

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

No. 6321 of 2005

BETWEEN

GLENN ALEXANDER THOMPSON and CHERYL MAREE THOMPSON
Plaintiffs

and

MACEDON RANGES SHIRE COUNCIL
First Defendant

and

THE COLIBAN REGION WATER AUTHORITY
Second Defendant

SUBMISSIONS ON BEHALF OF THE FIRST DEFENDANT

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Prepared by:
Maddocks
Lawyers
140 William Street
MELBOURNE VIC 3000

Solicitor's Code: 230
DX: 259 Melbourne
Tel: (03) 9288 0555
Fax: (03) 9288 0666
Ref: MED:764595
Attention: Michelle Dixon

A. THE APPLICATIONS AND THE PLAINTIFFS' APPEAL

1. The proceeding was issued on 31 May 2005.
2. By summons filed 23 and 20 September 2005, each of the Defendants applied for summary judgment. The summary judgment application was heard over two days on 14 and 15 November 2005. The Plaintiffs were represented by Mr Middleton QC and Mr Adams of Counsel. The Master reserved his decision.

3. On 15 May 2006, Master Efthim delivered his reasons for decision. The Master found for the Defendants on each of the substantive grounds raised by the Defendants in support of their application for summary judgment.
4. On 19 May 2006, Master Efthim ordered:
 - (a) that judgement be entered for the Defendants against the Plaintiffs;
 - (b) that the proceeding be dismissed;
 - (c) that the Plaintiffs pay the Defendants' costs of and incidental to the proceeding and of their summonses filed 20 September 2005 and 23 September 2005 including any reserved costs and costs of transcript on an indemnity basis.
5. The Plaintiffs appeal from these orders by notice filed 19 May 2006.
6. On the hearing of the appeal:

“the application is to be heard de novo¹ in the sense that the party who was applicant before the Master is the party to begin, the appeal is determined on the evidence placed before the Judge, no regard being had to the evidence before the Master, and the Judge determines the appeal without being in any way fettered by the decision of the Master but giving such weight to the decision of the Master as appears proper.”²

It is contended the Master's decision, delivered after detailed argument and submissions, is such that it is proper to give it significant weight.

B. THE NOVEMBER 2005 HEARING

7. In these submissions, the First Defendant and the Second Defendant are referred to as the “**Council**” and the “**Water Authority**” respectively.
8. The summary judgment application sought orders:

“(a) That judgment be entered for the Council against the plaintiffs pursuant to Rule 23.03.

¹ See Rule 77.05 (7)

² *Southern Motors v Australian Guarantee Corporation* [1980] VR 187 at page 190 (Full Court)

- (b) That judgment be entered for the Council against the plaintiffs, alternatively the proceeding be permanently stayed:
 - (i) pursuant to Rule 23.01;
 - (ii) alternatively, in the inherent jurisdiction of the Court;

on the basis, that the proceeding is scandalous, frivolous or vexatious and an abuse of the process of the Court.
- (c) That the plaintiffs pay the Council's costs of and incidental to the proceeding and of the summary judgment application on an indemnity basis."

9. The Council relied upon:

- (a) the "longer" affidavit of Michelle Elizabeth Dixon sworn 23 September 2005 ("**Dixon 1**");
- (b) the "shorter" affidavit of Michelle Elizabeth Dixon sworn 23 September 2005 ("**the Dixon security for costs affidavit**");
- (c) the affidavit of Michelle Elizabeth Dixon sworn 28 October 2005 ("**Dixon 2**").

10. The Plaintiffs relied upon:

- (a) the affidavit of Glenn Alexander Thompson sworn 18 October 2005 ("**Thompson 1**");
- (b) the "second" affidavit of Glenn Alexander Thompson sworn 7 November 2005 ("**Thompson 2**");
- (c) the "third" affidavit of Glenn Alexander Thompson sworn 7 November 2005 ("**Thompson 3**"); and
- (d) the "fourth" affidavit of Glenn Alexander Thompson sworn 10 November 2005 ("**Thompson 4**").

11. The pleading which fell for consideration by the Master was the 9 November 2005 amended statement of claim. The amended pleading sought damages and exemplary damages for:

- (a) events spanning the period November 1978³ to November 1989⁴;
- (b) damages said to be sustained in 1980⁵ and the period 1984 to 1987⁶.

12. The grounds upon which the Council relied below were as follows:

- (a) the Plaintiffs sought to agitate issues which were:
 - (i) raised and resolved upon settlement of earlier proceedings between the Plaintiffs and the Council and orders made by the Court⁷;
 - (ii) the subject of releases in favour of the Council at the time of settlement of such earlier proceedings;
- (b) to the extent any of the claims made were "fresh" claims or claims not released at settlement of the earlier proceedings the claims were so closely connected with the subject matter of those proceedings that they should have been raised in them. Applying *Port of Melbourne Authority v Anshun*⁸ it was not open to the Plaintiffs to now bring such claims; and
- (c) the Plaintiffs claims are manifestly statute barred⁹ and section 27 (b) of the Limitations of Actions Act 1958 on no view operates to postpone the limitation period until 31 May 1999.

³ Para W 2

⁴ Para W 71

⁵ Para D 2 (ii)

⁶ Paras D 3 (iii) to (v)

⁷ Upon orders being made pursuant to or in consequence of settlement a party is estopped (by way of estoppel by record) from seeking to relitigate any issue and to attempt to do so amounts to an abuse of process. See *Neil Pearson & Co v Comptroller-General of Customs* (1995) 38 NSWLR 443 at 451 per Kirby P

⁸ (1981) 147 CLR 589

⁹ Rule 23.01 (1) is an appropriate one to be relied upon where, as here there is a clear defence under the Limitation of Actions Act 1958. See *Riches v DPP* [1973] 2 All ER 935; *Ronex Properties Pty Ltd v John Laing Construction Ltd* [1983] QB 398; *Callinan v Western Australian Newspapers Ltd* [1988] WAR 212

13. On an application under Rule 23.01 (1), the Court may consider both the pleading and evidence.
14. Leaving pleading deficiencies to one side, the Council contended before the Master:
 - (a) that the proceeding constituted by the amended statement of claim is scandalous, frivolous and vexatious and an abuse of the process of the Court;
 - (b) to permit the case to go forward would be to permit injustice and unfairness to the Council to be perpetrated via the legal process – the very abuse which Rule 23.03 is designed to counter;
 - (c) that this case is one which calls for the timely exercise of the power¹⁰;
 - (d) the Council is entitled to judgment in reliance upon both Rule 23.03 and Rule 23.01 (1).
15. The cases establish that, in hearing such an application:
 - (a) whilst a Court will be wary to shut out a bona fide claim on a pleading or interlocutory application the fact that the transaction is intricate will not disentitle the Court from seeing whether the proceeding amounts to an abuse of process or is vexatious¹¹;
 - (b) on an application for summary judgment, the merits of the case are critical. If the Defendant establishes it has a good defence on the merits as the Council does here, then the case must stand dismissed;
 - (c) the case can be permitted to go no further when, as here, it is inevitable that, if the matter went to trial, the Court would find for the Council¹²;

¹⁰ See *State Bank of NSW v Stenhouse Ltd* (1997) Aust Torts Rep 81-423 at 64,086 per Giles CJ

¹¹ *Dey v Victorian Railway Commissioners* (1948) 78 CLR 62 at 92 per Dixon CJ

¹² *Webster v Lampard* (1993) 177 CLR 598 at 602-603 per Mason CJ, *Deane & Dawson JJ*; *Lindon v The Commonwealth*. [No 2] (1996) 70 ALJR 541 at 544-545 per Kirby J; *Camberfield Pty Ltd v Klapanis* [2004] VSCA 104 at [26] per Batt JA

- (d) the fact that lengthy affidavit material has been filed and served by the parties is neither determinative of the outcome nor indicative of any particular result;
- (e) the fact the amended pleading is itself difficult to follow and the affidavit evidence relatively extensive does not mean that the case is not one where the Council has a good defence on the merits. It is better to spend two days now than many dollars upon interlocutory matters and a lengthy trial all for nought¹³.

