MR GARDE: It's the sort of matter that unless one is comprehensive in one's material for reasons that are evident from the conduct of this matter and what's transpired, you'll find the missing bits will be filled in in an unexpected way by suggestions coming forward from the plaintiff. It's a matter in which we've had to provide very complete information.

MASTER: The only thing that I've worked out on reading all these submissions a couple of times is I'm going to have to read all the pleadings, I'm going to have to read the affidavits carefully, and after reading the plaintiffs' submissions again last night I'm really going to have to consider this matter. Let me put it to you this way, I don't think it's straightforward until I go through all the material.

MR GARDE: Once you do all that it's very straightforward. You've got to do the hard yards first and then you'll see how straightforward it really is.

MASTER: I have no preconceived ideas is what I'm saying.

MR GARDE: Yes, Master. There's one document I do wish to refer you to additionally from what I did yesterday and I'd invite you, if you were to take up the exhibit which is SME1 volume 2, and this is the Tylden Road action, and invite you to turn to the document at tab 43. Because it's a very comprehensive book of pleadings that's been interpolated by the plaintiffs, I draw your attention to what's actually in it. We say that what's in it shows very comprehensive knowledge on the part of the plaintiffs of the Tylden

Road situation and over a period of time it's a blow by blow account of what transpired.

The pages in this document are numbered by and large in the top right corner of each page but if you would - - -

MASTER: I don't think they're numbered on mine.

MR GARDE: They're not initially and then they are. They pick up - some of them are given C numbers and some are given ordinary numbers. I'm looking at the page which is 3 in the top right corner and I propose to do this, really, by way of highlighting to you what's there. You've got extracts from council minutes there, extracts from the Local Government Act with a commentary setting out the plaintiffs' view about all these things.

Then you go to p.5 and you then have a plan of subdivision with approval details. At p.6 you have the Thirtieth Schedule notice from the council in relation to the subdivision.

The next page, which is 7, you have the notice of requirements under s.569E with commentary. At p.8 you have photocopied extracts from the Local Government Act and relevant provisions. At p.9 you have extracts from Sale of Land Act with commentary. At p.10 you have correspondence between the plaintiffs and Mr Wilson, of the shire, and you will see, as you progress through this document, that you have the relevant statutory provisions, you have the council resolutions, you have various allegations of fraud and misconduct interspersed in all this.

You've got p.12. You've got various sealing resolutions from the council following the engineers report at p.13. This is where comments about people really commence. You've got allegations made at p.13 about Mr Buchanan. At p.14 you've got allegations made by Mr Buchanan and then there's a reference in the middle of p.14, "At the time of providing the guarantee I had the reasonable ... (reads) ... requirement upon Buchanan". Then there are allegations that the council let Buchanan off the hook which are made there, and that continues on to 15.

Then you've got extracts from the pleading and answers to interrogatories and if you turn over to - this goes on to extracts from reports, documents at 17, 18, and 19. Then at 20 you've got, "In April of 1982 I discovered Buchanan ... (reads) ... in these sales". Half-way down, "After discovering the ... (reads) ... to the police".

MASTER: Who prepared this?

MR GARDE: This is the plaintiff's.

MASTER: Who actually wrote this?

MR GARDE: Mr Thompson. This is all expressed in the first person. At 21 we've got the correspondence from the council relating to the fact that the water main should have been laid. There's a reference to the fact that on the rate records two of the lots have been sold, the owners have enquired of council when the works would be completed, considered the water main should be laid forthwith and the roadworks commenced. Then there's allegations that this is

false, on 21. These allegations continue on 22, 23. Discussions between - his version of discussions with Mr Porter.

At 24 that notice be given, this is a resolution of the council which is fully set out and signed by the Chairman, obviously from the minutes, "Confirmed 14 July 1982 ... (reads) ... at his costs", so there's a resolution of the trust along those lines.

Then at 25 you'll see correspondence between the trust secretary and the plaintiffs. The trust consider it should proceed forthwith. That's a reference to the fact that the "sub allotments have been sold and there's no indication ... (reads) ... undertake the construction itself". Then at the next, 25(a) you'll see a further letter along those lines from the trust secretary to the plaintiffs. Then at 25(b) the resolution of the trust that - advising the plaintiffs that the trust intends to proceed to call the bank guarantee to pay for the installation of a water main to serve the approved subdivision. Then there's more correspondence advising of that in the traditional way at 26.

At 27 you'll see commentary from the first-named plaintiff in relation to all that, that it asserts that, "If the guarantees were called on I'd be forced to sell the land", and sets out his position. That continues for a number of more pages. At 29 he starts to list specific lies that he alleges. He alleges Mr Porter deliberately lied. At 30 he sets out his position that Porter was lying about the water supply

agreement. More allegations of that general type found on that page through to 32.

Then he turns to C1 he sets out the pleadings and I won't read all this out but it's a very lengthy commentary on the pleadings, the interrogatories, the answers to interrogatories and there are very comprehensive commentary which shows that he's absolutely fully across the matter and the complaints that he has which are expressed with considerable vehemence and with very significant allegations of lying, fraud and the like alleged against a whole variety of people. That's the basis of the Tylden Road action in the book of pleadings as it was available on the County Court file leading up to the trial of this proceeding. We respectfully submit he has a very considerable state of knowledge and level of information about the Tylden Road action as demonstrated by his preparation of that document.

I have to correct one thing I said. My instructing solicitor informs me he was provided with that document by the plaintiffs. It's no the document that was on the file. It's a document that was provided to him by the plaintiffs. I correct that.

MASTER: It wasn't a document on the court file.

MR GARDE: Not on the court file but it was one provided to our instructing solicitor.

MASTER: That was provided around about 1980.

MR GARDE: It was provided - in March '99 it was provided to us.

MASTER: That's the end of that exhibit?

MR GARDE: That's the end of that bundle. We'll now turn to SME2 volume 4.

MASTER: Did you go through volume 3 last night? I don't think we did.

MR GARDE: I'll go directly to volume 4 at this juncture, Master. If you would go to tab 72.

MASTER: Yes, I've got it.

MR GARDE: This is now the Woodleigh Heights action and you had contained in this amended further statement of claim there are a number of allegations that were struck out by Justice Ashley and those allegations included fraud, allegations being struck out at this stage. But the overall point that we make with a 44-page statement of claim is that once again, and a huge variety of representations that are alleged as being false, untrue and so forth, is that it all shows that the plaintiffs were very fully informed of the position. They were comprehensively aware of what they were doing. When we come to look at the expiration of the limitation period the very wide scope and comprehensive nature of the allegations do need to be borne in mind.

Then that takes us through to tab 84 and tab 84, the terms of settlement which - the handwritten terms following the mediation in the fair hand of Mr Golvan, and you will see a sign on the second page by the various parties and you will see following the mediation the clause that relates to - - -

MASTER: That's the signature of the plaintiff, is it?

MR GARDE: Yes.

MASTER: And yet the solicitors have signed on behalf of the defendants.

MR GARDE: They have in the case of the second defendant probably reflecting the unfortunate fact that senior counsel have left at that stage. You'll see Mr Langmeade who was appearing for council and council officers were sued personally. He signed on behalf of the first, third and fourth defendants.

MASTER: I've read Mr Thompson's affidavit as to what he said about that.

MR GARDE: Very well. Of course you'll be aware also from the affidavit material that what subsequently transpired following the settlement at the mediation was the plaintiffs reneged on the settlement and handed a notice of trial because the matter was listed for directions or mention to the Listing Master and indicated they wished to proceed with the action regardless of the settlement. That then gave rise to a summons in this proceeding returnable before the Practice Court seeking a declaration that, "The terms of settlement ... (reads) ... ought to be specifically performed". That application was ultimately returnable before Justice Beach. There are allegations made about what was done at the hearing before Justice Beach which I'll come to in a moment, so I'm giving you the preamble here.

You'll then see that document 86 is a supporting affidavit from Mr Edward basically setting out that the money pursuant to the terms of settlement had been paid and you'll see what took place is that - I'll

come to this, a notice of trial which Mr Thompson signed is document 87. You'll then see his affidavit being document 88 indicating his intention to proceed with the matter. There is then a document 89, an affidavit from Mr Prosser Fen(?) and basically it exhibited correspondence and what was intended was that the payment of the $12,500 settlement by the council through it's solicitors was late.

If I then take you to document 90 you'll see Mr Edward's affidavit in support of the Practice Court application setting out the details and verifying the settlement.

You've got in para 12 of that affidavit, p.4, Mr Edward swears before Master Kings that Mr Thompson submitted that the mediation had been flawed, that there'd been a breach of the terms of settlement, he wanted the matter to proceed to trial, he did not elaborate as to why it was that the mediation had been flawed. Mr Edward says the mediation was conventional and proper and he ought not be permitted to make or maintain such statements". You'll see in the closing paragraphs of that affidavit he swears that the plaintiffs were refusing to uphold the terms of settlement executed following the terms of mediation.

All of that led to Mr Thompson's affidavit, which is at tab 94 setting out that he did not consider the settlement agreement dated 29 July 1999 to be a binding agreement and he then proceeds to express considerable criticisms of Mr Golvan and others.

That then takes us to the outline of argument

which is tab 95 before Justice Beach and the point which was sought to be argued on behalf of the present plaintiffs as to why they should not be bound by the terms of settlement, was the late payment of one-half of the settlement moneys, but of course time was not of the essence and so ultimately Justice Beach made the decision that he made and so you have his reasons for decision at tab 96. Time was not of the essence so the fact that the cheque arrived a few days late or whatever it was didn't make any difference.

I'll take you to the order because we've got some allegations made about this by Mr Thompson in current material. Tab 97 is the order. You'll see there are applications by summons of 24 August and 30 August. You've got Mr Tiernan of counsel appearing for the plaintiffs. You've got Mr Langmeade appearing again for first, third and fourth defendants. You've got an declaration by the court that "the terms of settlement ... (reads) ... specifically performed." You've got the court then making an order you'll see for solicitor/client costs, this pre dates the indemnity costs situation "including costs of the application ... (reads) ... on 17 August 1999".

We have - picture this, Master, we have an affidavit from Mr Thompson saying that, and I'll take you to it, that at this Practice Court hearing what took place was that counsel and solicitors for the defendants showed him a plan and he realised that the water main, would you believe, the water main was not constructed in 1979 as he had formerly believed, but

in 1982. We can picture the environment of the eleventh court. Suddenly at the conclusion of argument about time being of the essence and solicitor/client costs, counsel for the second defendant, namely Holiban, in the form of myself, suddenly I disregard Mr Tiernan's presence and 25 years of bar ethics about talking to a client on the other side, I dash over in the very attractive environment of the eleventh court, produce a plan and I say, it would it would seem, to Mr Thompson, "Look the water main was constructed in 1982". But it's not only that because on his affidavit Mr Langmeade of counsel disregards 20 years or so of practice at the bar and bar ethics, and the constraint of talking to your opponent's clients, he dashes over and says to Mr Thompson words along the same effect, "Here's a plan and look at the 1982 construction of the water main", but it's not only that because the allegation is that the solicitors are involved so Mr Edward, seeing this happy throng, disregards the presence of legal advisors for the plaintiffs and he joins in this discussion but it's not only that because the solicitor for the counsel being present to instruct Mr Langmeade also disregards any ethical requirement about consulting with your opponent's clients and dashes over and has that decision too.

According to Mr Thompson it's at that moment he realises that he's in a desperate situation, his prospects have diminished because the water main was constructed in 1982, so he's been informed.

Now, of course he had already settled this matter at the mediation with Mr Golvan. There was no extant action that was left and not only that but he'd gone past Master Kings. He'd just been in the Practice Court listening to Justice Beach announce that the terms of settlement were binding and so declaring, and ordering after a contested application, solicitor/client costs.

Frankly, Master, let me say, one might feel somewhat insulted by this. I mean, if one were to disregard 25 years of ethics of the bar and dash over and consult with someone, it would perhaps have to be much more attractive than Mr Thompson and the proposition we might to discuss would have to be something more inspiring than whether the date of a water main conducted in a subdivision of land was in 1982 or 1979.

What we simply say about all that is that it's complete nonsense to advance the sort of material that is being advanced and that every document that we have and can point to suggests that you should view the statements made with very considerable hesitation.

I now invite you to turn to tab 99, and this is the first-named plaintiffs's in essence declaration of intent to our instructing solicitor. You'll see it's September '99 and in his second sentence he says, having explained he's elected not to appeal, "And I include ... (reads) ... which was perpetrated by the defendant". So we have over six years ago that statement of intent by the first-named plaintiff which

he has now many years later sought to pursue.

The next tab, tab 100, you have his notice of discontinuous. They are the documentary background.

If I can take you back to Mr Edward's affidavits and I'll take you to his affidavit of 12 September 2005 which I was part way through, and I bring your attention now to p.4 of that affidavit and in particular from para 13 and onwards. You'll see there that Mr Edward identifies the many common characteristics the current proceeding, insofar as it affects the Tylden Road land, and the previous proceeding. He says, para 14 "Both the County Court action and the ... (reads) ... by the Shire of Kyneton". Then there's a reference to the provisions of the Local Government Act, "They further allege ... (reads) ... and associated waterworks". I know you've read this.

MASTER: I've not only read it but I've heard it from you before and I've also heard it from Mr Delany.

MR GARDE: There are some matters that are listed there. Similarly - - -

MASTER: It's also background. He also expresses his opinion in para 13.

MR GARDE: That's so, and Mr Edward in para 28, he sets out the same material in the context of Woodleigh Heights.

MASTER: What he says in para 28 and para 13 is what I've got to work out.

MR GARDE: Yes, that's so. I'll now move on to Mr Thompson's affidavit now of 18 October.

MASTER: This is a big affidavit.

MR GARDE: I notice it's been read by you so I will.

MASTER: That's okay. Make the points you wish to make.

MR GARDE: Yes. Para 26 we have this large black folder allegation. He says he took it home, gave it a cursory glance, didn't look at it until August 2000. We say about that that on no view is that fraudulent concealment within the meaning of the Limitation of Actions Act. He acknowledges he's got the material. Doesn't explain how any such event could have taken place at the settlement in the County Court but there's no material from which you can conclude that Coliban or it's predecessor of the water board in any way, shape or form was responsible for fraudulent concealment which must be on the authorities, intentional. There's in fact no concealment at all.

