricated nonsense and Justice Osborn must be aware of this.**

101) At paragraph 160 Justice Osborn further states, *"The permit conditions and in particular conditions 1 and 3 make clear that in the first instance the allotments could not be cleared or used for purposes other than pastoral use without the further permission of Council. Nevertheless it was envisaged that the cluster development would result in time in the erection of dwellings. Condition 8 imposed a precondition to use of development upon the land not upon the subdivision of the land."*

102) Whereas:

a) Condition 2 of that same permit (between the 1 and 3 mentioned by Justice Osborn) envisages immediate construction of dwellings.

b) The subdivision was carried out pursuant to the Cluster Titles Act 1974, this act was specifically intended for residential purposes, not farming.

c) Under Justice Osborn's interpretation we have 45 two acre farms with absentee farmers and tennis courts provided for them to use, but no water for the one third of a cow they could keep on 2 acres of bushland.

d) Clearing does not include preparing a house site.

e) The Plans registered by the Registrar of Titles record that the permitted use includes **residentia**l.[31]

f) The First Respondent issued building permit 2784 referred to at paragraph 47) hereof. That permit was for a dwelling. No further permit was required, applied for or granted.

g) Condition 8 did impose conditions on the subdivision of the land for the reasons set out in paragraphs 99) and 100) hereof.

103) **This statement by Justice Osborn was made in the complete absence of submissions and evidence. It is manifestly wrong.**

The Scheme of Justice Osborn's Reasons for Judgment.

[31] Refer plan at Appeal Book page D-1294

104) Justice Osborn's Reasons for Judgment are constructed in such a manner as to ignore, deny and conceal those things set out in paragraphs 16)a) to 16)g) above.

105) The scheme of the Reasons for Judgment has the apparently intended effect of:

a) Making true "**In compliance with - the permit had nothing to do with potable water.**" as predetermined by Justice Osborn.

b) Validating or holding as lawful, the 1982 Water Supply Agreement and water supply.

c) Representing that the 1982 water supply was the only "approved" water supply.

d) Validating or holding as lawful that the private company WHRD lawfully controlled the 1982 water supply and could withhold that water from the Appellants.

e) Validating or providing verisimilitude to the Reasons for Judgment of Master Efthim.

106) With the exception of paragraph 105)e) this is **precisely the scheme used by the Respondents** for the fraudulent purpose of implementing the "proviso". They falsely represented that the private water supply had never been approved, concealed the fact that it had, and falsely represented that the Water Supply Agreement and Water Supply were lawful and lawfully controlled by WHRD.

107) The scheme of the fraud of the Respondents for the purpose of giving effect to the "proviso" and the scheme of Justice Osborn's Reasons are indistinguishable from one another.

108) Justice Osborn at his paragraph 18, under the heading "Woodleigh Heights Factual Background" Justice Osborn states,

> "*Following such purchase a dispute arose as to the withholding of reticulated water supply from the plaintiffs' land by the subdivider. Such water was* ***supplied by the Water Board to this subdivision in 1982***".(my emphasis)

109) Whereas the facts known to Justice Osborn are:

a) The Water Supply was manifestly and grossly unlawful

b) WHRD was not the subdivider, it was merely another landholder, indistinguishable from the Appellants in that regard.

c) The water supply was not supplied "***to this subdivision***". It was purportedly, specifically supplied to the private entity WHRD.

d) Had it been supplied "***to this subdivision***" it would have been supplied to the Body Corporate and we would not be here today.

e) WHRD could not and did not withhold or purport to withhold the water. The Second Respondent was the only entity with the statutory authority to purport to withhold water and to the extent that it could withhold that which it could not lawfully provide, it was the Second Respondent which purported to withhold supply.

f) In this democratic country of Australia there is no lawful means whereby a private entity can gain control of an essential service such as water and withhold that essential service at whim or for the purpose set out in Justice Osborn's paragraph 74 where he says "*WHRD wished to compel the plaintiffs to complete the sale of land by the plaintiffs back to it*".

g) This paragraph 18 implies that such a thing was lawfully done.

110) I say that Justice Osborn's paragraph 18 is false and misleading and was known to be at the time of writing, it is difficult to believe that such a paragraph could be written carelessly by a Justice of this Supreme Court.

111) For the purpose of giving effect to the scheme of his reasons Justice Osborn says things which I am almost at a loss to explain. For example at paragraph 154 Justice Osborn states:

a) "*It is accepted for the present purpose, as the plaintiffs submit, that, a precondition to the grant of building permits on the Woodleigh Heights allotments was that the allotments be serviced by an approved reticulated water supply* ***(from the Water Board)****, such a requirement was not a stipulation of the original planning permit. Indeed the water supply proposal endorsed by the submission incorporated into the planning permit conditions proceeded on an entirely different basis.*"

112) This statement by Justice Osborn is simply false, I submitted that a precondition to the grant of building permits was that the allotments be serviced by an approved reticulated water supply. Full Stop. I have never said nor implied that the water supply from the Board was such an approved supply. It is and always was, manifestly, an unlawful supply and not an approved supply. That Justice Osborn himself introduced the bracketed words "***from the Water Board***" is deceptive, misleading and in the circumstances of the trial and reasons, I say a dishonest and deliberate misrepresentation of what I in fact said.

113) A similar misrepresentation is found at Justice Osborn's paragraph 73 where he says:

a) "*Thereafter the subdividers made application for a cluster redevelopment dividing each allotment created by the initial cluster subdivision into three smaller allotments.* ***This was evidently approved by the Council subject to the augmentation of water supply***" (my emphasis).

b) Justice Osborn attempts to provide verisimilitude to this statement by his footnote number 11 where he attributes this to "Plaintiffs' oral submission in this Court.

114) Whereas the facts are, at transcript page 114 lines 11 to 15 I said:

> "*A little bit later on, what happened was it was re-subdivided because they wanted to build a time share resort there. At that point in time, on my understanding later was that it was necessary to augment the supply that was out there initially.*"

115) The fact is it is not possible to construe Justice Osborn's statement from what I said..Justice Osborn's Paragraph 102 is false. The facts are as set out in paragraphs 52) and 58) above. In the circumstances of Justice Osborn's personal attack in respect to these without-notice issues my response of "*on my understanding later*" was good and accurate. It was actually some 5 months after the planning permit was granted that Buchanan applied for the water on behalf of the Body Corporate.

116) **Justice Osborn's paragraph 73 is a further fabrication to support the scheme of his reasons.**

117) Each of Justice Osborn's paragraphs, 69, 71, 72, 147, 152, 153, 154, 155, 156, 157, 160, 161, 163, 169, 170 and others relate to either or both of the construction of the Planning Permit and potable vis a vis non-potable water. Each of these paragraphs is a fabrication which rely upon the questions raised by Justice Osborn and determined by him in the complete absence of relevant evidence and submissions and they rely on various permutations of the nonsense I have already pointed out.

118) Each and every one of his remaining substantive paragraphs are also defective in one form or another however I have demonstrated sufficient.

119) Having regard to the scheme of Justice Osborn's reasons, there are grounds for a belief that the things in these paragraphs were not determined in error, they were determined for the purpose of the scheme of the Reasons for Judgment.

120) At his paragraph 175 Justice Osborn states, "*If however I am wrong with respect to the above matters then in my view it is apparent that the release given with respect to the Woodleigh Supreme Court proceeding is a complete bar to the present action*".

