

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE

No. 7966 of 1995

BETWEEN:

GLENN ALEXANDER THOMPSON and CHERYL MAREE THOMPSON Plaintiffs

and:

THE MACEDON RANGES SHIRE COUNCIL and OTHERS (as set out

in the Schedule attached hereto)

Defendants

STATEMENT OF CLAIM

Date of Document: 20/9/96
Filed on behalf of: The Plaintiffs

Prepared by the Plaintiffs
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1. The Firstnamed Defendant:

- a) is a body corporate duly incorporated pursuant to the provisions of the Local Government Act 1989 (and more particularly pursuant to order of the Governor in Council published in the Government Gazette 19.1.95);
- b) is the successor of the former Council called the "Kyneton Shire Council" ("the KSC");
- c) is liable for all liabilities of the KSC.

2. The Secondnamed Defendant:
 - a) is a body corporate duly incorporated pursuant to the provisions of the Water Act 1989 (and more particularly pursuant to Order of the Minister for Water Resources published in the Government Gazette 25.3.92);
 - b) as and from 30.3.92 took over the whole of the property, rights, liabilities, obligations, powers and functions of the "Kyneton Water Board" ("the KWB"). The KWB was itself constituted on 1.10.83 by Order of the Governor in Council, published in the Government Gazette 21.9.83. The predecessor of the KWB was the "Kyneton Shire Water Works Trust". ("KSWWT") As and from 1.10.83, all of the liabilities of the KSWWT were transferred to the KWB.
3. The Thirdnamed Defendant was at relevant times employed as the Secretary of both the KSC and the KWB.
4. The Fourthnamed Defendant was at all material times employed as the Shire Engineer of the KSC.
5. By Terms Contract of Sale of Land dated 1.11.79 the Plaintiffs purchased certain land within the "Woodleigh Heights Estate", located at Edgecombe Road, Kyneton in the State of Victoria.

PARTICULARS

The relevant land consisted of Lots 1, 2, 7, 10, 12 and 27 on Plan of Cluster Subdivision CS1134 and being all of the land more particularly described in Certificates of Title Volume 9171 Folios 687, 688, 693, 696, 698 and 713 respectively ("the Plaintiffs' land").

6. The Woodleigh Heights Estate:
- a) was, as at 1978, owned by Kenneth Raymond Buchanan and his wife Yvonne Rae Buchanan ("the Buchanans");
 - b) was within the municipal district of the KSC as designated pursuant to the provisions of the Local Government Act 1958;
 - c) was in 1978 part within and part without the Waterworks District of the KSWWT designated pursuant to the provisions of the Water Act 1958;
 - d) was in 1978 outside both the Urban District and the Rural District of the KSWWT as designated pursuant to the provisions of the Water Act 1958.
7. By Application dated 22 November 1978 the Buchanans applied to the KSC to develop the Woodleigh Heights Estate by subdividing it pursuant to the provisions of the Cluster Titles Act 1974, such subdivision consisting of 45 allotments averaging approximately 2 acres in size, together with substantial areas of common property and

provision for the installation of a privately owned and operated water supply and reticulation system forming part of the common property ("the Application for Cluster Subdivision").

PARTICULARS

The application for Cluster Subdivision consisted of the following relevant documents.

- a) Application for Permit dated 10th November 1978.
 - b) Submission dated 3.11.78, prepared by James A. Harris & Associates Pty. Ltd. ("the Submission").
8. The proposal for the privately owned and operated water supply and reticulation system (as contained within the submission), consisted of:
- a) a storage reservoir with a surface area of 4½ acres and a capacity of 8,500,000 gallons;
 - b) a high level header tank of 100,000 gallon capacity;
 - c) rising main between the reservoir and high level tank;
 - d) a reticulation system comprising main pipes from the tank through the estate and smaller pipes from the main pipe to the individual allotments;

- e) household drinking and bathroom water was to be supplied by means of roof rainwater tanks which were to be installed concurrently with the construction of houses.
- f) the reticulated water supply was for non-domestic uses only.

PARTICULARS

The proposed water supply and reticulation system was detailed in the submission in an Engineering Report by Garlick & Stewart dated 2.11.78. The Report consisted of a letter and plans entitled "Water Supply and Reticulation Layout Plan" and further described in the sections of the submission entitled "Planning Objectives", "The Development" and "Summary"

- 9. On or about 15 November 1978 the KSC issued to the Buchanans Planning Permit No. 2191 ("PP2191") dated 15th November 1978 authorising them to develop the Woodleigh Heights Estate in accordance with the said Planning Permit.
- 10. It was a condition of PP2191 that the Woodleigh Heights Estate be developed in accordance with the Plans and Submissions comprising the Application for Cluster Subdivision, including the constructions and installation by the Buchanans of the water supply and reticulation system as set out in the submission.