It would have been without any cost and effortless for him to have looked in the folder back in 1991 when he says he received it, when this took place, so that insofar as it's suggested this might support any extension under Limitation of Actions Act s.27 it is our submission a hopeless point because on no view could that material support such a conclusion. Of course it's material which has to be read in the light of our instructor's later affidavits which I'll touch on shortly.

Para 40 is the material I was referring to earlier.

MASTER: Yes, I know.

MR GARDE: You'll see (b), "At the time of showing me the reticulation ... (reads) ... of the proceedings that

day". He then says in (d), "The evidence disclosed by ... (reads) ... after appeal". Now, of course he had already settled the action at an earlier point of time and the enforceability of that had been subject to a ruling that day. Why there's any materiality as between 1979 and 1982 is quite illusory, Master, in any event.

We would then refer you to para 53 and there is a reference to Tylden Road. It's apparent from looking at the material that I've already taken you to and I've no doubt Mr Delany has taken you to, that the plaintiffs had the most comprehensive knowledge of the plans to the Tylden Road subdivision. There's reference to versions of plans being submitted into evidence in the 1987 Magistrates' Court proceeding, you'll see in his 53(b), so he was already conscious of what he described as the clipped versions of the plans through the 1987 Magistrates' Court proceedings. He produces bundles of plans, and you've got Mr Edward's material so you can conclude from what he says that he had been well aware of those plans since at least 1987.

He had shown he had a very considerable facility to collect information. He refers elsewhere to the fact he has 6,000 documents and he says himself he's made the most comprehensive searches of authorities in his endeavour to collect information. It's also very apparent he's had full access to the records of the municipality.

I invite you to turn to p.14, in particular (f)

which is two-thirds of the way down, where he produces notice of requirement and he discusses the plan of subdivision that had been abandoned, so he says, "and were considered by the council on 20 February 1980", and he refers to the fact that "the seven plans ... (reads) ... in substitution". He then discusses all of that both residential lots and industrial lots on his p.15.

Then in his para 55 at p.16, 55(a), he says, "In the previous proceedings the ... (reads) ... became known". The true causes of his loss and damage, such as he has claimed it, have been known since the proceedings were initiated namely he's claiming a loss of value in relation to lots and of course in the context of guarantees the money you have to pay in relation to the guarantees. There's no substance at all in that and he says, "And are similar in respect to both the Tylden Road land ... (reads) ... occurred from the time I purchased unusable allotments". He in substance acknowledges that his claim has always been the same all the way through all of these proceedings.

We make the same comment when he actually touches on the water board in this affidavit which is on p.20 and is numbered 13 where he says, "Insofar as the water board was ... (reads) ... instruct the water works at my cost". That has always been the same again through these proceedings. Those allegation are to be found repeated in a variety of places as I have been touching on some of the references of yesterday and today.

Then we have in his final paragraph at p.21, this assertion that's (v), "By showing me the reticulation plan ... (reads) ... were sealed", which he was fully aware of all of that "The substance of the ... (reads) ... statement of claim". So he's acknowledging that set out in the 1995 Supreme Court statement of claim was the fact that reticulated water supply was required by law to be present in 1979. He says after the settlement he found out the main was put in in 1982. That seems to be the only point he puts forward, and that was following the settlement.

Then it takes us, Master, to Mr Edward's affidavit of 3 November 2005. I know you've read this.

MASTER: Tell me what you wish to rely upon.

MR GARDE: What we specifically rely upon, the material from Mr Edward about his attendances at the plaintiffs' solicitor's premises at Orange. The fact that he photocopied the documents and low and behold the documents that were said to have only been located later or looked at later by the plaintiffs' documents that were discovered to Mr Edward in the course of his inspection at the plaintiffs' solicitor's offices in 1999, a date of course earlier than the suggested discovery. Mr Edward sets out in exhibits the documents he inspected and copied.

MASTER: I've got the folder.

MR GARDE: You'll have a bundle of all of that which is self explanatory when looked at. In addition, in relation to allegation of Mr Nevile, who's not acting

for the plaintiffs and did not act for the plaintiffs, he provides letters, Telexes, letters of demand, threatening court proceedings and numerous other documents including correspondence in para 16 saying, "We act as agents for ... (reads) ... to represent the plaintiff Glenn Thompson". That is all set out in that affidavit.

That led Mr Thompson to swear a further affidavit on 7 November 2005.

MASTER: Which I have.

MR GARDE: What we draw your attention to is his statement in para 15(a), "In my attempts to learn of the ... (reads) ... in various aspects". He says himself how well informed he is about these matters.

In 15(b) he now alleges that Mr Edward attended not at the solicitor's offices to conduct the inspection but at his home. You'll see that allegation made in (b) and (c) and he goes on to allege Mr Edward copied confidential communications between himself and his solicitors, that he was working, had no opportunity to object and make serious allegations of professional misconduct against Mr Edward. As you'll see in para 16 that he says that, Mr Nevile did act for him "now during the period ... (reads) ... of matters during that time". Then says he moved to Orange and makes further observations about Mr Nevile.

MASTER: He attended as a friend at the mediation.

MR GARDE: Yes, he did. The final affidavit to which we now draw your attention is another affidavit of

Mr Edward sworn on 11 November 2005.

MASTER: I have that.

MR GARDE: Responding to the allegations that were made of him and in essence, what he does is to exhibit the series of letters that passed between his firm and Baldock Stacy & Niven leading up to the inspection, which is quite a comprehensive exchange where arrangements were made for the inspection to occur at Orange as between the solicitors for a Xerox photocopying machine to be procured to assist with the conduct of the inspection and in para 11 he refers to the fact that on 4 February 1999 he attended at the offices of Baldock Stacy & Niven, in essence having gone to Orange to conduct the inspection.

He says the inspection amounts to about a quarter to one-third, that's over a two day period, he was able to inspect between a quarter and a third of the documents produced. There were 12 piles of documents that he inspected. There were 29 piles of documents on the tables in the room, so it was a mammoth undertaking. Then the first-named plaintiff brought further documents for him to inspect on 4 February 1999 and at the same time inspection of documents that he had brought was undertaken by the first-named plaintiff.

Because it wasn't complete, you'll then see there's a series of further correspondence where completion of inspection was subsequently discussed between respective solicitors. You'll see arrangements were made for the photocopier to be

installed by Xerox at Orange on 22 March, and a suggestion that a downstairs office of the building, that's the Baldock Stacy & Niven building, be provided to avoid having to lift the Xerox machine upstairs which would've been a formidable job.

Then you'll see that ultimately, this is now para 21, he went to the "offices of Baldock Stacy & Niven at about 9 a.m. on ... (reads) ... where the documents were located" and photocopying of documents proved to be an equally mammoth job. You'll see the days that he spent, three days continuously photocopying, trying to get across Mr Thompson's documents, "didn't photocopy some ... (reads) ... not gone through yet", but he thought that 90 per cent of them might have been copied anyway. You'll read about the process of that inspection but there's no doubt at all that we would respectfully say that the account given by Mr Thompson and the allegations he'd made in this respect are without any foundation whatsoever. You look at parties who have to suffer all of this which is why of course we bring this application.

Now, I know Mr Delany has spent a considerable time taking you through all the authorities. I won't do that at present but what we do submit is that - you have our outline and I won't take time going through that in any detail, but what we do submit is that it all demonstrates that first of all this is a case where summary judgment ought to be entered against the plaintiffs. It is just and fair that this lengthy and highly expensive and very prolonged litigious exercise

by the plaintiffs should be brought to a halt.

MASTER: Do you think my decision is going to bring it to a halt if I decide your way or do you think it will be appealed no matter what I decide.

MR GARDE: It may be so but as is apparent enough that's not a reason to - - -

MASTER: No, it's not a reason. It's an observation,

MR GARDE: - - - administer justice and at least you have the consolation you won't have to hear the appeal.

MASTER: Yes, but I'm going to have write a written decision.

MR GARDE: That's true. Again it's not an application just made on the one prong, as it were. Each of the three - you've doubtless been drawn - the wording of the release in both matters has doubtless been drawn to your attention.

MASTER: Yes, it has.

MR GARDE: And clearly the subject matter of the Tylden Road action is the same. There may be some attempt at elaboration but in terms of the Woodleigh Heights action on any view this is rising out of - it doesn't matter if it's rising or arising - out of or in any way related to the subject matter of the proceedings.

The plaintiffs' position - the plaintiffs' position and they're cause of action could be I think fairly described as obsessional. When you look at the vast number of documents, the huge effort they've put in despite all decisions of the court that have been made in the meantime, settlements or anything else, and we do say about that where you have an obsessional

situation there are, of course, other parties who are affected by all this and this is a case where it is highly appropriate for the court to put to an end the conduct of this very expensive obsession. That's all I'll say at this stage, Master.

I'm not being going to read out the submissions. We commend them to you, you've got them and - - -

MASTER: They're comprehensive submissions, I must say.

MR GARDE: Accordingly on all the points, the releases, Anshun and the limitation period, they should all be upheld.

MASTER: Thank you, Mr Garde. Mr Middleton.

MR MIDDLETON: The first thing to observe is the limited attack that is being made upon the plaintiffs proceeding at this stage and what I mean by that, if you look at para 6 of the submissions of the first defendant, you will see that the attack is upon three bases; there's the estopple Anshun point, there's the settlement point, and there's the limitation of action point.

MASTER: How big an attack did you want?

MR MIDDLETON: They don't attack. One thing. That's the underlying cause of action. There's no material saying that the underlying cause of action is without merit or should be summarily dismissed on its merits. That is very significant. I'll come back to that.

The best that happens is Mr Delany says it's going to be all very hard for us. I'll come back to that too. But there's no attack upon the underlying cause of action. They are all positive defences that will be raised or have been raised by one or other of the defendants as positive pleas assuming that the basic cause of action is successful. That's what the Limitation Actions Act is about, that's what Anshun is

about and that's what the terms of settlement are.

I won't take you to it but para 13 of the submissions of the second defendant equally raise those three matters articulated in a different way, but there is no attack by the second defendant whatsoever upon the merits of the case.

The significance of that, as far as you are concerned in the role of determining this application, is to proceed on the basis that that proceeding, the argument in favour of the cause of action, has merit. You certainly can't proceed on the basis that it has no merit. That's the first important preliminary matter.

The second preliminary matter arises because of Mr Delany's attack upon the notion that the prime facie course of action on the misfeasance of public office is going to be a difficult one. Now, we take issue with that. I'd like to refer you to some authority and we're now going to hand up, I hope, a folder of authorities for the Master.

The first case I want to take you to is the case of Cannon v. Tahche, Court of Appeal decision in 2002, 5 Victorian Reports at p.317. That is a decision of the Court of Appeal where all the members of the Court of Appeal being the President, Winneke, Justices Charles and Chernov of Appeal, determined that the cause of action in misfeasance - we've got one copy. Could I take you to p.330 and you'll see at para 34 it is said, "In the Three Rivers case", which is the House of Lords decision, "it was said the ... (reads)

... causing injury to the plaintiff". It is the last sentence that is significant and what we would strongly rely upon, "acts with the knowledge, they have no power, or recklessly disregarding the power". The other bases, (d), (e) and (f) are part of the ingredients.

This was a decision of, as I said, three members of the Court of Appeal, it's unanimous. It's after the decision of Mengel, which is the decision relied upon by Mr Delany in the High Court of Australia, and it's after the decision of had the House of Lords in the Three Rivers case. In our respectful submission, para 34 definitively statements the law as the ingredients of misfeasance of public office relevantly saying it's sufficient for the purpose of malice you can have reckless disregard of the power and knowingly disregard it.

When I take you to the ingredients of our cause of action, which you will see as being basically a paper trail, will be readily ascertained - this is not a matter for today - as to how the cause of action arises. That's the first point on the principles of misfeasance of a public office.

The second point I want to make about this, and again Mr Delany seems to make a lot of it in both oral and written submissions that the misfeasance of public office - the public office, for our purposes, are the public authorities, not the individuals. Normally one has, in most of the cases, actions against individuals who hold public office whether it be the secretary of

the government department, whether it be a minister, whether it be anyone of that ilk. But it is quite clear on the authority that a council and a public authority are, for the purposes of the tort of misfeasance of public office, public officers and we rely upon a Privy Council decision of Dunlop v. Woollahra Municipal Council, and second time lucky instead of third time lucky, I hope that's in the folder. These are not.

It's 1982 Appeal cases at p.158 and we'll get copies for our learned friends, and at the headnote of 159 you'll see the headnote 3, "That although the council is a statutory ... (reads) ... could not amount to misfeasance", and that's picked up, if one has a look at p.172 in the last full paragraph, abuse of public office by the Lord Diplock. Who spoke for all the members of the Privy Council.

The importance of that, Master, is that whilst the pleading refers to Porter and Wilson and others, it is done so to identify as precisely as possible some individuals upon which it is said the council is vicariously responsible, that's all. It's an unfortunate fact that Mr Porter is no longer with us but you're not exercising discretion, Master. This is not a situation where we're seeking to strike out a causation or want of prosecution, for instance, when in a situation like that you look to see if the documents are still in existence, whether the witnesses are still in existence or whatever. That's not your role. Your role is merely to see in relation

to this aspect, whether s.27 Limitation of Actions Act has been complied with. I see nowhere in the statute nor in any of the cases relevance as to the question of the death of a witness or the destruction of documents.

MASTER: I didn't take it that Mr Delany put too much reference on that. He mentioned it and that's all.

MR MIDDLETON: He put emphasis in his submissions, in our respectful submission, on the difficulty of Mr Porter being the person who would be attacked, but the reason I say it's not Mr Porter who is the person being attacked, it's the council who is the public officer, not Mr Porter. That's the significance of it.

MASTER: There would be evidentiary difficulties.

