

GLENN ALEXANDER THOMPSON and
CHERYL MAREE THOMPSON
v

Plaintiffs

MACEDON RANGES SHIRE COUNCIL and
THE COLIBAN REGION WATER AUTHORITY

First Defendant
Second Defendant

<u>JUDGE:</u>	OSBORN J
<u>WHERE HELD:</u>	MELBOURNE
<u>DATE OF HEARING:</u>	31 OCTOBER 2006, 1 NOVEMBER 2006
<u>DATE OF JUDGMENT:</u>	29 NOVEMBER 2006
<u>CASE MAY BE CITED AS:</u>	THOMPSON v MACEDON RANGERS SHIRE COUNCIL & ANOR
<u>MEDIUM NEUTRAL CITATION:</u>	[2006] VSC 458

Appeal from Master – Application by Defendants for summary judgment – subdivision of industrial and residential allotments – cluster subdivision for purpose of residential use and development – prior proceedings – effect of releases – application of limitation periods – no new facts enabling limitation periods to be avoided – RSC 23.01(1), 23.03, 77.05(7) – *Local Government Act 1958* ss 569, 569A, 569B, 569E – *Transfer of Land Act 1958* s 97- *Sale of Land Act 1962* s 9 - *Cluster Titles Act 1974*

<u>APPEARANCES:</u>	<u>Counsel</u>	<u>Solicitors</u>
For the Plaintiffs	The First Plaintiff appeared in person	
For the First Defendant	Mr J. Delany SC with Mr G. Ahern	Maddocks
For the Second Defendant	Mr G. Garde QC with Ms S. Burchell	Arnold Dallas McPherson

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HIS HONOUR:

Introduction

- 1 This is an appeal from the decision of Master Efthim who on 15 May 2006 gave summary judgment against the plaintiffs pursuant to Rule 23.03 of the Supreme Court Rules.
- 2 The plaintiffs seek to re-litigate the circumstances in which:
 - (a) land known as the Tylden Road land ("the Tylden land") part of which was subsequently purchased by them, was approved for subdivision into industrial and residential lots in and after 1979; and
 - (b) land known as the Woodleigh Heights land ("the Woodleigh land") part of which was subsequently purchased by them, was approved for cluster subdivision in and after 1978.

Tylden Road Factual Background

- 3 In 1979 after the initial subdivision of the Tylden land into two super lots, a subdivider named Buchanan gave notice pursuant to the 30th schedule of the *Local Government Act 1958* ("the LGA") of his intention to further subdivide the super lots into six industrial allotments and 18 residential allotments respectively.
- 4 The predecessor of the firstnamed defendant ("the Council") subsequently resolved on 20 February 1980 to seal the plans of subdivision and impose requirements upon such plans for the construction of roads and the provision of water supply to the subdivision.
- 5 Buchanan then submitted for approval a series of plans of subdivision which were in effect stages of the previously proposed residential and industrial subdivisions.

6 A Council officer, Porter (now deceased),¹ endorsed such plans as subject to the requirements originally imposed by Council with respect to the global plans of subdivision. The endorsement was to the following effect:

"A requirement under s.1 and s.1A of s.569E of the *Local Government Act* 1958 has been made by the Council of the Shire of Kyneton in respect of this plan of subdivision."

7 In or about October 1980, Buchanan thereafter persuaded the plaintiffs to give guarantees for the construction of the roads and the provision of water supply within the subdivision (\$25,000 to the Council and \$11,500 to the predecessor of the secondnamed defendant ("the Water Board")).

8 The Council then withdrew the requirements endorsed on the plans of subdivision and the plans were registered in November 1980.

9 The plaintiffs in turn purchased the land comprising the industrial allotments and 15 of the 18 residential allotments.

10 In 1982 when Buchanan had failed to construct the roads or provide the services, the Council and the Water Board called up the guarantees and constructed the roads and services.

11 In 1986 the plaintiffs were sued by the Council in the Magistrates' Court, for \$3,708 allegedly owing by way of the balance payable for the construction of roads servicing the Tylden subdivision.

12 The Magistrate found in favour of the Council, but this decision was successfully challenged before Kaye J by way of order to review proceedings.

13 The plaintiffs then sued the Council and the Water Board to recover guarantee moneys paid out for the purpose of works and services, and for alleged consequential loss suffered upon the forced resale of the Tylden land.

¹ Porter was, during the relevant period, both Secretary of the Council and Secretary of the predecessor of the second defendant.

- 14 This proceeding settled in 1991 and the plaintiffs gave the Council and the Water Board a release in consideration of \$40,000 plus costs paid to them.
- 15 The plaintiffs now contend that the Council failed to make valid requirements for the provision of roads and the supply of water prior to sealing and certifying the sequential plans of subdivision relating to the Tylden land thereby enabling them ultimately to be registered pursuant to the *Transfer of Land Act 1958* (the "TLA"), without the benefit of valid requirements for such services.
- 16 It is further said such failure was deliberate and fraudulent and constituted misfeasance in public office.

Woodleigh Land Factual Background

- 17 In the course of purchasing the Tylden land the plaintiffs had also been persuaded by Buchanan to buy a number of cluster allotments within the Woodleigh land.
- 18 Following such purchase a dispute arose as to the withholding of reticulated water supply from the plaintiffs' land, by the subdivider. Such water was supplied by the Water Board to this subdivision in 1982.
- 19 Ultimately the plaintiffs sued the Council and the Water Board in 1995 alleging that each had made fraudulent misrepresentations as to the plaintiffs' lack of entitlement to access to such water. As a result it was alleged the plaintiffs had suffered loss upon a mortgagee sale at which the land achieved values reflecting a lack of water supply when (it was alleged) the plaintiffs were in truth entitled to access to such water supply.
- 20 These proceedings were settled in the Supreme Court in 1999. Once again the plaintiffs gave a release to both the Council and the Water Board in consideration of moneys paid to them.
- 21 The plaintiffs now contend that the Council should not have sealed the relevant plans of cluster subdivision in the first place, because at the time the lots were

created, necessary water supply had not been provided to the land in accordance with the planning permit allowing the cluster subdivision.

22 The defendants contend that the plaintiffs' claims are barred:

- (a) by the releases previously given by them;
- (b) by issue estoppel including *Anshun* estoppel;² and/or
- (c) by the effluxion of time and the operation of the *Limitation of Actions Act 1958* ("the LAA").

The LGA Provisions

23 In order to better understand the shifting kaleidoscope of the plaintiffs' allegations with respect to the Tylden land, it is desirable to summarise the relevant provisions of the LGA.

Notice of Intention

24 Section 569(1) of the LGA required a person proposing to make a new road on land or subdivide such land into two parts, to give notice of his intention to the Council in accordance with the form of the 30th schedule and submit to the Council a plan of such proposal.

