

IN THE SUPREME COURT OF VICTORIA AT MELBOURNE
COMMON LAW DIVISION

No 6321/05

B E T W E E N

GLENN ALEXANDER THOMPSON
& CHERYL MAREE THOMPSON

Plaintiffs

and

MACEDON RANGES SHIRE COUNCIL

First Defendant

-and-

THE COLIBAN REGION WATER AUTHORITY

Second Defendant

AFFIDAVIT OF STEVEN MARK EDWARD

Date of document: 12th September 2005

Filed on behalf of: the Second Defendant

Prepared by:

Arnold Dallas McPherson
Lawyers
337 Hargreaves Street
BENDIGO VIC 3550

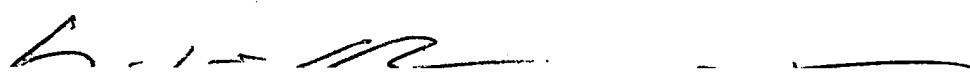
Solicitor code:
DX 55054 Bendigo
Tel 5445 9200 Fax 5441 4424
Ref: Steven Edward

I, **STEVEN MARK EDWARD**, Solicitor of 337 Hargreaves Street, Bendigo, 3550, in the State of Victoria, Barrister and Solicitor, MAKE OATH AND SAY AS FOLLOWS:

Introduction

1. I have since 1984 been a barrister and solicitor of this Honourable Court, and am a current legal practitioner under the *Legal Practice Act* 1996. I am an associate of the firm Arnold Dallas McPherson of 337 Hargreaves Street, Bendigo the solicitors for the second defendant, the Coliban Region Water Authority. I am responsible for the defence of these proceedings on the instructions of the second defendant.

2. I was the solicitor for the second defendant in action no. 7966 of 1995 between the same plaintiffs and defendants in the Supreme Court of Victoria. I was then an associate of the firm Beck Sheahan Quinn & Kirkham, which acted for the second defendant.
3. In this affidavit, I shall refer to the claims made by the plaintiffs against the second defendant. The second defendant has no issue against the first defendant against which no application is made in this summons. The first defendant is named as a party to the summons because it is a party to the action, and not because the second defendant has any claim or seeks any relief against it.
4. The second defendant seeks that the action be dismissed or stayed against it, and that the relief set out in the summons be granted.
5. Two claims are made by the plaintiffs against the second defendant in the present action. Both claims are made against the second defendant as the successor of the Kyneton Water Board which was in turn the successor of the Kyneton Shire Waterworks Trust.
6. The first claim concerns land at Tylden Road, Kyneton ("Tylden Road"). The Tylden Road claim as it concerns the second defendant is contained in paragraphs 1 to 10, T29-T34 and D1 to D6 of the statement of claim annexed to the writ herein ("the statement of claim").
7. The second claim relates to land within the Woodleigh Heights Estate, Edgecombe Road, Kyneton ("Woodleigh Heights land"). The Woodleigh Heights claim as it concerns the second defendant is found in paragraphs 1 to 10, W62 to W71 and D1 to D6 inclusive of the statement of claim.
8. Both the Tylden Road land and the Woodleigh Heights land have been the subject of prior legal proceedings on the part of the plaintiffs against the defendants.
9. The Woodleigh Heights land has also been the subject of proceedings concerning the plaintiffs, Woodleigh Heights Resort Developments Pty Ltd and Woodleigh Heights Marketing Pty Ltd (Supreme Court action no. 2360 of 1984) and other proceedings.