MR MIDDLETON: That maybe but that will be determined at trial. The evidentiary difficulties will be such that if, for instance, the plaintiff presents a case and Mr Porter could have been the person who could have answered it, then presumably evidence will be given that Mr Porter is dead and the court will take into account and not draw any inferences against the fact he's not called. That's how it will work. There's nothing unusual in litigation in that happening. It happens every week where a person is no longer available and the person can normally call that witness, and they have the burden of doing so, unless the witness's absence is explained, inferences are drawn, but if the absence is explained it can't. It's as simple as that.

They are the two cases I want to commence with in

relation to the misfeasance of public office.

Now, I want to go to the issues that arise in this litigation, to go and set out what the legislation is very quickly. It's not that complicated in some ways but the morass of detail that has been given to you and quite frankly concededly has been given to Mr Thompson, fails to disclose the real element, an essential element, in the cause of action.

What the determination that will be made in this proceeding by yourself will turn on what will undoubtedly be what was known by Mr Thompson, what was concealed from him, and what was reasonable to have known at a particular given time because once you determine those factual issues, in our respectful submission all the rest falls into line.

If I can give a thumbnail sketch to that. Remember the three attacks that have been made, we're having Anshun, the deed of settlement and limitation of actions. If it is found by you that Mr Thompson did not know sufficiently the relevant criteria or the relevant facts such as he - as we contend for, and they've put it at the highest, for the satisfaction of s.28 of the Limitation of Actions Act, then in our submission necessarily the defendant's Anshun point and (d) point go away because if it's hidden from him it couldn't possibly be reasonably expected to bring it in the earlier proceedings and the criteria for Anshun is not satisfied.

MASTER: You say I have to look at the limitation of actions point first before I look at the other two.

MR MIDDLETON: It's probably the most convenient way to do it because if you come to the - or more importantly find put the factual basis upon which Mr Thompson is putting his case in that respect, once you come to the view that we press upon you, that he didn't know the ingredients we say he didn't know, and he gets over s.27, it's rather difficult to see how he will (indistinct) an Anshun, and if we're right about our principles of construction with the deed of releases, then you'd inevitably come to the conclusions that those causes of action didn't encompass or contemplated within those proceedings what we're now alleging and I don't hear there to be any dispute with those principles of law, it's just how they're applied.

MASTER: That's exactly what Mr Delany was putting yesterday.

MR MIDDLETON: Exactly. If you come to the conclusion that the proceedings in the County Court and the Supreme Court are different, and a different cause of action wasn't contemplated by the parties that we're dealing with what we're dealing with now, then in our respectful submission the deeds of settlement can't help. So fortunately or unfortunately the facts are important.

MASTER: I would have thought crucial in this case.

MR MIDDLETON: Yes. That then raises another issue. My learned friends have, in my respectful submission, accurately set forward through their cases, Chief Justice Sir Garfield Barwick being the main

protagonist, in relation to the task you have to do. But if in the context of this case, after reading material, you come to the view that you cannot be satisfied that it can be disposed of as readily as my learned friends would wish you to depose of it, then on all the authorities it's quite clear that the matter should go to trail. Remember also that at trial, you'll have a greater knowledge of the loss or damage because at the moment my learned friends seem to have some difficulty with the way it's put. You'll know the full merits of the case as far as what the council did in their misconduct which you don't know at the moment, you have no idea of that at the moment other than what's pleaded.

But that will be a state of mind that you will only know once you've read the material. All I'm saying to you, Master, is if you're not completely satisfied on the basis of the material that you can make the decision, then the decision should not be made to stop the plaintiffs from proceeding.

The Master will know there are two competing policy issues here. My learned friend Mr Garde said, quite correctly, and with the greatest respect, that there's an importance of finality of litigation. Of course there is. But there's also the importance of allowing a person to have their day in court and to go to trial without being summarily dismissed.

MASTER: He says he's had his day in court.

MR MIDDLETON: That would depend upon what the issue is. If he's had his day in court then that's the end of

it. There's no doubt about that. If this was, and I don't think we're in too much disagreement with the principles; if this was a complete rerun of the earlier case then I probably wouldn't be standing here, but it's not and I'll come to that now.

Could I take you to our outline of submissions and I want to take you to para 2.3 which is on p.6. What I want to do is I want to go through these and after I've gone through these two pages, Master, I want to take you through the statutory backdrop and of the statutory obligations we say weren't complied with because in our submission once you understand that then it's readily apparent whenever you go back to the other pleadings, to see that what we're saying now isn't said there. That's the submission I'm making. I'm trying to make that good.

So looking at 2.3, the distinguishing features, in the 1998 Tylden Road proceedings you'll recall that's concerned only with residential land and the current proceedings are industrial and residential - 1988. That's a typo, I'm sorry.

Then you have in the cause of action the moneys had received under mistaken fact and law, proceedings were solely concerned with guarantees. In this case you have misfeasance of public office, that is, "There was a denial of essential service ... (reads) ... to obtain the land." Now, the remedy sought, in the Tylden road proceedings we saw the recovery of moneys wrongfully paid, that's some certain under the guarantees, and consequential damages for loss

occasioned by the wrongful acceptance in calling up the guarantees, all related to that particular Act.

Here the damages are primarily the difference in the value of the land of the date of purchase for what was bargained for, and the value of the land actually purchased, that is without the services. In other words it's not a difficult concept, readily in many cases and the Trade Practices Act, one got a lemon and one wants the difference between the - what it was represented as being $1 million, and what it was worth being a lemon which is 500,000. I'm not picking figures relevant to this case. It's just as an example. Not rocket science.

Then you have casual nexus. The simple casual nexus in the Tylden Road proceedings was the calling out of guarantees and in the current proceeding it's the, "First defendant sealing of the ... (reads) ... refuse to do so". Then with the second defendant it's the complicity and those sealing of plans.

Then the "State of knowledge of the ... (reads) ... relied upon", and in our current proceeding, "Each defendant acted maliciously intending harm or reckless as the likelihood of harm be occasioned". That's that proceeding and I'll come back and explain the legislative background.

In 1995 Woodleigh Heights proceedings, there the cause of action was negligent fraudulent representations about the availability of water . Just to stop for a moment. When my learned friend Mr Garde takes you and says, here's the word fraud used every

time in letters, in pleadings, it's fraud in relation to misrepresentations. It's not fraud in relation to anything that's now being alleged in relation to misconduct. Other than in the context of s.27, which is a different type of fraud, there is no allegation of fraud found in the statement of claim. It is merely the tort and misfeasance of public office. So every time when I ask you, Master, when you read the pleadings, when you see the word "fraud", don't be beguiled into what Mr Garde would want you to do which is to say it's fraud generally. It's fraud only in the context of misrepresentations. That's not the gist of the case here because it's ours in the Tylden Road case.

The remedies sought in the Woodleigh Heights case was that "damages between the difference ... (reads) ... mortgagee in 1989" and the price which would have been cheaper but for false representations of the defendants . As I said the damages here though effectively arise because the difference in value of the land for what you got and what you didn't get because the representation was made fraudulently it was said, at that particular time in May 1999.

The casual nexus, obviously the representations, was then thought to be false, were made to the plaintiffs and the plaintiffs' mortgagees, the water was not available to the plaintiffs' land. Now here the first defendants willful sealing of the plans of cluster division, contrary to statutory obligation, refused to do so and the second defendant's complicity

in that, and in 1982 providing a water supply for the "sole benefit of Woodleigh Heights ... (reads) ... all allotment holders". That's the causal nexus. Nothing to do with what representations were made in 1989.

Then the plaintiffs' knowledge at the time of those proceedings, "Water present on ... (reads) ... installation of" - so we thought there had to be water there, so the defence representations are false. Here as in Tylden Road and particularly the "defendant's representations although made ... (reads) ... because of the defendant's misfeasance".

So in our submission if you look at that list and you look carefully at what was in the early ones - - -

MASTER: Earlier?

MR MIDDLETON: Earlier proceedings, you'll see that this is the new claim. Now, it's complicated by one fact and one fact only, as is apparent by what my learned friends have taken you through, that there is, in our current pleading, reference to the earlier conduct alleged in the earlier proceedings. Why, you ask, and the simple answer is we claim exemplary damages and those - the rules of pleading require, which you have to set out each of the indicia and facts and circumstances giving rise to the exemplary damages, which we had done so.

That's why, and Mr Delany accepts this when he went through, as you may recall, our new pleading, and the same with the old pleading, that there are some things he said are new and the gist of the new things is what I have set out - what we have set out at pp.6

and 7 of our outline. The submission I make in relation to that is 6 and 7 outline are the core elements that we argue against the first and second defendants. That's the core and a completely new cause of action. The rest which is a subset of the earlier proceedings is relevant to exemplary damages because we say by their concealment of that behaviour they have compounded in disregard of our rights the normal test that applies in relation to exemplary damages. The rules of pleading I don't think anyone disputes this, in relation to exemplary damages you need to set out each material fact that you rely upon.

Can I go through now - can I hand up to you and my learned friends two documents. Can I take you to the statutory steps in respect of sealing an approval of plan of subdivision, and then I want to take you to the statutory obligations not complied with. What also probably is useful for you to have is a copy of the legislation.

MASTER: As it was at that time?

MR MIDDLETON: Yes. I think Mr Delany handed it up to you.

MASTER: I have that.

MR MIDDLETON: The Local Government Act I think you were handed up.

MASTER: Yes, I was.

MR MIDDLETON: Were you also handed up the Sale of Land Act?

MASTER: No, I don't.

MR MIDDLETON: If I can hand up a copy of the Sale of Land Act and s.97 of the Transfer of Land Act and the

Thirtieth Schedule. Can I take you to the statutory steps and s.9 is quite an important provision for you, Master, to understand, and what s.9, the Sale of Land Act it "prevents the sale of allotments on ... (reads) ... Transfer of Land Act". If I take you to the Sale of Land Act, s.9 says, "where a notice of ... (reads) ... s.97 of that Act". If you go to 97 of the Transfer of Land Act and s.97(2)(a), "The registrar shall not approve ... (reads) ... s.9 of the Sale of Land Act", or if there has been such a contravention certain things apply, don't need to worry with those. So, s.9 has a little bit more bite than my learned friend Mr Delany indicated because there is an absolute prohibition on a sale in the circumstances there prescribed.

Now, the villain in this litigation - sorry, one of the villains in this litigation is a fellow called Mr Buchanan and Mr Buchanan obviously sought to avoid the operation of s.9 and one way or the other the two defendants in this proceeding were involved in that avoidance. I will explain to you how it happened when I come to some simple facts.

You had to comply with s.9, simple way of doing it, lawyer telling you how to avoid it.

MASTER: Two allotments.

MR MIDDLETON: And do lots of them.

MASTER: As was mentioned yesterday, nine twos are 18, from memory.

MR MIDDLETON: Going through now the statutory steps, s.97 of the Transfer of Land Act requires, as I've

indicated, the allotments to which they're to be given. S.569 of the Local Government Act, "where a person intends to ... (reads) ... of the Thirtieth Schedule". I'll just go to the Thirtieth Schedule, which I've handed up. So what you do is you give a notice, "I give notice ... (reads) ... into allotments", the situation of the land, you set out a plan with the requirements and you pay a fee and you have to do that in relation to each and every subdivision by definition.

MASTER: Yes, I follow.

MR MIDDLETON: You go back to the legislation now of the Local Government Act you'll see that 569 states that, "Where in any case of any land ... (reads) ... in the form of the Thirtieth Schedule". You "submit to the council ... (reads) ... by the counsel". What the council gets is they get the Thirtieth Schedule or a number of them, they get the plans, or a number of them and that would depend on how many subdivisions one is having. Master, you'll understand the distinction between allotments. There may be many, many allotments and subdivisions which will have allotments in them.

MASTER: Correct.

MR MIDDLETON: Under s.569B(2)(a)(c), "The council shall refer ... (reads) ... the Kyneton water board". I won't need to take you to that, and then 569E of the Local Government Act, "The council may make ... (reads) ... withdrawn or complied with". That sets out the statutory scheme, it's not complicated but it

has special requirements and there are mandatory duties upon the council.

Now, let's see what they didn't do, and this is not rocket science or difficult to prove. It's done by way of looking at the documents, the minutes of the council and the timing. All objective facts which, as I said to you in the beginning of the submissions, are not - they're not saying this case has no merit as far as a prima facie case.

You start with the Tylden Road land, so you have s.972A, "The registrar of titles ... (reads) ... when plans submitted to council." Let me just take you to that. 569A - - -

MASTER: What page would that be on?

MR MIDDLETON: That would be on p.350, "The plan submitted to the council shall show ... (reads) ... the several corners" et cetera. Those things are required and shall show and they were not.

That's the first thing. It is said, to make it absolutely clear if one looks at .3, "The council is obliged ... (reads) ... with the Local Government Act". We go to sub-s.7 and you'll see quite clearly stated, "The council shall refuse to ... (reads) ... are complied with". We say that in May 1980, this is pleaded, the council contravened that provision and s.569A(1)(b) and (c) by sealing seven two lot plan of submissions which weren't in compliance with that. You won't find that anywhere in the earlier proceedings.

Next, none of the subdivisions in clause 4 above

- - -

MASTER: I won't find anywhere the allegation in para 4 is what you're saying.

MR MIDDLETON: Yes. To put the bottom line on this, Master, this is the first time that it's been alleged that the initial sealing of the plan of subdivision was unlawful or illegal and that's despite the fact that we've had lots of the proceedings and when I take you to Justice Kaye's decision, not for very long, it's apparent that everybody before Justice Kay proceeded on the assumption that a subdivision was lawful. Everybody in the Magistrates' Court proceeded on the assumption that the subdivision was lawful. Same in the County Court.

What we are doing is going back a step which was never thought of, never even contemplated that the subdivision itself would be unlawful.

Then if you go to para 5, none of the subdivisions we're referring to now had planning permits and none had valid notices requirement issued to it pursuant to E of the Act. I'll explain it to you in this sense, that there are clearly no planning permits. Secondly, but the resolution that was made originally as to the requirements was one made in February, 20th. It wasn't proceeded with. What was proceeded with to get around s.9 of the Sale of Land Act, we would say at the instigation of the villain Mr Buchanan, were a series of two lot subdivision but no requirements were made by any authorisation of the council whatsoever. You can't rely on the earlier one

because that's in relation to a different animal, so there's no authorisation at all in relation to the subsequent subdivisions.