121) In this paragraph 175 the words "*the above matters*" is a reference to all of the preceding paragraphs which relate to the planning permit and potable vis a vis non-potable issues.

122) Paragraph 175 relies upon the gravamen or right of action in the previous "Woodleigh Supreme Court proceeding" as compared to the gravamen or right of action in the present proceeding so that

the release of the previous Woodleigh Supreme Court proceeding is a release to the present proceeding.

123) In relation to this, at his paragraph 147 Justice Osborn sets out his particular rendition of the gravamen of the previous Supreme Court proceeding and in that paragraph he states, "..... *a reticulated potable water supply was in fact connected to the subdivision in 1982 but not extended to the plaintiffs' allotments. It was* ***this latter water supply*** *to which* ***the plaintiffs' were denied access****. This denial forms* ***the gravamen*** *of the Woodleigh Supreme Court proceeding*".

124) Now the problem for Justice Osborn is that paragraph 147 is a fabrication of his for the apparent purpose of the scheme of his reasons. As I have stated previously, this "latter" water supply was unlawful and not lawfully supplied. One cannot withhold or deny that which cannot be lawfully provided. The Amended Statement of Claim in the previous Woodleigh Supreme Court proceeding simply does not say or imply any such thing. The gravamen of the previous Woodleigh Supreme Court proceeding is set out in the Indorsement to the Writ and did not change in the various amendments to the Statement of Claim.

125) The right of action and gravamen of the previous Woodleigh Supreme Court proceeding was:

a) That the private water supply was a requirement of condition 8 of the planning permit.

b) That the private water supply was present when the plans were sealed.

c) That the Respondents concealed the fact that the private water supply was a requirement of the Planning Permit.

d) That the Respondents concealed the fact of the Appellants' entitlement to that private supply.

e) That the 1982 Water Agreement and Water Supply were unlawful and the things done and said by the Respondents in relation to that water agreement and water supply concealed the facts related to the private water supply.

126) In other words the previous Woodleigh Supreme Court proceeding specifically pleaded the scheme of the fraud of the Respondents as summarised at paragraph 106) above

127) It is not possible to construe the gravamen ascribed by Justice Osborn to the previous Woodleigh Proceeding. He misrepresented it.

128) Having misrepresented the gravamen of the previous Woodleigh Supreme Court proceeding his paragraphs 175 and 176 where he asserts that the previous release includes the gravamen of the present proceeding as in effect a dependant fabrication bit still nonsense as the gravamen of neither proceeding is remotely related to that described by Justice Osborn.

129) Manifestly one cannot know the scope of a release without knowing what is applies to and in this case by misrepresenting the gravamen Justice Osborn also misrepresented what it applied to.

130) As Justice Osborn fabricated his rendition of the Gravamen of the previous Woodleigh Supreme Court proceeding then paragraphs 175 and 176 are also a fabrication.

131) Justice Osborn's reasons in relation to Woodleigh Heights are a **complete fabrication** the effect of which is to deny, ignore and conceal the things set out in paragraphs 16)a) to 16)g) above.

Justice Osborn, Reasons for Judgment in relation to Tylden Rd.

Factual Background (limited)

132) Having set out the above in relation to Woodleigh Heights it is not necessary to also show that Justice Osborn's Reasons in relation to Tylden Rd were also fabricated however for the sake of completeness I demonstrate a small aspect which demonstrates that the scheme of the Reasons in relation to Tylden Rd was also to ignore, deny and conceal the facts.

133) This background is limited to the facts relevant to the points which will be made below.

134) On 23rd October 1979 the First Respondent issued Planning Permit 2441 permitting the subdivision of the Tylden Rd land into 18 residential and 6 industrial allotments.

135) Between 18th September 1979 and 20th February 1980 Buchanan filed a plan setting out the 6 industrial allotments and a plan setting out the 18 residential allotments.

136) On 7th February 1980 Buchanan sold two of the residential allotments.[32]

137) These sales were made in clear breach of s.9 of the Sale of Land Act 1962. The plans had not yet been sealed by the First Respondent let alone approved by the Registrar of Titles.

138) On 20th February 1980 the First Respondent considered the plans referred to in paragraph 135) hereof.

139) On or about 4th March 1980 Buchanan lodged with the First Respondent 3 plans comprising the series of industrial plans[33] and 7 plans comprising the series of residential plans[34] together with Notices to the Effect of the Thirtieth Schedule each dated 4th March 1980[35].

140) Each and ever one of these plans was contrived for the purpose of avoiding the **provisions** of (as distinct from **effect** of) s.9 of the Sale of Land Act 1962. (as discussed later)

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[32] Notices of Disposition at Exhibit GlennAT Tab 13
[33] Appeal Book pages D-2023 to D-2035
[34] Appeal Book pages D-2027 to D-2034
[35] Appeal Book Page 2043

141) On the 4th March 1980, the same day as the Thirtieth Schedule Notices were dated, Buchanan purported to give possession of the allotments which had been sold in breach of s.9 of the Sale of Land Act 1962.[36]

142) The First Respondent subsequently sealed each of the "contrived" plans.

143) On 2nd September 1980 Palmer Stevens & Rennick solicitors of Kyneton filed Applications to have plans of subdivision lodged and approved.[37] with the Registrar of Titles

144) On or about 23rd December Palmer Stevens & Rennick filed with the First Respondent Notice of Disposition in relation to each of the allotments which had been sold. Those notices contained details of the sales which had been made in breach of s.9.

145) The right of action set out in the Amended Statement of Claim was related to an assertion that the First Respondent had sealed Plans of Subdivision and Plans of Cluster Subdivision in full knowledge of certain deficiencies[38] and that, in knowledge of these deficiencies, the plans were sealed maliciously .... for an ulterior purpose, namely to avoid the **effect** of s.9 of the Sale of Land Act as pleaded at paragraphs T7 and W8 of the Amended Statement of Claim.

146) The **provisions** of s.9 of the Sale of Land Act and the **effect** of s.9 of the Sale of Land Act as pleaded at paragraphs T7 and W8 of the Amended Statement of Claim are two different things and cannot be confused with one another.

147) Avoidance of the **provisions** of s.9 of the Sale of Land Act 1962 involves "contrived" plans of the type in the abovementioned series of plans whereas avoidance of the **effect** of s.9 does not involve plans, unlawful or otherwise at all, merely sealing without the planning permit having been complied with.

148) The Respondents either did not understand this difference or were recklessly indifferent to it and they misled Master Efthim into believing that the right of action in relation to Tylden Rd related to the "contrived" plans referred to above. A complete summary of the distinction is found at Appellants Appeal Submission Part 1 paragraphs 59 to 62.[39]

149) Unfortunately my Counsel, who was retained urgently because my initial Counsel was overseas also did not understand the difference and he defended the strike out application on arguments related to the "contrived" plans so the fact that Master Efthim was misled was complete. I sacked

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[36] Notices of Disposition at Exhibit GlennAT Tab 13
[37] Exhibit GlennAT Tab 14
[38] In the case of Tylden Rd, that no lawful requirement had been made. In the case of Woodleigh Heights, that the private water supply defined in the plans and submissions referred to in condition 8 of the Planning Permit had not been completed.
[39] Appeal Book pages G-84 to G-88

my legal team for their neglect some 5 months before Judgment was handed down and I forecast that Master Efthim had been misled and I forecast the result.

150) **Justice Osborn and Section 9 of the Sale of Land Act 1962.**

151) As with Woodleigh Heights, under the heading "Tylden Rd Factual Background" Justice Osborn sets out a distortion of the facts.

