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IN THE SUPREME COURT
OF VICTORIA

IN THE MATTER of the
Magistrates Court Act 1971

AND

IN THE MATTER of the Local
Government Act 1958.

BETWEEN

GLENN THOMPSON

Applicant

-AND-

THE PRESIDENT COUNCILLORS and
RATEPAYERS of The SHIRE OF
KYNETON

Respondent

I, GLENN ALEXANDER THOMPSON of 4 James Street Whittlesea in the
State of Victoria, Computer Programmer MAKE OATH AND SAY as
follows:-

✓ 1. I was the Defendant in Action No D1419 of 1987 in the
Bendigo Magistrates Court in which the President Councillors
and Ratepayers of the Shire of Kyneton ("the Council") were
Complainants seeking to recover \$3708.00 being the balance of
the total \$28708.00 expended by the Council in carrying out
certain road works, namely the construction of a road called
"Hill Drive" in a subdivision known as "The Tylden Rd
Subdivision" which subdivision was on part of Crown Portion
132 and 129 in the Parish of Lauriston, County of Dalhousie,
comprising the whole of the land described in Certificate of

Title, Register Book Volume 9363 Folio 447 all of which said land lay within the Council district.

✓ 2. I entered a Defence to the action denying that I was liable for the sum claimed. A copy of the said summons and defence are now produced and shown to me and marked "GT1" and "GT2" respectively.

✓ 3. Before the hearing began Counsel for the Council applied to amend the Council's claim to a claim for the balance of work and labour done in the period from the 17th October 1982 to the 30th September 1984. This was agreed to.

4. The said action came on for hearing before Mr Connolly S.M. in the Bendigo Magistrates Court on Wednesday the 2nd day of December 1987. I was represented by Mr Barry iFox of Counsel and the Council was represented by Mr B. Phillips of Counsel. Oral evidence was given by the Council Engineer Mr Graeme James Wilson for the Council, and by myself and Mr Ross Nichols and Mr Lance Nichols on my behalf. In addition a bundle of documents marked "Exhibit A" were admitted into evidence by consent. These documents were copies of plans, letters, Council Notices and Council Minutes. Although not fully examined by myself at the time of the hearing there is now produced and shown to me what I believe to be a true copy of the said bundle of documents comprising a true copy of the individual documents comprising the bundle.

✓
5. At the conclusion of the evidence and after hearing legal argument about the interpretation to be placed upon certain Sections of the Local Government Act 1958 and in particular S.569E judgment was given in favour of the Council in the sum of \$3708.00 together with \$222.00 interest and \$1354.00 costs.

✓
6. I was present in the Court during the whole of the hearing of the action and when Judgment was delivered.

7. To the best of my recollection the evidence addressed on behalf of the Council was, in summary, as follows:-

✓
(a) That the Council had approved a planning permit for a subdivision (the Tylden rd subdivision) consisting of 18 residential allotments and 6 industrial allotments lodged by a Mr K. Buchanan.

✓
(b) On the 12th day of February 1980 Mr Buchanan lodged several plans of subdivision together with Notice to the effect of The Thirtieth Schedule pursuant to S.569(1)

✓
(c) The plan of subdivision was referred to Kyneton Waterworks Trust which recommended that the Trust request the Shire to impose a requirement pursuant to S.569E(1A) of the Local Government Act.

Can
I recall

No Reference

(d) The Council by notice dated the 20th February 1980 informed Mr Buchanan that the Council required him to construct the whole of all new drains, channels, streets, roads and passages shown on the plans and to give or cause to be given to Council a statement from the Kyneton Waterworks Trust that an agreement had been entered into with the Water Trust for the provision of a water supply.

*Buchanan
20th Feb 1980*

(e) Following representation from Mr Buchanan the Council informed Mr Buchanan by letter dated 7th May 1980 that it would be prepared to seal the plans of subdivision without a requirement placed thereon if a Bank Guarantee to the value of \$25,000 was lodged to cover road construction costs.

*1980
11/11/80
Mr Buchanan*

(f) Mr Buchanan did not supply guarantees and the council subsequently sealed the plans of subdivision with an endorsement placed thereon noting the existence of the requirement.

✓ (g) I subsequently supplied a Bank Guarantee to the sum of \$25,000.00

✓ (h) On the 19th November 1980 the Council resolved to "lift" the requirements and to so inform the Titles Office.

*to be sealed
20th Nov 1980*

✓
5 ✓
12 ✓
1980 ✓
(i) In December of 1980 I purchased 15 Allotments on the subdivision.

✓
(j) On or about the 19th November 1982 the Council informed my wife and I that it had resolved to call the bank guarantees and do the road construction work.

✓
(k) By letter dated 10th December 1982 the Council called up the Bank Guarantees.