Previous Tylden Road Action

10. By summons no. 880949 in the County Court of Victoria at Melbourne issued on 7 November 1988, the plaintiffs brought proceedings against the Shire of Kyneton, and the Kyneton Water Board, the predecessor in law of the second defendant. Now produced and shown to me and marked with the letters **SME 1 VOLUME 1** and **SME 1 VOLUME 2** are two folders of copy court documents and papers relating to this action. Save for the items numbered 43,44 and 46 in the folder **SME 1 VOLUME 2**, all of the documents in these two folders are true and correct photocopies of documents from the file of the County Court in proceedings no. 880949. I attended the County Court Registry on 5 August 2005 and photocopied the documents from the Court file. The documents numbered 43 and 44 in the folder **SME 1 VOLUME 2** were provided by the plaintiffs to the second named defendant during discovery in action number 7966 of 1995, and item 46 in the folder **SME 1 VOLUME 2** is a Certificate of a Registrar of the County Court taken out by me on 24 August 2005. The plaintiffs relied on a statement of claim annexed to the summons, and on an amended statement of claim dated 13 May 1991, and particulars of statement of claim dated 4 June 1991. The defendants relied on a defence dated 16 December 1988, an amended defence dated 31 May 1989, a re-amended defence dated 9 August 1990 and a further re-amended defence dated 3 June 1991.
11. On 12 June 1991, the action came on for trial before His Honour Judge Howden. Mr Francis Tiernan of Counsel, appeared for the plaintiffs on the instructions of Messrs Nevile & Co, solicitors, 7th Floor, 100 Collins Street, Melbourne. Mr Mark Bevan John of counsel appeared for the defendants on the instructions of Messrs Maddock Lonie & Chisholm. The action was part heard on 12 June 1991 and on 13 June 1991. On 14 June 1991, the action was settled. The action was settled on terms of settlement dated 14 June 1991, and signed by counsel for the plaintiffs and counsel for the defendants. A copy of those terms of settlement is the item numbered 47 in the folder **SME 1 VOLUME 2**. The terms of settlement provided for the plaintiffs to receive \$40,000 and costs of the action to be agreed or in default of agreement to be taxed.
12. Clause 5 of the terms of settlement contains a release by the plaintiffs of the defendants including the second defendant, and releases the second defendant

"from all claims, suits and demands whatsoever the subject matter of this proceeding". Following the execution of the terms of settlement, His Honour Judge Howden ordered that the action be struck out. (On 24 August 2005 a Registrar of the County Court issued a certificate of that order, and that certificate is the item numbered 46 in the folder **SME 1 VOLUME 2**.) Subsequently, proceedings for the taxation of costs occurred and the costs were taxed on 9 July 1992 by the Registrar in the amount of \$16,622.95. As set out in document 53 in the folder **SME 1 VOLUME 2**, there was as at 16 July 1992, an outstanding balance of costs of \$8,211.48 under the terms of settlement. Subsequently, this was resolved and the proceedings for costs were finally struck out on 18 August 1992.

Subject matter of the Previous Tylden Road Action and the Present Action

13. Perusal of the pleadings in the County Court action and the current pleadings insofar as they affect the Tylden Road land shows that the current action concerns the same subject matter as did the County Court proceeding.
14. Both the County Court action and the present proceedings as they affect the Tylden Road land are claims for damages, interest and costs. They involve identical parties. Both arise out of the subdivision of the same land in Tylden Road, Kyneton, by Kenneth Raymond Buchanan deceased who in February 1980 subdivided part of the Tylden Road land into allotments.
15. In both proceedings, the plaintiffs allege that a requirement was imposed by the Shire of Kyneton under section 569E(1) and (1A) of the *Local Government Act* 1958 in respect of the plans of subdivision. They further allege that in or about October 1980 the plaintiffs provided bank guarantees obtained from the Commercial Bank of Australia Limited in the sum of \$25,000 to cover the requirement for road construction works and \$11,500 to cover the provision of a water main and associated water works.
16. In the case of the guarantee in the sum of \$11,500, in both actions the plaintiffs allege that the Kyneton Shire Waterworks Trust called up the guarantee on 10 December 1982 following earlier demands to the effect that the water main and waterworks had not been constructed and proceeded to cause the water main and waterworks to be constructed in 1983 and 1984.

17. In both actions, the plaintiffs allege that the Kyneton Shire Waterworks Trust acted wrongfully and without lawful authority when it called up the guarantee for \$11,500, and that the calling up of the guarantee caused loss and damage to the plaintiffs. In both proceedings, the plaintiffs allege that the Tylden Road land was not at any time situated within the urban district or the rural district of the Kyneton Shire Waterworks Trust.
18. Both claims make allegations concerning George Stanley Porter who is now deceased and who was formerly the Shire Secretary of the Shire of Kyneton and the Secretary of the Kyneton Shire Water Works Trust.
19. In both claims, the plaintiffs further say that they additionally suffered a loss of profit in that they were called on to sell the residential allotments prematurely to a company called Chelmantau Pty Ltd for \$100,000 and that that company on-sold those allotments at a substantial profit over the period from 1984 to 1987.