Requirements as to the Contents of the Plan

25 Section 569A required the plan to describe the proposed subdivision in detail, including the delineation of allotments, roads, reserves, and parts of the land set aside for the purposes of enabling the land to be reticulated with mains for the supply of water.

Referrals

26 Section 569B required *inter alia* that the Council refer the plan of subdivision to the local Water Authority (i.e. the Water Board).

² *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589.

Sealing

- 27 Section 569B(4) provided that the Council must seal or refuse to seal the plan within 100 days of its receipt.

Consent of Water Authority

- 28 Section 569B(7)(c) provided that Council must refuse to seal the plan if the relevant water authority refused to give consent.

Planning Provisions

- 29 Section 569B(7)(d) provided that the Council should refuse to seal the plan if an interim development order was in force under the *Town and Country Planning Act* 1961 (the "T & CP Act"), unless the subdivision and the use of the development of the land contemplated in the subdivision, were permitted under the interim development order and any necessary permit for such subdivision and use of the relevant land had been obtained.

Potential Grounds of Refusal

- 30 Section 569B(8) set out potential grounds upon which Council could refuse to seal the plans including (n) proper provision not being made for the appropriation of specific portions of the land for the provision of water supply.

Water Supply

- 31 Section 569B(8AAA) provided that if the relevant Water Authority consented to the sealing of the plan, the Council could not refuse to seal the plan on water supply grounds.

The Effect of Sealing

- 32 Section 569B(10) provided:

"The sealing of a plan of subdivision shall be conclusive evidence for all purposes that there has been compliance with this Act with respect to such sealing and that all preliminary steps and proceedings required to be taken in connexion therewith have been duly and properly taken."

Power to Require Construction or Part Construction of Roads or Security

- 33 Section 569E(1) empowered the Council to require the owner of any land in respect of which a 30th schedule notice had been given, to cause the whole or any specified part of a new road shown on any plan of subdivision to be constructed, and/or to require security to be given to the Council for the estimated cost of such construction, and/or to undertake to carry out such work within a specified period.

Requirements for Water Supply

- 34 Section 569E(1A) gave Council the power to make requirements with respect to the provision of water supply.

Endorsement on the Plan

- 35 Section 569E(3)(a) provided that where a Council proposed a requirement with respect to the construction of roads or the provision of water supply, the Council was required to "cause an endorsement to be made on the plan before it is sealed to the effect that a requirement has been made under subsection (1) or (1A)."

Notice

- 36 Further the Council was required by s.569E(3)(b)-(c) to serve on the owner of the land two copies of the requirement and retain a copy of the requirement itself and maintain a running summary of steps taken with respect to the requirement, open for public inspection.

Withdrawal

- 37 By s.s.(3)(ca) the Council was given the power to withdraw a requirement if satisfied that in all the circumstances it should be withdrawn.

Satisfaction of the Requirement

- 38 When a requirement had either been complied with or withdrawn, the Council was required to lodge a statement to that effect with the Office of Titles (s.s.3(d)).

Approval

- 39 The Registrar of Titles was prohibited from approving the plan of subdivision until such a statement was lodged by the Council (or the Planning Appeals Board) (s.s.3(e)).

Powers to Complete Work

- 40 Where security was given for the completion of works, the Council was given power to go on to the land and complete the works itself if necessary (s.s.4). Further provision was made for adjustment as between the Council and the owner depending on the actual cost of the works.

The Service of Requirements

- 41 Sub-section 11 provided:

"Any requirements by a council under this section shall be of no effect unless served on the owner before the plan has been sealed by the council."

- 42 In the present case it is contended by the plaintiffs that no notice of requirements for road construction and water supply was served by the Council in accordance with s.596E(3) in respect of the subdivision of the Tylden land.

- 43 It follows a valid requirement could not be imposed on the owner once the plan was sealed by the Council (s.s.11).

- 44 It is said in turn that the failure to impose a valid requirement pursuant to s.569E, defeated the effective provision of road works and services by the subdivider to the plaintiffs and subsequent purchasers of the land.

The Decision of Kaye J

- 45 As I have said, in 1988 the plaintiffs successfully challenged the decision of a Magistrate awarding the Council moneys comprising the balance of the cost of works incurred by the Council in constructing roads for the Tylden subdivision. Because this decision may be regarded as a starting point for the subsequent legal

analyses which have been made of the plaintiffs' position, it is desirable to set out his Honour's reasons of 11 July 1988.

46 His Honour considered the following two grounds of complaint:

- (i) whether the Magistrate erred in finding that the Plaintiff was a person who could lawfully provide security for the cost of the work pursuant to s.569E(1) of the LGA; and
- (ii) whether the Magistrate erred in holding that the Council was lawfully entitled to claim the balance of the cost of the roadworks notwithstanding it had not complied with section 569E(4) of the LGA as amended.

47 The first ground arose out of the Magistrate's finding that the applicant was the owner of the land within the meaning of section 569E. In considering the meaning of 'owner of land' in s.569E, His Honour stated:

"By section 569(1) a person intending to subdivide land is required to give the Council notice of his intention in writing in the form of the 30th schedule. The 30th schedule requires the subdivider to state the name and address of the registered proprietor of land and if the subdivider is not the registered proprietor he is required to disclose his interest in the land, particulars of any sale of the land to him and the consent of the registered proprietor. It follows that the owner of the land as used in section 569E means the registered proprietor of the land and, if the subdivider is not the registered proprietor of the land, a person having an equitable interest in the land."³

48 His Honour referred to engineer's reports to the Council dated 20 February 1980 and 21 May 1980 and the notice of requirement put in evidence in which Mr Buchanan was referred to as owner, and held that:

"Although in his letter of 23 October 1980 the applicant described the subdivision as 'now a joint venture with the Buchanans', there was no evidence before the Magistrate that at the time of service of the requirement or at any relevant time thereafter the applicant was possessed of any equitable interest in the land.

³ *Thompson v The President, Councillors, and ratepayers of the Shire of Kyneton* (Supreme Court of Victoria, Unreported, 0/R 235 of 1987, 11 July 1987).

