

1 BUCHANAN, JA.: You appear for yourself, Mr Thompson?

2 MR THOMPSON: I do, sir.

3 MR AHERN: May it please the court, I appear on behalf of the  
4 first respondent.

5 BUCHANAN, JA: Yes, Mr Ahern.

6 MR GARDE: I appear with my learned friend, Ms Burchell, for the  
7 Coliban Region Water Authority, if the Court pleases.

8 BUCHANAN, JA.: Yes, Mr, Garde.

9 MR GARDE: I don't know that it matters, Your Honours, as to  
10 what order we start, but both respondents, of course,  
11 bring applications for security for costs.

12 Very briefly, the proceedings have in the past  
13 concerned two sub-divisions. One is described as the  
14 Tylden Road subdivision. In substance, in 1980 the  
15 appellants gave guarantees concerning the construction of  
16 roads and the provision of water supply to the Council and  
17 the then Kyneton Water Board. In 1982 there was default  
18 in that roads and infrastructure was not provided - - -

19 BUCHANAN, JA.: Mr Garde, we have read the reasons for the  
20 decisions below - - -

21 MR GARDE: Yes.

22 BUCHANAN, JA.: And we are quite familiar with the issues, I  
23 think.

24 MR GARDE: Yes. In those circumstances, Your Honours, we have  
25 an outline of submissions. They have been filed on the  
26 24th of July 2007.

27 BUCHANAN, JA.: We have read those as well.

28 MR GARDE: Yes; if I then just highlight what we are submitting  
29 in paragraph 6. We submit, there, that the appeal is an  
30 abuse of process, vexatious, and has no prospect of  
31 success; and particularly, I wish to refer the court to

1 paragraph 106 of His Honour Justice Osborn's reasons for  
2 decision.

3 BUCHANAN, JA.: Sorry, what paragraph was that?

4 MR GARDE: 106, Your Honour. Paragraph 106 sets out the release  
5 which the respondents had the benefit of, arising from the  
6 Tylden Road County Court proceedings, and the court will  
7 observe that it relates to "all claims, suits and demands,  
8 whatsoever the subject matter of this proceeding".

9 If one then turns back to, in the same judgment,  
10 paragraph 56, the court will observe that in the amended  
11 statement of claim filed in those proceedings there are a  
12 whole series of allegations of contraventions of section  
13 569, 569E of the former Local Government Act 1958; and,  
14 without reading out paragraph 56, it is apparent that  
15 allegations of contravention of the provisions of sections  
16 569E and A, and 569 as such, were made in a variety of  
17 ways.

18 In paragraph 57, His Honour says "This pleading is  
19 manifestly inconsistent with assertions made in the  
20 first-named defendant's primary affidavit".

21 REDLICH, JA.: "Plaintiffs."

22 MR GARDE: I am sorry - I withdraw that - "the plaintiff's  
23 primary affidavit", and the basis on which that affidavit  
24 was sworn is then set out in place by His Honour. So we  
25 have a situation where there is a release, there is an  
26 amended statement of claim in those County Court  
27 proceedings which canvasses the issues in the way set out,  
28 and we have the first-named plaintiff in the current  
29 proceedings setting out the matters that are described in  
30 paragraph 57 which are patently inconsistent with the  
31 pleading in the County Court. That is the position with

1 the release in Tylden Road.

2 In terms of the Woodleigh Heights proceedings, I  
3 draw the court's attention to paragraph 176 of His  
4 Honour's reasons. In the fifth line, in paragraph 176,  
5 His Honour observes: "The words utilised in the release  
6 could scarcely be broader: 'All actions, suits, demands,  
7 and costs, arising out of or in any way related to the  
8 subject matter of the proceedings'. The phrase 'related  
9 to' has been recognised as having a deliberately broad  
10 intent". Then His Honour goes on to discuss IBM  
11 Australia, where those propositions are made good. So the  
12 respondents had the benefit of that release in the context  
13 of the Woodleigh Heights proceedings.

14 I would then draw to the court's attention paragraph  
15 181 of the judgment dealing with matters of fact as  
16 recorded by His Honour in the context of the Woodleigh  
17 land, particularly (e) and (f). "(e) There is no evidence  
18 the defendants concealed relevant facts; (f) There is no  
19 evidence of new facts on the basis of which the plaintiffs  
20 could seek to avoid the limitations defence"; and there  
21 are similar observations made in the context of the Tylden  
22 Road proceedings in paragraph 101 at (c) and (d).

23 Paragraph 101(c) says "there has been no relevant  
24 concealment of the facts by the defendants which would  
25 provide an arguable basis for avoiding the relevant  
26 limitation period, and (d) "all the facts now relied upon  
27 are ascertainable upon the exercise of reasonable  
28 diligence since discovery in the Tylden Road County Court  
29 proceeding." So that is paragraph 101.