16. In his reasons for decision, the Master set out passages from the relevant authorities. He concluded that:

“if the Defendants were to be successful, it must be very clear that the Plaintiffs’ case is destined to fail”¹⁴.

17. Applying that criteria, the Master found the requisite degree of certainty as to failure did exist in this case. He did so, delivering cogent reasons upon which the Court should place significant weight. In particular, he found:

- (a) there is no doubt the proceedings are out of time by over a decade¹⁵;
- (b) for the Plaintiffs to succeed based on “fraudulent concealment” so as to establish reliance upon section 27 (b) of the Limitation of Actions Act, there must be consciousness of wrongdoing by the Defendants which have been concealed from the Plaintiffs¹⁶;
- (c) the critical document from the “black folder” was a copy of the complete version of the plans¹⁷;

¹³ See Barwick CJ in *General Steel Industries v Cmr for Railways (NSW)* (1964) 112 CLR 125 at p 130

¹⁴ Master’s reasons [27]-[30], at [30]

¹⁵ Reasons at [33]

¹⁶ Reasons at [50]

¹⁷ Reasons at [51]

- (d) the complete version of the plans were discovered in 1989. Nothing was concealed from Mr Thompson¹⁸;
- (e) an analysis of the notes made by Mr Thompson on pleadings in the County Court action prior to 1993 does not establish concealment, rather, only that there has not been any concealment¹⁹;
- (f) the case for concealment concerning the Woodleigh Heights land is not made out²⁰;
- (g) even if there was concealment, there is nothing to lead to a conclusion it was fraudulent²¹;
- (h) it would be inevitable for a Court to decide the limitation period should not be postponed;
- (i) the Tylden Road pleadings relate in the prior and present cases to the same facts²². The same applies concerning the prior Woodleigh Heights proceeding²³;
- (j) the releases in both earlier proceedings are a complete answer, save for the claim concerning the Tylden Road industrial land²⁴;
- (k) an Anshun operates in relation to the Tylden Road industrial land²⁵.

¹⁸ Reasons at [53] and [54]

¹⁹ Reasons at [58]

²⁰ Reasons at [59] to [60]

²¹ Reasons at [61]

²² Reasons at [69]

²³ Reasons at [72]

²⁴ Reasons at [73]

²⁵ Reasons at [78]

C. THE PLAINTIFFS SEEK TO LITIGATE MATTERS MADE AND RESOLVED IN EARLIER PROCEEDINGS

(a) Claims made in the present proceeding: misfeasance in public office

18. The Plaintiffs make two claims against the Council. The first relates to parcels of land described as the "**Tylden Road land**". The Tylden Road land is comprised of land described as "Residential land" and land described as "Industrial land". The second claim relates to parcels of land described in the statement of claim as the "**Woodleigh Heights land**".

19. In each claim, the allegation made by the Plaintiffs against the Council is a claim in tort for misfeasance in public office. In *Northern Territory v Mengel*²⁶, Deane J identified the elements of the tort:

"Its elements are: (i) an invalid or unauthorised act; (ii) done maliciously; (iii) by a public officer; (iv) in the purported discharge of his or her public duty; (v) which causes loss or harm to the plaintiff"²⁷

20. As held in *Mengel*, misfeasance in public office is a "deliberate tort"²⁸. The Plaintiffs must establish a "deliberate and dishonest abuse of power" by the holder of public office²⁹. In this case, for the most part, the holder of that office is alleged to be Porter, now deceased. Porter was identified in the first Tylden Road proceeding as the person who acted on behalf of the Council in relation to the subdivision of the land³⁰. To succeed, Porter must be shown to have

²⁶ (1995) 185 CLR 307

²⁷ At 345

²⁸ (1995) 185 CLR 304 at 345; 129 ALR 1; applied in *Grimwade v Victoria* (1997) Aust Torts Reps 81-422 at 64,074 per Harper J

²⁹ *Three Rivers* [2000] 3 All ER 1 at 8; [2000] 2 WLR 1220 at 1231 per Lord Steyn citing [2000] 2 WLR 15 at 67C-D (majority Court of Appeal)

³⁰ See Interrogatory 16 and Answer. Dixon Ex MEDI, Tab 11

acted in bad faith³¹. That is, to have committed the unlawful acts complained of with improper motive³².

21. To establish the tort, either malice or knowledge of the absence of power (including reckless indifference as to the extent of power but not constructive knowledge of the absence of power)³³ must be pleaded and proved. As noted by the House of Lords in *Three Rivers*, the case law reveals "two different forms of liability for misfeasance in public office"³⁴. One is "targeted malice", conduct specifically intended to injure a person or persons, here that would need to be conduct on the part of Porter specifically intended to injure the Plaintiffs³⁵. The other is found where a public officer, here said to be Porter, acts knowing that he or she has no power to do the act complained of and that the act will probably injure the Plaintiffs³⁶.
22. The earlier proceedings regarding both Tylden Road and Woodleigh Heights both alleged "unlawful acts" on the part of the Council. The new case pleads the same facts but gives them a slightly different legal characterisation. In the case of Tylden Road, the "unlawful acts" are now pleaded to constitute misfeasance in public office. No particulars are given of what might be relied upon to show the requisite intent and no affidavit evidence has been filed going to this issue.
23. 2005 is not the first pleading of intentional misconduct regarding Woodleigh Heights. The 1995 Woodleigh Heights proceeding pleaded fraud but gave no

³¹ See Lord Hutton in *Three Rivers* [2000] 3 All ER 1; [2000] 2 WLR 1220

³² *Three Rivers* [2000] 3 All ER 1 at 34-5; [2000] 2 WLR 1220 at 1259 per Lord Hutton

³³ *Mengel* (1995) 185 CLR 307 at 346, 357, 359

³⁴ See Lord Steyn [2000] 3 All ER 1 at 8; [2000] 2 WLR 1220 at 1231

³⁵ In this case the bad faith is the improper or ulterior motive

³⁶ In this case the bad faith is the lack of an honest belief that the act is lawful

particulars. Mr Thompson now concedes that he alleged fraud in the 1995 proceeding in circumstances where he "could not say or demonstrate what the fraud was or who was responsible for it"³⁷.

24. In *Mengel*, Brennan J concluded that:

"Malice, knowledge and reckless indifference are states of mind that stamp on a purported but invalid exercise of power the character of abuse of or misfeasance in public office. If the impugned conduct then causes injury, the cause of action is complete"³⁸

25. The case pleaded in 2005 seeks to agitate claims concerning Tylden Road and Woodleigh Heights based upon an intentional tort, the alleged causes of action for which were all complete more than twenty years ago. On the Plaintiffs' case as pleaded, the causes of action were complete in 1980 in the case of the Tylden Road industrial land³⁹, in 1983 in the case of the Tylden Road residential land⁴⁰ and in 1984 in the case of the Woodleigh Heights land⁴¹. The claims are manifestly statute barred.

(b) The prior Tylden Road proceeding

26. On 11 July 1988, Kaye J delivered judgment in proceeding OR 235 of 1987, being an order to review a decision of the Magistrates' Court at Bendigo between Mr Thompson and the Council⁴².
27. On 7 November 1988, the Plaintiffs issued proceeding 880949 in the County Court against the Council concerning the Tylden Road residential land (**"the prior Tylden Road proceeding"**)⁴³.