It follows that at the relevant time the applicant was not the owner of the land within the meaning of section 569E(1) and that he was not the owner from whom the Council was entitled to recover any payment under subsection (4) of section 569E."⁴

49 His Honour went on to consider the effect of the withdrawal of the original requirement to construct works upon the obligations of Buchanan. His Honour, having summarised the requirements of s569E,⁵ stated:

"... it is performance of the requirement endorsed on the plan of subdivision and the subject of the notice served upon him which the owner is bound to discharge. By paragraph (ca) of subsection (3) of section 569A it is provided as follows:

'Where pursuant to this section the Council requires the full construction or part construction of any street, road, lane or passage or any payments, security or undertaking to be made or given in respect thereof or the provision of works of water supplies, sewage or drainage, the following provisions shall have effect, if the Council is satisfied that in all the circumstances any requirement should be withdrawn, it may withdraw the requirement. It follows that the power given to the Council is to withdraw a requirement provided that in all the circumstances it is satisfied that it ought to be withdrawn.' (sic)

The significance of this provision is twofold: first the obligation of the owner is to carry out the requirement made by the notice of requirement and secondly, the form of power given to the Council is to withdraw the requirement. It is not a power to substitute a requirement."⁶ (My emphasis)

50 His Honour observed that there was no provision which enabled the Council to substitute or amend a requirement once endorsed on a plan of subdivision. His Honour therefore held that the Council's right to claim payment by way of adjustment of costs for carrying out street construction pursuant to subsection (4) applied only when payment or security for payment was given by the owner pursuant to a requirement under paragraphs (b) or (d) of subsection (1). His Honour concluded that the Magistrate's finding that the notice of requirement given to Mr Buchanan dated 20 February 1980 was made pursuant to section 569E(1)(b) or (d), was in conflict with the express terms of the requirement and that, if the Council

⁴ Section 569E(4) summarised above.

⁵ See above.

⁶ *Thompson v The President, Councillors, and ratepayers of the Shire of Kyneton* (Supreme Court of Victoria, Unreported, 0/R 235 of 1987, 11 July 1987).

amended the requirement, the Council did so without power.

51 The above decision carefully articulates the primary bases upon which it can be said the Council acted irregularly both with respect to purporting to impose guarantee obligations upon the plaintiffs and in purporting to assert continuing underlying obligations with respect to the construction of the roads after the sealing of the plans of subdivision.

52 Significantly Kaye J held that it is the performance of an obligation with respect to the provision of roads or services which is endorsed on the plan of subdivision and the subject of notice served upon him, which the owner is obliged to discharge. I respectfully agree. The plaintiffs now draw attention to the fact that his Honour's decision proceeded on the basis that lawful notices of requirement had been issued with respect to the construction of roads and the provision of water supply on 20 February 1980. Evidence obtained in the course of subsequent proceedings demonstrates this was not the fact.

53 The decision of Kaye J was the fount of subsequent proceedings. Thereafter in reliance upon his Honour's reasoning, the plaintiffs instituted proceedings in the County Court seeking damages from the defendants:

- in respect of moneys previously paid to both the Council and the second defendant ("the Water Board") pursuant to guarantees unlawfully obtained from the plaintiffs for the cost of the construction of subdivisional roads and provision of water supply to the Tylden land; and
- in respect of consequential loss said to have been suffered as a result of the sale of the residential component of the Tylden land.

The Tylden Land Proceeding

54 The statement of claim in the County Court proceeding was amended in May 1991 to plead in further detail the statutory processes of subdivision undertaken by the

Council.⁷ In particular it was pleaded that an initial notice of intention to subdivide the whole of the Tylden land was initially given on or about 12 February 1980 by Buchanan, the subdivider. Thereafter Buchanan gave a further four notices of intention to subdivide on 4 March 1980. On or about 20 February 1980 the Council had served a requirement pursuant to s.559E(1) and (1A) in respect of the construction of road works and the obtaining of a statement from the Water Board that an agreement had been entered into to make provision for water supply. On 21 May 1980 the Council sealed seven separate plans of subdivision relating to the Tylden land.

55 Thereafter it was alleged that in or about October 1980 the plaintiffs provided a bank guarantee of \$25,000 in respect of moneys which might become payable by the plaintiffs to the Council in connection with the subdivision of the land. In or about November 1980 the Council withdrew the requirement on the land with respect to the provision of such a guarantee and notified the Registrar of Titles in accordance with the withdrawal. The Registrar then approved the plans of subdivision.

56 The amended statement of claim then alleges:

"In the premises, the firstnamed defendant was not entitled to retain and/or call up the first bank guarantee either pursuant to section 569E, or at all, for the following reasons:

(a) that it failed to comply properly or at all with the provisions of s.569 and s.569E in that:

(i) *there was no or no proper or sufficient notices given by the subdivider, pursuant to section 569(1) of the LGA; (my emphasis)*

(ii) The plans of subdivision sealed by the firstnamed defendant in relation to the land contravened:

A. section 569A(1)(a) in that each of them did not show at all, or distinctly all allotments into which the land was to be subdivided marked with distinct numbers or symbols;

- B. *section 569A(1)(c) in that plans 79305E, 79305F, 79305G, and 79305H did not show at all or show distinctly all new streets, roads, lanes or passages proposed to be made or laid out; (my emphasis)*
- (iii) *the firstnamed defendant did not serve or cause to be served on the subdivider any, or any proper or sufficient 'requirements' within the meaning of section 569E(3)(b); (my emphasis)*
 - (iv) the firstnamed defendant did not retain copies of any or all of the purposed 'requirements', nor did it keep at all or sufficiently, at its offices (or anywhere else) an up to date summary in writing of all actions taken pursuant to s.569E in respect of the requirements - thus contravening s.569E(3)(c);
 - (v) the purported 'requirements' had been withdrawn by the firstnamed defendant within the meaning of s. 569E(3)(ca);
 - (vi) that in contravention of section 569E(3)(d) the firstnamed defendant caused to be lodged with the Office of Titles a statement to the effect that the purported 'requirement' or 'requirements' had been complied with by the owner, when such requirement or requirements had not been complied with and the firstnamed defendant knew that such requirement or requirements had not been complied with;
- (b) there was no other valid and/or enforceable basis or ground upon which the firstnamed defendant could retain and/or call up the first bank guarantee."

57 This pleading is manifestly inconsistent with the assertions made in the firstnamed plaintiff's primary affidavit⁸ that:

"The Tylden Road proceeding was predicated upon the belief that the Council had:-

- (i) lawfully sealed the plans of subdivision; and
- (ii) lawfully issued notices of requirement in respect to the construction of roads and the construction of water works."

58 It may be that the Tylden Road proceeding was issued with these assumptions that the Council had acted lawfully, but the amended statement of claim specifically alleged that the plans were not lawfully sealed and lawful notices of requirement

⁸ Sworn 18 October 2005.

were not issued.

59 It is further to be observed from the allegations emphasised in the quotation above that this pleading specifically alleged that:

- (a) the subdivider gave no or no proper notices pursuant to s.569(1) of the *Local Government Act* with respect to the plans of subdivision ultimately sealed and certified;
- (b) such plans including Plan 79305G did not show all the new roads proposed to be made or laid out;
- (c) the Council did not serve *any or any proper* "requirements" upon the subdivider;
- (d) the Council did not retain copies of purported "requirements".