152) At his paragraph 5 he states of the "contrived plans". "*Buchanan then submitted for approval a series of plans of subdivision which* ***were in effect stages*** *of the previously proposed residential and industrial subdivisions*" (my emphasis).

153) This once again is to ignore, deny and conceal the true facts which were that sales in breach of s.9 had occurred and the series of "contrived" plans were intended to avoid the **provisions** of s.9 and that both Respondents had processed those plans. As detailed below Justice Osborn misrepresented the s.9 of the Sale of Land Act 1962 for the apparent purpose of providing verisimilitude to paragraph 5 and the effect of which was to ignore, deny and conceal the facts.

154) s.9 of the Sale of Land Act[40] is a simple piece of legislation which I say is not capable of being misinterpreted or misread.

155) On any reading the effect and purpose of s.9 of the Sale of Land Act 1962 is not capable of being read as meaning anything other than that, in relation to any subdivision consisting of three or more allotments, the "Sale of subdivided land is to be prohibited before plan approved by Registrar" as the heading in the Act states.

156) It follows that it is **manifestly obvious** that subdivisions consisting of two, and only two, allotments are not subject to s.9 and allotments may be sold prior to the plan being registered by the Registrar of Titles.

157) It is also manifest from s.9(2) that any contract entered into in breach of s.9(1) is absolutely void.

158) If any person has any doubt as to the meaning of this simple piece of legislation then such doubt is clarified by reference to Hansard [Assembly] 24/10/1962 at page 1058[41] where Mr. Rylah said in plain English, (of the Sale of Land Act) "Subdivided land is not to be sold until a plan of subdivision has been registered by the Registrar of Titles." and at Hansard [Assembly] 29/11/62

[40] Exhibit GlennAT Tab 15
[41] Exhibit GlennAT Tab 16

page 2092[42] where Mr. Rylah said (of the Sale of Land Act) "clause 9 of the Bill, which requires subdivisions to be registered in the Titles Office before land is sold".

159) The words "three or more" were inserted in 1963 by Act number 7052.

160) An understanding of my right of action and the things alleged by me was absolutely dependant upon a proper understanding of this most simple piece of legislation and, for the purpose of that understanding, I set out in clear terms the relevant legislation and its effect at page 13 paragraph 46 of my Plaintiffs' Appeal Submissions Part 1.[43]

161) At paragraph 122 of his Reasons for Judgment Justice Osborn firstly dismisses the things said by me in relation to s.9 and the methods of avoiding s.9 of the Sale of Land Act and then at his paragraph 123 he sets out his preferred understanding, or in his words "better view" of the intended effect of s.9 as being that s.9 is "*primarily directed to avoiding the possibility a series of terms contracts could come into existence with respect to one lot .....*"

162) Justice Osborn's paragraph 123 purports to attribute, at least in part, his manifestly wrong view of s.9 to Vounard whereas the fact is that Vounard, as transcribed by Justice Osborn in his footnote, does not say or imply the things said by Justice Osborn.

163) It is manifest, from the simple words of the Act, from the words of Mr. Rylah, and from Vounard as quoted by Justice Osborn, that s.9 of the Sale of Land act was absolutely intended to prohibit a **first sale** of an allotment until the plan has been approved by the Registrar of Titles. It **manifestly is not** "*primarily directed to avoiding the possibility a series of terms contracts could come into existence with respect to one lot .....*" as either misunderstood **or misrepresented** by Justice Osborn. I say Justice Osborn's construction cannot be construed, by a reasonable person, from either the act or Vounard. It is manifest that the possibility of multiple contracts in relation to a single lot (as discussed by Vounard) is prevented as an obvious corollary of prohibiting a first sale. Justice Osborn's "better view" is **manifest nonsense**, the effect of which is to ignore, deny and conceal a specific allegation constituting the right of action.

164) This misconstruction of the effect and intent of the Act by Justice Osborn is also essential to Justice Osborn's purported statement of fact at his paragraph 5 where he states "*Buchanan then submitted for approval a series of plans of subdivision which were **in effect stages** of the previously proposed residential and industrial allotments*" (my emphasis). The fact is however, that on the proper construction of s.9 of the Sale of Land Act and on the facts before and known to Justice Osborn, each of these plans was manifestly contrived to facilitate **first sales** in avoidance of s.9 of the Sale of Land Act and manifestly were not and cannot be construed to be "*in effect*

[42] Exhibit GlennAT Tab 17
[43] At Appeal Book page G-72 and also at paragraphs 59 to 62 of that document.

stages" as wrongly represented, or I say, deliberately misrepresented, by Justice Osborn. To have 7 stages in an 18 lot subdivision, 6 of which are 2 lot stages is a manifest nonsense.

165) Each of these contrived plans was filed on 4th March 1980, each with a separate, Notice to the effect of the Thirtieth Schedule. Each of the Plans were sealed by the Second Respondent on the same day. There was **not even the pretence of stages**. The further fact is that as evinced by the Notices of Disposition referred to above sales in manifest breach of s.9 of the Sale of Land Act 1962 were made and these plans were contrived for that purpose.

166) I say that no person capable of reading simple English could construe either the Act or Vounard as set out by Justice Osborn.

167) Justice Osborn's Reasons do ignore, deny and conceal the facts in relation to both Tylden Rd and Woodleigh Heights. No person can rely upon his reasons.

Justice Osborn and the Water Act.

168) S.307AA(2)[44] of the Water Act 1958 is also a most simple piece of legislation. It empowered an authority (the Second Respondent) to enter into an agreement with **the owner** of land for the provision of water to such land. It manifestly did **not** empower an authority to enter into an agreement with any entity or person for the supply of water to land **not owned** by that entity or person.

169) "Owner" is defined in the Water Act 1958 as "*means with respect to land any person seized of any land at law or in equity for his own life or for the life of another or for any greater estate*".

170) Cluster Subdivision CS1134 being the Woodleigh Heights Subdivision referred to in the Amended Statement of Claim is manifestly a cluster subdivision developed under the provisions of the Cluster Tittles Act 1974.

171) Woodleigh Heights Resort Developments Pty. Ltd ("WHRD") is manifestly a Company incorporated pursuant to a relevant corporations act.

172) Manifestly WHRD is not, and never could be, the Body Corporate of Cluster Subdivision CS1134 and manifestly is **not**, and **never could be**, "**the owner**" of the Common Property within CS1134 and WHRD is manifestly not the owner of those allotments within CS1134 not owned by it and which includes the allotments which were beneficially owned by the Appellants to the total exclusion of WHRD. .

[44] Exhibit GlennAT Tab 12

173) Manifestly, by its specific terms, the purported Water Supply Agreement[45] for the 1982 Water Supply between the Second Respondent and WHRD specifically recites that WHRD is the "*owner or* ***occupier*** *of ALL THAT piece of land being ..... the whole of the land described in Cluster Plan of Subdivision No. 1134*".

174) Thus by its specific terms the purported Water Supply Agreement is at best ultra vires and it is manifest that this agreement could not and did **not lawfully** deliver control of the water supply in relation to the whole of the land described in Cluster Subdivision CS1134 into the hands of WHRD, which included land manifestly **not owned** by WHRD and specifically that land beneficially owned by the Appellants and the common property. To the extent that the agreement entered into and maintained on foot and was known to and was intended by the Second Respondent and WHRD to purport to unlawfully deliver such control of water to WHRD for the purpose and known effect of preventing the sale of the Appellants' allotments to any entity other than WHRD, then the agreement was also fraudulent. This purported agreement was not capable of being performed. Manifestly the Second Respondent could not agree with WHRD for the supply of water to the common property or to allotments not owned by WHRD in the identical sense that they could not perform a contract of sale or lease or any other thing affecting those lands.