PARTICULARS

The Plaintiffs refer to provision 8 of PP2191 which states;

- a) "The development to be carried out in accordance with the plans and submission which formed part of this application"
11. KSC alone approved the Private Water Supply and reticulation system as set out in the submission. KSC did not refer the plans of subdivision to KSWWT pursuant to S11(1) of the Cluster Titles Act 1974 and S569B(2)(ac) of the Local Government Act 1958.
12. On 9 August 1979 the Cluster Subdivision was registered by the Registrar of Titles, as Plan of Cluster Subdivision No. CS1134 ("CS1134").
13. At the time of registration of CS1134 the following relevant works had been carried out in relation to the Construction and installation of the water supply and reticulation system:
- a) The lake referred to in the submission had been constructed and was near full of water.
- b) Two 50,000 gallon concrete high level water tanks had been constructed in lieu of the single 100,000 gallon high level tank referred to in the submission.
- c) The rising main had been laid between and connecting the lake and the high level tanks as referred to in the submission.
- d) Primary reticulation pipes had been laid in the common property and connected to the concrete high level tanks to convey non domestic water from the tanks to the allotments as referred to in the submission.

- e) The high level tanks contained water.
14. By reason of the matters referred to in paragraphs 5 - 13 above the Plaintiffs, as beneficial owners of the land purchased by them;
- a) had a right of access and an entitlement to the water supply and reticulation system within CS1134.
 - b) had a right to install roof rainwater tanks to provide drinking and bathroom water.
15. In or about September 1980, the Buchanans advised the Plaintiffs that they were intending to develop the Woodleigh Heights Estate as a retirement village and that they were desirous of repurchasing from the Plaintiffs all of the allotments owned by them.

PARTICULARS

- a) The advice was verbal and was contained in a conversation between the Firstnamed Plaintiff and Kenneth Raymond Buchanan in or about November 1980 at the time of Kenneth Raymond Buchanan discussing with the Firstnamed Plaintiff the construction of retirement units at Kyneton by Church Authorities.

16. The Plaintiffs responded to Mr. Buchanan's request by advising that, subject to agreement upon price and conditions, the Plaintiffs would sell back to the Buchanans all of the allotments purchased by them.

PARTICULARS

The agreement was partly verbal and partly in writing;

- a) Insofar as the agreement was verbal it was contained in conversations between the Firstnamed Plaintiff and Kenneth Raymond Buchanan in or about November 1980 and December 1980 such conversations being held variously at the home of the Plaintiffs at Whittlesea and the Home of the Buchanans at Whittlesea.
- b) Insofar as the agreement was in writing it is contained in a document dated 1st December 1981 and signed by Kenneth Raymond Buchanan and Yvonne Rae Buchanan and the Firstnamed Plaintiff.
17. In or about November 1980 the Buchanans made application to the KSC for a Cluster Redevelopment of CS1134 dividing each allotment of CS1134 into three smaller allotments.
18. KSC approved the application for Cluster Redevelopment and issued planning permit 2784 (PP2784) in or about November 1980.

19. KSC did not refer the plans for Cluster Redevelopment to KSWWT pursuant to S11(1) of the Cluster Titles Act 1974 and S569B(2)(ac) of the Local Government Act 1958.
 20. There was no alteration to the Water Supply or Reticulation requirements within CS1134 pursuant to PP2784 and the Water Supply and Reticulation requirements remained identical to that described in the submission and set out in paragraph 8 above.
 21. In or about January of 1981 the plaintiffs learned that the Buchanans were in fact intending to develop Woodleigh Heights Estate as a "Timeshare Resort", and were intending to incorporate a company for the purpose of undertaking the development.
 22. On 10th March 1981, the Buchanans or their agents caused Twelfth Monelux Pty. Ltd. to be incorporated, which company changed its name to Woodleigh Heights Resort Developments Pty. Ltd. ("WHRD Pty. Ltd.") on 13 March 1981.
- PARTICULARS**
- a) The initial shareholders and directors in the company were Mr. Kenneth Raymond Buchanan and a Mr. Brian Noel Murphy.
 23. By contract dated 12th August 1981 the Buchanans sold four of the lots forming part of CS1134 to WHRD Pty. Ltd. and granted an option to purchase to WHRD Pty. Ltd.

in respect to further of the allotments comprising CS1134 such option including the Plaintiffs land.