60 Each of these allegations forms part of the subject-matter which the plaintiffs now wish to revive. The critical allegation now relied on is that the Council did not serve proper "requirements". The plaintiffs' awareness of this fact is now said to have been triggered by the recent realisation that plan 79305G did not show all the roads proposed to be laid out and may have been deliberately "clipped" when produced in evidence in the Magistrates' Court. The underlying facts (other than the clipping) were squarely pleaded in 1991.

61 The amended statement of claim went on to allege that the plaintiffs not only suffered the loss of the guarantee in the sum of \$25,000 but that this expense resulted in the forced sale of 15 residential allotments comprised in the Tylden land. The plaintiffs purchased 15 of 18 lots in the subdivision in December 1980 for the sum of \$92,000. The 15 lots were on-sold for a total sum of \$100,000 in April 1983 and the proceeds (presumably the net proceeds) were expended upon the construction by the Council of a road. Subsequently the purchaser, Chelmantau Pty Ltd, on-sold the allotments and achieved a total return of \$269,050 for 12 of the 15 allotments by 1987. The plaintiffs accordingly claimed a loss of profit in the region of \$200,000. It is this same loss of profit which they now wish to claim again. It is again calculated by reference to the differential between the price achieved by the plaintiffs and that achieved by Chelmantau.

62 The County Court proceedings were settled and the plaintiffs gave a release to both
the Council and the Water Board for valuable consideration of "all claims, suits and
demands whatsoever the subject matter of this proceeding."

The Woodleigh Land

63 In 1995 the plaintiffs instituted proceedings in this Court in respect of the wrongful
refusal of water supply to the Woodleigh land. The claim alleged that the plaintiffs
had suffered the loss of the difference between the value of the land if serviced with
a reticulated water supply and the value achieved on a mortgagees sale, in
circumstances where the Council and the Water Board maintained the plaintiffs had
no rights to a reticulated water supply to the Woodleigh land.

64 The claim was formulated as one based upon fraudulent representations by the
defendants as to the status of the Woodleigh land and in particular its entitlement to
water supply.

65 This claim was also settled for value and a release was executed by the plaintiffs
which released the Council and the Water Board from "all actions, suits, demands
and costs, arising out of or in any way related to the subject-matter of the
proceedings."

66 The amended further statement of claim dated 17 March 1999 filed in the Woodleigh
Supreme Court proceeding pleaded the background facts in substantial detail. In
particular it alleged that the subdivider applied on 22 November 1978 to develop the
Woodleigh land by subdividing it pursuant to the provisions of the *Cluster Titles Act*
1974 into 45 allotments averaging approximately two acres in size, together with
substantial areas of common property and provision for the installation of a
privately owned and operated water supply and reticulation system forming part of
the common property.

67 The application included a submission prepared by consultants which described the
proposed private water supply system.

68 The amended further statement of claim in the Supreme Court proceeding made allegations in terms reflecting this submission:

"7. The proposal for the privately owned and operated water supply and reticulation system (as contained within the Submission), consisted of:

- (a) a storage reservoir with a surface area of 4½ acres and a capacity of 8,500,000 gallons;
- (b) a high level header tank of 100,000 gallon capacity;
- (c) rising main between the reservoir and high level tank;
- (d) a reticulation system comprising main pipes from the tank through the estate and smaller pipes from the main pipe to the individual allotments;
- (e) household drinking and bathroom water was to be supplied by means of roof rainwater tanks which were to be installed concurrently with the construction of houses;
- (f) the reticulated water supply was for non-domestic uses only."

69 It is thus abundantly clear that as at this date the plaintiffs understood that the reticulated water supply contemplated by the permit application was not a supply of potable water from the Water Board.

70 Thereafter it was alleged that the Council issued a planning permit authorising cluster subdivision but requiring by condition that:

"(a) The development to be carried out in accordance with the plans and submission which formed part of this application."

71 It was alleged the Council then approved the water reticulation system required pursuant to the permit⁹ and the cluster plans of subdivision were registered. At the time of registration the statement of claim alleged that the following works had been carried out in relation to the water supply system contemplated by the permit:

"(a) The lake referred to in the submission had been constructed and was near full of water.

⁹ Such water supply not being concerned with the provision of potable water.

- (b) Two 50,000 gallon concrete high level water tanks had been constructed in lieu of the single 100,000 gallon high level tank referred to in the Submission.
- (c) The rising main had been laid between and connecting the lake and the high level tanks as referred to in the submission.
- (d) Primary reticulation pipes had been laid in the common property and connected to the concrete high level tanks to convey non domestic water from the tanks to the allotments as referred to in the Submission.
- (e) The high level tanks contained water."

72 Reference to the submission adopted by the permit condition, shows that what was required in respect of water mains was the provision of 2160 lineal metres of mains of varying dimensions, laid out in accordance with an attached plan. The mains were proposed to run from a header tank at the north eastern corner of the block, and would decrease in size from 100 millimetres diameter to 50 millimetres diameter as they spread away from it. The mains would not extend to the public roadway abutting the western side of the subdivision but would run towards it. PVC piping would be used for the smaller mains. It would of course be necessary for each allotment to ultimately be connected to these mains (as paragraph 7 of the further amended statement of claim set out above indicates) but such connections to individual lots were not intended to be installed as part of the works described in the submission. It is also relevant to note the planning permit did not allow residential use of the cluster allotments without further secondary permission.¹⁰

73 Thereafter the subdividers made application for a cluster redevelopment dividing each allotment created by the initial cluster subdivision into three smaller allotments. This was evidently approved by the Council subject to the augmentation of water supply.¹¹

74 The plaintiffs then purchased part of the Woodleigh land. By April 1984 they were in dispute with a company, Woodleigh Heights Resort Developments Pty Ltd ("WHRD") associated with the original subdivider, which was developing a

¹⁰ The terms of the relevant permit conditions are analysed further below.

¹¹ Plaintiffs' oral submissions to this Court.

timeshare resort on the cluster subdivision. WHRD wished to compel the plaintiffs to complete the sale of land by the plaintiffs back to it.

75 In or about March and April of 1984 a director of WHRD advised the firstnamed plaintiff that WHRD had a private water supply agreement between itself and the Water Board for the supply of water to the whole of the cluster subdivision. It was further said that under the water agreement, WHRD controlled the supply of water from the Water Board to the cluster subdivision.

76 The plaintiffs then made enquiries of the Council and the Water Board and were advised that WHRD had the benefit of a water supply agreement with the Water Board. They were advised that under that agreement, WHRD controlled the supply of water obtained from the Water Board within the cluster subdivision. The Water Board would not transfer the benefit of the water agreement to the body corporate of the cluster subdivision except with the agreement of WHRD nor enter into a separate water supply agreement with the body corporate except with the agreement of WHRD.