175) Manifestly the purported agreement could not be performed, they may flood the land, squirt water all over it or whatever but the certainty is that they could not lawfully "provide" water to the common property or those allotments not owned by WHRD.

176) At paragraph 18 of his Reasons for Judgment, under the heading "Woodleigh Heights Factual Background" Justice Osborn states, "*Following such purchase a dispute arose as to the withholding of reticulated water supply from the plaintiffs' land,* ***by the subdivider****. Such water was supplied by the Water Board to this subdivision in 1982*" (my emphasis).

177) In relation to paragraph 18, I say that at the time of writing that paragraph, Justice Osborn was fully aware.

a) The Water Supply Agreement was at best ultra virus and in the circumstances set out in the Amended Statement of Claim had, on the face of it, been used by the Respondents for fraudulent purpose, namely to prevent the sale of the plaintiffs' land to any entity other then WHRD or associated entities.

b) That WHRD ("*the subdivider*") manifestly did not and could not withhold a reticulated water supply from the plaintiffs' land (as asserted by Justice Osborn).

[45] Appeal Book page D-2167

c) That the Second Respondent, with the collusion of the First Respondent, alone had withheld or purported to withhold water from the Plaintiffs' land by representing that the Appellants were not entitled to a reticulated water supply.

d) That no person, including Justice Osborn, can describe any lawful means whereby, in this democratic country, a private entity can gain control over water or any other any essential service to their neighbour's land and thereby "*withhold*" that essential service (as specifically **misrepresented** by Justice Osborn).

e) That Justice Osborn's paragraph 18 is a baseless fabrication which misrepresents the facts known to him. Justice Osborn knew full well that the Second Respondent represented that the Appellants were not entitled to a reticulated water supply as distinct from withheld the water supply. So to the extent that it can be said that the water supply was withheld it was the Second Appellant alone which withheld and not WHRD as asserted by Justice Osborn. He further knew that WHRD could not and did not purport to withhold such water and there is no possible basis for that belief and assertion in any document or fact or law which was before Justice Osborn.

f) This manifestly wrong assertion by Justice Osborn goes to ignore, deny and conceal, inter alia:

i) one of the central acts of fraud of the Respondents which was to deny the legitimacy of the private water supply and fraudulently represent that the 1982 water supply and Water Supply Agreement were unlawful,

ii) the misrepresentations of Major General Garde Q.C. as detailed at paragraphs 226) to 234) below.

178) These examples are representative of the remainder of the substantive reasons authored by Justice Osborn and used by him to justify his findings and orders against the Appellants.

Perjury by the First Respondent and false admissions by both Respondents.

179) At the Magistrates Court at Bendigo and in the Supreme Court of Victoria before Justice Kaye, the First Respondent gave specific evidence that it had served a single s.569E Notice of Requirement dated 20th February 1980 and that the First Respondent had made a lawful requirement.[46]

180) It is manifest that both the Magistrate and Justice Kaye relied upon that evidence and made their respective Judgments in the belief that the s.569E Notice had been served and that a lawful requirement existed.

[46] A summary of the proceeding before Justice Kay is set out at paragraphs 46 to 53 of Justice Osborn's Reasons for Judgment.

181) In relation to Tylden Rd the specific, and only, allegation of the Appellants giving rise to the right of action is that the First Respondent omitted to issue and serve the s.569E Notice of Requirement which it resolved to issue and serve at its meeting of 20th February 1980 in relation to the 18 lot residential plan of subdivision. This omission is the means by which the First Respondent facilitated avoidance of the effect of s.9 of the Sale of Land Act 1962 by Buchanan..

182) The evidence given by the First Respondent in the Magistrates Court and the Supreme Court that the Notice of Requirement was served cannot be reconciled with the facts alleged at paragraph T5 of the Amended Statement of Claim which is that the s.569E Notice of Requirement was **not** served.

183) Notwithstanding that Counsel for the Respondents misled Master Efthim as to what matters and things constituted the right of action, the strike out applications by the Respondents relied, inter alia, upon assertions by them that the matters comprising the right of action were known to the Appellants too long ago and had in fact had not only **not** been concealed but had been **openly disclosed** by the Respondents in discovered documents.[47]

184) One cannot openly disclose, in discovered documents, or by any other means, that which is false or not so. Ipso facto, the submissions of the Respondents included an assertion that they disclosed that the s.569E Notice had **not** been served. (one may disclose the falsity of something but one cannot disclose that which is false).

185) In his Reasons for Judgment;

i) At his paragraph 116 Justice Osborn says "*It seems to me that it is clear that at the date of this document in May 1991 the Plaintiffs were fixed with knowledge of what is now said to be the central fact namely that valid notices of requirement were not served pursuant to s.569E(3)(b) in respect of the relevant lots.*"

ii) Then at his paragraphs 127 Justice Osborn says, "*it cannot be that to voluntarily provide copies of discovered documents .... was to conceal the facts*".

iii) And at his paragraph 128 he says "*Insofar as the documents demonstrate actions now complained of, those actions have not been concealed. They were voluntarily disclosed to the plaintiffs at least 15 years ago*".

186) These paragraphs by Justice Osborn clearly say that (according to Justice Osborn) the Appellants were "*fixed with knowledge*" that valid s.569E Notices were not served and that this fact was voluntarily disclosed to the Appellants in discovered documents. Ipso facto, the Judgment

[47] Paragraph 66 of the Outline of Submissions of the First Defendant at appeal book page A-95 -

of Justice Osborne, upon which the Respondents, not I, rely discloses perjury in the Magistrates and Supreme Court. The respondents cannot both rely upon Justice Osborn's Reasons and deny that perjury.

187) Again I assert the self evident.

i) One cannot be "*fixed with knowledge*" of that which is not.

ii) One cannot "*voluntarily disclose*" that which is not.

188) Ipso facto, on the express assertion of Justice Osborn and, **according to Justice Osborn**, the Respondents' voluntary disclosure was, "valid notices of requirement were **not** served" (my emphasis).

189) It follows therefore, from the Respondents own submissions, and the specific finding of Justice Osborn that the evidence given in the Magistrates Court and Supreme Court was false. **This is perjury**.

190) In their joint Defence, Amended Defence, Re-Amended Defence and Further Re-Amended Defence[48], both Respondents admitted to paragraph 7 of the Statements of Claim[49] in County Court proceeding 880949 where they made four separate admissions each for a total of eight admissions that the s.569E Notice of Requirement **had been served**. On the submissions of the Respondents in the present proceeding and the findings of Justice Osborn, each of these eight separate admissions by the Respondents were **false admissions.**

191) The fact is, that no such open disclosure in discovered documents occurred at all. The First Respondent perjured itself before the Magistrates Court and the Supreme Court and both Respondents made false admissions in the County Court. The discovered documents, in all three Courts, were contrived and intended to conceal the fact of that perjury and false admissions.

192) The submissions made by Counsel for the Respondents before Master Efthim and Justice Osborn is manifestly untrue, the Respondents **did not** openly discover that which they intended to, and did, conceal by their perjury and false admissions.