³⁷ See para 50 (a) of the Thompson summary judgment affidavit

³⁸ (1995) 185 CLR 307 at 357; 129 ALR 1

³⁹ Particulars of Loss and Damage page 34

⁴⁰ Particulars of Loss and Damage page 35

⁴¹ Paragraph D5 of the original Statement of Claim, page 36 of the amended document

⁴² See Thompson 1 Exhibit GAT – 3 at pp 3, 7, - 9

28. The comparative table set out in para 22 of Dixon (1) demonstrates that allegations of fact made in the prior Tylden Road proceeding are the same allegations sought to be relied upon by the Plaintiffs in this proceeding. In this case, extending also to the Tylden Road industrial land.
29. The amended statement of claim in the prior Tylden Road proceeding alleged the Council should not have sealed or lodged the plans of subdivision⁴⁴. It was alleged that doing so was in breach of duty owed to the Plaintiffs which breach caused loss⁴⁵.
30. In the prior Tylden Road land proceeding, the Plaintiffs claimed "consequential" loss and damage arising from the sale of the residential land component of the Tylden Road land⁴⁶. In the current proceeding as issued, the Plaintiffs claimed the same consequential loss and damage⁴⁷.
31. Following the filing and service of Dixon (1), the Plaintiffs filed the amended statement of claim. The amendments relate to particulars of loss and damage and concern the Tylden Road residential land only. By the amendment, the Plaintiffs attempted to differentiate the loss and damage in this proceeding from that in the prior Tylden Road proceeding. The amended particulars seek to explain why the residential allotments were allegedly sold at less than market value. Nonetheless, the same damage is relied on in both cases.
32. Before the Master, the Plaintiffs asserted in their submissions⁴⁸ that there were "key" distinguishing features between the two proceedings. These were said to

⁴³ See paras 10 and 15-21 of Dixon 1

⁴⁴ Para 20

⁴⁵ See tab 3 (particularly paras 20 and 29) to the exhibits folder ("MED1") to Dixon 1

⁴⁶ See paras 25 to 27 of Dixon 1 and tab 4 of MED1

⁴⁷ See paras 25, 26 and 30 of Dixon 1

⁴⁸ Para 2.3

be contained in what Mr Thompson described as the “omitted paragraphs”, being those paragraphs of the 2005 amended statement of claim which were not contained in the amended statement of claim in the prior Tylden Road proceeding⁴⁹. The “omitted paragraphs” were said to be T5, T6, T9 to T12, T14, T15 and T18.

33. A comparison between the matters pleaded in the “omitted paragraphs” and para 20 of the amended statement of claim in the prior Tylden Road proceeding makes plain that the matters pleaded in the “omitted paragraphs” are based on the same factual matrix.
34. The only point of differentiation in 2005 is to plead that the relevant plans of subdivision should not have been sealed or lodged for another (new) reason. However the causative effect of the new reason is the same and the loss and damage is the same damage⁵⁰.
35. The prior Tylden Road proceeding was compromised in 1991 and releases given. It is a clear abuse of process to seek to bring a second claim in 2005 which relies upon the same facts and alleges the same damage as the earlier compromised proceeding. Upon settlement the County Court ordered the prior Tylden Road proceeding be struck out⁵¹.

(c) The prior Woodleigh Heights proceeding

36. In 1995, the plaintiffs commenced proceedings in the Supreme Court against the Council, the Authority and two individuals in respect of the Woodleigh Heights land (“**the prior Woodleigh Heights proceeding**”)⁵².

⁴⁹ See Thompson 1 at para 42 (a)

⁵⁰ Compare para T16 of the current statement of claim with para 19 of the amended statement of claim in the prior Tylden Road proceeding

⁵¹ See para 33 of Dixon 1 and exhibit MEDI, Tab 15, Order of Howden J

⁵² See paras 34 to 37 of Dixon 1 and tabs 16 to 30 of the exhibits folder

37. Fraud was alleged by Mr and Mrs Thompson against the Council. In the present case, the Plaintiffs allege misfeasance in public office with no particulars of the state of mind alleged and no evidence on affidavit to substantiate the allegation.
38. The comparative table in para 47 of Dixon (1) reveals that the same allegations of fact made in the prior Woodleigh Heights proceeding are sought to be advanced in this proceeding. Both proceedings seek to advance claims in tort based on those facts.
39. The complaint in the prior Woodleigh Heights case was that the Plaintiffs purchased various lots in the subdivision and that when the mortgagee came to sell the Plaintiffs' lots, both the Plaintiffs and the mortgagee sought advice from the Council as to whether the land could be sold on the basis they had access to reticulated water. Access to reticulated water would have enabled the purchasers of the lots to obtain a building permit. The owner of one of the other lots in the sub-division had asserted that water was only available in a private water system which it controlled and over which it had refused access to the plaintiffs. It was alleged by the Plaintiffs in the prior Woodleigh Heights proceeding that the Council wrongly advised the Plaintiffs that their lots had no access to water and that the Council had acted fraudulently. The Plaintiffs' lots were sold on the basis of the alleged incorrect advice with the consequence that such lots were allegedly sold at a loss.
40. In the present case the complaint is that the Council unlawfully sealed the relevant plans of sub-division, a further wrongful act, without making sure water was available to the Plaintiffs' lots with the consequence that when such lots were sold by the mortgagee they were sold at a loss.

41. In the prior Woodleigh Heights proceeding, the Plaintiffs claimed loss upon the sale of lots calculated as at the date that the relevant lots were sold⁵³. In the original statement of claim in the current proceeding, the Plaintiffs put their loss on precisely the same basis⁵⁴.
42. After filing and service of Dixon (1), the Plaintiffs served the amended statement of claim. The amendments:
- (a) amended the particulars of loss and damage relating to the Woodleigh Heights land;
 - (b) set out the "basis" upon which the alleged loss is to be calculated;
 - (c) alleged that a comparison should be undertaken of the market value of the Woodleigh Height lots with access to water and the value of the lots without access to water⁵⁵.
43. However, what the Plaintiffs now allege is that the loss is to be calculated as at the date the Plaintiffs purchased the lots rather than the date that such lots were sold. That is, the difference between the market value at purchase of the Plaintiffs' unusable lots (because they had no access to water) with the market value of such lots with water access. Previously it was the market value on sale.
44. The inference is open that the Plaintiffs, after receiving Dixon (1) attempted to set up a claim that differentiated the loss in the current proceeding from that alleged in the prior Woodleigh Heights proceeding. However, on a proper analysis:
- (a) when compared, both constitute a claim for the same damage despite amendment;

⁵³ See para 50 of Dixon 1 and tab 16 of exhibit "MED 1"

⁵⁴ See para D 5 on p 39 of the statement of claim. See paras 50 and 51 of Dixon 1

⁵⁵ See para 2.3 of the Plaintiffs' submissions below

- (b) the Plaintiffs might calculate loss and damage as at the purchase date if the Plaintiffs still held the land. However, as the Plaintiffs' land was sold, any loss has crystallised. The correct and only basis of calculating loss and damage is the value of the land at the time of sale – which was the basis that the Plaintiffs originally adopted in the statement of claim in this proceeding;
- (c) if it is open to the Plaintiffs to now allege that the loss and damage should be so calculated, it was equally open to them to do so in the prior Woodleigh Heights proceeding. It follows they are now estopped from doing so now applying Anshun.

45. The Plaintiffs instituted the prior Woodleigh Heights proceeding in 1995 and settled it in 1999 with releases. It is not open to them to bring a second proceeding in 2005 based on the same facts and alleging the same damage. The compromise of the Woodleigh Heights proceeding required the Plaintiffs to file a notice of discontinuance. They failed and refused to do so. Beach J ordered specific performance of that term⁵⁶.

(d) The Tylden Road industrial land

- 46. The claims in the present proceeding relate to both the residential and industrial Tylden Road lands. The Council acknowledges⁵⁷ that the prior Tylden Road proceeding related to the residential land only.
- 47. The Plaintiffs are precluded from making the Tylden Road industrial land claim:
 - (a) first, because it is so closely connected with the prior Tylden Road proceeding that they are estopped from bringing a later separate proceeding⁵⁸;

⁵⁶ See para 55 of Dixon 1 and MED1 tab 31 Beach J Judgement MED-1 tab 31 reasons paragraphs 5 and 6

⁵⁷ Paragraph 15 of Dixon 1

(b) second, because it is manifestly statute barred.