77 The plaintiffs were further advised that unless the plaintiffs' allotments had access to a reticulated water supply the Council would not issue building permits for the plaintiffs' land.

78 Thereafter the plaintiffs' land was sold by mortgagee at a loss, because of representations by the Council and Water Board that such land was not entitled to reticulated water supply.

79 It was specifically alleged that such representations were fraudulent.

80 It was further alleged that the loss suffered resulted from the fact that the plaintiffs' land was sold for a total price of \$135,000 when, had the plaintiffs' land been sold on the basis that there was an entitlement to "an approved private water supply and reticulation system" its sale value would have been \$431,500. It is this same

differential in respect of which the plaintiffs now seek to claim again with respect to the Woodleigh land.

81 Following execution of the terms of settlement in respect of the Supreme Court proceeding relating to the Woodleigh land, the plaintiffs sought to resile from them. On 1 September 1999, however, Beach J ordered specific performance of the terms of settlement.¹²

The Present Proceeding

82 The present proceeding arises out of the same matrix of fact as the two previous proceedings. At heart the plaintiffs contend that the actions of the Council in sealing and certifying the plans of subdivision for the Tylden land and in sealing and certifying plans of cluster subdivision for the Woodleigh land, were not simply unlawful (as has previously been contended in respect of the plans relating to the residential component of the Tylden land) but constituted acts of misfeasance in public office, to which the Water Board was also a party.

83 The Council and the Water Board have contended before the Master that the claim should be summarily dismissed:

- because it is the subject of previous releases; and/or
- because it is the subject of estoppel including *Anshun* estoppel and/or;
- because it is manifestly statute barred.

84 The Master accepted these contentions and I have also concluded that they should be accepted in part.

¹² With hindsight it can be said his Honour was somewhat optimistic to state: "In my opinion there is no reason in this case why the plaintiffs in this case should not be held to their agreement. Indeed, if one has regard to the age of the plaintiffs' cause of action and the nature of the plaintiffs' allegations, it is in my opinion high time that the proceeding was finally laid to rest.": *Thompson v Macedon Ranges Shire Council* [1999] VSC 338 at [11].

Relevant Principles

85 An appeal from the Master to a single judge of this Court is an appeal de novo. Rule 77.05(7) of the *Rules of the Supreme Court* provides:

"The appeal shall be by re-hearing *de novo* of the application to the Master but each party may, subject to any proper objections to admissibility –

(a) rely upon any affidavit used before the Master and upon any evidence given orally before the Master; ..."

86 Nevertheless, it is open to give weight to the Master's decision.¹³

87 In the present case, the firstnamed plaintiff appeared on the appeal in person. He put the appeal on the express basis that the claim was not correctly articulated by senior and junior counsel who appeared for the plaintiffs before the Master. Accordingly, I am invited by the plaintiffs to adopt a different framework of analysis than that considered and decided upon by the Master.

88 Conversely the defendants contend that I should give weight to the Master's decision and, in particular, the findings of fact made by him after extended argument and examination of the evidence over several days of hearing.¹⁴

89 In the event, I have sought to deal with the matter on the basis now put to me by the firstnamed plaintiff. This basis was elaborated in very detailed written submissions of some 117 pages. The central propositions were further elaborated in argument. I propose to deal with the matter on the basis that the case so elaborated is the case to be considered rather than that previously argued by legal representatives that the plaintiffs now disavow.¹⁵ This is not to say, however, that I have not found the Master's reasons to be of assistance.

90 The defendants contended before the Master:

¹³ *Southern Motors Pty Ltd v Australian Guarantee Corporation Ltd* [1980] VR 187 at 190.

¹⁴ Rule 23.04 of the Rules of the Supreme Court provides that on an application under Rule 23.01 evidence shall be admissible.

¹⁵ The Master's reasons contain a detailed analysis of the pleadings at [2]-[25].

- (a) that the proceeding constituted by the amended statement of claim was 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 be perpetrated by the legal process;
- (c) that this case is one which calls for the timely exercise of power to give summary judgment; and
- (d) the defendants are entitled to judgment in reliance upon both Rule 23.03 and Rule 23.01(1).¹⁶

91 The Master in his decision summarised the principles to be applied. He made reference to the judgment of Mason CJ, Deane and Dawson JJ in *Webster and Anor v Lampard*;¹⁷ the judgment of Kirby J in *Lindon v Commonwealth (No.2)*;¹⁸ and the judgment of Batt JA with whom Winneke P and Dodds-Streeton AJA agreed in *Camberfield Pty Ltd v Klapanis*.¹⁹ He accepted, as I do, that the defendants are entitled to summary judgment if it is inevitable that a trial court after a full hearing would find for the defendants, but that it must be very clear that the plaintiffs' case is destined to fail.

92 In the present case, there are two subsidiary principles which I regard as relevant. First, because the underlying conceptual basis of the power to give summary

¹⁶ Rule 23.03 provides:

"Summary judgment for defendant

On application by a defendant who has filed an appearance, the Court at any time may give judgment for that defendant against the plaintiff if the defendant has a good defence on the merits."

Rule 23.01(1) provides:

"Stay or judgment in proceeding

- (1) Where a proceeding generally or any claim in a proceeding –
 - (a) does not disclose a cause of action;
 - (b) is scandalous, frivolous or vexatious; or
 - (c) is an abuse of the process of the Court –
 the Court may stay the proceeding generally or in relation to any claim or give judgment in the proceeding generally or in relation to any claim."

¹⁷ (1993) 177 CLR 598.

¹⁸ (1996) 70 ALJR 541.

¹⁹ [2004] VSCA 104.

judgment is in significant part the necessity to avoid abuse of the process of the Court, the protracted and difficult history of prior litigation concerning the facts in issue in this case, encourages a careful and detailed examination of the question whether the action should be permitted to proceed further. The underlying notion of abuse of process was elaborated by Mason CJ, Deane and Dawson JJ in *Walton v Gardner*:²⁰

"The inherent jurisdiction of a superior court to stay its proceedings on grounds of abuse of process extends to all those categories of cases in which the processes and procedures of the court, which exist to administer justice with fairness and impartiality, may be converted into instruments of injustice or unfairness. Thus, it has long been established that regardless of the propriety of the purpose of the person responsible for their institution and maintenance, proceedings will constitute an abuse of process if they can be clearly seen to be foredoomed to fail. ... Yet again, proceedings before a court should be stayed as an abuse of process if, notwithstanding that the circumstances do not give rise to an estoppel, their continuance would be unjustifiably vexatious and oppressive for the reason that it is sought to litigate anew a case which has already been disposed of by earlier proceedings. The jurisdiction of a superior court in such a case was correctly described as by Lord Diplock in *Hunter v Chief Constable of the West Midlands Police* as 'the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people'." (Citations omitted.)