PARTICULARS

Special condition 5 of the Contract of Sale dated 12th August 1981 granted an option to purchase to WHRD Pty. Ltd. in respect to Lots 1 to 27 inclusive and Lots 34 and 35 of CS1134

24. The Buchanans did not repurchase the Plaintiffs' land.
25. On or about 5th May 1983 Woodleigh Heights Marketing Pty. Ltd. ("Marketing") took title to the Plaintiffs' land and held it in trust for the Plaintiffs, as and from this date;
 - a) Marketing was the registered proprietor of the Plaintiffs' land.
 - b) The Plaintiffs were the beneficial owners of the Plaintiffs' land;
 - c) The Plaintiffs were entitled to the benefit of the land.

PARTICULARS

The Plaintiffs were beneficial owners of the land pursuant to the terms of a Declaration of Trust dated 22nd December 1993, executed by the Plaintiffs and Marketing.

26. On 6 May 1983 at the direction of the Plaintiffs, Marketing granted an option to WHRD Pty. Ltd. to purchase the Plaintiffs' land.

PARTICULARS

- a) The option agreement was in writing and dated 6th May 1983.
 - b) The parties to the option were Marketing and WHRD Pty. Ltd.
 - c) The agreed sale price under the option was \$33,000.00 per lot for each of the lots comprising the Plaintiffs' land.
27. Condition 6 of the option agreement dated 6th May 1983 required Marketing to consent to WHRD Pty. Ltd. lodging a plan of Cluster Re-Development in respect to each of the lots of the Plaintiffs' land. ("the redevelopment")
28. On 31 August 1983 WHRD Pty. Ltd. exercised the option dated 6th May 1983 and entered, inter alia, into the following Contracts of Sale, each dated 31 August 1983:
- a) Contract for Sale regarding Lots 27 and 10, completion date 21 September 1983; Contract price \$66,000;
 - b) Contract of Sale regarding Lots 1 and 2, completion date 21 December 1983; Contract price \$68,558;
 - c) Contract of Sale regarding Lots 12 and 7, completion date 21 March 1984; Contract price \$71,115;
29. By April 1984 WHRD Pty. Ltd. was in default with respect to the three Contracts of Sale identified in paragraph 28.

PARTICULARS

- a) WHRD Pty. Ltd. had failed and refused to complete any of the contracts either in part or in full.
 - b) WHRD Pty. Ltd. had failed and refused to pay any monies falling due under the contracts.
30. The Plaintiffs advised WHRD Pty. Ltd. that unless the said default was rectified, the relevant Contracts of Sale would be rescinded and the Plaintiffs' land, the subject of those Contracts, would be sold on the open market.

PARTICULARS

- a) The advice to WHRD Pty. Ltd. was verbal and contained in various conversations between the Firstnamed Plaintiff and Mr. Brian Murphy the Managing Director of WHRD Pty. Ltd.
- b) The conversations took place in or about March and April of 1984 at various locations in both Melbourne and Kyneton.
- c) The Plaintiffs advised WHRD Pty. Ltd. that the default of WHRD Pty. Ltd. was causing financial difficulty for the Plaintiffs.

- d) The Plaintiffs advised WHRD Pty. Ltd. that if the default was not rectified the Plaintiffs would rescind the contracts which WHRD Pty. Ltd. had defaulted on and would sell the land the subject of those contracts on the open market.

31. WHRD Pty. Ltd. responded by:

- a) advising the Plaintiffs that WHRD Pty. Ltd. had entered into a private water supply agreement ("the Water Agreement"), with the KWB for the supply of water to all of the allotments comprising the Woodleigh Heights Estate;

PARTICULARS

- i) The advice was verbal and contained in conversations between the Firstnamed Plaintiff and Mr. Brian Murphy the Managing Director of WHRD Pty. Ltd. in or about March and April of 1984.
 - ii) Mr. Brian Murphy advised the Plaintiffs that the Water Agreement related to the supply of water to all of the lots in CS1134 including those lots owned by the Plaintiffs.
- b) threatening that if the Plaintiffs sought to rescind the said Contracts of Sale, WHRD Pty. Ltd. would exclude the Plaintiffs' land from access to the water supply and reticulation system within CS1134 and thereby render the Plaintiffs' land valueless and unsaleable.