It gets worse because that's all happened and Mr Buchanan, having a few financial problems, presumably, wants to have himself relieved of the obligations to carry out certain responsibilities of a developer such as water and drainage, et cetera, so he wants the requirements lifted. What the council does is we've got a bunny, we've got Mr Thompson. He'll give guarantees. We'll ask him for guarantees to pay - undertake these works. We'll release Mr Buchanan and we'll tell the Registrar of Titles that the requirements of the Local Government Act had been complied with and they do. They tell, by letter, there's not over the phone, we don't have to prove this by telephone, call anybody who's now talking to someone who's dead, and these are before you, this evidence, a letter where the registrar has said - it's said that the registrar says the notes have been complied with. That's blatantly false.

What had happened was the requirements had been lifted and it was sought, as the litigation before Justice Kaye and the Magistrates' Court demonstrates, it was sought to impose the obligation on Mr and Mrs Thompson. With the greatest respect I'm surprised the case took so long to determine because clearly Mr Thompson wasn't the owner. In any event, Justice Kaye determined, we would say correctly, that Mr Thompson could not be liable. The legislation provides that

the local council can withdraw a requirement but certainly makes no provision for it imposing it upon or substituting another person who is not the owner relevantly for the purposes of the Local Government Act. I don't need to argue that any longer. That's been decided by His Honour Justice Kaye.

That's the elements of the misfeasance of public office in relation to Tylden Road and you will not find them. You will find references to the registrar being deceived, you will find the references to s.9 of the Sale of Land Act, but all not in the context of the earlier point which we are now starting at which is the unlawful sealing of the plan of subdivision.

MASTER: I do this exercise which is going to take me a couple of weeks, obviously, and you'll say I won't find these elements.

MR MIDDLETON: You won't find as the gist of the cause of action the attack upon the original plan of subdivision. But you will find, and this is the difficulty of it, you will find a reference, for instance, to the registrar being told X, Y and Z. But it doesn't relate to the original unlawfulness of the subdivision. Whatever other reason there will be, I'll come to that later, but one point at the time. That's the first thing you'll find.

MASTER: I cut you off, you were on Woodleigh Heights.

MR MIDDLETON: No, I just wanted to say in relation to Tylden Road if I make that just as an example of that. Let me take you to what you will find, the intellectual exercise that's required in relation to

distinguishing it. If I can take you to SME1 vol.1. This is the County Court proceeding. Just look at the statement of claim. Tab number 1.

MASTER: I was taken to that yesterday.

MR MIDDLETON: The fact, Mr Garde was nearly going this far, perhaps even Mr Delany was going this far, the fact that we've joined the same defendants I don't think raises an Anshun problem. Paras 1 and 2 are a bit of deja vue but that's not sufficient, I think. Then you are in the same urban district and rural district within para 6.

Let's go to para 7, "On or about 20 February the first ... (reads) ... provide a requisition". Then keep going over to para 18, "On or about the ... (reads) ... conditions of the requirement". As I said - then on 19, "On 28 November the registrar approved the plans of subdivision". This makes the point I was trying to demonstrate to you, Master. You will find the references I'm talking about. They're here because they're part of the chronology relevant to the cause of action brought in this proceeding in relation to the representations that were made. But what you don't find is that anywhere in the pleading does it say that that written notice was unlawful or that the Registrar of Titles was in fact improperly notified of the reasons that the original subdivision was unlawful.

MR DELANY: If I can indicate I'm in the amended statement of claim and I particularly relied on para 20 which is not in the pleading my learned friend is referring to.

I dealt with it as an exhibit. It is actually at tab 40.

MR MIDDLETON: I don't mind dealing with it.

MASTER: Tab 40, is that the amended version.

MR MIDDLETON: You won't find in the proceedings anything dealing with the initial subdivision relevant to the matters that are set out in the Tylden Road proceeding.

MASTER: Set out in your?

MR MIDDLETON: In that document.

MASTER: There'll have to be a comparison and time spent, I accept that.

MR MIDDLETON: Yes. Now, where there is a chronology or where there is reference to certain matters of the same decision, that's not enough, that doesn't make it the same cause of action. That's the principal point.

Where my learned friend, Mr Delany, went through the pleading and referred to para 20 of that pleading in relation to the guarantee, look at para 20, "In the premises the ... (reads) ... for the following reasons". That's relating to the calling up of the guarantee, not an attack upon the statutory declaration as originally sealed.

You see, for instance, on p.9(a)(2), (a) and (b) do not show all the allotments in which the plan was subdivided, do not show all the streets and lanes, so that's the same allegation my learned friend Mr Delany is being made in this proceeding but we say it's not because it's relating to the guarantees not as a separate attack upon the - - -

MASTER: You say when I read the paragraph - - -

MR MIDDLETON: You've got to look at para 20 entirely. If you do that every time you won't, we would say - you'd find the answer as we have submitted.

MASTER: You want me to read these paragraphs in their entirety then compare it to this.

MR MIDDLETON: Yes, thank you. Now with the Woodleigh Heights land, it arises because there's a cluster of subdivision or subdivision planning permit, which required a reticulated water supply to be installed and simply we say in relation to that in contravention of the Local Government Act and plus the Titles Act which is similar provisions to the Local Government Act and the interim development, "The council's seal of ... (reads) ... was present." It's going back to the same issue that at a root and branch attack upon the subdivision as sealed. Same point but with a different statutory content. That's the cause of action.

MASTER: Again I have to do the same.

MR MIDDLETON: Yes, you would.

MASTER: I understand, yes.

MR MIDDLETON: If I can just take you to two exhibits which perhaps graphically illustrate the way in which this misconduct arose, although I think probably having regard to what I've done now it may have indicated anyhow, but it just helps by looking at a diagram maybe. I want to go to Mr Thompson's exhibits 14 and 19.

MASTER: This is the folder GAT1, is it?

MR MIDDLETON: Yes. You'll see you'll have two documents there, you'll have a notice and request, the Thirtieth Schedule, do you see that?

MASTER: Yes, I do.

MR MIDDLETON: Down the bottom there's an important inscription which says, "Note, plans submitted in ... (reads) ... all identical to this". Of course the five is wrong, it should be seven but don't worry about that.

The significance of that to the reader, we would say, certainly as Mr Thompson proposes, is that it looks as though when you look over the page to the diagram, that's all done in one lot, in one basic subdivision because they're all schedules identical to this. You just see that document. That's what Mr Thompson thought was happening.

Go to 9 and we'll see what did happen, not to Mr Thompson's knowledge, however. It took a little while for this to sort of sink in. I'll come to the way the iron sometimes works. You go to 9 and you see there that what happened was there was a series now of subdivisions. Have a look at the first one and you'll see (e) and down the bottom near Hill Drive. Now, keep going to the next page, you'll see Hill Drive gets bigger, so that's the second subdivision. You'll see NIS down the bottom of that second page, not in subdivision, because that's the earlier one and you've got two lots coming up. He's described the road by a bit bigger.

You go to the next diagram and you'll see Hill

Drive is getting longer and you've got a new two lots of subdivision and the old ones are not in the subdivision.

MASTER: Where are the two new lots?

MR MIDDLETON: You'll see 8 and G and then you've got not in subdivision is the previous ones are taken out.

MASTER: Let's go back to the previous one. I see 8 and 7, NIS increase, but doesn't G and F look similar? Have a look at the second one. You have NIS7 and then you've got an F. On the third one you've got NIS and 8, so Hill Road gets bigger. What's the difference between G and F?

MR MIDDLETON: They're different subdivisions. Look as the NIS as bigger. NIS in 8 one is consumed the 7 and the 8 is the next one around the Hill Drive as extends on.

MASTER: I follow.

MR MIDDLETON: In other words what's happening is look at the next one, you'll see there progressing around Hill Drive and the secret is to look at the Hill Drive road. So what's happened to comply with s.9 is a whole series now of subdivisions.

What Mr Thompson thought we say perfectly legitimately, is there was document which he saw at 14 and always thought that was the plans submitted in the sections, not separate subdivisions, that's the notation down the bottom. Remember that notation I took you to, plans submitted in five sections? He thought it's just all one five different sections when in fact when you look at what happened you have the whole new series of subdivisions. The other piece to

put into the puzzle is you have no resolution of the council authorising that.

MASTER: Authorising?

MR MIDDLETON: The whole series of them. You start with the one and you have a resolution in relation to that with all the requirements. Mr Buchanan finds out that s.9 is in my way. I can't settle. I'll tell them what to do. I'll tell the council now to do it in this way but the council doesn't comply with the Act. That's okay. Then all the issues as to why they did that and there'll be a lot of evidence about that, and the complicity of it all and how the council was in relationships with the water board, remembering Mr Porter was an officer of both and there were common directors and all that sort of thing, so the two get connected and there ae also requirements between the local water board and the local council under the statute which I've indicated to you, where one can request certain requirements to be made. So they're all in it together in this misfeasance of public office.

That's the case and that's as far as we - much further than we would have to go having regard to as I said to you what is being attacked at this basis but we wanted to indicate to you that there's obviously a tribal issue in relation to these very issues.

It's important for you, Master, to appreciate the essential elements of the cause of action because as my learned friends correctly say the concealment has to relate to the facts and material facts that give

rise to the cause of action. So it's no good them demonstrating that Mr Thompson knew 100 material facts. If he didn't know the 101th that required him to come to the conclusion that there was a misfeasance of public office in the way he now alleges, and that last phrase is significant because it seems that my learned friends - I'll come back to this - seem to say there's a case brought in tort. They brought one in tort before. It's somehow dealing with the same land, somehow dealing with the Local Government Act.

MASTER: They said same damage.

MR MIDDLETON: Yes, I'll come back to that. At one stage Mr Delany said, well, when he was arguing about the residential land and the industrial land, he said it's all dealing with land, the same land. It's a tort dealing with Local Government Act.

MASTER: I think he started with the damage and worked his way back thought, but I understand your point.

MR MIDDLETON: The damage here, just to make the point right at the beginning, as you look at p.6 and 7 are outlined, the damage here that's primarily called upon is the loss and diminution of value of the land at the time that the purchase is made and the Thompsons become entitled to the land. It's the buying of the lemon. It's the buying of something has the requirements of water to be enforced or water, and we don't have that. It's a very simple thing to see how Mr Thompson can do that because under the Torrens system of course we have here the Registrar of Titles having sealed - having approved the land and is now on

the Registrar of Titles as a subdivision, so any (indistinct) assumes that the regulatory requirements, the Local Government Act, have been complied with otherwise the system doesn't work.

As a matter of public policy and interest if the allegations are made against these public authorities are true, they are very serious because it undermines the whole way in which the Torrens system works.

What I want to do now is I want to go to paras 53 and 54 of Mr Thompson's first affidavit. To take you through his thinking process - - -

MASTER: Yes, I've got that.

MR MIDDLETON: 53 is on p.12. They are at the heart obviously of what Mr Thompson says is the state of knowledge in August 2000 and I say two preliminary matters about this and one is that at this stage of the proceedings no-one's been cross-examined.

MASTER: You expect someone to be cross-examined at this stage of the proceedings?

MR MIDDLETON: No, therefore you should accept the affidavit.

MASTER: Depends on what is said in reply and depends if I find any inconsistencies in it too, doesn't it?

MR MIDDLETON: I'll go to two inconsistencies that Mr Garde said and you'll see that you can't resolve them. For instance, he says Mr Thompson was represented by Mr Tiernan in the Practice Court and Mr Thompson says no, he wasn't. So you've got to a dispute. He says in his affidavit that he wasn't represented by council.

MASTER: Isn't there a court order who says - - -

MR MIDDLETON: I'm just saying what the affidavit says so you have to say he was mistaken or not mistaken. He may not have been. He was there. He would know whether he was represented or not.

MASTER: Wouldn't the court know as well?

MR MIDDLETON: He may not have been on that particular day at the time the conversation was made. The other thing about that particular conversation, Mr Edward doesn't say the conversation which my learned friend says he finds hard to understand was made, Mr Edward doesn't say it wasn't made. There's nowhere in a reply affidavit saying that wasn't said. I'll come to this in more detail but just to give you an example in relation to that.

Then you've got the problem about the issue of discovery, how Mr Edward went out. The fact is and this is shown by the documents that Mr Thompson actually lives on the third floor of the offices where Mr Edward went. It's the same address, 68 Summer Street in Orange, and the solicitor's on the ground floor and where the photocopier went and Mr Edward went was the residence in actual fact of Mr Thompson and that's made apparent where you have a look at Mr Thompson's affidavit where he swears where he's residing, which is the address where Mr Edward went to, and when you look at the correspondences as to where the address is you'll see it's the same address.

All Mr Garde's comments about that being inaccurate fall by the wayside but it just shows an

example of being careful about not drawing conclusions and coming to the whole different scenario in relation to these factual scenarios, that's the only point I want to make about it but it comes back to how sure you are in your mind when you look at the material. The fact that someone says something different doesn't necessarily mean that either one are wrong but you can't determine that, in our respectful submission.

Now, there's no suggestion that what is being said in this affidavit, remembering that a lot of it is said as to what Mr Thompson knew and understood, it's not an honest held belief. That can't be said.

What is being said, and they rely upon the documents to say look at the documents that he admits having and you, by looking at those documents, will see what he had before him and that is a perfectly legitimate exercise. But you've got it see what Mr Thompson says in his affidavit as to the circumstances leading up to having those documents and what else he had that impacted upon his mind.

MASTER: In other words he had the 6,000 documents.

MR MIDDLETON: Exactly, and went to other people and the circumstances in which he was given the black folder, which I'll come back to, and the reasonableness of what to do with that black folder. There's nothing magical in the black folder.

MASTER: This is an important part of your argument, isn't it?