30 BUCHANAN, JA.: It seems to be apparent from the respondents'  
31 outline that they contend that the concealment rests in

1 the way in which counsel has conducted the litigation  
2 below.

3 MR GARDE: The position is that, at least it is said that, at  
4 the conclusion of the Tylden Road proceedings there was  
5 some material provided to the appellants which was not  
6 looked at for many years. The immediate difficulty that  
7 arises in the context of that particular submission is  
8 that, as His Honour notes, the exercise of reasonable  
9 diligence in reviewing it would clearly have disclosed the  
10 substance of that material. And a further difficulty is  
11 that the black book, as it is described, a book made  
12 available containing notes and records in the County Court  
13 proceedings, clearly shows the requisite level of  
14 knowledge. So there were just obvious problems,  
15 Your Honour, in the course of any suggestion that there  
16 was a fraudulent concealment, noting also Justice Dodds'  
17 decision as to what those words in the Limitations of  
18 Action Act really mean. So they were just some of the  
19 array of problems.

20 In terms of a limitation period: at the time when  
21 the current proceedings were issued, in 2005, around or in  
22 excess of 20 years had elapsed since the events in  
23 question and the dates upon which damage could reasonably  
24 be said to have been sustained. So below, before Master  
25 Efthim, and before His Honour, the respondents relied on  
26 the fact that the proceedings were patently out of time,  
27 the relevant period of six years, on any view, having long  
28 since expired.

29 In terms of the endeavour made to allege fraudulent  
30 concealment, His Honour and Master Efthim considered there  
31 to be no substance in that on examining the actual

1 pleadings that were before the court on the earlier  
2 occasions; and secondly, on examining the documentation  
3 which was actually available in the course of discovery,  
4 including plans. Then, of course, there was the question  
5 of the releases, and the action doctrine which also was  
6 available to be called in aid.

7 So for those reasons, if the court pleases, if I  
8 just refer to paragraph 6 onwards in our outline, it is a  
9 case where the proceedings are, in our respectful  
10 submission, truly an abuse of process and vexatious, and  
11 even on those bases have no prospect of success.

12 BUCHANAN, JA.: You don't have to establish that to obtain  
13 security for costs, surely?

14 MR GARDE: No, we don't.

15 BUCHANAN, JA.: You don't get security for costs because the  
16 proceeding appears vexatious.

17 MR GARDE: Yes.

18 BUCHANAN, JA.: You get security for costs because there are  
19 special circumstances - - -

20 MR GARDE: Yes.

21 BUCHANAN, JA.: And prima facie, impecuniosity is one of those.

22 MR GARDE: Yes.

23 BUCHANAN, JA.: Now, I would have thought, in that context, that  
24 the prospects of success of the appeal are not - they are  
25 not irrelevant, but they are of lesser moment.

26 MR GARDE: No.

27 BUCHANAN, JA.: It may be, it wouldn't shut out - I mean, you  
28 might be careful to shut out an appeal that had every  
29 prospect of success.

30 MR GARDE: Yes.

31 BUCHANAN, JA.: But you don't, with respect, I would have

1 thought, obtain an order for security of costs just  
2 because - - -

3 MR GARDE: Yes.

4 BUCHANAN, JA.: You can characterise the appeal as having little  
5 prospect of success.

6 MR GARDE: Perhaps I should put it this way, Your Honour: that  
7 amongst the circumstances that exist in this case is the  
8 fact that there were these earlier proceedings; that they  
9 were resolved, by settlement in one case and at mediation  
10 in another case; and that, subsequently, specific  
11 performance of the second settlement following the  
12 mediation was granted by His Honour, Justice Beach, and  
13 those are amongst the circumstances which are before this  
14 court and can be taken into account.

15 Moving on to the question of impecuniosity and  
16 assets, we note the absence of any affidavit from  
17 Mr Thompson.

18 Mr Thompson, as the court is aware from a reading of  
19 the judgment, is very experienced in the context of  
20 litigation. He has been involved in a good number of  
21 proceedings, as emerges, again, from the facts in this  
22 matter. He has not seen fit to come before this court  
23 with an affidavit setting out his position, and we note he  
24 says, if I look at page 42 of his outline of submission -  
25 and this is Roman numeral 8 at the very top on page 42, it  
26 is under the heading of "Insufficient Assets" on the  
27 previous pages - "In accord with the position held by me,  
28 I will not make any submissions as to my present financial  
29 position other than saying that previous submissions made  
30 by me in this regard do not purport to and cannot be  
31 construed to represent my present financial position." So

1 he is not forthcoming, either in terms of affidavit  
2 material or in terms of anything in his submission, in  
3 that respect.

4 We have, if the court pleases, in our paragraphs 10  
5 and 11, referred to the fact that a warrant of seizure and  
6 sale was returned by the Deputy Sheriff, unsatisfied, in  
7 relation to a property in the name of the appellants, with  
8 the notation that the Bailiffs were unable to find any  
9 personal or real estate on which to make levy.