(e) Release from claims in the prior Tylden Road proceeding

48. The prior Tylden Road proceeding was settled against both the Council and the Water Authority on the terms contained in signed terms of settlement dated 14 June 1991⁵⁹.

49. The terms of settlement incorporate a release which is a complete answer to the Tylden Road residential land claims. The terms provide:

"1. The Defendants jointly and severally agree to pay the plaintiffs' solicitors on behalf of the plaintiffs the sum of \$40,000 together with costs as agreed or in default of agreement as taxed and the plaintiffs agree to accept the said sum in full settlement of the proceedings herein.

...

5. Subject to the Defendants' performance of these Terms of Settlement, the plaintiffs release the Defendants from all claims, suits and demands whatsoever the subject matter of this proceeding. [emphasis added]⁶⁰

50. The "subject matter" of the Prior Tylden Road proceeding was the residential land component of the Tylden Road land. The claims made by the Plaintiffs against the Council alleged tortious behaviour, specifically pleading unlawful acts by Porter. The 2005 proceeding relies upon a second aspect of Porter's behaviour regarding the same plan causing the same damage in respect of the same land.

51. By reason of:

⁵⁸ C/f Plaintiffs' submissions below para 2.2 Anshun applies in such a case and also to any amended claim for loss and damage

⁵⁹ See para 31 of Dixon 1 and tab 14 of the exhibit folder

⁶⁰ The pleading analysis, AS/C shows that includes acting unlawfully in sealing and lodging the POFS causing the same loss as the additional unlawful conduct relating to the same events is said to have caused. The "subject matter" is more than wide enough to release the Council [C/f Plaintiffs' submissions below 3.5. Extent of release is an issue of construction]

(a) the fact of the settlement, in the form of the Orders made by Howden J and, separately;

(b) the terms of the 1991 release;

the Plaintiffs cannot make the claim in the 2005 proceeding relating to the residential land.

(f) Releases from claims in the prior Woodleigh Heights proceeding

52. The prior Woodleigh Heights proceeding was settled on the terms contained in signed terms of settlement dated 29 July 1999⁶¹.

53. By the terms:

(a) the Defendants agreed to pay \$25,000 to the Plaintiffs;

(b) the parties provided mutual releases:

“The Plaintiffs and the Defendants agree to release each other from all actions, suits, demands and costs arising out of, or in any way related to the subject matter of the proceedings.”

54. The Plaintiffs unsuccessfully contested the enforceability of the 1999 terms of settlement. In *Thompson v Macedon Ranges Shire Council*⁶², Beach J declared:

“The terms of settlement of these proceedings dated 29 July 1999 and executed by or on behalf of the parties herein ought be specifically performed.”⁶³

55. The “subject matter” of the prior Woodleigh Heights proceeding was the Woodleigh Heights land. The loss allegedly sustained was that lots did not have access to reticulated water for which the Council was to blame. The 1991

⁶¹ See para 53 of Dixon 1 and tab 29 of the exhibit folder

⁶² [1999] VSC 338

⁶³ See para 55 of Dixon 1 and tab 31 of the exhibit folder

terms of settlement are a complete defence to the Plaintiffs' claims concerning the Woodleigh Heights land.

56. The words "arising out or in any way related to" are very wide⁶⁴. They extend to cover additional matters (which caused the same loss) now sought to be alleged by the Plaintiffs. Namely, allegations that:
- (a) the sealing of the plans of subdivision was itself unlawful; and
 - (b) the lodgment of the unlawful plans with the Registrar of Titles.
57. This is not a case where a plaintiff is seeking to advance a wholly different case causing a wholly different loss. By reason of the fact of the settlement and the terms of the 1991 release, the Plaintiffs are precluded from making the claims they now seek to advance concerning the Woodleigh Heights land.

(g) The Tylden Road industrial land: Anshun estoppel

58. The Plaintiffs have not previously sought relief in respect of or sued the Council concerning the Tylden Road industrial land. The Plaintiffs still own the Tylden Road Industrial land. The complaint seems to be that it comprises one lot and not 6 lots⁶⁵. If that is the complaint the Plaintiffs' knew of this fact when they were registered on title on 4 September 1981⁶⁶.
59. The subject matter of the present Tylden Road industrial land claim is so closely connected with the subject matter of the prior Tylden Road proceeding that, if they wished to sue, the Plaintiffs should have done so in that action.

⁶⁴ C/f Plaintiffs' submissions 3.5

⁶⁵ See D 2 page 34 AS/C

⁶⁶ See Dixon Security Affidavit, copy title ex. MED 2. There is no mention in the table in para 2.3 to the industrial land. This is because the industrial land was not part of the prior Tylden Road proceeding. The industrial land claim is difficult to follow. It appears from the particulars that the plaintiffs are alleging that because the sealing of the plan was unlawful the plaintiffs were not able to subdivide the land into six allotments. However no foundation for this claim is made in the body of the statement of claim. No mention is made for example of any application to subdivide the industrial land and that such application was refused on the basis of the subdivision being unlawful. The claim for loss and damage in respect of the industrial land is not anchored by any factual or legal foundation which supports or grounds it

That is, in 1988. They are estopped from doing so now⁶⁷. The Court requires parties to bring forward their whole case at the same time⁶⁸.

(h) Claims made in the current proceeding are manifestly statute barred

60. It is trite to say that a cause of action in tort accrues when loss and damage is suffered by reason of the tortious act⁶⁹. On the Plaintiffs' own pleading, the most recent cause of action accrued in 1984. The claims are manifestly statute barred⁷⁰.

Tylden Road land – limitation period

61. The Plaintiffs allege:

- (a) they purchased the industrial land in or around September 1980⁷¹;
- (b) that the residential land was acquired in December 1980⁷²;
- (c) that, in respect of the industrial land the Plaintiffs' loss is to be calculated from December 1980⁷³. On this basis, the limitation period in relation to the industrial land claim expired in December 1986;
- (d) as to the residential land, the particulars of loss and damage⁷⁴ assert that loss and damage is to be calculated from April 1983, being the date that the Plaintiffs were forced to sell the residential land. On this basis, the limitation in respect of the residential land expired in April 1989.

⁶⁷ *Anshun* at 602 per Gibbs CJ, Mason and Aickin JJ

⁶⁸ [See *Henderson v Henderson* (1843) Hare 100 at 114-115]

⁶⁹ See eg *Hawkins v Clayton* (1988) 164 CLR 539 at 561, 587 and 599

⁷⁰ Section 5 of the *Limitation of Actions Act* 1958 provides that proceedings in tort shall not be brought after the expiration of six years from the date that the cause of action accrued

⁷¹ Para T 17

⁷² Para T 18

⁷³ See amended statement of claim pages 35 and 36; the earlier version alleged a date in 1984

⁷⁴ See amended statement of claim pages 35 and 36

62. Mr Thompson's affidavit evidence is that loss and damage was sustained from the date the Plaintiffs purchased both the residential and the industrial land⁷⁵. If he is correct, then the 6 year limitation period in respect of the Tylden Road land claims (both the residential and the industrial land) had expired by the end of 1986.
63. Whether as pleaded or as deposed to in on affidavit, the Limitation of Actions Act – section 5, provides a complete defence and a bar to the Plaintiffs' claim to which there is no arguable answer.

The Woodleigh Heights lands – limitation period

64. The Woodleigh Heights pleading alleges that the cause of action was complete when damage was sustained in 1984⁷⁶. The alleged loss is calculated as and from November 1984⁷⁷. On the facts, the very latest date that the Plaintiffs could conceivably have suffered loss and damage is 1989. That is, when Esanda Limited allegedly sold the land to Deckwood Pty Limited⁷⁸.
65. Taking an extremely generous view, at the very latest, the limitation period concerning the Woodleigh Heights land expired in 1995. The claim had been statute barred by 10 years when it was issued in 2005.