193) The further fact is that it was only in the light of subsequent knowledge derived from things, secreted within discovered documents, that the Appellants were able to glean the truth from those discovered documents which were in fact intended to, and did, conceal the facts.

194) A truthful submission by Counsel for the Respondents would have been to the effect that the First Respondent gave false evidence and falsified discovery to the Magistrates Court and the

[48] At Appeal Book pages D-26, D-95, D-212 and D-262 respectively
[49] Statement of Claim at Appeal Book page D-3 -- Amended Statement of Claim at Appeal Book page D-233

Supreme Court however in the light of subsequent knowledge, the Appellants were able to glean the truth which, until that time, was successfully concealed, and intended to be concealed, from the Courts and from the Appellants.

195) Counsel for the Respondents, either carelessly or deliberately, avoided the necessity for truth in this regard by making submissions which led Master Efthim to believe that unlawful sealing of unlawful plans of subdivision was the issue and formed the right of action. As a consequence of the submissions and the neglect of Mr. Middleton Q.C., Master Efthim made his Judgment on this issue and not in relation to the s.569E Notice, and as a consequence Master Efthim said, at his paragraph 55 (of my affidavit) "*One may ask why Mr Wilson's evidence had the effect of concealing the First Defendant's true conduct from the Court and Mr. Thompson. This is not a credible explanation*". The fact of course is that the Magistrate and Justice Kaye were deceived and the First Defendant's true conduct, in relation to s.569E Notices of Requirement, was concealed from the Courts and this is manifest from the fact of the Judgments of the Magistrate and Justice Kaye.

196) The fact is that the true conduct of both Respondents was also concealed from Master Efthim. The proceeding before Master Efthim was a sham. Master Efthim could not have made the statement "*One may ask why Mr Wilson's evidence had the effect of concealing the First Defendant's true conduct from the Court and Mr. Thompson. This is not a credible explanation*" had he been aware that service of the s.569E Notices constituted the right of action. -- It is manifest from Master Efthim's reasons that he had not even an inkling that s.569E Notices were relevant and that the First Respondent had in fact perjured itself and both Respondents had made false admissions and that as a consequence *"the First Defendants true conduct"* was "*concealed*" *"from the Court and Mr. Thompson"* and **also concealed from Master Efthim**. This is self evident.

197) The further fact is that the Respondents similarly misled Justice Osborn however, once becoming aware of the true rights of action from the Appellants, Justice Osborn manufactured his own reasons upon which the Respondents now seek to rely, but the truth and fact is, it reveals the deceit of the Respondents and the continuing deceit of, at least, the Second Respondent via its Counsel.

The Second Respondent did by resolution of its members specifically deceive the Appellants for the purpose of fraud.

198) As set out in the Second Respondents Minutes referred to above the Woodleigh Heights land was outside the Waterworks District of the Second Respondent.

199) On 8th November 1984 the Second Respondent sealed a plan to increase its Water District to include the Woodleigh Heights Land and to increase its Urban District to include, inter alia, the Woodleigh Heights Land.[50]

200) As and from the date of gazettal of the above plan the Appellants had the rights set out in s.208 of the Water Act 1958. [51]

201) The Appellants land was scheduled to be auctioned by Australian Guarantee Corporation ("AGC") on Saturday 17th November 1984.

202) Four days before the scheduled auction (5 days after sealing the above plan) the Second Respondent wrote an unsolicited letter to L.J. Hooker of Kyneton and advised that water and sewerage were denied to the Appellants' land and could not be obtained.

203) As a consequence the proposed auction was cancelled.

204) By identical letters dated 29th November 1984,[52] AGC wrote to the Respondents inquiring as to the availability of water to the allotments and additionally specifically inquiring as to whether or not tank or bore water could be used as an alternative.

205) The First Respondent replied by letter dated 20th December 1984[53] and stated that "*the issue of building permits is to remain conditional upon the development being serviced by reticulated water and sewerage*".

206) The Second Respondent considered AGC's letter at its meeting of December 1984 and resolved "That the matter be referred to the Engineer for report and that AGC be advised accordingly. The Second Respondent wrote to AGC by letter dated 7th December 1984[54] and said:

a) "*The matter is complicated because of both the Board's existing water and wastewater agreements with the management of Woodleigh Heights and the Shire of Kyneton's requirements for the issue of building permits.*"

b) "*The Board's Engineers, Garlick and Stewart, are to report back to the Board after consideration* ***of all of the factors*** *involved with your proposal.*" (my emphasis)

207) Mr. Peter Charles Everist of the Board's Engineers, Garlick & Stewart, reported back by letter dated 20th February 1985,[55] apparently after having been "**coached**" by the Respondents in respect to "***all of the factors***".

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[50] Exhibit GlennAT Tab 26
[51] Exhibit GlennAT Tab 12
[52] Exhibit GlennAT Tab 18
[53] Exhibit GlennAT Tab 19
[54] Exhibit GlennAT Tab 20
[55] Exhibit GlennAT Tab 21

a) This letter, inter alia, says:

i) "*Internal reticulation is the property and responsibility of Woodleigh Heights Resort Development.*" – [This is false, but consistent with the misrepresentations of the Second Respondent. Internal reticulation is manifestly common property, owned by the Body Corporate].

ii) "*All of the land in the development is known under the name of Woodleigh Heights Resort Development Pty. Ltd. Notices of Acquisition and Deposition have not been received by the Shire.....*" -- [This is not a usual thing for a water engineer to concern himself with.]

iii) "*The shire sealed the subdivision into separate lots and further subdivision into clusters with the **proviso** that the lots would remain as part of the total resort development*".-- [**This "proviso" is the reason for the fraud or fraudulent intent.** The Respondents conspired with one another and with KRB & PS&R to give effect to this unlawful "*proviso*". It was a secret and unlawful condition of the cluster re-development that the Appellants' land become owned by Woodleigh Heights Resort Developments P/L. To give effect to this unlawful "*proviso*" the Respondents conspired with one another and with KRB, PS&R and WHRD to enter into the unlawful Water Supply Agreement and did all things necessary to prevent the sale of the Appellants' allotments to any entity other than WHRD or associated entities.]

b) Peter Charles Everist, water engineer, then went on to say:

i) "The *resort is **not in** the Board's Sewerage District or **Urban Water District.***" (my emphasis). -- [This was only true because the plan sealed by the Second Respondent on 8th November 1984 had not yet been approved by the Governor in Council or gazetted. However the fact known to the Second Respondent was that the plan had been forwarded to the Governor and would soon be gazetted, after which the land would be within the Urban Water District and s.208 of the Water Act would apply.]

ii) "*It is considered that reticulated water and sewerage **would be available** ..... subject to the conditions of the Agreements with the Board and **under the ownership** of Woodleigh Heights Resort Development Pty. Ltd*". (my emphasis). -- [This establishes that from an engineering or water supply point of view **water could be made available** but Everist, water engineer, considers that such supply should be subject to the Agreement which the Second Respondent, and possibly Everist, knew full well to be unlawful and only **under the ownership of WHRD**].

iii) "*However, if lots 7, 10, 12 and 27 are under* ***different ownership*** *then it is* ***recommended that the Board refuse the supply of reticulated water*****.....** " (my emphasis) -- [So on the face of it, Everist, water engineer recommends the supply of water based upon ownership rather than water pressure considerations. I say there are grounds for a belief that Everist was **coached by the Respondents** to recommend that water not be made available, he did not check the rate records or the file containing notices of disposition (or "*deposition*" as he says). As a water engineer Everist said that water could be made available, however he **recommended against supply on the basis of ownership**. I say there are grounds for a belief that he was coached and the Respondents expected and required him to recommend against supply from an engineering point of view.]