10 As to that, Mr Thompson says, at the top of his page  
11 41, "Mr Edward sent a Sheriff to what he knows to be a  
12 vacant block of land owned by the appellants and which he  
13 states to be subject to the encumbrances referred to in  
14 paragraph 11 of his affidavit of 6 July 2007." "The  
15 Sheriff found nothing other than encumbered vacant block  
16 of land", and then he directs criticism at Mr Edward,  
17 which I won't read out.

18 In terms of impecuniosity, we note that Mr Thomson,  
19 in his own affidavit on the 18th of October 2005 described  
20 his current financial circumstances as limited, and that  
21 he was fully committed to providing for himself, his  
22 ex-wife and his daughter.

23 BUCHANAN, JA.: Yes. We have read all that, Mr Garde.

24 MR GARDE: Very good. Then the court will be aware of the  
25 varied terms of the outstanding costs orders which now  
26 amount to in excess of \$248,000 in terms of taxed costs  
27 orders. There are four different orders.

28 It is correct to say, Your Honour, that, despite  
29 those orders of the court, the appellants have elected to  
30 pay not one cent in reduction of those orders, despite the  
31 issue of the warrants. So no moneys have been paid at

1 all, and the respondents have every reason, in our  
2 submission, to be very concerned about their future  
3 position.

4 Searches disclose that the first appellant has, in  
5 relatively recent times, incorporated a company called  
6 Thompson Couplings Limited. The financial documentation  
7 associated with that has been reviewed. He appears to  
8 have adopted the practise of inviting venture capital from  
9 other persons, but if we look at what he says about that  
10 at page 42 of his written submission, under the heading  
11 Roman numeral 9, "ASIC Search and \$83,000 Loan to  
12 Company", 3, underneath that, says "The loan referred to  
13 is an ongoing loan, was provided years earlier and is not  
14 recoverable by me except as determined by the company to  
15 repay it", whatever that may mean, but he asserts it is  
16 not recoverable by him except on those terms.

17 The court will then observe that security has been  
18 demanded, and security was agreed. Mr Edward's Exhibit 57  
19 was a letter from Mr Thompson whereby he agreed to provide  
20 security, and in this letter dated the 2nd of April 2007  
21 Mr Thompson advised Maddocks and Arnold Dallas McPherson  
22 that he would undertake to "provide \$100,000 security for  
23 costs of the appeal by Friday, 15th of June 2007." "2:  
24 In default of my providing the said security I will  
25 withdraw from the appeal"; and 3, he sought that the  
26 directions hearing be adjourned until the first available  
27 date after 15 June 2007. That is what he wrote. Maddocks  
28 prepared appropriate consent orders to the above effect.

29 Subsequently, as Mr Edwards sets out in his  
30 affidavit, the first appellant recanted that position, and  
31 at the directions hearing before Master Cane on the 28th

1 of May stated that this consent was offered to buy time to  
2 arrange for his counsel of choice to appear in that  
3 proceedings. The court will be more generally aware that  
4 the position of the first appellant's representation has  
5 varied: before Master Efthim the then Mr John Middleton  
6 QC and Mr Adams appeared for him; before Justice Osborn he  
7 appeared on his own behalf, and in previous proceedings  
8 Mr Francis Tiernan has not uncommonly appeared for him.  
9 So one of the circumstances on which we rely, if the court  
10 pleases, is the consent to the position of security  
11 described in that letter and the subsequent reneging of  
12 that, which is similar to what transpired following the  
13 mediation before Mr Golvan which gave rise to the order  
14 for specific performance before Justice Beach.

15 In terms of the quantum of security, if the court  
16 pleases, we have filed an affidavit of Ms Melanie Jane  
17 Crowe which, together with the evidence of Mr Edward, is  
18 in support of the figure for security set out in the  
19 summons.

20 BUCHANAN, JA.: Well, on what basis do you say that the appeal  
21 will last for two days?

22 MR GARDE: On the basis of previous experience, and on the basis  
23 of the lengthy submissions likely to be filed by  
24 Mr Thompson and the lengthy submission likely to be made  
25 of which this court has already had some experience.

26 BUCHANAN, JA.: But you say the issues are quite straight  
27 forward, don't you?

28 MR GARDE: The legal issues are straight forward.

29 HIS HONOUR: Well, why will this court take two days to deal  
30 with them?

31 MR GARDE: It is a question, Your Honour, as to whether the

1 court will fully listen to the submissions likely to be  
2 advanced on behalf of the appellants. We are in the  
3 court's hands but - - -

4 BUCHANAN, JA.: How long did the case before Mr Justice Osborn  
5 last?

6 MR GARDE: The answer to that is it was two days, and that is  
7 the 31st October and the 1st of November. The case before  
8 Master Efthim took longer and, there, the appellants were  
9 represented. So one would hope, Your Honour, it could be  
10 done in a single day; whether that is achievable is in the  
11 hands of the court, essentially.