MR MIDDLETON: It's an important part of my argument. There's nothing magical about the black folder. There

wasn't a bolt from heaven whereby the black book was opened and Mr Thompson said, Hah, all has now been revealed because of one document in the black book. That's not deposed to by Mr Thompson. What my learned friends would like to be said is nice objectively, let's have a look at the black book. You'll see there that it's apparent by anyone with any modicum of basic background that what happened was there were a whole lot of separate subdivisions and the answer to that is look at what was said and misrepresented in the Magistrates' Court by Mr Wilson. Look at the various things that happened since that Magistrates' Court and the circumstances leading up to what he had.

Now we all know you can look at a series of documents and the more wealth of documents you may not pick up readily the essential ingredient. It happens to us all and where you are misled, which we say happened here, down the wrong track, and I'll come to this, when you're misled down the wrong track, even more so is there not the opportunity to look at a document afresh and say now the light has been shone so we know the truth. That's what the gravamen of paras 53 and 54 do is to explain that process to the court so that it can be demonstrated.

Now, can I go to 53, "So for the purpose of appearing preparing a defence ... (reads) ... of this affidavit". You will recall that the black folder was given to Mr Thompson at the end of the earlier litigation. In the fourth affidavit, I don't know if you've had an opportunity to read that, Mr Thompson

sets out - it's a very short affidavit dated 10 November. It's the fourth affidavit.

MASTER: Yes, I have it.

MR MIDDLETON: Para 3, just take you to it, "Outside the court door ... (reads) ... I left the court with the documents". That's the context in which this black folder is given, it's given by the barrister, "Here, hold it for me for convenience". Mistakenly kept by Mr Thompson. At the end of the proceeding, so no relevance to look at them for the purpose of the proceedings, it's all over. As far as Mr Thompson is concerned this case is behind him. Now, I don't know what clients do but I certainly don't look at my brief when my case is finished so I'm sure he would also and that's what happened with Mr Thompson.

What he says in (b) is, "Upon examining the documents in ... (reads) ... inter alia the following, So there was a large plan showing all the residential allotments and the complete road, and that's ten, so he had the large plan which gave the impression of one large plan, "Three plans comprising ... (reads) ... in the manner described above." Then you have the council minutes of 20 February containing item 8, "A minute of resolution ... (reads) ... on the sub-divider", ad that's on 20 February 1980, and that was produced. You have the engineers report of 20 February referencing a 16 lot plan of subdivision owned by Buchanan and referencing a six lot plan of subdivision owned by Buchanan being industrial area. Then you had a copy of the notice of requirement dated

20 February being the plan reference G, and a statement of plan referred to as lodged with the council on 12 February and a statement of notice requirement related to the road show in the plan.

Now, the reference to those documents, and remember the sequence of events I referred to before, you've got 20 February, you've got the change in circumstance so the 20 February resolution doesn't have any bite upon the later what in fact happened. Then Mr Wilson gave evidence and his evidence was, "The council approved ... (reads) ... place the wrong". Those things were wrong. It wasn't done in seven parts, it was done in seven subdivisions.

There's no suggestion at this stage of the proceeding that what Mr Thompson is saying there is not true. You've got nothing that says it's not true, what he's saying there.

So you have an accepting at this stage false evidence of Mr Wilson on behalf of council under oath, which I don't think it's hard to say should be accepted as being on Mr Thompson's part regarded as truthful. He had no reason to believe that what Mr Wilson, a proper officer of the council was saying was not true.

Then, "Upon further examination ... (reads) ... the whole of the land be constructed". Then it comes to an important para (f), "As a result of ... (reads) ... falsely dated 20 February". He shows that notice of the Thirtieth Schedule dated 4 March, "The plan of subdivision considered ... (reads) ... was in fact

considered the true conduct", and that's in August 2000.

MASTER: He did all this in August of 2000.

MR MIDDLETON: That's his realisation in 2000 and in the other affidavit I think I referred you to or I think you had been referred to, I think Mr Garde referred you to it, he refers to the fact that - this is second affidavit para 15(a), how in an attempt to learn the true cause of his loss and damage, during the period 1984 to 2000 he accumulated thousands of documents.

MASTER: That's right.

MR MIDDLETON: He has an accumulation of knowledge and this is the point I'm trying to emphasise for you. It's not just one day opening a black book and all of a sudden, bang, I now know I have to issue proceedings against the council and water board. There's accumulation of knowledge which he identifies in various sources but what he says is the ingredient that I needed to know and which I found out about which gave the cause of action that I'm now pursuing, arose in August 2000. That's what he's saying, and the black book was the catalyst, if you like, was the reason for him opening that book and reflecting for the first time, because litigation had been alluding him until that time.

MASTER: The black book was given to him well before 2000.

MR MIDDLETON: Yes, there's no dispute about that. The reason why he looked at the black book was proceedings were brought against him. There was a reason for him to look at the black book, that was for rates, I

think, in respect of other non existent lots but that's by the way. That's the reason he looked at the black book. It wasn't just one day he thought he had nothing to do and I better have a look at the black book.

MASTER: The black book he gets by mistake, he looks at it - he gets it well before 2000.

MR MIDDLETON: Had no reason to look at it.

MASTER: Then an event happens in 2000, and then he looks at it, then he works all this out.

MR MIDDLETON: That's it. When we say works it all out, works out that the original subdivision was unlawful. It's important for us to identify and we say once you do identify it we succeed, identify what it is that is the cause of action being brought here and what it is that he discovers. What it is is that the original subdivision was always flawed. The foundation, if you like, was always dodgy. The foundation didn't exist for everything else that was litigated. It simply wasn't there. It was all based upon the premise that the subdivision was lawful.

If you go to para 54 it deals with Woodleigh Heights and there similarly but in a different statutory context, he puts together the pieces particularly having regard to experience in the Tylden Road and the Woodleigh Heights, they both feed off each other because he comes to the conclusion what's happened with one has probably happened to the other.

MASTER: This goes back to your submission start with the facts and start looking to see and then you go back

from there is what you say because you say that will all fall in place.

MR MIDDLETON: Yes, and start with the facts, once you identify what the cause of action is, which is the important beginning point, identify the cause of action which is the substance of the cause of action which I've set out in that brief note, then you work out once you work out what the ingredients are of that cause of action then you work out when Mr Thompson became aware of them and I'll come to other issues that have been raised by Mr Delany about this. But I'll come back to that in a moment. That's the material that Mr Thompson says gave rise to.

What I want to do is just demonstrate through the document that Mr Garde took you through which was item 43 of SME1 vol.2. This is the book of pleadings and you may recall this was some of the documents that my learned friend, the second defendant's instructing solicitor, photocopied.

MASTER: It wasn't part of the court file.

MR MIDDLETON: Yes, that's fine. I think what the - the only dispute seems to be whether it was in Mr Thompson's private residence or whether it was Mr Thompson's solicitors and I've explained to you that Mr Thompson's affidavit says he live at 68 Summer Street which is the place Mr Edward went to and it's on the third floor. That's the material that's before you. It probably makes no difference, quite frankly as to where it took place.

MASTER: But there's a document.

MR MIDDLETON: Yes. It's probably a document which undoubtedly would have been privileged at the time because it's obviously a document where the client a writing instructions for the purposes of giving them to his legal adviser but that has been waived in circumstances – it's been waived.

What I want to demonstrate to you, Master, is that this document, unlike the characterisation Mr Garde puts upon it by saying this shows that Mr Thompson knew everything way back in whatever year it was written, it actually shows, in our submission, that Mr Thompson was still under the wrong impression that there was still this one plan of subdivision. They weren't done in different parts. I want to take you to a few pages.

MASTER: That's okay. You're saying this actually answers you because if I look at what he says he found out in 2000 there won't be any of it in here.

MR MIDDLETON: No, I can't go that far. What I say is that if you look at some of the notations in this document, which are notations made by Mr Thompson, you readily see that he is still under the impression that the subdivision was to proceed as one in accordance with the resolution of 20 February. That's the submission I make.

Can I take you to p.6 and you'll see that was the Thirtieth Schedule, notice and request that I referred to before.

MASTER: It's the same one?

MR MIDDLETON: Yes, and the relevance of this document is

this is now in this particular bundle of documents so that's relevant for my learned friends because they say it's in his handwriting, some of the notation, and therefore this ascribes what he knew. I've got no doubt that's a fair proposition. I embrace that proposition.

MASTER: You rely on it.

MR MIDDLETON: And rely on it. P.6 down the bottom there you'll see, "Plan submitted five ... (reads) ... identical to this". What that gives the impression is exactly the impression that it was attached to in the document I showed you before that there was one subdivision albeit being processed by a series of sections. That's consistent with his thinking process.

Then you go to p.15 and there you'll see the copy letter to the Registrar of Titles from Mr Porter of 24 November 1980 and you'll see in the last paragraph, "Notice is given ... (reads) ... pursuant to s.569E". That's wrong.

MASTER: I think I've already been taken to this.

MR MIDDLETON: You have but the importance is the province of the document is important because he if has this letter because it says - the word is "has complied with" so that assumes there are requirements that are valid and are properly complied with. Now, we know that's not correct. Now we know that.

Then if one goes to p.31 and observe that same letter you'll see a handwritten notation by Mr Thompson, "At all times Porter knew ... (reads) ...

the Registrar of Titles that" and then refers to that letter. That shows Mr Thompson still working under the idea that there are requirements and they've been lifted. To lift something means it's in place. It's not saying the requirements were never there. That's the point. All consistent with the state of mind of the type that I have sought to tell you.

Then if you go to C28, you'll see there in typed version a part of a judgment of Justice Kaye, that's the "Furthermore there is no provision" and it's a typed version of Justice Kaye's decision. You've been taken to Justice Kaye's decision already by Mr Delany, I don't want to revisit it, but the important thing of that judgment is you'll see the third line down, "By the terms of its resolution ... (reads) ... lifted the requirement", so it's all based on the premise that the requirement was validly adhered to. That's the point.

All I'm doing is by demonstrating the examples that when you go through the documents you'll see that it's implicit in everybody's thinking, Justice Kay, to the extent Justice Beach had to worry about it, probably not, certainly the Magistrates' Court and the County Court it's implicit in everyone's thinking the requirements were there and that's implicit in what Justice Kaye was talking about because all he had to concern himself with was who was going to be responsibile for the payment. That's picked up by Mr Thompson in his thinking, in giving instructions to his lawyers, that's still picked up in his thinking.

Finally as far as this document is concerned, we look again at WB27 and you'll see in the middle of the page the handwritten notation, "In any event the ... (reads) ... did apply to me" and Buchanan was released from his obligation, and again there's part of the judgment set out there all going to the releasing of something that we now say never, never existed.

This document, it's unclear as to when it was compiled but it certainly would have been compiled after the 1988 proceeding because of the documents that referred to it so it's after the evidence of Mr Wilson which is false. Mr Thompson is still working on the premise of the evidence given by Mr Wilson.

MASTER: That's in - there is a document which refers to '89.

MR MIDDLETON: You've also been taken to the defence fil by the council which indicates that the plans proceeded by way of a series of plans, not separate subdivisions. So that's why when one thinks how one's mind works, it works by the accumulation of information and knowledge over a period of time and each one builds on the other. So if you're sent off on a wrong track as Mr Wilson did send, we say, you build on that wrong track and everything else is put in to that particular framework. I'm going on to another topic if that's a convenient time.

MASTER: If we have to sit later I will.

MR MIDDLETON" I'll talk to my learned friends.

MASTER: I don't want you having to come back another day.

MR MIDDLETON: I'll speak to my learned friends about this and Mr Delany alluded to this, it may be that the security of costs application should be deferred.

MR DELANY: I think it's clear we wouldn't finish it today because there is - I'll be a little time in reply and I assume Mr Middleton will be half an hour or an hour.

MR MIDDLETON: If perhaps we start at two.

MASTER: Yes, that's fine. We do want to finish today.

MR MIDDLETON: We do.

MASTER: We'll be back at two then.

LUNCHEON ADJOURNMENT

UPON RESUMING AT 2.00 P.M.:

MR MIDDLETON: Can I, just for completeness, the letter I've referred to a number of times in a different context of 24 November 1980 to the Registrar of Titles informing the registrar by Mr Porter's secretary and the council, that there had been compliance with the conditions of the Local Government Act, that's actually, so you know, it's part of exhibit GAT74. I don't meant to take you to it but that's where it will find itself.

MASTER: Yes, I've got it.

MR MIDDLETON: What I had endeavoured to indicate in relation to the cause of action was that you have the unlawful sealing, you have that in the full knowledge that there were no services at the time that sealing was occurring and moreover you know or the council knows and the water board knows there's no way of compelling services because unless you have a lawful subdivision and a lawful requirement, the requirement is as if it's void and worth nothing. So all those factors come together as constituting the misfeasance in relation to the council.

I want to move to a point made by Mr Delany. We've focussed up to now on the black book. Can I put that black book, I hope, in context to what it means in the context of this application, but also what's relied upon is the fact there was discovery. It's said the documents that were discovered in the proceedings, if they were looked at at the time, one

then has the means of ascertaining the very nature of the cause of action we are now agitating.

MASTER: So therefore can't be concealed.

MR MIDDLETON: That's the argument and superficially that has some form of attraction to it and my learned friend relies upon the case of Mann. Now, the answer to it, Justice Batt gives us a clue in the CE Heath case and I'll take you to that, but the proposition we are putting is this is simply not a case of there being discovery with nothing else.

So if the case was simply here are the documents, we've discovered them and there were no other surrounding circumstances, I probably wouldn't be here making the submission I'm about to make. But that's not what happened because, as you know, and I've taken you to some detail in paras 53 and 54, that you have the handing over the documentation in the form of which it was done, that's the discovery, in the context of the misrepresentations and the evidence of Wilson.

So you're not starting with a clean slate and looking at the documents with a fresh mind. You're looking at the documents in the context of the false evidence given by Mr Wilson. It's not just the simple matter - Mann's case doesn't answer the proposition. What my learned friends seek to do is to elevate questions of fact into a propositions of law and what they seek to do is say they've been discovered, as a matter of law, how can that be a concealment because we've actually handed over the documents.