Previous Woodleigh Heights Action

20. By a writ dated 26 October 1995 in action no. 7966 of 1995, the plaintiffs made a claim against the second defendant and other defendants relating to the Woodleigh Heights land. Now produced and shown to me and marked with the letters **SME 2 VOLUME 1**, **SME 2 VOLUME 2**, **SME 2 VOLUME 3** and **SME 2 VOLUME 4** are four folders of copy court documents and papers relating to this action. The items in these folders numbered 7, 11, 12, 19, 24, 44, 45, 46, 48, 50, 51, 52, 54, 55, 57, 65, 71, 81, 82, 83 and 96 are true and correct photocopies of documents from the file of the Supreme Court in proceedings no. 7966 of 1995. I attended the Supreme Court Registry on 24 August 2005 and photocopied these documents from the Court file. The balance of the documents in these four folders are documents that had been within the possession or custody of my then firm (Beck Sheahan Quinn & Kirkham) as solicitors on the record on behalf of the second defendant, but which have been in the possession of my firm (Arnold Dallas McPherson) since I commenced employment with this firm in June 2000.
21. The plaintiffs relied on a statement of claim endorsed on the writ, further and better particulars dated 20 June 1997, further and better particulars dated 13 July 1998, a further statement of claim dated 28 August 1998, a reply to defence

dated 18 September 1998, an amended reply to defence dated 23 September 1998, an amended further statement of claim dated 17 March 1999, and a reply dated 2 June 1999. The second defendant relied on defences of 31 January 1997 and 8 May 1997, further and better particulars of defence dated 2 July 1997, a defence dated 11 September 1998, a rejoinder to amended reply filed 28 September 1998, an amended defence of 6 October 1998 and a defence to further amended statement of claim dated 18 May 1999.

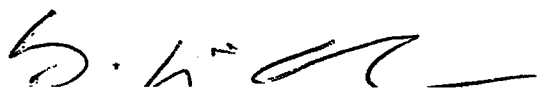
22. On 29 July 1999 the action was the subject of a mediation conducted by Mr George Golvan QC. I attended the mediation and instructed Mr Greg Garde QC who appeared for the second defendant. The first plaintiff also attended the mediation and was assisted by his solicitor, Mr Neville. The action was compromised and terms of settlement were executed by the respective parties. Item numbered 84 in the folder **SME 2 VOLUME 4** is a copy of the terms of settlement dated 29 July 1999 as written out by the mediator Mr Golvan in my presence and signed by the first plaintiff, myself and Mr H J Langmead of Counsel who appeared for the first, third and fourth defendants.
23. Clause 3 of the terms of settlement contains mutual releases and releases the second defendant from all actions, suits, demands and costs rising out of or in any way related to the subject matter of the proceedings.
24. Subsequently, the defendants paid the plaintiffs the settlement monies due under the terms of settlement. The plaintiffs declined to honour the terms of settlement or to discontinue the action as they were obliged to do.
25. Subsequently by summons dated 24 August 1999, (as appears from the Court Order dated 2 September 1999), application was made on behalf of the second defendant for declarations and orders for the specific performance of terms of settlement and for an order that the action be dismissed. The other defendants sought relief in similar terms by summons dated 30 August 1999.
26. These applications came on for hearing before Mr Justice Beach on 1 September 1999 in the Practice Court. Mr Tiernan of Counsel appeared for the plaintiffs. Mr Garde QC of Counsel appeared for the second defendant. Mr Langmead of Counsel appeared for the first, third and fourth defendants. After hearing counsel, the Court declared that the terms of settlement of the proceedings dated

29 July 1999 and executed by or on behalf of the parties ought be specifically performed. The Court dismissed the proceedings and ordered the plaintiffs to pay the defendants' costs of the proceedings as from 13 August 1999 on a solicitor and client basis including the costs of these applications and the costs of the directions hearing reserved by Master Kings on 17 August 1999.

27. Under cover of a letter dated 20 September 1999 the first plaintiff purported to serve a notice of discontinuance and advise that he had in the circumstances elected not to appeal.