93 Further, the relatively detailed level of argument as to the proper analysis of the facts, which both the plaintiffs and the defendants have engaged in before me, should not preclude exercise of the power for summary judgment, if at its conclusion the salient facts are plain and their legal consequences unarguable.²¹ I respectfully adopt the words of Gillard J in *Bretherton v Kaye and Winneke*²² who said:

"Mr Wright [counsel for the plaintiff] ... has submitted that by the very nature and extensive range of the discussion and argument by counsel on this application (and presumably also after my having reserved judgment for a period of time to consider the authorities) how can it

²⁰ (1993) 177 CLR 378 at 392-393.

²¹ See Barwick CJ in *General Steel Industries v Commissioner for Railways NSW* (1964) 112 CLR 125 at 130.

²² [1971] VR 111 at 114 - 115.

be said that the plaintiff's case is so hopeless that it should not be allowed to proceed? ... Whilst this is a formidable argument, I am of the opinion the plaintiff cannot improve his position by allowing the action to proceed if, on the admitted facts, it does clearly appear that as a matter of law the occasion of Mr Winneke's opening to the Board should be ruled as one of absolute privilege." (i.e. the defence must succeed). (Citations omitted.)

The Core Submission

94 The plaintiffs' core submission is that they have issued the present proceedings in consequence of the realisation that the actions of the Council and the Water Board which led to the sealing of plans of subdivision with respect to the Tylden land and plans of cluster subdivision with respect to the Woodleigh land, were deliberately undertaken unlawfully with the intention that potential purchasers of the land might be deprived of protection which lawful actions would have accorded them.

95 Accordingly, the present proceedings are founded on allegations of misfeasance in public office.

"[37] The proceeding involves two subdivisions, one known as Tylden Road, the other as Woodleigh Heights. ...

[39] The most simple issue in respect to each subdivision is that with the knowledge and consent of the second defendant the first defendant sealed the plans of subdivision in full knowledge that the required services were not present and that there was no lawful means of compelling the subdivider, Buchanan, or anyone else to provide those services.

[40] The defendants fraudulently concealed the facts behind these issues during the period 1979 until discovered by me in August 2000 (sic)."²³

96 The plaintiffs contend that their apprehension of the true character of the defendant's actions arose as follows:

(a) As a result of reflecting upon the effect of s.9 of the *Sale of Land Act* 1962 ("the SLA")²⁴ the firstnamed plaintiff arrived at a "holistic view of the effect of such section."

²³ Plaintiffs' appeal submission paragraphs 37 to 40.

"...

- (c) On a holistic view the effect of s.9 is derived from 3 Acts:
 - (i) pursuant to s.9 [of the SLA] the sale of allotments on subdivisions consisting of three or more allotments is prevented until such time as the Registrar of Titles has approved the plans.
 - (ii) The Registrar of Titles in turn is prevented by s.97 [of the TLA] from approving the plans unless the plan is a plan in accord with the plan sealed by the Council and the plan is not subject to the provisions of section 569E.²⁵
 - (iii) The Council may only seal a plan if it is not prevented from doing so by the operation of section 569B(7) and pursuant to section 569E(3)(a) it must endorse the plan if the plan is subject to section 569E.
- (d) From this holistic view it is clear that the effect of s.9 is quite different from the apparent literal provisions. On

²⁴ Section 9 provided that where a notice of intention to subdivide land into three or more allotments had been given in the form of the 30th schedule to the LGA, or where in respect of any land such a notice was required to be given, no person should sell any such allotment, unless the land was under the operation of the TLA and the allotment was an allotment on a plan of subdivision approved by the Registrar of Titles pursuant to s.97 of the TLA. Any agreement for sale entered into in contravention of this provision was absolutely void and of no effect and any person who had paid money under such agreement was entitled to recover such money. Section 9 was subsequently amended by the *Sale of Land (Allotments) Act* No. 10216 of 1985.

²⁵ At the relevant dates, section 97(1) and (2A) of the TLA provided:

- “(1) Where any proprietor subdividing any land (including, without affecting the generality thereof, any building) into two or more parts is under this Division required by the Registrar to lodge a plan of such land the plan shall show clearly all roads streets passages thoroughfares squares reserves or easements (if any) appropriated or set apart for the use of proprietors and also all allotments into which the land is divided marked with distinctive numbers or symbols and the area of each allotment (where it contains 4000 square metres or more).
- (2A) The Registrar shall not approve any plan of subdivision to which the provision of s569 of the *Local Government Act 1958* apply unless –
 - (a) the plan is in accord with the plan sealed by the council of the municipality; and
 - (b) he is satisfied –
 - (i) that there has been no contravention of the provision of s9 of the *Sale of Land Act 1962*; or
 - (ii) if there has been any contravention –
 - that the contravention was due to inadvertence and that approval of the plan has been consented to by every person to whom there has been a sale of any allotment on the plan; or
 - whether or not the contravention was due to inadvertence, that approval of the plan has been consented to by an arbitrator appointed under the *Sale of Land Act 1962*. “

It was s.569E(3)(e) of the LGA which prevented approval by the Registrar of a plan subject to a s.569E requirement.

the holistic view the true purpose and effect is not to prevent sales until the Registrar of Titles approves the plans, but is instead to prevent the sale of allotments on subdivisions consisting of three or more allotments until such time as the plans have been lawfully sealed by the Council and the required services are present and the allotments are useable and then until such further time as the Registrar of Titles approves the plans pursuant to s.97.

- (e) On this holistic view avoidance of the effect of s.9 is facilitated or effected by the Council unlawfully sealing plans of subdivision in full knowledge that the required services are not present and that there is no lawful means of compelling provision of those services.
- (f) Once sealed in this manner the Registrar of Titles will approve the plans pursuant to s.97 and the developer is then free to sell the land in compliance with the provisions of s.9 but in certain avoidance of the obvious intended and holistic effect of s.9.
- (g) With the co-operation of a dishonest Council and a bargain between thieves a developer can avoid the effect of s.9 while complying with the literal provisions of s.9.
- (h) As discovered by me in August 2000 this is what happened in respect to both Tylden Road and Woodleigh Heights."²⁶

- (b) The plaintiffs submit that the apprehension of the holistic scheme of the legislation enabled the firstnamed plaintiff to properly characterise the defendants' actions.
- (c) The plaintiffs submit that this proper characterisation was triggered by consideration of:
 - Documents given to the plaintiffs by the defendants' counsel at the time of settlement of the County Court proceeding relating to the Tylden land in 1991; and

²⁶ Plaintiffs' appeal submission [62(c)-(h)].