Now we all know, we've all experienced it, that you may have 15 volumes of a court book and in the course of those 15 volumes there'll be one page that the judge or Master has not taken to in the context of submissions made. Now, it hardly lies in the mouth of some barrister on appeal to say, well, the judge had all before him. It was there in p.1,030. I know we didn't take him to it but it wasn't concealed from him because it was there. Now, I don't think that would go very well. I only give as an example of you've got to see the conduct of handing over the documents in the context.

MASTER: So this context is there's 6,000 documents, you can't expect him to look at all documents.

MR MIDDLETON: Yes, and understand the significance of them particularly when you have Mr Wilson's evidence.

MASTER: I understand the argument.

MR MIDDLETON: In fact Justice Batt gives us the clue to that because if you have a look at the CE Heath Underwriting case, it's behind tab 3. I'm actually relying upon my learned friends' book of authority. Tab 3 is the CE Heath case and p.47 I want to take you to. My learned friend Mr Delany indicated the nature of this particular case and as you know before His Honour Justice Batt we had the issue of s.27.

If you have a look at p.47, you see item J, "Matters put in denial of fraud ... (reads) ... by rules of court", so he wasn't satisfied that the mere handing over of documents or the knowledge of documents was sufficient. All I'm indicating is it's

a question of fact in the circumstances. There's no principle of law that discovery is in s.27, therefore fails to show concealment. I'm not saying that the facts here are exactly the same, obviously not. It's an indicia, that's all I'm saying.

Then you go down the page, "The plaintiffs could with reasonable diligence have discovered the fraud", if you have a look in that middle of that particular paragraph, "The plaintiffs do not suggest that such an inspection ... (reads) ... end the period of indemnity", and they recited some cases, "The causes of action ... (reads) ... relating fiduciaries." What was said and what in our submission is saying here is where you have declarations, where people are saying something to you, you're entitled to rely upon those.

Now, admittedly you have cases where you have, in this case, obviously insurers have utmost good faith and you have fiduciary responsibilities and we cannot come within that category of case. I clearly cannot. But here you have a situation which in many ways is worse where you have an officer giving sworn testimony which was false and it's like the half truth and the half lie. They're more insidious than the full lie, if you think about it. Where you've got a full lie you often can pick it readily. When you've got a half truth and a half lie it's sometimes more difficult to work out the truth.

You may be familiar there are a lot of cases in misleading and deceptive where they talk about silence and they talk about half truths and silence can be in

a situation that arises where you have positively misled somebody and then one stands by and doesn't correct it. That's not a dissimilar situation that's arisen here where you have the positive misleading in the evidence and everyone works on the basis that that's the position as far as the other side of the equation is concerned, which is the plaintiff in this case.

I'm going to refer to the Bulli coal mining company and the Beaman Arts Company case but for an entirely different reason than he anticipated. I accept what he says is they are cases dealing with equitable relief and I do not seek to make a submission to you, Master, or to anybody else, that equitable principles, putting aside what Justice Dean said, equitable principles override the Limitation of Actions Act. I do however, and in our outline of submission we do rely upon what Sir William Dean said in relation to unconscionability and the Limitation of Actions Act. I want to say nothing more about it than what we put in our outline of submission.

Mr Delany correctly pointed out if you have a look at the analysis that Justice Batt made to it in the CE Heath case as far as you are concerned, then that may not be a way in which this case can be determined. But in any event we formally put that submission in relation to the Sir William Deal analysis. But putting that to one side, what I want to rely upon in the Bulli coal mining case to start off with - it's at 20.

My learned friend indicated the facts of that particular case where there was willful and secret underground trespass over a series of years. What I want to rely upon is the observation made on p.363 by the Privy Council and it's, we say, relevant to what's happening here. P.363 at the bottom paragraph, "The contention on behalf of the ... (reads) ... difficult or remote", and that's what happens here. There's been a cunning attempt to conceal starting at the periods we've identified, and just because it hasn't been done blatantly they seem to say we've done all these things by handing over all these documents in the way we have in the context in which we now know how the impression is going to be given to the plaintiff.

That was picked up in the Beaman case and at p.470, if I may take you to that case. It's tab 21. Lord Green, Master of the Rolls said at p.475, and this was the bailment case that my learned friend referred to, "I am of the opinion that the ... (reads) ... the appeal is allowed". Then going over to p.471, Lord Justice Somerville, in the middle of the page, the first full paragraph, "There remains a question of ... (reads) ... of their address". It's not required of us to show that there were positive acts later after we are shown the original concealment.

The other thing which is important is the very nature of the acts we're complaining of here which are misfeasance of public office are secretive in themselves. They're things the plaintiff would not

necessarily know about. So the concealment is in the very act of the tort of misfeasance of public office. It's not like a case where there's a tort where I assault somebody or I trespass on their land or I committed a nuisance where the person will know that something has happened to them. The tort is all being done behind the closed doors of the council and the water board, so the nature of the tort is important and the way in which it was alleged.

If I could just take you to Justice Warren, now Chief Justice, decision in the Di Sante case. You may recall that's in the first-named defendant's list of authorities behind tab 6.

MASTER: Yes, I've got it.

MR MIDDLETON: You may recall my learned friend Mr Delany picked up the point there was a reference to Seymour v. Seymour. Para 51 the New South Wales Court of Appeal said there, "In relation to the lack of confidence that he was not conscious of his own lack of proper standards", and we rely upon that as a proper principle of law as to the nature of the fraud. So it's a common law fraud, the authorities seem to say that but the extent to which one then works out the content of that common law fraud is a reference to intentional wrongdoing and clear fraud, deceit, moral turpitude and doing something where you are lacking in conscience, closing eyes to the wrong.

In this case you probably don't need to worry about what is the proper test if there is a dispute about it because we say, having regard to the evidence

of Mr Wilson we're clearly within even the moral turpitude taken at its strictest.

Now, the other matter I wish to go on the authorities is that my learned friend Mr Delany also referred to the Skrijel case and that is behind tab 21 of the same book that I had taken you to. That was a decision of Justice Eames and my learned friend referred to the passage at para 49 on p.9 and conveniently I'll take you to it and indicate exactly we rely upon the same passage. There His Honour refers to the Mirror Group newspapers case and there was a statement there referred to. You'll see in para 49, "In order to give relief ... (reads) ... are not relevant to it".

MASTER: You rely on that.

MR MIDDLETON: We rely upon it because what we say is that unlike the characterisation that my learned friend said a number of times in this address to you that all that's happened are new facts to make the other causes of action stronger, we say that the fact that we're relying upon, namely the unlawful sealing initially, is a new fact which gives rise to its own cause of action and I'll give you some example as to why that must be right.

We would readily accept that you may have a cause of action dealing with a particular matter and as matters eventuate through discovery or through your investigations you find more witnesses to say the same thing. That's evidence. That's fine. That comes within that. Cause of action is complete. You're

finding more material to prove your case. So let's say I had one witness to prove a meeting and something was said. I know what was said. I've got one witness. I get five other witnesses. I can't come along to the court and say, well, I had to wait till I got five witnesses. That won't be any good. But I don't know there was that meeting existed, assuming that meeting was an important meeting for constituting the cause of action. I don't know, then the cause of action is not complete. That's our point, that's the distinction.

It's an important distinction. It's a distinction about material facts that one would plead to constitute your cause of action. The best way to think about it, in our respectful submission, is to think about it as a pleading.

MASTER: Applied here.

MR MIDDLETON: Applied here. We did not know that the subdivision was originally flawed and unlawful and we found that out in August 2000.

MASTER: Therefore?

MR MIDDLETON: Therefore then s.27 bites, we get the benefit of it. We say that must be right and the distinction between finding more facts and getting a stronger case is readily understood if one keeps in mind evidence and material allegations of fact.

Let's just think of a few examples. You've got a builder and an owner who have an ongoing relationship through a contract. In the course of that contractual relationship, the windows don't accord with the

specification and the owner sues the builder in relation to the one building in 200 Queen Street - in relation to the windows under a contract which was entered into today, and sues for damages. It would be a nonsense to suggest that if after that case was brought you found out that the foundations were faulty and you brought an action in relation to the foundations, same building. Same contract but a different breach and that's the element. It's a different breach.

It's all very well saying there's a misfeasance of public office. It's all very well saying there's a tort. It's all very well saying it's the same land and the same parties, but that doesn't mean that you can't bring an action later having discovered a different ingredient for your cause of action.

MASTER: I see how you put it.

MR MIDDLETON: It's the same if one puts it into personal injuries context where you have a situation where a person may sue a doctor in relation to a particular element of negligence and then discovers after one comes out of a coma, or whatever, that there's another element of negligence which caused damage and the fact - - -

MASTER: Same damage or different?

MR MIDDLETON: Different damage. We have different damage in this case because we're suing for the diminution of the value of the property so there's no problem with th damage. All I'm trying to say, Master, is it's too glib to say just because we're dealing with the same

land and the same people - - -

MASTER: I understand your argument.

MR MIDDLETON: I want to just now go to some final matters which are all discrete, to just rebut a few things that have been said by my learned friends. I think my learned friend, Mr Delany was toying with the idea that because there were court orders which encapsulated the terms of consent that somehow elevated this case into a true res judicata or true estopple.

The propositions we make about that are as follows. Firstly, where you have a consent order you can raise no higher than the agreement that gave rise to that consent order and you're probably familiar with the arguments about that and the case law is quite clear, in our submission. So if there's any argument about the consent order you have a look at the terms of settlement and the intrinsic facts and you work out what the term said.

Further, in this case, in our submission, the court order and the terms went no further than the issues that were before the court on the occasions they were made and that's either put by looking at the pleadings or what was in contemplation of the parties at the time, and you have evidence about that now, and it's not dissimilar to a case of Storey, which I'll hand up to you, Master. This was a case that was dealing with a power of appointment and there was some litigation in relation to a particular breach of trust. But there was a question which arose in the

proceedings that the actual trust deed itself and the appointment was void or voidable.

If one goes over to Lord Justice Neville at first instance at p.25 at the bottom paragraph, "The next point to be considered is ... (reads) ... of the appointments in question", similar here. We've got a deed of compromise against us, and it proceeded as I have put in the submissions, upon the basis that everyone assumed that the subdivisions were valid.

Going on, Lord Justice Neville said, "It is said that was ... (reads) ... came to them". We say that is completely apposite to our situation because we are now going back to the validity of the subdivisions. We didn't know about the invalidity, had no knowledge upon the facts upon which that validity depended, and it'd be wrong to cut us out.

Now that went on appeal and in the Appeal Court Lord Justice Fowl(?) at p.33, and all the other lords agreed with him, the second point – the next point is this, then going down to the middle of that paragraph, "In order to make this compromise ... (reads) ... of their present action". That's all I need to say.

MASTER: You say that directly applies here.

MR MIDDLETON: Exactly. That's that separate issue. I've already gone through the issue of the Practice Court and what went on in the Practice Court and the simple answer to that is Mr Edward doesn't deny what occurred, whatever dispute may be as to who was represented and who wasn't represented. It's a peripheral matter. I only raise it because it seems

to be an attack upon the affidavit and it's peripheral.

MASTER: It may be credit.

MR MIDDLETON: It may be credit but no-one seeks - it's hard to do a credit issue when the witness isn't in the box.

MASTER: No, but as you know when you look at two or three affidavits and if you haven't got a witness, then you look at the affidavits to see if there's any consistencies and all sorts of things k.

MR MIDDLETON: You do but you've got to be a little bit careful of this sort of application.

MASTER: I know.

MR MIDDLETON: I've already mentioned the business of the address of where the inspection went of the documents.

MATER: Yes, you have.

MR MIDDLETON: And the same address. You can't criticise the plaintiff at this level on the basis of what I have said in the material being the same building where the plaintiff lives and the solicitors. Whether there was a misunderstanding is neither here nor there. It was an attack upon the affidavit of Mr Thompson presumably to - the only reason for it would be to discredit the affidavit and there's a rational explanation for it that I've now proffered. In any event one has to be careful about that aspect of dealing with those things.

At the end of the day you, Master, have to work out why Mr Thompson or reasonable diligence wouldn't have determined the essential matter now in dispute

and by way of summary I just make these points. When you're looking at the material in the black book and the circumstances of the black book, do recall it was given right at the end of the Tylden Road litigations, it's all over. The other thing to remember, the second point, is that the residential land was in fact sold so that all that Mr Thompson had left was the parent title. So in other words, not only was the litigation behind him but commercially everything was behind him. The land had been sold.

The third consideration is that there was no reason to look at the black book until new litigation prompted Mr Thompson again to defending himself against the demand made and there's no suggestion there was any need to look at the black book.

The other point to remember or the next point to remember is this is all a back drop of false representations made one way or the other either by Mr Wilson in court or by County Court proceedings in the pleadings as to the nature of what occurred.

The other thing to remember, which I haven't mentioned before but has to be put into the melting pot itself, is that the Registrar of Titles themselves - you have the registration, you everything which is done which is based upon the premise that everything is done according to Hoyle. If the Registrar of Titles and all the people are saying who should know that everything's been done according to Hoyle, why do you expect Mr Thompson to reflect any differently.

The next point which I have made is all the

litigation, and this is evidenced by the judgment and the pleadings, was premised on the basis that the subdivision was lawful at its initial stages.

The final thing again which I don't think I've mentioned, is if you have a look at para 28 of Mr Thompson's first affidavit, you'll see that despite the fact that he requested documents over a period of time, if you look at 28, "During the period ... (reads) ... granted access to the files". So there was a denial of material.

MASTER: There's no response to that 28, is there? I can't recall any.

MR MIDDLETON: There's no response. They are the matters we seek to put before you as to why the applications should not succeed.

In relation to security for costs I forgot that Mr Garde's client doesn't have an application yet so I think it's best to delay that one and put it off, and I think Mr Delany would be happy with that, getting a bit of a nod, so we're don't have to deal with that. The only other issue is I see Mr Garde has in his submissions the question of costs in relation to this application. If I may say, that should be argued at the end of the deliberations so we know exactly what reasons you give for the decision. Unless I can be of any other assistance, that's the submissions we make.

MASTER: Mr Delany.