208) The letter from Peter Charles Everist was fully transcribed into the Second Respondent's minutes of 6th March 1985[56] and the Respondents, and in particular the Second Respondent, had a major problem in respect to implementing the "proviso".

a) Despite being coached, the Water Engineer said that, from an engineering point of view, water was available to the Appellants' land.

b) The Plan extending the Urban District had been sealed and filed by the Second Respondent and was soon to be gazetted, after which the Appellants would be statutorily entitled to water.

209) Faced with these problems, and their wish to give effect to the "proviso" the Second Respondent resolved "***That no action be taken***".[57] In other words it resolved not to respond to the letter of AGC at that time.

210) The Plan extending the Water District and the Urban District of the Second Respondent was gazetted at page 811 of the Victorian Government Gazette No 24, 27th March 1985.[58]

211) As and from the 27th March 1985 the Appellants had an absolute right to water pursuant to s.208 of the Water Act 1958.

212) As the Board had resolved to take no action and accordingly did not respond to AGC then AGC again inquired by letter dated 9th April 1985[59] and said:

a) "Your formal communication conveying the Board's determination to our request of 29/11/84 would be appreciated."

b) "It is believed that the matter was dealt with 6/3/1985."

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[56] Exhibit GlennAT Tab 22
[57] Exhibit GlennAT Tab 22
[58] Exhibit GlennAT Tab 23
[59] Exhibit GlennAT Tab 24

213) This new request from AGC was transcribed into the Second Respondent's minutes of 1st May 1985.[60]

214) In full knowledge that water was available, both from an engineering point of view and from the operation of s.208 of the Water Act, the Second Respondent determined not to respond to AGC. The Second Respondent's minutes of 1st May 1985 merely record "***received***" in relation to the request of AGC.

215) At its meeting of 1st May 1985, in full knowledge of the things set out above and in full knowledge of its duty to advise AGC that water was available by statutory right, **the Second Respondent sealed a further plan excising, inter alia, the Woodleigh Heights land from the Urban District**[61] thereby intending to remove the statutory right to water from the Appellants.

216) By letter dated 3rd May 1985[62], in full knowledge of the above, the Second Respondent wrote to AGC and said:

a) "*..... I advise that the Board is not in a position to supply water to allotments for which you are mortgagee in possession in C.A. 41 occupied by Woodleigh Heights Resort Developments Pty. Ltd.*"

b) "*The Board does not wish to repeat itself in this matter as you appear to be requesting.*"

217) Three days later, by letter dated 6th May 1985[63] the Second Respondent forwarded the new plan diminishing the Urban District to the Department of Water Resources for subsequent approval by the Governor in Council and gazettal.

218) The Second Respondent's letter of 3rd May 1985 was received by AGC on 6th May 1985. Mr. Des Roberts of AGC was offended by the response. As a consequence, on 7th May 1985[64] Mr. Roberts telephoned the Respondents' Joint Secretary, Mr. David Parkinson. The handwritten notes of Mr. Roberts say:

a) "*S/W (spoke with) Parkinson. This is inadequate and cheeky, this is only official refusal and needs to be enlarged upon. If we are being forced to sell without services ..... property will probably not attract a bid let alone an adequate price.*"

219) By letter dated 7th May 1985,[65] one day after sending the new plan to be actioned by the Governor and in full knowledge that the plan had not yet been gazetted, the Second Respondent,

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[60] Exhibit GlennAT Tab 25
[61] Exhibit GlennAT Tab 27
[62] Exhibit GlennAT Tab 28
[63] Exhibit GlennAT Tab 29
[64] Exhibit GlennAT Tab 28
[65] Exhibit GlennAT Tab 30

having been prompted by Mr. Roberts, and secure in the knowledge that the plan had been sealed and sent for gazettal, again replied to AGC and said:

a) *"Water has been supplied to Woodleigh Heights Resort Developments Pty. Ltd. as* ***an outside of the water area agreement*** *on the basis that all costs for construction of the mains were paid for by that company."* (my emphasis)

b) *"The Board therefore has no mechanism by which the allotments referred to may be supplied with water except with the agreement of Woodleigh Heights Resort Developments Pty. Ltd."* (the Second Respondent's underlining).

220) The Second Respondent's letter of 7th May was a fraudulent misrepresentation. The Second Respondent and each of its members and its Secretary, knew full well that:

a) they were acting for the specific and unlawful, and I say fraudulent intent of giving effect to the "proviso";

b) the Water Supply Agreement was unlawful and had been entered into for the purpose of giving effect to the "proviso";

c) the water main, whether or not paid for by WHRD was, pursuant to s.307AA(8) of the Water Act 1958, vested in the Second Respondent;

d) the land was firmly in the Urban District and was not "*outside of the water area*";

e) pursuant to s.208 of the Water Act 1958, water was, by statutory right, available to the Appellants' land; and

f) the plan excising, inter alia, the Appellants' land from the Urban District had not yet been gazetted.

221) The plan excising, inter alia, the Appellants' land from the Urban District was approved by the Governor in Council on 25th June 1985 and was gazetted in July 1985.[66]

222) These things were done with the clear knowledge and intent of each of the members of the Second Respondents Board some of whom, by statutory requirement, were also Councillors of the First Respondent. They were also done with the knowledge of the Joint Secretary to each of the Respondents. Each and every one of these persons including the corporate entities being the Respondents were aware of those things which I say provides grounds for a belief of fraud.

223) I say that **this alone is grounds for a belief that the Second Respondent acted fraudulently, in company and collusion with others** for the specific purpose of preventing the lawful sale of

[66] Exhibit GlennAT Tab 31

the Appellants land and giving effect to the "proviso". The numerous other acts including entering into and maintaining on foot a manifestly unlawful water agreement for the known purpose and effect of giving effect to the "proviso" provide excellent, **overwhelming** grounds for a belief as to the fraud of the Respondents.

Grounds for a belief that Major General Garde habitually mislead the Court.

224) In relation to Major General Garde I refer to and repeat the things set out at pages 2 through 16 inclusive of the Plaintiffs' Appeal Submissions Part 2.[67]

225) For the reasons set out at paragraphs 168) to 174) above the Water Supply Agreement is manifestly at best ultra vires and due to the reason that it was fraudulently entered into for the purpose of giving effect to the "proviso" referred to in paragraph 207)a)iii) above it was entered into for unlawful and fraudulent purpose, namely to prevent the lawful sale of the Appellants' Woodleigh Heights land to any entity other than WHRD or associated entities and is therefore fraudulent. In addition because it purported to affect land not owned by WHRD the purported agreement was not capable of being lawfully performed or performed at all.

226) On 7th March 1988 at a Planning Appeals Tribunal hearing in Melbourne I appeared for the purpose of bringing to the attention of the Tribunal the fact of the unlawful nature of the Water Supply Agreement.

227) WHRD were the Appellants at that time. They were represented by the then Lieutenant Colonel Garde Q.C. who in turn was instructed by Mr. John Price of Gair and Brahe, solicitors.

228) Prior to the hearing I faxed a copy of my proposed submissions dated 26/2/88[68] to the Tribunal and also to Gair and Brahe solicitors.