Failed attempts to extend the limitation period section 27 (b) of the Act

66. After the proceeding was served, the Council put the plaintiffs on notice that, the claims sought to be made were all statute barred. Mr Thompson has sworn 4 affidavits in an endeavour to find a path around the limitation point, attempting to rely upon section 27 of the Limitation of Actions Act. The Master

⁷⁵ See para 55 (a) of Thompson 1

⁷⁶ Refer to footnote 20 above

⁷⁷ See paragraph D 5 of the statement of claim on page 39

⁷⁸ Paragraph W 71 of the statement of claim

was correct to reject these arguments as lacking in substance and bound to fail.

67. Section 27 provides:

"Where in the case of any action for which a period of limitation is prescribed by this Act –

- (a) the act is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
- (b) the act is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
- (c) the action is for relief from the consequences of a mistake -

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it."

68. The Plaintiffs seek to overcome the statute of limitations (and the fact and contents of the release) by asserting that:

- (a) the claim in the current proceeding contains allegations not made in the prior Tylden Road proceeding. These allegations are said to be contained in paragraphs T5, T6, T8, T9, T10, T11, T12, T14, T15 and T18 of the amended statement of claim. Mr Thompson refers to these paragraphs as "**the omitted paragraphs**"⁷⁹;
- (b) the facts and circumstances referred to in the "omitted paragraphs" were concealed from Mr Thompson by the Council until August 2000.

69. Mr Thompson deposes that the matters pleaded in the "omitted paragraphs" were the "true cause" of his loss and damage⁸⁰:

"I say that the omitted paragraphs relate to the true cause of my loss and damage in respect of the Tylden Road land and the facts and circumstances set out in those paragraphs were not pleaded in the 1988 proceedings [the prior Tylden Road proceeding] because they

⁷⁹ See para 42 (a) of Thompson 1

⁸⁰ In paragraph 42 (a) of Thompson 1

were concealed from me by the defendants conduct until August 2000."

Woodleigh Heights land

70. The Plaintiffs seek to overcome the statute of limitation (as well as the release) in relation to Woodleigh Heights by asserting that:

- (a) the claim in the current proceeding contains allegations not made in the prior Woodleigh Heights proceeding. These allegations are said to be contained in paragraphs W8, W9, W10, W11, W12 and W14 of the amended statement of claim⁸¹, the **"further omitted paragraphs"**;
- (b) the facts and circumstances referred to in the "further omitted paragraphs" were concealed from Mr Thompson by the Council until August 2000.

71. Mr Thompson asserts that the further omitted paragraphs "relate to the true cause of my loss and damage in respect to the Woodleigh Heights land". The Plaintiffs seek to advance the same "concealment" argument put by them in relation to the Tylden Road land claims in relation to the Woodleigh Heights land claims.

72. To make out an arguable case for postponement until 31 May 2005 in reliance upon section 27, the Plaintiffs must show:

- (a) concealment;
- (b) fraudulent intent to conceal; and
- (c) that the Plaintiffs could not have discovered the cause of action so fraudulently concealed with reasonable diligence prior to 31 May 1999 (6 years prior to issue).

73. The cases establish:

⁸¹ See para 42 (a) of Thompson 1

- (a) concealment must be actual⁸²;
- (b) what must be concealed must be the right action, not just evidence⁸³;
- (c) fraud or conscious wrong doing on the part of the Council in concealing the existence of the cause of action is needed;
- (d) the onus of showing the Plaintiffs acted with reasonable diligence lies upon them.

The “black folder”: no concealment of the document: the “complete” plan

74. Putting the case at its highest for the Plaintiffs, the circumstances relied upon to constitute “concealment” are as follows:

- (a) shortly prior to signing the terms of settlement relating to the prior Tylden Road proceeding (14 June 1991) Counsel for the Council and the Water Authority handed to Mr Thompson a large black folder containing copies of various documents (“**the black folder**”)⁸⁴;
- (b) Mr Thompson deposes:
 - (i) he was asked by opposing Counsel to hold the black folder whilst the terms of settlement were drafted; and
 - (ii) that he, Mr Thompson, took the black folder home mistakenly⁸⁵;
 - (iii) when at home he “gave it a cursory glance but because I considered the matter to be at an end, I archived the folder and did not look again at its contents until August 2000”⁸⁶;

⁸² Not enough if there is a failure to reveal. *Hamilton v Kaljo*

⁸³ For example, as might convert an arguable case the Defendant caused the loss to a good case. *Sknel v Mengeder*

⁸⁴ See para 26 of Thompson 1

⁸⁵ See Thompson 4

⁸⁶ See para 26 of Thompson 1

- (iv) in August 2000, for the purposes of preparing a defence and counterclaim against the Council in respect of a rates dispute, Mr Thompson re-examined the contents of the black folder⁸⁷;
- (c) in August 2000, upon examining the documents in the black folder:
 - (i) it became apparent to Mr Thompson that there were 2 versions of the plans for the industrial land component of the Tylden Road land:
 - (1) the "complete" version; and
 - (2) the "clipped version"⁸⁸;
 - (ii) Mr Thompson recognised the clipped version as being the same as those admitted into evidence by Wilson (of the Council) in the 1987 Magistrates' Court proceeding⁸⁹;
 - (iii) Mr Thompson noticed:
 - (1) that the clipped versions of the plans had been clipped in copying in such a manner as to remove or omit the identifying number which was present on the complete version⁹⁰;
 - (2) that the black folder also contained copies of "the residential series of the Tylden Road plans of subdivision", that those plans had also been clipped;
 - (iv) Mr Thompson recognised such clipped plans as being identical to those admitted into evidence in the 1987 Magistrates' Court proceeding and the related Supreme Court Appeal⁹¹;

⁸⁷ See para 53 (a) of Thompson 1

⁸⁸ See para 53 (b) of Thompson 1

⁸⁹ Being the proceeding referred to in para 23 of Thompson 1 whereby the Council sought to recover from the plaintiffs the overrun of road construction costs in respect of the Tylden Road land. See para 5 3(b) of Thompson 1

⁹⁰ See para 53 (b) of Thompson 1 and exhibit "GAT-7" to that affidavit, being a bundle of the "complete" version of the plans

⁹¹ See para 53 (c) of Thompson 1

(d) as a result of reviewing the documents in the black folder and reflecting upon the evidence given in previous proceedings Mr Thompson reached certain conclusions which now form the basis of the allegations pleaded in the "omitted paragraphs"⁹².

75. It is apparent from Thompson 1 that the "critical document" from the black folder which led Mr Thompson to reach the conclusions which now *underpin* the allegations in the "omitted paragraphs" was the copy of the "complete version" of the plans for the industrial allotments⁹³.

76. The complete version of the plans for the industrial allotments is considered by Mr Thompson to be the "critical piece of the puzzle" which he says enabled him to comprehend fully the events which he alleges took place twenty five years ago⁹⁴.

77. The picture Mr Thompson seeks to paint in Thompson (1) is that the first time the complete version of the industrial plans was made available to him was in June 1991 whilst at Court. On the uncontested evidence, that is not so. The complete plans had previously been discovered.