- The content of a water reticulation plan viewed by the plaintiffs at the time of the settlement of the Supreme Court proceedings relating to the Woodleigh land in 1999.

97 It is submitted by the plaintiffs that the documentation before the Court demonstrates:

- (a) that the Council did not give the requisite notice requiring the provision of necessary services as a condition of certification of the Tylden Road plans of subdivision; and
- (b) a reticulated water supply was not provided to the Woodleigh land at the date of sealing of the initial cluster subdivision plans, as it was required to be pursuant to the planning permit authorising such subdivision.

98 The plaintiffs now contend that the defendants were involved in sequential frauds:

- "(m) As the facts become known from this my submission it will be seen that the Defendants perpetrated four separate but related frauds. Two in respect to Tylden Road and two in respect to Woodleigh Heights.
- (n) The first fraud, in respect to each subdivision was that with the knowledge and consent of the Second Defendant, for the purpose of facilitating avoidance of the effect of s.9 the First Defendant sealed the plans of subdivision in full knowledge that the required services were not present and that there was no lawful means of compelling the subdivider, Buchanan, or anyone else to provide those services.
- (o) The first and primary fraud in respect to each subdivision was a fraud against the State and all citizens including the Plaintiffs in that the act of sealing the plans and subdivision was a fraudulent representation to all people that the plans had been lawfully sealed and the subdivisions had been or would be completed according to law.
- (p) The secondary fraud in respect to each subdivision was for the purpose of facilitating the provision of the missing services by fraudulent means. In these instances due to the juxtaposition of circumstances these secondary frauds were specifically directed against my family and I as owners of the land, but could well have been directed against any person unfortunate enough to

rely upon the representations of the Defendants and then in reliance upon those representations purchase land situate in the districts of the Defendants.

- (q) The act of sealing the plans included an overt act of concealment of the fact of and the facts of the primary fraud.
- (r) The secondary frauds depended upon the continuing concealment of the primary fraud and the secondary frauds were in themselves acts of concealment of the primary and secondary frauds.
- (s) In respect to each subdivision the primary fraud forms the root of the present rights of action and the secondary frauds are consequential or dependent frauds which precipitated the loss and damage occasioned by the primary frauds.
- (t) In respect to the primary frauds at the root at the present rights of action, at paragraph 55(b) of my Affidavit of 18 October 2005 ('my first Affidavit'), I say *"My present cause of action is that the Council did in breach of its specific duty seal the residential series of plans and the industrial series of plans and the plans of cluster subdivision in full knowledge that the allotments thereby created were unusable due to a lack of services and in full knowledge that there was no lawful means to compel or cause construction of those services in order to make the allotments useable."*
- (u) In relation to Tylden Road the predicated facts giving rise to the primary fraud are found at paragraphs T3 to T12 of the present Amended Statement of Claim and are, in summary;-
 - (i) that on the 20th February 1980 the First Defendant resolved to issue a s.569E Notice in relation to the first residential plan and to serve it upon the owner of the Tylden Rd land, and;
 - (ii) that in furtherance of its malicious conduct the First Defendant omitted to issue and serve that s.569E Notice and did not further process the first residential plan to which it related, and;
 - (iii) The First Defendant then processed the series of residential plans and fabricated s.569E Notices in relation to that series of plans.
- (v) Consequently, for the reasons which I will shortly set out, lawfully issued and served s.569E Notices were the only means to compel construction of the services and as no such notice was either issued or served the Defendants were aware that there were no services present and "there was no lawful means to

compel or cause the construction of those services nor to make the allotments useable."

- (w) In relation to Woodleigh Heights the predicated facts of the primary fraud are found at paragraph W10 of the present Amended Statement of Claim and are, in summary, that the First Defendant sealed the plans of cluster subdivision in full knowledge that the private reticulated water supply which was described in the submission dated 3 November 1978 and referred to in paragraph W2 of the present Amended Statement of Claim and which water supply was required by law to be completed in 1979 had not been completed.
- (x) Consequently, for the reasons which I will shortly set out, at the time the cluster plans were sealed, there was no water supply present and once the plans of cluster supply were sealed, there was "no lawful means to compel or cause construction of those services in order to make the allotments usable."
- (y) In paragraphs T7 and W8 of the present Amended Statement of Claim it is alleged that the purpose of the primary fraud is to avoid the effect of s.9.
- (z) The allegation in respect to s.9 is the uniting allegation and element between the two parts of the present Amended Statement of Claim. This is a most serious allegation and the Defendants not only did, but would not, not conceal the facts giving rise to this allegation (sic).
- (aa) The fact that the 569E Notice was not served in relation to Tylden Rd and the fact that the water supply and reticulation system was not completed in respect of Woodleigh Heights are the only things pleaded which can give rise to the allegation in respect to s.9 of the *Sale of Land Act* and are the only things pleaded which cause a loss causing deficiency in the allotments.
...
- (bb) The secondary or dependant frauds are set out in the remaining paragraphs of the present Amended Statement of Claim."²⁷

99 Further, the firstnamed plaintiff hypothesises:

- "(f) The purpose and effect of the conspiracy was to facilitate the unlawful sale of allotments for the purpose of raising funds to complete the works necessary to make the allotments useable. Such conspiracies attracted and facilitated substantial development at Kyneton and I understand other local government municipalities.

²⁷ Plaintiffs' appeal submissions [42].

- (g) The method used had nothing to do with 2 lot plans of subdivision or any other form of unlawful plans.
- (h) As discovered by me in August 2000 and as I will describe a little later on the method used was for the First Defendant to seal plans of subdivision in full knowledge that the allotments so created were unusable because the required services were not present and there was no lawful means of compelling Buchanan or anyone else to provide those services.
- (i) The scheme relied upon a bargain between thieves so to speak, the bargain being between Buchanan and the Defendants. The bargain was that notwithstanding that there was no compulsion at law Buchanan would complete the services once having sold a few allotments and having thereby raised the capital to pay for the missing services. Buchanan in return or as a consequence would carry out development which may otherwise not occur."²⁸

100 He further submits:

"In the case of Tylden Road the secondary fraud by the Defendants was as now set out in the present Amended Statement of Claim and in summary was falsely misrepresenting that a s.569E Notice of Requirement had been served and that I was the owner liable at law to construct the services required by those s.569E Notices and in my default call upon my bank guarantees and construct the services at my cost.