12 BUCHANAN, JA.: Yes, I see.

13 MR GARDE: If Your Honour pleases.

14 BUCHANAN, JA.: Mr Ahern?

15 MR AHERN: If Your Honours please. This application by the  
16 first respondent is made in a context where you have had a  
17 two-day hearing before Master Efthim where the appellants  
18 were represented by Mr John Middleton, QC, and Mr Adams,  
19 QC, where there was an extensive consideration of the  
20 issues, written reasons and an indemnity costs order; an  
21 appeal against that to Justice Osborn over two days again,  
22 117 pages of written submissions by the appellants; again,  
23 the appeal was dismissed; there was a hearing de novo,  
24 again an indemnity costs order.

25 To date, the taxed costs and the assessed costs of  
26 both respondents are \$478,000 and, in my submission, the  
27 plaintiffs - there are two grounds for showing special  
28 circumstances in this case. One is that the appellants  
29 are impecunious in the sense that they would be unable to  
30 meet the costs of the Council and of the Water Authority  
31 in the event that the respondents are successful; and two,

1 in the context that this appeal has poor prospects of  
2 success.

3 BUCHANAN, JA.: Yes, but you don't get, surely, security for  
4 costs just because the prospects of success are poor.

5 MR AHERN: No, it is combined with impecuniosity. There was a  
6 time when there was an established line of authority that  
7 said impecuniosity, of itself, was a special circumstance  
8 for Rule 64.24.

9 There has been a recent change, or a trend - the  
10 opinion has been expressed that impecuniosity, of itself,  
11 is not a sufficient consideration to be a special  
12 circumstance, but a significant consideration to be  
13 weighed with other circumstances, and the 'other  
14 circumstances' in this case, it is submitted, is the poor  
15 prospects of success.

16 One thing, on the poor prospects of success, that I  
17 wish to focus upon is the fact that the appellants  
18 concede, in essence, that the claims are manifestly  
19 statute barred given the six-year limitation period; but  
20 before Master Efthim, and before Justice Osborn, the  
21 appellants sought to rely on section 27B of the  
22 Limitations Act to say that the fraud, this is a case of  
23 fraud; the cause of action had been concealed by fraud,  
24 and in both circumstances, before both Master Efthim and  
25 Justice Osborn, that endeavour to overcome the six-year  
26 limitation hurdle was unsuccessful.

27 Now, one of the reasons for that was that the  
28 appellants, sir - we were given a black folder of  
29 documents in 1991, at the time we settled the prior Tylden  
30 Road proceeding. Now, that folder has been taken home and  
31 not read by the first appellant until 2000, August 2000.

1           The appellants say that in August 2000, in relation to  
2           another proceedings again the Council, he took out the  
3           folder and he read the documents.

4       BUCHANAN, JA.: What were the dates again, Mr Ahern? The folder  
5           was supplied when?

6       MR AHERN: In 1991.

7       HIS HONOUR: Yes, and read in?

8       MR AHERN: In August 2000.

9       BUCHANAN, JA.: Yes. Thank you.

10      MR AHERN: So there was a settlement of the prior Tylden Road  
11           proceeding, which only related to the residential land,  
12           not the industrial land. This proceeding relates to both.  
13           The earlier proceeding related to the residential land.  
14           There was a settlement of that proceeding. The  
15           appellant's evidence was that while the terms of  
16           settlement were being signed he was handed a black folder  
17           and said "Could you hold this?", and terms were signed,  
18           but the black folder wasn't asked for back by the counsel  
19           for the Council. He then said "I had no reason to read  
20           the folder because the proceeding was at an end".

21           Then, in August 2000, he reviewed the documents, he  
22           said, in relation to another proceeding against the  
23           Council. The Council was claiming rates against the  
24           appellants. He then took out the black folder and he read  
25           the documents. His evidence was that reviewing those  
26           documents, and then considering those documents in light  
27           of an earlier proceeding, made him lead to certain  
28           conclusions, and it was those conclusions which then led  
29           to this proceeding. Now, both before Master Efthim - and  
30           that was how he sought to postpone the limitation period.  
31           He maintained the limitation period commenced in August

1           2000 and, therefore, he was in time by commencing  
2           proceedings in May 2005.

3       BUCHANAN, JA.: That is in August 2000, he discovered the facts  
4           which had been fraudulently concealed.

5       MR AHERN: That is what he says. He read documents which then  
6           led him to reflect upon earlier matters, which then led to  
7           this proceeding.

8           The problem that was encountered, both before Master  
9       Efthim and before Justice Osborn, was that the documents  
10       contained in the black folder had been discovered in the  
11       prior Tylden Road proceeding. They had been discovered in  
12       that proceeding and copies of them had been provided to  
13       his solicitor in that proceeding, and the finding was that  
14       there was a no concealment, and certainly no fraudulent  
15       concealment, because he had the relevant documents  
16       discovered to him by the Council, my client, in the prior  
17       Tylden Road proceeding. It is those aspects of the  
18       judgment of Justice Osborn that I would like to take you  
19       to, that deal with that issue.