✓
12 ✓
1983 ✓
(l) On or about the 13th February 1983 the Council began the road construction work and finished it in about September 1984.

✓
(m) The Council claimed that it was empowered to go on to the land and to do the road construction and claim any deficiency from me pursuant to 569E(4) and accordingly sued me for the balance of the road cost, namely \$3708.00

✓
(n) Mr Wilson, the Council Engineer, gave formal evidence of the above matters by reference to the various documents comprised in the bundle exhibited to this my affidavit being marked "GT1"

✓
8 (a) I gave evidence which in summary was to the effect that I provided the Bank Guarantee at the request of Mr Buchanar

✓ and that Mr Buchanan prepared a letter dated 23rd October 1980 which I signed and the purpose of which was to inform the Council that the Guarantees provided by myself were to be applied in respect of Mr Buchanan and that although the letter prepared by Mr Buchanan and signed by myself said "the subdivision is now a joint venture between ourselves and Mr Buchanan and the partnership is still managed by Mr Buchanan" there was no profit sharing arrangement or partnership arrangement in existence.

✓ (b) I agreed that I had purchased 15 allotments in December of 1980

✓ (c) I confirmed that I had not paid the sum of \$3708.00 claimed. I also gave evidence that My Wife and I had sold the land in March of 1983, shortly after the guarantees were called up.

✓ 9. The evidence of Mr Lance Nichols and Mr Ross Nichols was that they each purchased one residential allotment in December of 1980, that neither had made any complaint to or request of the Council for the construction of the road works, nor had they been called upon to make any contribution to the costs of the roadworks. Neither allotment purchased by either Mr Nichols was purchased from me. Both Mr Nichols said that they had since sold their respective allotments.

10. In summary the argument made by the Council was that:-

(a) It was entitled to take a guarantee that is security for the provision of roadworks.

(b) That I had given the security.

(c) That I was the owner of the land when the guarantees were called up.

(d) That I had failed to construct the roads when called upon.

(e) That council was entitled by reason of 569E(4) to go onto the land and construct the roadworks and to claim the balance if any from me.

11. The argument made on my behalf in summary was that:-

(a) I was not the owner of the land at the time the Thirtieth Schedule Notice was lodged.

(b) The requirement made by Council pursuant to 569E(1) although lawfully made and subsequently withdrawn cannot be acted upon once withdrawn.

✓ (c) That notwithstanding the requirement did not provide for the giving of security the Council had no authority to call up the security once the requirement was withdrawn.

✓ (d) That Council had no power to act as it purported to under 569E(4) but may only act pursuant to division 10 of part XIX after a requirement has been withdrawn.

✓ (e) Where security is given for the construction of roadworks the requirement must have been made pursuant to 569E(1)(b),(c) or (d) and in this matter it was not.

✓ (f) A council when acting pursuant to 569E(4) is required to complete the roadworks within 3 years of the giving of the security and this was not done and further none of the alternatives open to the council in the event of ifailure to complete within 3 years as provided in 569E(5) was followed.

✓ (g) My guarantee was limited to \$25,000.00 and no more.

12 The learned Magistrate after adjourning for consideration of the arguments found against me for reasons which to the bast of my recollection went as follows:-

✓
(a) That S.569E was the principal section relevant to the matters in this dispute.

NOT ✓
(b) That I purchased the land in December of 1980 and sold it in 1983 and was therefore the owner of the land within the meaning of S.569E

✓
(c) That the council acting under S.569E(1) & (1A) imposed a requirement for road construction and further that it withdrew the requirement pursuant to S.569E(3)(ca) and was entitled to do so.

(d) That I was engaged in a joint venture with Mr Buchanan and had lawfully given the guarantee and that the Act does not specify that the person who gives the security must be the owner himself.

✓ NOT
(e) That the requirement was made pursuant to either 569E(1)(b) or (d) and the Council was entitled to act pursuant to S.569E(4).

✓
(f) Finally he found that the council was not debarred from claiming any balance by reason of not completing the roadworks within 3 years of the giving of the security or failing to comply with S569E(5)

13. I am aggrieved by the decision of the Magistrates Court and I desire to review the said decision before this Honourable Court.

SWORN by the said }
 }
GLENN THOMPSON }
 }
at Melbourne }
 }
IN THE STATE OF VICTORIA }
 }
THIS 21st day of December }
1987)

BEFORE ME.

THIS AFFIDAVIT is filed by NEVILE & Co OF 7th Floor 100 Collins Street Melbourne 3000 Solicitors for the Applicant.

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Governments Act 1958

B E T W E E N -

GLENN A. THOMPSON

Applicant

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RATE PAYERS OF THE SHIRE OF KYNETON

Respondent

AFFIDAVIT OF APPLICANT

Deponent - Glenn Alexander Thompson
Sworn -

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