PARTICULARS

- i) The threats were verbal and contained in various conversations between the Firstnamed Plaintiff and Mr. Brian Murphy for WHRD Pty. Ltd. in or about March and April of 1984
- ii) Mr. Murphy advised the Plaintiffs that the Water Agreement was a private agreement between WHRD Pty. Ltd. and the Kyneton Water Board
- iii) Mr. Murphy advised that Plaintiffs that under the Water Agreement WHRD Pty. Ltd. controlled the supply of water within CS1134 including the supply of water to the Plaintiffs' land.
- iv) Mr. Murphy advised the Plaintiffs that if the Plaintiffs rescinded the contracts of sale and attempted to sell to anyone other than WHRD Pty. Ltd. that WHRD Pty. Ltd. would act to deny and prevent the supply of water to the Plaintiffs' land and thereby render the Plaintiffs' land valueless and unsaleable.

32. In April 1984 the Plaintiffs made enquiries of the KSC and the KWB to ascertain whether the matters communicated to the Plaintiffs by WHRD Pty. Ltd. (refer paragraph 31 above) were correct.

PARTICULARS

The enquires were oral and contained in a telephone conversation in or about April 1984 between the Firstnamed Plaintiff and Mr. Stan Porter who was known to the Plaintiffs and known by the Plaintiffs to be the Secretary of both KWB and KSC.

33. In response to the Plaintiffs' enquiries the KSC and the KWB represented to the Plaintiffs that:

- a) CS1134 was outside the Kyneton Water Trust area and in an area where under the provisions of the Water Act 1958 water was supplied under private agreements at the discretion of the Trust;
- b) there was under the provisions of the Water Act 1958 a legally valid Water Agreement in existence between the KWB and WHRD Pty. Ltd.;
- c) that under the Water Agreement WHRD Pty. Ltd. owned and operated the water supply and reticulation system within CS1134;
- d) the Plaintiffs' land;
 - i) was not entitled to the water supply or reticulation system within CS1134;
 - ii) could not obtain access to the water supply and reticulation system without the agreement and consent of WHRD Pty. Ltd.;

- e) the body corporate of CS1134 was not entitled to the water supply or reticulation system within CS1134;
 - f) KWB would not;
 - i) transfer the existing Water Agreement to the body corporate of CS1134 except with the agreement of WHRD Pty. Ltd.;
 - ii) enter into a separate water supply agreement with the body corporate of CS1134 except with the agreement of WHRD Pty. Ltd.;
 - g) unless the Plaintiffs had access to a reticulated water supply the KSC would not issue building permits to build upon the Plaintiffs' land.
- ("the representations").

PARTICULARS

The representations were oral and contained in a telephone conversation between the Firstnamed Plaintiff and Mr. Stan Porter in or about April 1984.

34. In April 1984 the Plaintiffs requested the KSC, the KWB and WHRD Pty. Ltd. for a copy of the said Water Agreement, however each of the said parties failed and/or refused to either give the Plaintiffs access to the Water Agreement, or to supply them with a copy of the same.

- vii) Grange Lea Nominees Pty. Ltd. was the family trust company for the family of the Buchanans.
- viii) The directors of Deckwood Pty. Ltd. were Jame Stanton Lewis and Corinne Jenny Normington. The Secretary of Deckwood Pty. Ltd. was Corinne Jenny Normington.
- ix) Jame Stanton Lewis a Director of Deckwood Pty. Ltd. was also a Director of Club Resorts Limited. Pheonix Hytech Horizons a company controlled and owned by Jame Stanton Lewis was a shareholder of Club Resorts Limited.
- x) Corinne Jenny Normington is a Daughter of the Buchanans.
- xi) Club Kirribilli is the name of a Timeshare resort developed by Club Resorts Limited or associated companies on and within CS1134.
- xii) Petite Pty. Ltd. is the manager of the Club Kirribilli timeshare resort.
- xiii) By transfers of land dated 27th April 1992 Deckwood Pty. Ltd. transferred the Plaintiffs' land to Petite Pty. Ltd.
- xiv) By application dated 27th April 1992 Petite Pty. Ltd. made application under section 98D of the Transfer of Land Act for the issue of 102 certificates of title for share interests in respect to each lot of the Plaintiffs' land.

xv) By stamped lease dated 24th July 1990 Petite Pty. Ltd. leased each lot of the Plaintiffs' land to Club Kirribilli Limited.

xvi) by further two documents entitled "Deed of Licence" and "Management Agreement" respectively, each dated 24th July 1990 Petite Pty. Ltd. entered into a Deed of Licence and a Management Agreement with Club Kirribilli Limited in respect to the Plaintiffs' land.