20       BUCHANAN, JA.: Yes.

21       MR AHERN: If I could take you to page 22 of the reasons for  
22       decision, and it is paragraph 94.

23           At paragraph 94, His Honour sets out the plaintiff's  
24       core submission in relation to the present proceeding. He  
25       then sets out, in paragraph 95, three paragraphs from the  
26       appellant's submissions before him, and paragraph 40 of  
27       those submissions is the paragraph I wish to take you to,  
28       where it says "The defendants fraudulently concealed the  
29       facts behind these issues during the period 1979 until  
30       discovered by me in August 2000", and how he came to  
31       discover that is then dealt with by His Honour on page 31.

1 REDLICH, JA.: Sorry, what paragraph?

2 MR AHERN: It starts at paragraph 108, where he deals with the  
3 plaintiff's awareness of the facts, and the relevant  
4 paragraph is 113 on page 32.

5 Master Efthim summarised the thrust of the  
6 first-named plaintiff's primary affidavit as to the  
7 background of this aspect of the matter as follows:

8 "Mr Thompson, in order to demonstrate that his action had  
9 not been statute-barred, has sworn in his first affidavit  
10 as follows: He initiated proceedings in the County Court  
11 in 1988 in relation to the Tylden Road land to recover  
12 moneys mistakenly paid pursuant to bank guarantees. He  
13 also claimed damages for losses occasioned by the mistaken  
14 calling up of the bank guarantees."

15 Now this comes to the black folder. "On the second  
16 day of the hearing the Defendants made an offer of \$40,000  
17 to settle the matter and he agreed. Terms of settlement  
18 were drawn. At the time of signing the terms of  
19 settlement counsel for the Defendants handed to  
20 Mr Thompson a large black folder containing copies of  
21 various documents. He took this material home and gave it  
22 a cursory glance but because he considered the matter to  
23 be at an end he did not look at the contents again until  
24 August 2000", and then there is paragraphs dealing with  
25 the other proceedings, the prior Woodleigh Heights  
26 proceedings.

27 Then, on the top of page 33: "In August 2000,  
28 Mr Thompson for the purpose of preparing a defence and  
29 counterclaim against the First Defendant in respect to a  
30 rates claim brought by the First Defendant, began  
31 reviewing all of the documents available to him. Upon

1 examining the documents within the black folder given to  
2 him in 1988" - but actually it was 1991 - "it became  
3 apparent to him that there were two versions of plans for  
4 the industrial allotments for the Tylden Road subdivision,  
5 namely complete versions and clipped version. The clipped  
6 versions had been clipped in the copying in such a manner  
7 as to remove or omit the identifying number which was  
8 present on the complete version."

9 "He noticed that the black folder also contained  
10 copies of residential series of Tylden Road plans and  
11 those plans had also been clipped and he recognised the  
12 clipped plans to be identical to those which had been  
13 admitted into evidence in the Magistrates' Court  
14 proceeding".

15 Now, at paragraph 114, he then reflects on those  
16 documents in the black folder and reflects upon the  
17 evidence given in the earlier Magistrates' Court  
18 proceeding. Then, on the bottom of page 34: "As a result  
19 of perusing the documents in the black folder ... and  
20 reviewing the documents tendered in the Magistrates'  
21 Court, and the evidence given by" - this is an officer of  
22 the Council - "in that Court I came to a number of  
23 conclusions." These were as follows, and those  
24 conclusions at the top of page 35 led to this proceeding.

25 The issue that I wish to take you to is, then, the  
26 acceptance by both Master Efthim and Justice Osborn that  
27 these documents in the black folder had been discovered to  
28 him in the prior Tylden Road proceeding, and that is on  
29 page 39, paragraph 125, where it starts: "There is a  
30 further fundamental problem confronting the plaintiffs'  
31 case as to further concealment of relevant facts. The

1 black folder comprised documents discovered in the County  
2 Court proceedings. In this regard I accept the  
3 conclusions of Master Efthim at paragraphs 53 and 54 of  
4 his decision" - and they are - "It is clear from  
5 Mr Thompson's first affidavit that critical documents in  
6 the black folder which led to this matter being further  
7 litigated are the complete version of the plans of the  
8 industrial allotments of the Tylden Road subdivision."

9 "In relation to these claims, I note that Michelle  
10 Elizabeth Dixon, solicitor, for the First Defendant has  
11 sworn that she has reviewed the documents discovered by  
12 the First Defendant in the Tylden Road proceedings heard  
13 previously. Each of the documents described by  
14 Mr Thompson as the complete plans were discovered by the  
15 First Defendant in the Tylden Road proceedings as  
16 discovered document number 4 in its supplementary  
17 affidavit sworn 23 May 1989. She also swears that the  
18 clipped versions of the plans were also discovered. In  
19 addition, it appears from correspondence that Neville &  
20 Co., solicitors acting on behalf of Mr Thompson, requested  
21 and were provided with a copy of all documents discovered  
22 by the First Defendant by supplementary affidavit of  
23 documents", apart from one document. "A complete version  
24 of the plans were therefore provided to Neville & Co."