229) My submission was on the unlawful nature of the Water Supply Agreement and the fraudulent purpose to which it had been put and used as best I could with my limited knowledge at that time however the matters and things set out in that document were adequate to make known to Gair and Brahe and Mr. Garde the fact that the Water Supply Agreement was an unlawful agreement. These things were set out in paragraphs 2,3,5,6,7,12,13,14,15 and 16 of that submission.

230) At that hearing, in knowledge of my submission, in his written and signed submission 7th March 1988, Mr. Garde said;

a) In 1984, Supreme Court proceedings erupted between the 3 develpers (viz Glenn and Cheryl Thompson, the Appellant and Woodleigh Heights Marketing ....."; and;

[67] Appeal Book page G-118
[68] Exhibit GlennAT Tab 32

b) (in capital letters) "THE APPLICANT HAS THE BENEFIT OF ENFORCEABLE LEGAL AGREEMENTS WITH THE WATERWORKS TRUST FOR THE PROVISION OF WATER ....."

231) He said this in plain full knowledge of the Water Act and all those facts set out in paragraphs 168) through 174) above and the things set out in my submission and in full knowledge or careless disregard for the fact that the Water Supply Agreement was unlawful and not capable of being lawfully performed or performed at all.

232) Before Justice Osborn, Major General Garde said:

a) "*.....but what subsequently happened was that there was a dispute that broke out between the Buchanans and the Thompsons as we apprehend the position with the consequent result that* ***the development company*** *that was controlled by the Buchanans* ***denied any access to the water*** *which that company had procured through the supply agreement to the Thompsons*".[69]

b) "*There was under the provisions of the Act* ***a legally valid water agreement*** *in existence between the board and the development company and that under the water agreement, the development company* ***owned and operated the water supply reticulation system*** *within the cluster subdivision*".[70] (my emphasis)

233) These things are manifestly false. I say that Mr. Garde did not ,could not and does not, hold a belief as to the truth of these things said by him before the Planning Appeals Tribunal and repeated before Justice Osborn. [Note that at his paragraph 18 Justice Osborne says essentially the identical thing as was said by Mr. Garde before the Tribunal and before Justice Osborn. The Tribunal was misled in this regard but not Justice Osborn, he like Mr. Garde knew full well what he was saying]

234) Had the Planning Appeals Tribunal not been misled by Major General Garde then it is possible, even probable that the fraud of the Respondents would have been ended there and then and the 1995 Supreme Court proceeding would not have occurred and the present round of proceedings also would not have occurred. Mr. Garde's deception has had far reaching adverse effect on my family and I and lined his pockets well. He seeks even more lining at this time.

235) **The document entitled "Outline of Submissions of the Second Defendant for 14 November 2005"**[71] authored by Major General Garde and Ms. Sharon Burchell.

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[69] Transcript page 193
[70] Transcript page 197
[71] At Appeal Book page A-59

a) I do not propose to entirely disassemble this document however a most brief glance provides an insight into the carelessness or neglect or perhaps deliberate intent to mislead with which it was prepared.

b) Paragraph 1 states "*The Plaintiffs allege that they are owners of certain parcels of land... ... ...* ", whereas:-

   i) The entire reason for the present proceeding is that I do not own the land having lost it to the fraud of the Defendants. **Paragraph 1 is false**; and

   ii) The purported facts of paragraph 1 cannot co-exist with the purported facts of either paragraph 5 or paragraph 6 of that same submission.

c) Paragraph 3 states "*The Plaintiffs allege that there was a requirement imposed by the Shire of Kyneton under s569E(1) and (1A) ....* ", whereas:-

   i) Paragraph T5 of the present Amended Statement of Claim clearly alleges that the s.569E Notice was never served and consequently no requirement imposed. **Paragraph 3 is false**.

d) Paragraph 5 states " ..... *Woodleigh Heights land, ... the land was sold by public auction by .... (AGC) on 17th November 1984*", whereas:-

   i) Paragraph W47 of the present Amended Statement of Claim clearly states that the proposed auction by AGC was cancelled and was cancelled because of the fraud of the Defendants. **Paragraph 5 is false**; and

   ii) It is self evident the purported facts of paragraph 5 cannot co-exist with the purported facts of paragraph 6 of that same submission; and

   iii) The deliberate fraud of the Second Respondent as described at paragraphs 198) to 223) above specifically prevented the sale which Mr. Garde and Ms Burchell say occurred.

e) Paragraph 6 states "*... .. ... the Plaintiffs say .... .. the auction scheduled for ... 1985 was cancelled...* " and further states " .... *the Plaintiffs sold their land in 1989 ...* ", whereas:-

   i) Paragraph W71 of the present Amended Statement of Claim clearly states that Esanda exercised their right of mortgagee sale. The reason for this was because that due to the fraud of the Defendants the Plaintiffs could not sell their land with its lawful entitlement to a water supply. **Paragraph 6 is false**; and

   ii) It is self evident that the purported facts of paragraph 6 cannot co-exist with either paragraphs, 1 or 5 of that same submission.

f) The document is a nonsense, it is self contradicting and misleading. It totally misrepresents my case by presenting a fabricated case of their own concoction.

g) Four of the first six paragraphs are simply false and cannot co-exist with the other paragraphs.

236) Major General Garde and Ms. Sharon Burchell, under instruction from Mr. Steven Edward repeated these things, essentially word for word, before Justice Osborn in their further document entitled Outline of Submissions of the Second Defendant for 31 October 2006.[72]

237) Justice Osborn awarded indemnity costs against the Appellants, in part, for pointing out these truths. Mr. Garde and Mr. Edward and apparently Justice Osborn call it vilification, however it remains the undeniable truth. Their Outline of submissions is a palpable nonsense.

238) I am, and the Court should be, offended that nonsense such as this is brought before the Courts by senior Counsel with impunity, these things make the Court a sham and particularly so when in full knowledge of these things, as was the case with Justice Osborn, he awards indemnity costs, including the costs for the time taken to produce such manifest nonsense.

239) It must be that Messrs Garde, Edward and Ms. Burchell say and repeat these things before this court because they have a well founded sense of impunity. It appears to me that they are confident that they work in the most sheltered workshop ever devised. If they were brake mechanics turning out such shoddy work they would be unemployable.

240) Justice Osborn made indemnity costs against the Appellants, at least in part, because the Appellants set out these truths. Little wonder they try again.

Master Efthim was misled by Counsel for the Respondents.

241) Again the "little bit pregnant" rule applies. I will attend to the Woodleigh Heights Submissions made to Master Efthim By Mr. Delany S.C and supported by Mr Garde Q.C.

242) I have dealt with the Outline of Submissions by Mr. Garde and Ms. Burchell above, they were simply nonsense however the outline by Mr. Delaney was at least coherent but nevertheless completely misleading.

243) At paragraph 85 of Mr. Delaney's Outline he at least gets the root of the right of action correct when he says "*the water mains were in fact laid in 1982 and not in 1979 as alleged by Mr. Thompson and, on Mr. Thompson's understanding, as required by law;*" followed by his paragraph 86 which correctly defines the root of the method of avoiding the **effect** of s.9 of the Sale of Land Act 1962.

[72] Appeal Book page G-43

244) However Mr. Delaney then goes on to mislead Master Efthim completely where he says at his paragraph 87 "*What Mr. Thompson fails to mention and what the objective documentary evidence establishes is that he was aware and has been aware since August 1987 (if not before), that the 'reticulated water supply' had been laid in 1982 and not 1979.*"

245) Now the obvious facts are that knowledge of the 1982 water supply does not and cannot include knowledge that the 1979 water mains were or were not previously laid. Mr. Delaney relied upon misleading Master Efthim into believing that it was "water supply" per se at issue with the result that Master Efthim never became aware that the question he had to determine was when I became aware that the internal reticulation mains had been laid in 1982 and not 1979 as required by law.