78. As the uncontested evidence before the Master discloses:

(a) the complete version of the industrial plans were formally discovered in the prior Tylden Road proceeding supplementary affidavit of documents sworn 23 May 1989⁹⁵ - albeit as the industrial subdivision plans such discovery was arguably unnecessary⁹⁶;

⁹² See para 53 (c)-(h) of Thompson 1

⁹³ No other documents from the black folder are mentioned by Mr Thompson in his affidavit as assisting him in reaching the conclusions he did

⁹⁴ See para 53 of Thompson 1

⁹⁵ See paragraph 9 of Dixon 2 and exhibits MED-8, MED-11 and MED-12 to that affidavit

⁹⁶ See Thompson (2), para 11

- (b) a copy of the complete version of the industrial plans was provided to Mr Thompson's solicitors in the prior Tylden Road proceeding, Nevile & Co, during the currency of that proceeding by the Council's solicitors (Maddock Lonie & Chisholm) under cover of a letter dated 15 May 1989⁹⁷;
 - (c) the provision of a copy of the complete version of the industrial plans followed an inspection by Nevile & Co of the documents referred to in Council's supplementary affidavit of documents sworn 23 May 1989⁹⁸;
 - (d) Nevile & Co attended at the offices of Maddock Lonie & Chisholm on 19 July 1989 for the purposes of inspecting documents discovered by the Council in the prior Tylden Road proceeding⁹⁹;
 - (e) further and of some significance, on 20 July 1989, Mr Thompson *personally* inspected documents discovered by the Council in the prior Tylden Road proceeding¹⁰⁰, a fact not disputed by Mr Thompson;
 - (f) in March 1999, Mr Edward of the second defendant's solicitors undertook inspection of documents discovered by the Plaintiffs in earlier proceedings and retained by the Plaintiffs. Those documents included a copy of the "complete" version of the plans for the industrial allotments¹⁰¹.
79. That a complete version of the industrial plans was discovered in 1989 is conceded in Thompson (2)¹⁰².
80. In the present case, there is:

⁹⁷ See paras 11, 12.4 and 12.5 of Dixon 2 and page 5 of the exhibit MED-14 to that affidavit

⁹⁸ See paras 12.4 and 12.5 of Dixon 2 and page 4 of exhibit MED-14 to that affidavit

⁹⁹ See para 12.6 and page 6 of exhibit MED-14 to that affidavit

¹⁰⁰ See paras 12.7 and 12.8 of Dixon 2 and pages 7 and 8 of exhibit MED-14 to that affidavit

¹⁰¹ See paras 6 and 7 of the affidavit of Steven Edward sworn 3 November 2005

¹⁰² See para 11

- (a) no concealment. The evidence establishes the “critical document” was discovered in the earlier proceeding in 1989, inspected and a copy provided;
- (b) no evidence of “fraud” – how could there be when the document relied on was discovered.

81. Further:

- (a) the Plaintiffs have failed to show that they acted with reasonable diligence;
- (b) the evidence establishes there is no arguable case for postponement to 31 May 1999. The documents in question have been in the physical possession of the Plaintiffs since 1991. At best for the Plaintiffs, time ran from 14 June 1991, the date of the settlement at Court and expired on 14 June 1997.

No concealment of the cause of action: book of pleadings

- 82. The plaintiffs key contention in the current proceeding (which is said to underpin the misfeasance in public office allegations) is that the initial sealing of the plans of subdivision was unlawful or illegal and that the plans were sealed in such a way so as to avoid the operation of section 9 of the Sale of Land Act 1962 (Vic).
- 83. The plaintiffs contend that they only worked out that the initial sealing of the plans of subdivision was unlawful or illegal when Mr Thompson opened the “black folder” in August 2000 and reviewed the copy of the complete plans for the industrial allotments.
- 84. However, what is clear from a book of pleadings annotated by Mr Thompson for use in the prior Tylden Road proceeding is that Mr Thompson had formed the view prior to the settlement of the prior Tylden Road proceeding in 1991 that the initial sealing of the plans of subdivision was unlawful. The “new”

matters that the Plaintiffs are now seeking to rely upon to support their misfeasance in public office cause of action have been known to them since prior to 1991 (that is some 14 years to the issue of the current proceeding).

85. The following extracts are quotations from Mr Thompson's handwriting in the book of pleadings¹⁰³:

(a) this is the critical "new" fact that the Plaintiffs contend that they were unaware of until August 2000;

"Notwithstanding that it was illegal Buchanan had sold at least two of the allotments (notices of disposition opposite). In order to avoid the provisions of section 9 of the Sale of Land Act which at that time prevented the sale of allotments on subdivisions of more than two allotments (etc) Buchanan then lodged seven separate plans which were contrived to create several subdivisions of two lots each"¹⁰⁴

(b) "Buchanan lodged 30th Schedule notices in relation to these new contrived plans. The new Notices are dated 4/3/80 which is also the date which the notices of disposition give as the date of possession passing to the new Purchasers"¹⁰⁵;

"The Council served a separate 'Notice of Requirement' in relation to each of the Contrived Plans which were numbered 79305E/79305K"¹⁰⁶

(c) in Thompson (1), Mr Thompson asserts that it was only after reviewing the complete version of the plans for the industrial allotments that he became aware that a copy of a plan that he had previously seen and which was marked 7905G was in fact part of a sequence of plans¹⁰⁷. The

¹⁰³ See tab 43 of the exhibit folder "MED 1"

¹⁰⁴ At p 5

¹⁰⁵ At p 6

¹⁰⁶ At p 7

¹⁰⁷ See paras 53 (d) and (e)

notation made by Mr Thompson and quoted below reveals that this is simply not the case;

- (d) further, "Not one of the plans submitted comply"¹⁰⁸ - that is with section 569A of the Local Government Act:

"Although Buchanan thought he had exploited a loophole in the law he had in fact broken the law because as it was his clear intention to subdivide the land into 18 allotments he was bound to give one 30th schedule Notice and one plan showing all allotments".

- (e) "Buchanan therefore approached the Council" in order to have the Notice of Requirement (in respect to the construction of a road on the subdivision) issued under section 569E of the Local Government Act lifted¹⁰⁹ so as to enable Buchanan to realise the proceeds from the sale by him of the 2 lot plans of subdivision¹¹⁰;

"Discovery however indicates that council's evidence at Bendigo was false"¹¹¹

- (f) in Thompson (1), it is said that Mr Thompson only became aware of this "false evidence" after he read the complete version of the plans in the black folder¹¹². His notations record:

"Discovery reveals that the 'relevant' 30th schedule Notices were dated 4th March 1980"¹¹³

- (g) this is a further matter of which Mr Thompson asserts that he first became aware in August 2000;

"The note on the bottom of the previous doc is incorrect as the plans were in fact 7 in number. The error however is explained

¹⁰⁸ At p 8

¹⁰⁹ At p 10

¹¹⁰ At p 9

¹¹¹ At p C 3

¹¹² See para 53 (f)

¹¹³ At p C 4

and continued in document discovered in defendants
supplementary affidavit doc No 2"¹¹⁴

- (h) This reference can only be a reference to the complete version of the plans for the industrial allotments discovered in the prior Tylden Road proceeding. Mr Thompson refers on the same page of the book of pleadings to the sequence of plans numbered "79305 G, H, I, J & K". Evidence that Mr Thompson was aware prior to 1991 that plan numbered 7905G is part of a sequence of plans, a matter he now asserts that he was unaware of until August 2000¹¹⁵;
- (i) Mr Thompson sets out the minutes of Council dated 21 May 1980. The sequence of plans 79305E to 79305K is clearly referred in the minutes, as is the fact that plans have been submitted in 7 parts¹¹⁶;
- (j) critically Mr Thompson records:

"Mr Buchanan had illegally sold 2 of the lots and had been able to do so as the Council was prepared to accept plans of subdivision contrived in such a manner as to appear to be 'two lot subdivisions'"¹¹⁷

- (k) further, Mr Thompson notes:

"Subsequently upon accepting my guarantee Council gave effect to its original intent by lying to the Registrar of Titles"¹¹⁸

86. The handwritten annotation in the first Plaintiffs' own handwriting in the Plaintiffs' book of pleadings puts to rest the proposition that there was

¹¹⁴ At p C 5

¹¹⁵ That Mr Thompson knew that plan 7905G was part of a sequence of plans is also clearly illustrated from the extract from the minutes of Council set out on page 12 of the book of pleadings

¹¹⁶ At p C 9

¹¹⁷ At p C 12, emphasis added

¹¹⁸ At p C 13, emphasis added

concealment of the Plaintiffs' cause of action. The handwritten entries reveal that Mr Thompson was aware from at least 1991 of the "new" matters of which he now contends he first became aware in August 2000 as a result of reading the "black folder" documents. It was open to the Plaintiffs to make the claims they now seek to advance in 1991. The claims are manifestly statute barred.