Subject matter of the Woodleigh Heights Action and the Present Action

28. Perusal of the pleadings in the previous Supreme Court action and the current pleadings insofar as they affect the Woodleigh Heights land shows that the current action concerns the same subject matter as did the Supreme Court action.
29. Both the Supreme Court action and the present proceedings as they affect the Woodleigh Heights land are claims for damages, interest and costs. They involve the same parties with Mr Parkinson and Mr Wilson, the relevant officers of the predecessors of the defendants also being named as parties in the Supreme Court action.
30. Both concern land in the Woodleigh Heights estate located at Edgecombe Road, Kyneton. In both proceedings, the plaintiffs allege that in November 1978, Kenneth Raymond Buchanan and his wife Yvonne Rae Buchanan who owned the Woodleigh Heights estate subdivided the estate by way of a cluster subdivision on the basis of a privately owned and operated water supply reticulation system. They further allege that on or about 1 November 1979 the plaintiffs entered into a contract to purchase a number of allotments within the estate. They further allege that the Kyneton Shire Waterworks Trust entered into an agreement on or about 1 January 1982 for the supply and distribution of water to a company incorporated by Buchanan and known as Woodleigh Heights Resort Development Pty Ltd.




31. They further allege that by entering into an agreement with Woodleigh Heights Resort Development Pty Ltd which was developing a time share resort to supply and distribute water for the whole of the subdivision the Kyneton Shire Waterworks Trust acted wrongfully and in excess of its powers.
32. The plaintiffs and their company Woodleigh Heights Marketing Pty Ltd fell into disputes with the Buchanans and with Woodleigh Heights Resort Developments Pty Ltd. The land purchased by the plaintiffs was subject to various mortgages to financiers including General Credits Limited (later Australian Guarantee Corporation Pty Ltd), The Associates Pty Ltd (later Mercantile Credits Limited) and Stateside Credit Corporation Pty Ltd. Because of their default, their land was sold by public auction by AGC who appointed LJ Hooker, real estate agents of Kyneton to sell their land on 17 November 1984.
33. In both actions, the plaintiffs allege that prior to the auction AGC inquired of the Board and the Council whether there was access to sewerage and mains reticulated water. In both actions, the plaintiffs allege that in response to those inquiries the Board's officers misrepresented the situation by indicating that the plaintiffs' land did not have access to an approved reticulated water supply. As a result, they say that the auction scheduled by AGC for 23 November 1985 was cancelled. Ultimately, the plaintiffs allege that their land was sold in 1989 to a company called Deckwood Pty Ltd by the first mortgagee for a lower price than they contend they would otherwise have obtained had there been reticulated water available and their land sold on the open market between November 1984 and December 1987.

Limitation of Actions

34. The claims made in respect of the Tylden Road land are found in paragraphs 1-10, T1-T34 and D1-D6 of the statement of claim. Paragraph D2 quantifies the plaintiffs' loss in the amount of \$72,000 as at December 1980 reflecting a real estate agent's estimate of the value of each of the six allotments described in the industrial plan made in or about 1979. Paragraph D3 refers to the sale of the residential allotments under a contract between the plaintiffs and Chelmantau Pty Ltd resulting in a transfer of the plaintiff's land to Chelmantau Pty Ltd on or about

27 July 1983 for \$100,000. Paragraph D3 quantifies the plaintiff's loss in relation to the residential allotments in the amount of \$237,105 plus interest calculated from 13 January 1984.

35. The claims made in respect of the Woodleigh Heights land are found in paragraphs 1-10, W1-W71 and D1-D6 of the Statement of Claim. In paragraph D5, the plaintiffs loss is quantified having regard to the value of the allotments as at November 1984 of \$460,000 less mortgages owing as at November 1984. The net loss is calculated as at November 1984 in the amount of \$330,000.
36. The plaintiff's claim that but for the conduct of the defendants pleaded in the statement of claim, the plaintiff's Woodleigh Heights land would have been sold on the open market between November 1984 and December 1987.
37. It is apparent from an examination of the pleading that the action is hopelessly out of time, and that on no view could the action be within time.

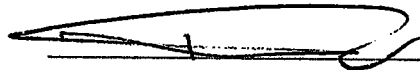
Conclusion

38. The action is vexatious, oppressive and an abuse of process of the Court. It is essentially a re-run of the subject matter of the County Court action and the previous Supreme Court action. It is a breach of the terms of settlement in each of the previous actions and in contravention of the releases granted to the second defendant and the order of Mr Justice Beach.
39. I request that the Court grant the relief set out in the summons.

SWORN by
STEVEN MARK EDWARD
 at Bendigo in the State of Victoria
 on 12th September 2005.

) *h. n. 2*

Before me



This affidavit is filed on behalf of the Second Defendant.

TERRENCE MERVIN TEMPLER
 ARNOLD DALLAS & McPHERSON
 337 Hargreaves St, Bendigo, Victoria.

Who is a current practitioner within
 the meaning of the Legal Practice Act 1996