67. By reason of the matters alleged herein the Plaintiffs suffered loss and damage.

PARTICULARS

- a) Before selling the the Plaintiffs' land MCL obtained a letter dated 12th October 1988 from a registered valuer G.D. Sutherland Pty. Ltd. (as set out in paragraph 56 g)) setting out an opinion of value of the Plaintiffs' land;
- b) the letter of opinion noted the complications of services and set the value of the Plaintiffs' land as being in the range \$5000.00 to \$6000.00 per lot or \$90,000.00 to \$108,000.00 for all eighteen allotments without the benefit of water.
- c) By subsequent Valuation dated 17th March 1992 G. D. Sutherland supported its previous letter of opinion and valued the Plaintiffs' land at \$117,000.00 as at the date of the letter of opinion referred to in subparagraph a) and b) above.
- d) The value of the Plaintiffs' land as set out in both the letter of opinion dated 12th October 1988 from G.D. Sutherland Pty. Ltd. and the subsequent

Valuation dated 17th March 1992 are both based upon a value wherein the Plaintiffs' land did not have a water supply available to it.

- e) MCL sold the Plaintiffs' land for \$135,000.00 which sum represented the value of the Plaintiffs' land without the benefit of a reticulated water supply available to it.
- f) The Plaintiffs subsequently obtained a valuation dated 5th June 1995 from A. T. Cocks and Partners Pty. Ltd. valuing the Plaintiffs' land as at the date of sale by MCL and assuming that a water supply was available to the Plaintiffs' land.
- g) The valuation referred to in subparagraph f) above placed a value of \$431,500.00 on the Plaintiffs' land as at the date of sale by MCL.
- h) The loss suffered by the Plaintiffs as at the date of sale to Deckwood Pty. Ltd. was the difference between the actual sale price namely \$135,000.00 and the value of the Plaintiffs' land with a water supply available to it as at the date of sale namely \$431,500.00 the difference being \$296,500.00

ALTERNATIVELY

- i) The Plaintiffs' land was valued at \$305,000.00 as at 28th October 1983 in a valuation by L. J. Hooker (Vic) Limited for A.G.C.
- j) The Plaintiffs expected to realise an average of \$50,000.00 per allotment for each of the six lots for a total of \$300,000.00 at the time of the auction set

down for 17th November 1984 and subsequently cancelled for the reasons set out above;

- k) the loss suffered by the plaintiffs as at the date of sale of the Plaintiffs' land by MCL is \$300,000.00 plus interest according to statute between 17th November 1984 and 31st October 1989 less the sale price realised by MCL namely \$135,000.00

ALTERNATIVELY

- l) The Plaintiffs' land was valued at \$305,000.00 as at 28th October 1983 in a valuation by L. J. Hooker (Vic) Limited for A.G.C.
- m) The Plaintiffs expected to realise an average of \$18,000.00 per allotment for each of the eighteen re-developed lots for a total of \$324,000.00 at the time of the auction set down for 23rd November 1985 and subsequently cancelled for the reasons set out above;
- n) the loss suffered by the plaintiffs as at the date of sale of the Plaintiffs' land by MCL is \$324,000.00 plus interest according to statute between 23rd November 1985 and 31st October 1989 less the sale price realised by MCL namely \$135,000.00
- o) Further and better particulars of the loss and damage suffered by the plaintiffs will be provided before trial.

AND THE PLAINTIFFS CLAIM:

- A. Damages
- B. Tax payable upon the award of damages, or alternatively, an indemnity in respect of the same.
- C. Interest pursuant to statute.
- D. Costs
- E. Such other and further order as the Court deems fit.

5 Dated:

5

For and on behalf of the Plaintiffs

SCHEDULE OF PARTIES

GLENN ALEXANDER THOMPSON

First Plaintiff

and

CHERYL MAREE THOMPSON

Second Plaintiff

and

THE MACEDON RANGES SHIRE COUNCIL

Firstnamed Defendant

and

THE COLIBAN REGIONAL WATER AUTHORITY

Secondnamed Defendant

and

DAVID PARKINSON

Thirddnamed Defendant

and

GRAEME WILSON

Fourthnamed Defendant