MR DELANY: If I can begin by dealing with the same point that Mr Middleton began with which was the question of misfeasance and I think we would accept that the finer points of the tort are not really for determination here but the first point Mr Middleton raised was by reference to the Court of Appeal's decision where he said that reckless indifference as to whether or not the power to so act is there or not is sufficient. The point in relation to this case is that there really are no particulars and there's no affidavit evidence either that would suggest that the council was recklessly indifferent so there's no arguable case pleaded for that or particularised. It's pleaded but it's not particularised.

In fact the proposition appears to be the contrary because it seems clear when we go to some documents that the council believed it had power to approve the plan as if it were in stages. You had a plan for 18 lots in February. Mr Buchanan submits various two lot plans and you might be familiar with the concept for approving plans of subdivision in stages and it seems quite likely that that's the way the council's proceeded. There's nothing particularly recklessly indifferent to that.

The second point Mr Middleton put is look, here the public officer is the council and not the individual whose sued, but he also accepted the proposition, as I understood what he put to you, that

the council was vicariously liable for the acts or omissions of its officer.

The cases on misfeasance establish that the council in such a circumstance would only be vicariously liable if what was done by the - if the particular action of which the complaint is made by the public officer was authorised by the council, by the scope of the officer's authority to do that particular act.

Now, it's a very high burden that has to be discharged to show that the council is vicariously liable for the tort but I didn't want it to be thought that it we were accepting it was an easy misfeasance case the case was well articulate and well pleaded because we don't but we agree that the key issues in the case don't involve the plea itself of misfeasance.

MASTER: What he said was you didn't say anything about the merits of that case.

MR DELANY: No.

MASTER: You still don't?

MR DELANY: No, because we're not here to argue the merits of that case but if one looks at our application to strike out as an abuse of process, you can take into account overall that that case is not properly pleaded because there are no particulars given even of the recklessly indifferent behaviour.

MASTER: Isn't it enough to get you home that it's not properly pleaded?

MR DELANY: Not on its own. You'll see from our outline we say that under 23.01 you can consider the pleadings

and all the other material.

MASTER: But that's only one factor, you say.

MR DELANY: Yes, it's one factor. Now, Mr Middleton then suggested to you that by the look of this case was to look at the 27B point and if his client got up on that point then the Anshun point and the terms of settlement points and the estoppel points don't matter.

MASTER: He said that they'll probably go by the wayside.

MR DELANY: That's why he was at pains to seek to persuade you that there's a different cause of action.

MASTER: Even if he went the other way he still would have had to show the different cause of action.

MR DELANY: Yes, but if the cause of action that is pleaded, or the subject matter in fact that's now relied upon is the same, then there's no doubt that the two releases were effective to release the council and for that matter the water authority from those claims and there was a valiant attempt to say, don't worry about all those paragraphs that were in the earlier pleas. They're really only there for our exemplary damages case. All you had to say for your exemplary damages case was there was a case once, they put in a defence, they were very naughty and we settled it and they're still misbehaving.

MASTER: But they have a claim of exemplary damages in the previous cases.

MR DELANY: No, they didn't claim exemplary damages in the previous action but it would have been open to them to do so

MASTER: Does it make a difference?

MR DELANY: No, I don't believe it does because they complain particularly in the second action of fraud and we'll come to the fraud in a minute.

MASTER: I cut you off, your point was what in relation to the - - -

MR DELANY: What we say is all of the paragraphs that are still there are pleaded for a reason and when you look at the so-called further omitted paragraphs, they're interwoven with the other paragraphs that were in the existing earlier pleadings.

MASTER: What's more important, the paragraphs that are there or the paragraphs that are not there?

MR DELANY: We say it's the paragraphs that are there and one can see, particularly when one goes to the Tylden Road proceeding in those paragraphs in para 20 that were added by amendment that I referred to.

MASTER: You'd say the paragraphs that are not there are more important but the exercise has to be done by me. I have to look at everything that's pleaded.

MR DELANY: That's right, and we agree with Mr Middleton you need to look at the pleadings as a whole. But the critical point here is that you've got claims in tort for the same property in each case and based on the fact that titles issued by the registrar in one instance without roads being constructed, in another without there being water available, and it's the same case based on the same facts.

What's happened is not the pleading of different causes of action but rather a gloss on the earlier

cases. You were taken to the Storey decision a moment ago and at first instance, at p.26, what was said is that, "No question was raised ... (reads) ... had no knowledge". We would say in relation to these plaintiffs, first of all, if you take the Tylden Road proceeding that the sealing of the plan of subdivision and the proffering of it as sealed by the council to the Registrar of Titles were both res pleaded and relied on, and further for reasons that I'll come to, the damage that was claimed is the same damage. P.

It's really not similar at all to what was discussed in that case and in the Court of Appeal in the Storey decision, the court was concerned with approval of a compromise on behalf of infant children and therefore of course the court had to be told all facts, good, bad or otherwise, that might affect its decision to approve a compromise. It's quite a different circumstance to where parties proffer consent orders.

You were also given the story of the building that Mr Middleton and I inhabit at 200 Queen Street and told look, you've got one case about the windows, you settle that and then you come along and you find the foundations are no good. We would agree wholeheartedly that they're very different cases but if you take Tylden Road, the complaint is that the plan of subdivision that was sealed was sealed in such a condition as to permit it to be sealed and the titles to issue without the roads being constructed. That was the problem. It's the same problem

complained of now. Different additional reason put forward now. All the old ones are there plus there's the story about the antecedent plans which I'll come back to.

If you look at the position concerning Woodleigh Heights the situation is that the problem complained of is not one of windows and foundations but in each case no water supply. So there was no water available to the lot so they couldn't be sold as residential lots. The facts that are relied on are the same.

Once you get to that situation, then it's not a case of saying, well, if we win on s.27B then that's the end of the matter because what's happened is that the earlier proceedings both dealt with and resulted in releases in favour of the defendants for the same subject matter and the same cases.

MASTER: I can still start with 27B, but you say it doesn't stop there, keep going.

MR DELANY: No, and if you decided 27B is hopeless, and we say it is, then I have to say to you that you probably can stop there. You can say, well, they lose because they can't win on 27B and I don't have to deal with the other arguments, even though they're very attractive.

MASTER: I'll try to deal with the whole three if I can because I do think it will go elsewhere so I should deal with the whole three.

MR DELANY: Litigation has had quite a history so who knows where it might end up.

MASTER: I'll be staggered if it doesn't keep going, but

anyway.

MR DELANY: If we take the Tylden Road proceeding to see whether or not it's a different case, it is important to appreciate that the complaint in the earlier Tylden Road proceeding was that the plan of subdivision that issued without the roads being constructed and it's that plan that got registered and the titles to that plan issued.

Yes, there was an earlier plan and there's now a complaint going back earlier in time about events in February, but it doesn't add anything and if you look at the pleading you will see that it's one of the events leading up to but that's all it is. It's just a further event that's pleaded. It's really an extra reason why it's now said that the council's decision to seal the plan and to put it forward to the titles office was not lawful.

What was put to you in relation to concealment focussed on Mr Thompson's affidavit and also, understandably, on aspects of the exhibit, volume 2 SME1 and you were taken to particular documents. But what you weren't taken to were each of the critical documents in that folder. I want to take you to them because by doing so it immediately becomes apparent that the propositions that Mr Middleton put to you as to what is needed in order to know you've got a cause of action, are made out as being in existence at the time the note on that document were made by Mr Thompson. The three things Mr Middleton say you needed, you need to have the documents, you needed the

council minutes and you needed to know the timing.

I'll just tell you before going to those documents, that is to the exhibit, that the documents here are the document - a lot of focus upon it being in the black folder but it was earlier discovered. So it's sliding across the matter to say you look at what's in the black folder.

MASTER: He went a bit further than that though. He said it's one of 6,000 documents that were discovered. That's one thing I want you to address me on. It's just more than the black book.

MR DELANY: Yes, I'll address you on that. The witness focussed on it, as we'll come to, and he made notes about it and he knew what had happened before Mr Edward inspected the documents. In the Tylden Road proceeding there are 122 documents discovered by both defendants.

MASTER: There's also the context in which they were discovered.

MR DELANY: I'll come back to that. There are 122 documents and the affidavit of documents are there so that's what my instructions are about that.

The documents were actually discovered and inspected by both the solicitor and by Mr Thompson in 1989 and documents were provided. If the first ingredient he needs is the documents, he had them in 1989 and, yes, he got them again in - when they were handed across to him, on his evidence, in 1991.

Secondly, the council minutes, they were discovered in the 1989 proceeding. So the council

documents and the timing were all known then and I'll show you that by reference to the consolidated book of pleadings because it's as plain as day from that that all the relevant documents were there, that they were read and the complaints that are now sought to be agitated were known.

It might be best to go to Mr Thompson's, if you have Mr Thompson's main summary judgment affidavit and then you also have available SME1 volume 2.

MASTER: Yes, I have that and I do have Mr Thompson's affidavit.

MR DELANY: Can I just mention for your reference that exhibit MED11 to Ms Dixon's affidavit sworn 28 October 2005 is a consolidated list of documents in the Tylden Road proceeding and it shows 122 documents.

MASTER: Okay.

MR DELANY: If the 6,000 figure is the number of documents that the solicitor for the water authority was confronted with when he went to look at the plaintiff's documents from all over the world, if you like, in '99.

Mr Thompson's affidavit, if we just go to p.13 and to the paragraph that starts (ii) at the bottom and there's been a lot said by Mr Middleton about Mr Wilson and the allegedly false evidence that he gave. So this is evidence that's said to have been given by Mr Wilson in 1987 in the Magistrates' Court.

The case that Mr Thompson advances here is, first of all, Mr Wilson gave false evidence, and that starts at the bottom of p.13 and over to (g) at the bottom of

p.14, "At the time of ... (reads) ... the following facts", and then he sets out about plans of subdivision so there's some 1987 behaviour of Mr Wilson that's relied upon by our learned friends and that's when that behaviour starts and ends. It's before he issues his 1998 proceeding and it's certainly well before he issues his second proceeding being the Woodleigh Heights proceeding.

The second complaint that's made in these paragraphs at p.14 is the witness says this, that - in sub-para (d), "Upon further examining ... (reads) ... of the road being constructed". He's relying upon one key document being the plan reference 79305G in saying when I found that it opened up the puzzle to me and what it told me, because these are the so-called new allegations, it told me there were breaches of the Sale of Land Act, it told me there were seven subdivisions, not five, it told me the plans the subject of the council's February 1980 resolution were not the ones sealed and sent to the titles office.

Let's see about when he first found out about those things because what we do know is he certainly knew all of those things at the time he made the handwritten notes in the documents in tab 43, every single one of them, and he even wrote them all down so we weren't in any doubt about it.

Despite all the affidavits Mr Thompson doesn't say is when he made these handwritten notes but we would so say that the inescapable inference that the court should and must draw is that they were made

before this proceeding was settled in 1991 because there's no other reason one would annotate and make a book of pleadings, and we will invite you to quietly look through these annotations. I think you'll clearly form the conclusion that they must've been made before 1991.

If we start please with the page which is numbered 2 and I'll be pretty quick about this but it is important to go through them, I think, in sequence because it shows that the facts were known and also that the complaints that were now made about different lots of plan of subdivision were also known.

The first handwritten note at the top of the page, p.2, "On 12 February 1980 ... (reads) ... to the Local Government Act". If we then go to p.5 and you weren't taken to this handwritten note, this is very important, "Notwithstanding it was illegal ... (reads) ... notice of disposition opposite". One might say, why was it illegal, "in order to avoid the provisions of s.9 of the Sale of Land Act". Isn't that interesting, "which at that time ... (reads) ... of more than two allotments". Buchanan then lodged - what did he do? He lodged seven separate plans which were contrived, written in the plaintiff's own hand, to create several subdivisions of two lots each. This is the critical piece of information you're being told that this poor man didn't find out until 2000 and didn't realise that he had this great case.

If we then go over to p.6, at the top of the page he writes, "Buchanan lodged ... (reads) ... 4 March

1980". That means the notices are notices after the 20 February resolution and he knows it because the new notices are dated 4 March 1980 and if we go over to the next page, p.7 at the top of the page, he says this, "The council served a separate ... (reads) ... 79305E-79305K". Within that sequence one would think would be letter G but we don't have to speculate because Mr Buchanan made his own note about plan G - Thompson, I'm sorry.

If we go over to p.10, the note says, "Buchanan therefore approached the council" and this is the letter from Buchanan of 7 March 1980 that says in the last paragraph, "Would it be ... (reads) ... may be lifted". Then if we go forward - I should have read at the top of p.8, "Mr Buchanan thought he'd exploited ... (reads) ... one plan showing each allotment". That's at the top of p.8. The bottom of the note says, I think you were taken to 569A by Mr Middleton, his clients note that not one of the plans submitted comply. So he knew that when he made that note. It's no wonder he wasn't very happy about what he thought have been a waiver of privilege.

If we then go forward, because I said to you that he knew about the particular plan which is number (g). If we go forward to C5.

MASTER: Yes, I have it.

MR DELANY: You'll see, "Note on the bottom of the previous box is incorrect as the plans were in fact seven in number". The error however is explained and continued in document discovered in defendant supplementary

affidavit no.2, that is the discovery of the plans to which our instructing solicitor's affidavit refers, the plans he'd had since 1989, if you go down to the bottom of the page where he's set out an extract from the letter from the Shire of Kyneton, from Mr Wilson, you'll see 79305GHIJK identical. He's got (g) and he knows it's identical to all the other plans and he knows it's part of the sequence of plans, and if you turn back to page no.12 he's even be discovered by these so-called fraudulent council officers the engineers' report and the resolution which is carried for the sealing of the plans, and you'll see item (c) that, "Plan reference 79305G ... (reads) ... of the Local Government Act".

MASTER: He refers to it in his own writing.

MR DELANY: That's right.

MASTER: You go back to his affidavit and say he must've known this - - -

MR DELANY: All the things he relies on now, which were outlined to you, not only did he know but he made notes about, and what's more we've had a complaint about the giving of false evidence in the Magistrates' Court at Bendigo.