25 "Mr Edwards, solicitor, for the Second Defendant,  
26 swore that he undertook inspection of documents discovered  
27 by the Plaintiffs in the second, earlier proceedings.  
28 Those documents include a copy of the complete version of  
29 plans of industrial allotments". So both Justice Osborn  
30 and Master Efthim found that the documents in the black  
31 folder which led to, which documents then led to this

1 proceeding, had been discovered by the Council in the  
2 prior Tylden Road proceeding; therefore, there had been no  
3 concealment; therefore, the 27B hurdle was not overcome.

4 Now, in Mr Thompson's written submissions in this  
5 matter there is no mention about how, as to why that is  
6 wrong. He goes to great length in his submissions to say  
7 why the earlier proceedings and this proceedings are  
8 different, but he doesn't go on to say that these  
9 documents were not discovered in the previous proceedings,  
10 and as to why the findings by Master Efthim, and by  
11 Justice Osborn more relevantly, are wrong on the 27B  
12 hurdle.

13 He makes two references to this issue and they are  
14 on pages 3 and 39 of his submissions. At the bottom of  
15 page 3 of his outline he says: "The appellants, on the  
16 other hand, relied upon section 27 of the Limitations of  
17 Actions Act as detail in stock(?) that the necessary  
18 fraudulent concealment was manifestly present", but he  
19 doesn't deal with the discovery issue.

20 On page 39 of his outline, at paragraph (d), under  
21 the heading "The Present Claims are Statute-Barred", he  
22 states: "They were concealed by perjury, false  
23 affidavits, false admissions, and by the very conduct of  
24 the previous proceedings. This concealment was  
25 fraudulent, known to be wrong, done for the purpose of  
26 concealing the present right of action. All of the acts  
27 which are fraudulent concealment necessary for section 27  
28 relief are present", but doesn't go on to deal with why,  
29 or why the finding by Justice Osborn that these documents  
30 had been discovered is wrong. All of these documents had  
31 not been discovered to him in the previous proceedings.

1           In relation to the - as you are aware, there was  
2           also a prior Woodleigh Heights proceeding. The current  
3           proceedings is for both the Tylden Road land, and the  
4           Woodleigh Heights land. There was an earlier Tylden Road  
5           proceeding in the County Court, and an earlier Woodleigh  
6           Heights proceeding in the Supreme Court. Mr Thompson's  
7           position was that, having reflected upon reading the  
8           folders in the black folder, and having considered what  
9           had happened in relation to the Tylden Road land, he then  
10          further reflected on what may have happened in relation to  
11          Woodleigh Heights. So those documents led to a reflection  
12          and conclusions in relation to the Woodleigh Heights land  
13          as well.

14           On that issue His Honour, Justice Osborn, says the  
15          following on page 45 at paragraph 144: "In the first  
16          instance the first-named plaintiff contends that his  
17          understanding of the character of the defendants' conduct  
18          with respect to the Woodleigh land flowed from his  
19          understanding of the character of the defendants' conduct  
20          with respect to the Tylden land. Insofar as this is so,  
21          it falls with the limitation defence in respect of the  
22          Tylden land."

23           Now, if I can just elaborate upon what Master Efthim  
24          said about that. He elaborated a little bit more about  
25          that reflection. I am not sure whether we have to hand  
26          the reasons by Master Efthim?

27   BUCHANAN, JA.: Yes, we do.

28   MR AHERN: They are Exhibit 7 to the affidavit of Rosemary (?).

29          That is page 20 at paragraph 59, where Master Efthim  
30          stated: "I am also at a loss to understand how there has  
31          been any concealment in relation to the Woodleigh Heights

1 land."

2 "I note that Mr Thompson swears that upon reaching  
3 the conclusions in relation to the Tylden Road land he  
4 began to consider the possibility that the first defendant  
5 may have acted unlawfully in relation to the Woodleigh  
6 Heights land. He therefore reconsidered the failed 1995  
7 proceedings" - which is the prior Woodleigh Heights  
8 proceeding - "and the reticulation plan which had been  
9 shown to him in the Practice Court. He then realised that  
10 the first defendant had sealed the plans of cluster  
11 subdivision in contravention of their statutory duty to  
12 refuse to seal them. Furthermore, they did so in full  
13 knowledge that the subdivision had not been completed  
14 according to law, and a reticulated water supply was not  
15 present in 1979 as required. I learned that was later  
16 1982."