246) In his Reasons for Decision at paragraph 60 Master Efthim relies on this specific submission by Mr. Delaney and Master Efthim rely upon my Letter of 24th August 1987 to demonstrate my knowledge of the 1982 water supply. The letter is an extremely comprehensive letter it detail with precision all things known to me at that time but there is no evidence at all of knowledge as to when the internal reticulation was laid. Master Efthim was misled into believing that "water supply" per se was the issue.

247) That the 1982 water supply is irrelevant was, apparently carelessly, relied upon by Justice Osborne where at his footnote number 46 he says (of Mr Delany's submissions as to the 1982 water supply), "..... *It is apparent that the Council's submissions upon which he relied are limited to the fact of the reticulated potable water in 1982. They suffer from the from the same defect as admissions as the firstnamed plaintiff's assertion that he had seen a plan showing the 1982 reticulation. The question for me is not what was done in 1982 but what was done in 1979*"

248) The Defect of Mr. Delaney's submissions and Master Efthim's consequential judgment are painfully obvious. Mr. Delaney and Mr. Garde must be fully aware that Master Efthim was misled and he may as well have adjudicated on the price of fish.

Justice Osborn's Reasons vis a vis Master Efthim' Reasons.

249) At paragraph 247) above I said to the effect that Justice Osborn's footnote number 46 was careless. In that footnote he unequivocally says to that the First Respondents submissions as to the "*fact of the reticulated potable water in 1982*", "*suffer from the same defect*" as the "*plan showing the 1982 reticulation*", "*the question .... is .... Not what was done in 1982 but what was done in 1979*"

250) He then goes on to say those things set out in his paragraphs 169 and 170 where he relies upon what Master Efthim said, Namely "*the 1987 letter and the 1982 water reticulation agreement*

demonstrate that the firstnamed plaintiff was aware from at least 1987 that a reticulated potable water supply was in fact provided for in 1982."

251) So on the one hand the Justice Osborn says that the First Respondents submissions as to the 1982 water supply are defective yet on the other my knowledge of the 1982 water supply is relevant. This is careless nonsense.

252) I say that Justice Osborn was well aware that insofar as it related to the submissions of the First Respondent and the facts of the 1982 water supply his footnote 11 set out the true belief of Justice Osborn and he did so in a momentary lapse. However for the sake of ignoring, denying and concealing those things set out at paragraphs 16)a) to 16)i) above he reverted to the scheme of his reasons for his paragraphs 169 and 170.

253) It is manifest that the bringing of town water to a property does not indicate that the property did not have internal pipes from a tank or some other supply before the town water arrived. Mr. Delany's submission is so nonsensical as to be false. Master Efthim was misled. he thought "water supply" per se was the issue and Justice Osborn's reason are a simple fabrication from top to bottom. Justice Osborn knew full well that Master Efthim had adjudicated on the price of fish. He provided credence to Master Efthim's reasons by purporting to rely on and accept them while knowing full well the truth. He knew full well they could not tell him what the rights of action were and he had read my submissions. This is commensurate with the scheme of his Reasons, ignore, denial and concealment of the truth and the facts.

254) Insofar as Tylden Rd is concerned a document entitled "Book of Pleadings" became central.

Mr. Middleton. Q,C failed to put my case.

255) The right of action is set out at paragraphs 63 of the document entitled Plaintiffs' Appeal Submissions Part 1.

256) Nobody addressed these issues at the hearing before Master Efthim. This is manifest from the submissions, the transcript and Reasons for Decision.

257) It is manifest from his Reasons that Master Efthim not only did not adjudicate on these rights of action his reasons specifically exclude these rights of action as constituting any part of the thing adjudicated upon by him.

258) Upon reading the transcripts of what was said before Master Efthim I dismissed Mr. Middleton Q.C. and the rest of my then legal advisors some 5 months before the Judgment of Master Efthim was handed down.[73]

[73] Exhibit GlennAT at Tab 35

To say more is unnecessary. I reject each and every assertion of Mr. Steven Mark Edward and Mr. Garde Q.C. as a further fabrication. The facts speak for themselves.

Conclusion

259) This Court, the Supreme Court of Victoria, has completely and utterly failed to adjudicate on the facts. This has now occurred twice, once through the careless and/or intentional neglect of Counsel appearing before this Court leading to the fact that Master Efthim did not adjudicate on the issues, and once because Justice Osborne determined to act as set out above.

260) These things, so long as the Judgments stand have cost me some $800,000 to $1,000,000 and have come at great personal cost to myself and to my family but which I feel compelled to pursue as a matter of principle.

261) In view of these things I determined that so long as Barristers such as Mr. Garde appear before this Court and say the things that they do with impunity then this is not the place to seek justice. I determined to stop throwing money away and having this Court continually reward Mr. Garde for his fabrications. At the hearing for security for costs of the Appeal the Court of Appeal declared its position on the purported Authenticated Orders of Justice Osborn and told me that the Court of Appeal did not agree with my allegations in that respect. It did so in ignorance of the whole of the circumstances which would have been led at Appeal some of which are set out above. I decided to abandon the Appeal in favour of going public with the complete story of what has occurred over the years including in this Court and to actively campaign to expose deception, incompetence and dishonestly in this Court and particularly expose Barristers who mislead the Court.. To this end I reserved a website www.courtsontrial.com well before the present summons was served. I do not apologise for abandoning the Appeal.

262) Truth and fact are far more powerful than any Judgment of this Court.

263) So long as Counsel can mislead this Court with impunity this Court is a sham.

264) This present hearing has been forced upon the Appellants and this Court by what is in fact a grab for cash which is itself dependant upon ignore, denial and concealment. That Solicitors and Counsel come in this manner to this Court is indicative of a sense of impunity.

265) Justice Osborn did not hold a judicial belief as to his reasons

266) I do not submit that this court should find my allegations not unfounded, I say that it **cannot** find them unfounded.

267) I am a layperson, I do not know the powers of this Court however I have heard the word "unfettered" bandied about. If this is the case I say that there should be a Judicial Inquiry into the

conduct of the proceedings before Master Efthim and in particular to the Conduct of the proceeding before Justice Osborn and into the Conduct of Justice Osborn.

268) I had a most simple expectation of this Court, that it find for or against me on the facts, not the fabrications of Counsel and Justice Osborn. This Court has failed in that duty and it is now too late, I have abandoned the Appeal because this Court, presently, is not seen by me, or the public at large, to be an honest place. That Counsel mislead the Court is not mere folklore, from the above, including the mere fact of the present application, it is fact and appears endemic.

269) I say no costs should be awarded at all at this time. The Respondents and their legal representatives have already profited well from their incompetence/deception and the determination, as distinct from determinations, of Justice Osborn.

270) I say that this Court should reserve a determination as to costs in the now abandoned Appeal pending an enquiry by this Court or other competent body into the conduct of the previous hearings in this proceeding.

271) I say that it would be wrong to award indemnity costs and the present application should be refused with costs to the Appellants and such other orders as this Court pleases.

272) The **facts** set out in this document are so outrageous as to confound and confront the mind. This Country is Australia, not Zimbabwe.

Affirmed by Glenn Alexander Thompson

In the State of New South Wales

3rd September 2008

Before me:-