No Woodleigh Heights concealment

87. Mr Thompson credits the documents in the black folder for making him aware in August 2000 of the facts and circumstances set out in the further "omitted paragraphs" relating to Woodleigh Heights. Whilst that is his contention, there is no evidence that any particular or identified document in the "black folder" led Mr Thompson to reach the conclusion he did in respect of the Woodleigh Heights land. Instead, the argument for the Plaintiffs is that Mr Thompson's review of the contents of the black folder after a 9 year delay prompted him to reflect further on the evidence presented in the prior Woodleigh Heights proceeding. There is no element of concealment on the part of the Council involved in these propositions.

88. That this is the "fraudulent concealment" case sought to be advanced relating to Woodleigh Heights appears from the following:

"Upon reaching the foregoing conclusions in relation to the Tylden Road land I began to consider the possibility that the Council may have acted unlawfully in relation to the Woodleigh Heights land. I reconsidered the failed 1995 proceedings and the reticulation plan which had been shown to me in the Practice Court. I then realised that the Council had in fact sealed the plans of Cluster Subdivision in contravention of its statutory duty to refuse to so seal them and in full knowledge that the subdivision had not been completed according to law and the reticulated water supply was not present in 1979 as required by law but was instead laid in 1982 as pointed out to me in the Practice Court. I was now able to reconcile the representations made to me in the Practice Court in 1999 with my prior state of knowledge. It was now apparent that the Conduct of the Council and Water Board in relation to the Woodleigh Heights Subdivision was essentially similar to their conduct in relation to the Tylden Road land.. Subsequently the Council and Water Board engaged in an ongoing course of conduct the effect of which was to conceal from me the true facts as now known. In the case of the

Woodleigh Heights land this ongoing course of conduct is now set out in paragraphs W14 to W71 inclusive of the present Statement of Claim.”¹¹⁹

89. The Practice Court hearing took place on 1 September 1999. It was then that the Plaintiffs endeavoured unsuccessfully to set aside the terms of settlement dated 29 July 1999 entered into in respect of the prior Woodleigh Heights proceeding¹²⁰.
90. No document contained in the “black folder” was at all relevant to the conclusions which Mr Thompson says he reached in August 2000 in respect of the Woodleigh Heights land. The matters concerning the provision of the black folder have no bearing on the claims now sought to be advanced in respect of the Woodleigh Heights land.
91. Further, as demonstrated by the matters set out below, whilst Mr Thompson alleges that he reached the conclusions referred to in August 2000 it was open to him to have reached the same conclusions in August 1987 (if not earlier). The key document upon which Mr Thompson says he reflected in 2000 is the water reticulation plan.
92. Mr Thompson deposes to the following in respect of the 1999 Practice Court hearing¹²¹:
 - (a) during the course of the hearing the Council and the Water Authority showed Mr Thompson a water reticulation plan for the Woodleigh Heights subdivision;

¹¹⁹ See para 54 (a) of Thompson 1. Emphasis added

¹²⁰ See para 55 of Dixon 1 and tab 31 of the exhibit folder

¹²¹ At para 82 of Thompson 1

- (b) the plan showed that the principal water mains were in fact laid in 1982 and not in 1979 as had been alleged by Mr Thompson and, on Mr Thompson's understanding, as required by law;
- (c) at the time of showing Mr Thompson the reticulation plan both Counsel and the solicitors for the Council and the Water Authority pointed out that the plan disclosed that the water main was in fact laid in 1982 and not 1979 as alleged by Mr Thompson and said to Mr Thompson words to the effect "How do you explain that?";
- (d) that Mr Thompson's entire cause of action in the prior Woodleigh Heights proceeding "hinged upon the assertion that the subdivision had been completed according to law and that therefore a reticulated water supply should have been present in 1979 at the time of sealing of the plans of cluster subdivision";
- (e) because of Mr Thompson's alleged "ignorance of the facts as now pleaded in paragraphs W1 to W13 of the present Statement of Claim, the evidence disclosed by the reticulation plan that a water main had not been installed until 1982, seemed to me to be fatal to any prospects of ultimate success after appeal."

93. It is this water reticulation plan, discussed with Mr Thompson at the Practice Court in 1999, that Mr Thompson asserts he reflected upon in August 2000 after reviewing the unrelated documents contained in the black folder. It was after reflecting upon the reticulation plan, that Mr Thompson realised that if the "reticulated water supply was not present in 1979 as required by law but was instead laid in 1982" then the Council "had in fact sealed the plans of cluster subdivision in contravention of its statutory duty to refuse to seal them ..."¹²².

¹²² See para 54(a) of Thompson 1

94. However, what Mr Thompson fails to mention and what the objective documentary evidence establishes in relation to the issue of timing of the reticulated water supply, is that he was aware and had been aware, at least from August 1987, that the "reticulated water supply" had been laid in 1982 and not 1979.
95. Mr Thompson's own correspondence, establishes that he was aware from at least 1987 that the reticulated water supply had been laid in 1982. By a letter dated 24 August 1987, Mr Thompson advised the Council concerning the "reticulated water supply" on the Woodleigh Heights subdivision:
- "25. Sometime in 1980 or 1981 the timing of which is irrelevant the Kyneton Council approved the resubdivision of the Woodleigh Heights Subdivision into 131 allotments.
- ...
27. By minute dated 6 November 1980 the Kyneton Water Board resolved to advise the Kyneton Development Committee that it could supply 1,000,000 gallons annually in any reticulated area and that any anticipated consumption in excess of that figure would be subjected to negotiation.
28. By letter dated 5th March 1981 Kenneth Buchanan requested a water supply of 1,000,000 gallons annually to service the Woodleigh Heights subdivision.
- ...
30. Kyneton Water Board did subsequently enter into a water supply agreement between itself and Woodleigh Heights Resort Developments Pty Ltd for the supply of water to the whole of the Woodleigh Heights Subdivision.
- ...
33. Subsequent to the making of the above agreement trenches were dug and pipes laid along a considerable length of Edgecombe Road **in order to facilitate the supply of water to the Woodleigh Heights Subdivision.**
- ...
112. The Board under cover of letter dated 12 September 1985 made a copy of the agreement available [being the agreement referred to in paragraph 30 of the August 1987 letter] after my solicitor threatened to take legal action to force the Board to make a copy available.

113. My Supreme Court action No 2360 of 1984 was settled on the day that the copy of the agreement was received at the office of my solicitor which was too late to be considered" (emphasis added)¹²³
96. Further, the agreement between the Kyneton Water Board and Woodleigh Heights Resort Developments Pty Ltd "for the supply of water to the whole of the Woodleigh Heights Subdivision" dated 1 January 1982 ("**the 1982 water reticulation agreement**")¹²⁴ was discovered on 15 April 1998 by the Water Authority in the prior Woodleigh Heights proceeding¹²⁵.
97. Clauses 1 and 2 of the agreement are in the following terms:
- "1. The Trust shall (subject as hereinafter provided) so far as it is able to do so subject to the provisions hereof and of the WATER ACT 1958 and regulations made thereunder and any BY-LAWS and REGULATIONS made by the Trust thereunder supply to the Consumer and the Consumer shall take from the Trust water for domestic purposes on the said land as and from the First day of October One thousand nine hundred and eighty-one (hereinafter called "the date of commencement").
 2. The Consumer shall at its own expense and to the satisfaction of the Trust provide and install all pipes and fittings which may be necessary for obtaining such supply from the Trust's pipeline at the corner of Edgecombe Road and Dettman's Lane, and shall so long as this Agreement remains in force keep the pipes and fittings within the said property in good order and in proper repair to the satisfaction of the Trust. Any authorized Officer of the Trust may at any time or times inspect and examine all or any such pipes or fittings.
- The pipeline installed along Edgecombe Road will be taken over and maintained by the Trust on the First day of July, 1982 subject to the pipeline passing performance tests to the satisfaction of the Trust."