17 Now, the conclusions reached by Mr Thompson in  
18 relation to the Woodleigh Heights land flowed from the  
19 documents in the black folder. The documents in the black  
20 folder were discovered to him in the prior Tylden Road  
21 proceeding. That is a hurdle that is going to be very  
22 difficult for the appellants to overcome in this appeal  
23 and, in my submission, it is not touched upon or dealt  
24 with by Mr Thompson in his outline of submissions in this  
25 court.

26 Now, that point, covered with the impecuniosity of  
27 the appellants, in my submission, gives rise to special  
28 circumstances under Order 64.24.

29 BUCHANAN, JA.: Thank you, Mr Ahern.

30 Mr, Thompson, do you have a submission you wish to  
31 make?

1 MR THOMPSON: Your Honours, no doubt, have read my submissions.

2 BUCHANAN, JA.: We have, and there is no need, really, to repeat  
3 what it is you have written.

4 MR THOMPSON: Yes.

5 BUCHANAN, JA.: But is there anything you would like to  
6 emphasise or add to - - -

7 MR THOMPSON: Yes. Just, in relation to what has just been  
8 said, I would just like to make a couple of short  
9 comments.

10 With regard to what was said by Mr Garde in relation  
11 to the releases, the only point I would make is that the  
12 releases cannot, and do not, release or include that which  
13 was concealed at the time; and the only other aspect that  
14 I wish to make is in relation to all this discovery that  
15 was just spoken about.

16 The first thing to note is that neither Master  
17 Efthim nor Justice Osborn had looked at the black folder.

18 Now, in order to accept what they say about that  
19 black folder, both in the Tylden Road proceeding they, in  
20 fact, concealed by false admission those things which were  
21 set out in my statement of claim, paragraph 7. They made  
22 false admissions as to those things.

23 In order to accept what they say now, one has to  
24 believe that discovery showed that their false admissions  
25 were, in fact, true. You see, it is self-defeating. And  
26 the other thing is that, in relation to the black folder,  
27 their arguments on the day were in relation to the plans;  
28 nothing to do with the section 569E notices. And  
29 certainly, the black folder does contain details of the  
30 plans, but there is certainly no evidence at all of the  
31 fact that the 569E notices were not issued, and no

1 evidence at all that their admissions to the paragraph 7  
2 of the statement of claim were false. And I can't see how  
3 they can argue that - their discovery, in fact, gave the  
4 lie to their pleadings, and at the appeal, sir, I will  
5 show that.

6 I think that is about all the direct comment I need  
7 make.

8 BUCHANAN, JA.: Yes. Thank you Mr Thompson. I take it those  
9 submissions are made on behalf of your co-appellant?

10 MR THOMPSON: Yes, they were, sir.

11 REDLICH, JA.: Mr Thompson, did the trial judge address the  
12 point that you are now making, that - - -

13 MR THOMPSON: No, he did not.

14 REDLICH, JA.: Discovery in the earlier proceedings did not  
15 result in production of all the documents contained in the  
16 black folder? That is your point now; is it not?

17 MR THOMPSON: Yes. You see, my point now is that when this  
18 point was argued, first of all before Master Efthim, and  
19 then Justice Osborn, they raised the proposition that the  
20 that the plans were subdivision rather than 569E notices  
21 that were the cause of action. They were dealing with the  
22 wrong thing. The court was, well, misled as to what the  
23 true case was.

24 Then they were saying that the black folder  
25 contained evidence, of course, of the unlawful plans.  
26 Well, that is true. But they are also irrelevant. The  
27 black folder did not contain evidence of the fact that the  
28 569E notices had not been issued. The black folder, in  
29 fact, gave evidence of what they pleaded in their  
30 pleadings, which was, in fact, the false admissions to the  
31 paragraph 7 of the day, to my paragraph 7.

1 BUCHANAN, JA.: Yes. Thank you, Mr Thompson.

2 Is there anything you wish to say in reply,  
3 Mr Garde?

4 MR GARDE: Two things. The appellants were at liberty to  
5 produce whatever documentation they wanted to, to Master  
6 Efthim, and to His Honour, Justice Osborn, in support of  
7 their contentions, including any documentation derived  
8 from the so-called black folder. If they did not do so,  
9 that is entirely a matter for them.

10 The second observation is that in the judgment  
11 Justice Osborn refers to, I think it is 'the shifting  
12 kaleidoscope' of the arguments which were advanced before  
13 him, and it would seem to us this court has had a similar  
14 experience.

15 They are the only things.

16 BUCHANAN, JA.: Do you have anything you wish to add, Mr Ahern?

17 MR AHERN: I want to say, Your Honours, the matters in relation  
18 to the black folders, that are repeated in the judgment,  
19 come from the primary affidavit of Mr Thompson dated the  
20 18th of October 2005, copies of which I have here if Your  
21 Honours would like to look at the relevant paragraphs.

22 BUCHANAN, JA.: Has Mr Thompson been given a copy of this  
23 document?

24 MR GARDE: This was the primary affidavit relied upon by  
25 Mr Thompson, both before Master Efthim and before Justice  
26 Osborn. Paragraph 26 on page 5 will have some familiarity  
27 with what I have read before from the judgment.