I invite you to have a look at document C4 - actually start with C3. What he's doing here is annotating the pleadings in the action. In the middle of the page he says, "The claim was derived from the evidence of the Shire's engineers given at the Bendigo Magistrates' Court", and then he says over at C4, "Discovery, however, indicates that council's ...

(reads) ... 4 March 1980". Now, that's exactly the complaint that he now wants to make. He wants to say now they were dated March 1980 so they were later than the February ones and he also knows that they're separate plans from p.12 that I took you earlier to because each plan had a separate plan reference number.

The concealment, if there ever was any, was well and truly over; not only was the concealment over at the time of discovery in this proceeding but also it was known to him. So nothing was in fact concealed from him. If one says maybe the test is and it isn't but maybe it's when you find out, well, he found out then.

If we go forward to C9, this is the extract from the council minutes and remember Mr Middleton said he'd need to have the minutes and he'd need to have the plans. Well, he has the minutes. Council minutes, "This is about ... (reads) ... plans be sealed", and then there's a reference to three plans which are the - with two lots.

MASTER: Where are you reading from?

MR DELANY: About half-way down the page. It's got A reference 79305B, two lots, next one two lots, and so on.

MASTER: Yes, I've got it.

MR DELANY: If we go down below that we see that there's (g) and he knows that the industrial land is separately being dealt with in these two lot plans because item 6 starts off "Industrial lots", and the

bottom section I was reading from just related to residential.

What he finds is he knows, which he says he didn't find out until 2000, that it's all part of a sequence of plans because the sequence is there set out in the council minutes and as we know the plans themselves have been discovered in 1989.

Can I take you to C12 and this is his critically new complaint, "Mr Buchanan had illegally sold two of the lots", now that's not his complaint but this is, "and had been able ... (reads) ... two lot subdivisions". Now, if there's a new complaint, which we say is antecedent to the real complaint, that's what it is.

If we just go back to C13, and I accept you'll need to look at these at your leisure.

MASTER: I will.

MR DELANY: Sorry, it's actually C15.

MASTER: Yes.

MR DELANY: You'll see, "Subsequently upon receipt ... (reads) ... Registrar of Titles".

I won't go to any further material there but what we would say is if you compare the handwritten notes made by Mr Thompson at a time that he's not decided to tell us about, although he's sworn a number of affidavits, but certainly we would say must be in 1991 before - at least prior to 1991 that they're exactly the same facts and not only the facts and the documents are available to him, he drew - if his case has got any legs or validity now, he drew what might

be said to be the right conclusion then, just didn't issue his proceeding.

It is I think important to appreciate that the way this affidavit of Mr Thompson, this is his main affidavit reads is that once he discovered the so-called problem with the Tylden Road plans, it's that discovery that led him on to a concern about Woodleigh Heights.

I won't dwell on this but in the context of Woodleigh Heights, the evidence that Mr Thompson puts forward is that he was given a reticulation plan at court. Now, at para 88 of our outline we set out what the factual position is but I think I should just take you to the document that is in tab 26 of Ms Dixon's exhibit which is the document we rely on. When you find it you'll notice it's an affidavit sworn by Mr Thompson in the Supreme Court in a proceeding in 1995 in the Woodleigh Heights proceeding.

MASTER: It was sworn on 14 December '98.

MR DELANY: Yes. But what's important is it exhibits a letter which she wrote and you'll see it's a letter to the Shire of Kyneton which is the present council.

MASTER: It's exhibit no.1.

MR DELANY: Yes, and there are then paragraph numbers.

MASTER: It's in exhibit 1, is it?

MR DELANY: Yes. Can I ask you if you can see if you can find para 25?

MASTER: Yes.

MR DELANY: What his affidavit in support of a proposition that the time should be postponed says in substance

is, "I didn't know until I was at the Supreme Court and I was handed the reticulation plan, that in fact the water was not available until 1982. I always thought it was available in 1979". That's the substance of what he says and he's relying on that for some extension of time or postponement.

Now, this is a letter which he exhibited which e wrote in August 1987 and it's 24 August '87. It's reproduced in our submissions. The reason I take you to it is because one critical date we failed to include in the part we quoted. So para 25 of his letter says, "Some time in ... (reads) ... In any reticulated area", and then he says in 28, "On 5 March '81 ... (reads) ... Woodleigh Heights subdivision", but in 30, "Kyneton water board did ... (reads) ... Woodleigh Heights subdivision", and then in 33, "Subsequent to the making ... (reads) ... Woodleigh Height subdivision".

MASTER: You say he knew.

MR DELANY: Not only did he know, once again, just as he did when he wrote up the pleadings, he likes to go into print and he went into print and in his own hand he wrote in 1987. What he now tells the court is he didn't know until 1999. The test is the case is bound to fail at trial. If you're looking at postponement for the - just based on the plaintiff's own handwriting his own notes, we say there's no doubt about that.

MASTER: For both properties.

MR DELANY: For both, that's right. But just to deal

briefly with a couple of points which Mr Middleton made, he suggested that this case was a half truth case, perhaps a little like the Daraway case, we say it's not. What happened is that some wage records were discovered but not the critical ones. It was suggested that it might be a concealment case like Bulli Coal, perhaps a cunning concealment case, we say nothing of the sort. The documents were discovered and reference was made to the Skrijel decision, I think I've already dealt with that in the context of the windows in our building.

Then finally Mr Middleton concluded with his black book comments. Yes, that's all very well but the trouble with the black book is there was an earlier book. So it's not really relevant to say he was given the black book at the end of the 2001 litigation because he had the only critical information and documents he relies on well before.

He also asserted, and your attention was drawn to the proposition that between '85 and '89 he was refused access to relevant files and in '95 he was eventually granted access to the files. Well, the critical documents were discovered in 1989 but even if you untook that paragraph at face value, March '95 is still ten years ago. We say that if you decide to start with a concealment point, it won't be too hard to end there because you'll conclude that there's really no arguable case for the postponement.

I think Mr Middleton said in his submission that this might be the first case in which it was said the conduct was unlawful. That was part of the case he pleaded in para 20 and I think it's in 21 and 22 of his earlier Tylden Road proceeding. So it isn't the first occasion that the plea's been raised. Unless there's anything else.

MASTER: No, that's fine, thank you. Mr Garde, do you wish to say anything else as well?

MR GARDE: In addition to everything that Mr Delany has said, on behalf of the water authority and it's predecessors, the first point that I make is that having now listened to the submission that's been made by Mr Middleton, none of these suggested discoveries have anything to do with the water works trust or the water board because of course the water works trust and the water board are not responsible for the approval of antecedent plans. They're not responsible for administering functions under the Local Government Act. They're not responsible for the particular responsibilities under the Sale of Land Act that were referred to, and they're not responsible for sending anything to the titles office.

Nothing was put forward, in our respectful submission, that could constitute any new information or change of circumstances vis a vis the water board or the water works trust. The focus seemed to be as we apprehend the submission, on the antecedent plans which our learned friend, Mr Delany, has very ably

addressed and I won't repeat that by taking you through all of the antecedent plans and pointing out they were of course all in the plaintiffs' possession from a very early stage indeed.

It sees that the case that's been put forward on behalf of the plaintiffs really is not one that is in any way shape or form directed at the water board or the water works trust.

MASTER: All of the statutory obligations that were given to me by Mr - that weren't complied with by Mr - they were given to me by Mr Middleton and you say none of them relate to your client.

MR GARDE: Yes. We do say that. We don't have obligations under the section Sale of Land Act.

MASTER: Yes, I understand that.

MR GARDE: Nor do we under the Local Government Act references. There seems to be nothing and we were patiently listening to what our learned friend might wish to say directed at the water works trust or water works board and having done so there is nothing.

Of course insofar as indeed both of the defendants are concerned, and we heard from our learned friend the allegation that what he was fundamentally saying was that it was flawed and unlawful and we found out in February 2000, if I summarise that as the gravamen of his submission.

When you review the contemporaneous pleadings and documentation, you can inevitably and indeed you can do nothing else but reach the conclusion that at all times the plaintiffs have alleged that what was done

was fraud and unlawful. It's not only a matter of knowing the actual facts and having access to the actual document as has been pointed out a few moments ago, but it's also the case that the allegations that have at all times been made are allegations of flaws and illegality.

Many of the references you have been taken to a moment ao in relation to the book of pleadings deal with alleged flaws and alleged illegalities, but I will perhaps give you perhaps a few more. The book of pleadings really is, if I can describe it as an absolute gold mine in terms of the information it records.

Mr Delany took you to pp.14 and 15 and there are many references that put this in different ways and I won't by any means read them all out, on 14, "From the time of providing the guarantee ... (reads) ... or a legal requirement upon Buchanan". I pause there to make this additional observation and that's when you read those repeated allegations of flaws and illegality, they're directed at a the entities and not only the individuals. That's a very good example where you see the allegations made directed at the council and directed at the water trust.

Then at 15, "I now know the council and water trust", again the entities, "accepted the guarantee for ... (reads) ... of the Local Government Act". At p.17 at the top, "The council however, always intended that the ... (reads) ... still on foot". So we have express knowledge of alleged covert or secret activity

being alleged by the plaintiffs. Half-way down the page you will observe, "But without authority of law". So here we have an allegation that what was being done was without lawful authority.

Reference has been made to the allegations on p.C12 of contrived plans. It's quite apparent that the plaintiffs were fully across the various subdivisional plans advanced at all times in relation to the property. Then at WB15, "As there was never an agreement ... (reads) ... without lawful authority". At WB25 referring to in the second part at the top of WB25, "For the purpose of allowing ... (reads) ... as it did in it's letter of 24 November 1980", and then at WB27, "Council and the water trust misrepresented ... (reads) ... because of my default". Then at WB33 "Unfortunately for the trust, however, all facts indicate they are again lying".

Then on the next page, "The land was at all ... (reads) ... not supplied with water". There are simply repeated allegations at every step of the way of flaws and of illegality. So far from it being the case that this was discovered in February 2000, as is our learned friend's fundamental proposition, that was always the case.

In terms of our client in the context of the Woodleigh Heights subdivision, I draw to your attention Mr Thompson's affidavit of 23 February 1998 which is tab 24 in SME2 volume 1. You'll see the most substantial exhibit to the affidavit is in fact a transcript of an address by Mr Thompson to the

council. It's a bit hard to refer to because there are no page numbers but if you go to a reference four pages from the back of that exhibit, which is GAT D. It's a voluminous exhibit.

MASTER: Yes, I've got GAT D.

MR GARDE: Four pages from the back it starts off with "It's not really funny, Graham, I'll tell you that much", but just to see the way the case was being put, if you go down to the end of the address where Glenn is referred to and the words, "Well, put it this way".

MASTER: Yes.

MR GARDE: "I'll be quite plain ... (reads) ... is totally unacceptable, full stop". That's the thrust of the case that's always been put against the authorities by the plaintiffs.

Now, to say that, as was put, that there's some particular distinction between the individuals and the public authorities, and we all acknowledge the legal concept of vicarious liability. We all acknowledge Dunlop v. Woolhara. The fact, however, is that the allegations have always been made both against the public authorities and against to individuals. It's obvious to us all that the public authorities exist by reason of legal incorporation. They can only ever act through the individuals. The individuals are the officers and the individuals are the members. The attack as in the passage I've just read out, has always been fairly and squarely unequivocally against both because of the flawed way, in the plaintiff's view, they've conducted themselves and because of the

illegal way, in the plaintiffs' view that they're conducted themselves.

The fact that these applications are based on fundamental matters like releases, fundamental matters like Anshun and fundamental matters like the expiration of the limitation period is not, in our respectful submission, any detriment to them and nor can they be criticised and of course what's been done here as far as the second defendant is concerned, is simply to bring before you simple and, in our respectful submission, clear cut reasons why these proceedings cannot go forward.

To suggest we're not contesting the subject matter or we're not contesting the way it's been pleaded or we're not contesting the underlying cause of action is not to the point in any way, shape or form at all.

Now, I do want to puck up on this topic of address because our learned friend suggested there was a felicitous convergence of the address between his instructing solicitor and his client. Of course he drew attention to the fact that the first-named plaintiff was living, it was said, at 68 Summer Street but the comment we wish to - that the same address as his solicitors. The extent we wish to make is this that the time we are talking about is 1999. It's not 2005. When you in fact look at where the first-named plaintiff says he was living at the relevant time it was not at the location that he was currently living at and the best way of observing that is simply to

look at his own affidavits which he swore in '98 and '99.

MASTER: What does he say his address is?

MR GARDE: 2 November 1998, "I, Glenn Alexander Thompson at 345 Lords Place, Orange in the State of New South Wales do hereby affirm and say on oath". His affidavit of 14 December 1998, "I, Glenn Alexander Thompson of 98 Hill Street, Orange in the State of New South Wales do hereby affirm and say on oath". I'll just give you four, that should do the job, 22 February 1999, "Glenn Alexander Thompson formerly of 98 Hill Street, Orange but now of 345 Lords Place, Orange in the State of New South Wales, computer programmer". Somewhat later in '99, 12 March 1999, "formerly of 98 Hill Street, Orange, now of 345 Lords Place, Orange" and on they go. I can say to you he swore a lot of affidavits in these proceedings and it's only in the most recent times that he's suggested he had now moved in with his solicitor. That of course is not to the point, as Mr Edward sets out in his letter.

It was suggested - I'm just pointing out that that particular suggestion is without any foundation at all when you look at the period we're actually talking about.

You have, I think, been referred to cases and the final matter we wish to draw attention to, the highlight of the case put against us and the argument put against us seemed to be that he was entitled to say what he said about what happened to the Practice

Court regardless of what anyone said and Justice Beach seemed to know within his judgment who was appearing and who was advancing argument before him and in the court order for specific performance, it was plain without any doubt at all that counsel was appearing. We simply say you should not give those particular submissions any weight at all.

That leads me to conclude that having listened to everything that's been put and having heard every conceivable argument that very capably can be put, the initial submissions hold strong and good.

MASTER: Thank you very much. I'll be totally honest with you. I've got something on every day until the end of the year so I'll be aiming to deliver it in the first week in February.

ADJOURNED TO A DATE TO BE FIXED