¹²³ The 24 August 1987 letter is exhibit "GT 1" to the affidavit of Mr Thompson sworn 14 December 1998 in the prior Woodleigh Heights proceeding. Tab 26 of the exhibit folder – "MED 1"

¹²⁴ A copy of this agreement is exhibited to Thompson (3). See exhibit "GAT 26"

¹²⁵ See exhibit "SME 2", vol 2, tab 32 to the affidavit of Steven Edward sworn 12 September 2005 – document no 22

98. What the August 1987 letter and the 1982 water reticulation agreement demonstrate is that Mr Thompson was aware from at least August 1987 (if not September 1985 when a copy of the 1982 water reticulation agreement was provided to him) that the reticulated water supply was not present in 1979 but was in fact provided for in 1982. It follows that it has been open to Mr Thompson to "reflect" upon any legal consequence of these matters since at least August 1987. No conduct on the part of the Council at any time after August 1987 has prevented Mr Thompson from being able to make the allegations he seeks to advance eighteen years later in respect of the Woodleigh Heights land.

No "fraudulent" concealment

99. In *Hamilton v Kaljo*¹²⁶, McLelland J considered what was meant by the expression "fraudulently concealed" for the purpose of section 55 of the Limitation Act 1969 (NSW)¹²⁷ in the context of directors concealing a contract from the company. After considering the English authorities, His Honour stated:

"For my own part, I would regard it as a misuse of language, and unsound, to apply the statutory expression 'fraudulently' in s 55 to any conduct which did not involve some form of dishonesty or moral turpitude."¹²⁸

100. In *CE Heath Underwriting and Insurance (Australia) Pty Ltd v Daraway Constructions*¹²⁹, Batt J considered the meaning of "fraud" for the purposes of section 27 (b) of the Victorian Act:

¹²⁶ (1989) 17 NSWLR 38

¹²⁷ The New South Wales' equivalent of section 27 (b)

¹²⁸ At 386

¹²⁹ Supreme Court of Victoria, Batt J, 3 August 1995

"I prefer the reasoning of McLelland J and therefore proceed on the footing that (leaving aside equitable claims) 'fraud' means common law fraud and that intentional concealment is requisite."¹³⁰

101. In *Seymour v Seymour*¹³¹, Mahoney A-CJ of the New South Wales Court of Appeal, with whom the other 2 members of the Court agreed, took a wider view of what might constitute fraud than Batt JA in *Daraway Constructions*¹³²:

"In my opinion, there must be in what is involved a consciousness that what is being done is wrong or that to take advantage of the relevant situation involves wrongdoing. At least that is so in the generality of cases. (There is in this as in many things, the problem of dealing with the person who 'closes his eyes to wrong' or is so lacking in conscience that he is not conscious of his own lack of proper standards)."

102. In *Skrijel v Mengler*¹³³, a misfeasance in public office case involving alleged fraudulent concealment of false fingerprint evidence, Eames J observed that, for the purposes of section 27 (b), "fraud":

"Involves a consciousness that what is being done is wrong or that to take advantage of a relevant situation involves wrongdoing. The section is not confined to simple common law fraud, but extends to conduct beyond that, which involves some sort of dishonesty or moral turpitude: see *Hamilton v Kaljo* (1989) 17 NSWLR 381 at 386; *Seymour v Seymour* (1996) 40 NSWLR 358 at 371-2."

103. In *Di Sante v Camando Nominees*¹³⁴, Warren J (as she then was) was required to consider the operation of section 27 (a) of the Limitation of Actions Act (which relates to circumstances where the action is based on the fraud of the

¹³⁰ At [80]

¹³¹ (1996) 40 NSWLR. Mahoney A-CJ with whom Meagher JA and Abadee AJA agreed also said, that in his opinion, the words "fraudulent concealment" in section 55 of the NSW *Limitation Act* was not confined to common law fraud

¹³² Go to tab 20 at 360, 370-372

¹³³ Supreme Court of Victoria, Eames J, 5 October 1998, unreported

¹³⁴ Supreme Court of Victoria, Warren J, 25 May 2000, unreported

defendant). In so doing, her Honour approved the approaches adopted by

McLelland J in *Hamilton v Kaljo* and Mahoney A-CJ in *Seymour v Seymour*:

"In New South Wales equivalent provisions to s27 of the Victorian statute are contained in s55 of the Limitation Act 1969. In considering the New South Wales provisions in *Hamilton v Kaljo & Ors* (1987) 17 NSWLR 381 McLelland J considered (at 386) that the postponement of the limitation bar in matters where fraud, deceit or concealment are alleged require proof of some form of dishonesty or moral turpitude. *Hamilton* was considered by the New South Wales Court of Appeal in *Seymour v Seymour* (1996) 40 NSWLR 358. There, Mahoney A-CJ, with whom Meagher JA and Abadee AJA agreed, held that the New South Wales provision required a consciousness of wrongdoing:

'In my opinion, there must be in what is involved a consciousness that what is being done is wrong or that to take advantage of the relevant situation involves wrongdoing. At least, this is so in the generality of cases. (There is in this as many things, the problem of dealing with the person who 'closes his eyes to wrong' or is so lacking in conscience that he is not conscious of his own lack of proper standards).'

A similar view was expressed in *Grahame Allen & Sons Pty Ltd v Water Resources Commission*; (2000) 1 Qd R 523.

There is no allegation at this point made by the plaintiff against ANZ of a consciousness of wrongdoing. I agree with the approach of the New South Wales and Queensland authorities."

104. These authorities demonstrate that fraudulent concealment for the purposes of section 27 (b) of the Limitation of Actions Act:

- (a) requires intentional concealment¹³⁵;
- (b) requires that the cause of action must be concealed¹³⁶;
- (c) involves a consciousness of wrongdoing which must be alleged and proved¹³⁷;
- (d) involves some sort of dishonesty or moral turpitude¹³⁸;
- (e) that time runs once "concealment" has ceased¹³⁹.

¹³⁵ *CE Heath Underwriting, supra*

¹³⁶ *Skrijel* at [49] and [59]

¹³⁷ *Di Sante; Seymour*

¹³⁸ *Seymour, Di Sante*

105. Assuming concealment of the black folder and the complete version of the industrial plans for Tylden Road, which there was not, there is no evidence of any "fraudulent" conduct on the part of the Council, or for that matter, on the part of the Water Authority after 1991. The Council's conduct in voluntarily providing to Mr Thompson the black folder containing "the critical piece of the puzzle" is not conduct evidencing a consciousness of wrongdoing or involving dishonesty or moral turpitude. If the limitation period in respect of the tort of misfeasance in public office had not already begun to run, it certainly commenced running from 14 June 1991 (and thus expired in June 1997).

No reasonable diligence

106. Further, once the relevant party has the documents said to have been concealed, there can thereafter be no fraudulent concealment. Whatever may or may not have happened prior to 14 June 1991, after the black folder containing the "critical document" was handed to Mr Thompson by Counsel acting for the Council and the Water Authority there could not be and was no intentional concealment thereafter of any relevant material on the part of the Counsel. Mr and Mrs Thompson fail to discharge the burden of showing reasonable diligence on their part thereafter so as to ensure that the limitation period did not commence to run.
107. In *Mann v Commonwealth*¹⁴⁰, the New South Wales Court of Appeal held that the service of an affidavit on the plaintiff by a defendant in a prior proceeding which listed certain documents and which stated that such documents had been disclosed to the defendant by various Commonwealth and State public servants was sufficient to inform the plaintiff of the existence of a claim against

¹³⁹ *Skrijel*; see also *Mann v Cth*

¹⁴⁰ New South Wales Court of Appeal, Handley, Powell and Stein JJA, 13 July 2001, unreported

the Commonwealth and the relevant States in respect of the disclosure of those documents. Accordingly the Court held that the time for limitation began to run from the date of service of the affidavit and not from the later date asserted by the plaintiff as being the date that he became aware of the cause of action.

The present case is no different.

108. For the reasons set out here and for the reasons given by the Master, the appeal must be dismissed.

Dated: 30 October 2006

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