28 "On the second day of the hearing the Council and  
29 the Water Board made an offer for \$40,000 to settle the  
30 matter. I was advised that I should accept the offer of  
31 settlement. I agreed and terms of settlement were drawn

1 and signed. At the time of signing the terms of  
2 settlement counsel for the Council and Water Board handed  
3 me a large black folder containing copies of various  
4 documents. I took this material home and gave it a  
5 cursory glance, but because I considered the matter to be  
6 at an end I archived the folder. I did not look at its  
7 contents again until August 2000."

8 "Had I been aware of the matters deposed to in  
9 paragraph 56 I would not have settled the 1988  
10 proceeding".

11 In paragraph 53, paragraph 53 page 12, "(a) For the  
12 purpose of preparing a defence and counterclaim against  
13 the Council in respect to a rates claim which the Council  
14 had brought against me, I again began a review of all the  
15 documents available to me. I re-examined the contents of  
16 the large black folder referred to in paragraph 26 of this  
17 affidavit. (b) Upon examining the documents within the  
18 black folder it became apparent that there were two  
19 versions of the plans for the industrial allotments" - and  
20 that is the clipped and unclipped version which I have  
21 read out from Justice Osborn's reasons. (c) I then - - -

22 BUCHANAN, JA.: Mr Thompson says it has got nothing to do with  
23 the plans at all.

24 MR AHERN: No, that is what he is saying now.

25 BUCHANAN, JA.: Yes.

26 MR THOMPSON: This is what he said before.

27 BUCHANAN, JA.: Yes, I follow.

28 MR AHERN: I am just saying that the first - this was the basis  
29 which he relied upon in two earlier proceedings. If  
30 Your Honour please.

31 BUCHANAN, JA.: The Court will temporarily adjourn.

1 (Short adjournment).

2 BUCHANAN, JA.: Mr Thompson, although the debate in this Court  
3 has been largely concerned with the prospects of success  
4 of the appeals, of course, that is a relevant factor, but  
5 first and foremost the special circumstances which can  
6 justify the grant of an order for security for costs  
7 concern the appellants' financial position, and where  
8 appellants do appear to be impecunious so that they won't  
9 be able to meet the costs of the successful respondent to  
10 an appeal the prospects of success assume really a  
11 secondary importance.

12 Is there anything you want to say about the first  
13 aspect, that is, your financial position and the financial  
14 position of your wife?

15 MR THOMPSON: Sir, firstly, I apologise. I guess I  
16 misunderstood. I thought that the prospect of success was  
17 a high priority.

18 BUCHANAN, JA.: No, it is not. In the first instance, the  
19 discretion is enlivened by your financial position and  
20 what will happen if the appeals fail.

21 The prospects of success are relevant in that if  
22 there is a very strong prospect of success the court is  
23 loath to shut out an appellant. On the other hand, if the  
24 prospects of success are more dubious, then the court  
25 might be more inclined to act upon the evidence of  
26 impecuniosity. But in the first instance, it is that  
27 which is important.

28 MR THOMPSON: Yes. Sir, then, indeed, what I said in my  
29 submission, that I didn't intend to make any submission in  
30 that regard; what I will say, sir, is that I am entirely  
31 capable.

1 BUCHANAN, JA.: Sorry?

2 MR THOMPSON: What I will say, sir, is that I am entirely  
3 capable of providing the security, and meeting all of the  
4 costs that were awarded in the first case.

5 BUCHANAN, JA.: I see. Is that all you wish to say?

6 MR THOMPSON: Is there something else, sir?

7 BUCHANAN, JA.: That is a matter for you to determine.

8 MR THOMPSON: I am not sure how I can add to it anyway.

9 REDLICH, JA.: Well, Mr Thompson, it should be evident from the  
10 material filed against you that that assertion you have  
11 made from the Bar table is not accepted by the other  
12 parties. So you really need to reflect upon whether or  
13 not that is all you want to do, to simply make such an  
14 assertion from the Bar table.

15 MR THOMPSON: Well, such an assertion as to liability?

16 BUCHANAN, JA.: Yes, Mr Thompson?

17 MR THOMPSON: You mean as regards liability?

18 REDLICH, JA.: I am just pointing out to you that the material  
19 that has been filed makes clear, on the respondent's part,  
20 that they challenge your ability - - -

21 MR THOMPSON: Yes, they do.

22 REDLICH, JA.: Either to pay the costs generally of the previous  
23 proceedings or make security.

24 MR THOMPSON: Yes. And I, on the other hand, challenge their  
25 assertion that it has no prospect of success.

26 BUCHANAN, JA.: Well, really, I think Justice Redlich's point is  
27 that we can't simply act upon a bald statement,  
28 unsupported by any evidence, that you are able to pay the  
29 costs.

30 MR THOMPSON: Yes. I understand that.

31 (Ruling follows)