In the case of Woodleigh Heights the secondary fraud was to induce the private company Woodleigh Heights Marketing Pty Ltd to complete the reticulation system and to reward that company by entering into the plainly illegal 1982 water supply agreement which purported to give control of the water supply within the subdivision to that company and to then do those additional things now set out in the present Amended Statement of Claim which ultimately resulted in interests associated with that company acquiring my land at a price which represented a value without access to water."²⁹

101 In relation to Tylden Road, I have come to the conclusion that the plaintiffs' current claim cannot succeed.

- (a) the claim with respect to the residential land was the subject of the release upon settlement of the County Court proceeding;

²⁸ Plaintiffs' appeal submissions [58].

²⁹ Plaintiffs' appeal submissions p.23.

- (b) the plaintiffs were aware of the facts now relied on in respect of both the industrial and the residential land at the time of the County Court proceeding;
- (c) there has been no relevant concealment of the facts by the defendants which would provide an arguable basis for avoiding the relevant limitation period;
- (d) all the facts now relied on were ascertainable upon the exercise of reasonable diligence since discovery in the Tylden County Court proceeding;
- (e) even if the primary claim of misfeasance in public office is itself characterised as one in fraud the limitations defence cannot be avoided.

102 In relation to the Woodleigh land, I have come to the conclusion that:

- (a) insofar as it is premised upon the plaintiffs' appreciation of the facts relating to the Tylden land it must also fail;
- (b) the fundamental contentions of the plaintiffs with respect to the nature of requirement for reticulated water supply at the date of the cluster subdivision and non compliance with such requirement should be rejected;
- (c) the history of the provision of water supply was pleaded by the plaintiffs in the Woodleigh Supreme Court proceeding, and there is no evidence of new facts discovered by the plaintiffs since at least 1987;
- (d) there is no arguable basis on which the limitation defence could be avoided;
- (e) the release given in the Woodleigh Supreme Court proceeding is a full and complete release with respect to the claim made in this proceeding;
- (f) the effect of the release is the subject of an issue estoppel.

Conclusions with Respect to Tylden Road

The Ambit of the Release

103 In my view the current claim with respect to the residential lots is covered by the release given in respect of the Magistrates' Court proceedings. Further the plaintiffs have received the payment contemplated by that release and accordingly the defendants have a defence of accord and satisfaction.³⁰

104 As I have indicated above, the amended statement of claim of May 1991 in the County Court proceedings specifically alleged that the Council did not serve or cause to be served on the subdivider any or any proper notice of requirements pursuant to s.569E(3) of the LGA. Further the claim made in the County Court proceeding was not only for the value of the guarantees provided at the request of the Council and Water Board but also for the loss of profit alleged to have resulted from the forced sale of the land to another developer. It is this loss which is in turn claimed in the present case. The plaintiffs claim "the difference between the value of the Plaintiffs' sale to Chelmantau and the Plaintiffs' reasonable expectations of sales upon the open market of the lots with services as reflected in the prices obtained for the allotments by Chelmantau."

105 This is now more precisely calculated by reference to the difference between the average price paid by Chelmantau and the average price obtained on sale. It is quantified as:

15 allotments x \$22,473 = \$337,105
Less proceeds of sale to Chelmantau 15 x \$6,666 = \$100,000
Nett loss \$237,105 plus interest.³¹

106 The release in the County Court proceedings was expressly related to "all claims, suits and demands, whatsoever the subject matter of this proceeding."

³⁰ "Accord and satisfaction is the purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative." See *British Russian Gazette and Trade Outlook Ltd. v Associated Newspapers Ltd* [1933] 2 KB 616, at 643-4 per Scrutton LJ; *Fraser v Elgen Tavern Pty Ltd* [1982] VR 398 at 400.

³¹ Such claim ignores holding costs and other incidental expenses, together with the settlement moneys previously received in respect of the same damage.

107 In my view the word "whatsoever" is sufficient to embrace any claim based on the
contention that no valid notice was given of requirements pursuant to s.569E(3), and
to block any further claim for, or equivalent to, the loss of profit on resale previously
claimed and in respect of which the plaintiffs have already received settlement
moneys.

The Plaintiffs' Awareness of the Facts Underlying the Present Claim

108 Section 5(1)(a) of the LAA states:

- "(1) The following actions shall not be brought after the expiration of
six years from the date on which the cause of action accrued –
 - (a) Subject to sub-sections (1AAA), (1AA) and (1A), actions
founded on simple contract (including contract implied by
law) or actions founded on tort including actions for
damages for breach of a statutory duty;"

109 The plaintiffs' claim is one in tort for misfeasance in public office.

110 Further, on any view, the plaintiffs' cause of action accrued more than six years prior
to the issue of the current proceedings. Indeed, it would seem that if the plaintiffs'
case were accepted, they first suffered damage as a result of misfeasance in public
office more than 20 years ago.

111 In order to overcome s.5(1) the plaintiffs seek to invoke s.27 of the LAA which states:

- "Where, in the case of any action for which a period of limitation is
prescribed by this Act –
 - (a) the action 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 right of action is concealed by the fraud of any such person
as aforesaid; 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."

112 The plaintiffs contend that the relevant right of action has been concealed by the
fraud of the defendants.

113 Master Efthim summarised the thrust of the firstnamed plaintiff's primary affidavit
as to the background to this aspect of the matter as follows:

"35. Mr Thompson, in order to demonstrate that his action has not
been statute barred, has sworn in his first affidavit as follows:

- He initiated proceedings in the County Court in 1988 in relation to the Tylden Road land to recover moneys mistakenly paid pursuant to bank guarantees. He also claimed damages for losses occasioned by the mistaken calling up of the bank guarantees.
- On the second day of the hearing, the Defendants made an offer of \$40,000.00 to settle the matter and he agreed. terms of settlement were drawn. At the time of signing the terms of settlement counsel for the Defendants handed to Mr Thompson a large black folder containing copies of various documents. He took this material home and gave it a cursory glance but because he considered the matter to an end, did not look at the contents until August 2000.

During the period from 1985 until 1989, the Defendants refused to allow him access to the relevant files. In March 1995, he was finally granted access to files and upon reviewing these files he issued 1995 proceedings against the Defendants in relation to the Woodleigh Heights land.

- In 1999, those proceedings were settled at mediation and it was agreed that the Defendants pay \$25,000.00 to the Plaintiffs by a particular date. Mr. Neville, solicitor, accompanied Mr. Thompson at the mediation but was not instructed to act.
- The Defendants issued proceedings in the Practice Court of this Court seeking specific performance of the terms of settlement. Mr. Thompson was ordered to perform the terms of settlement by Beach J.
- He did not appeal against the decision because during the course of the Practice Court hearing, the Defendants showed Mr. Thompson a reticulation plan for the subdivision. This plan seemed to Mr. Thompson to be fatal to any prospects of ultimate success after appeal.

- In August 2000, Mr. Thompson for the purpose of preparing a defence and counter claim against the First Defendant in respect to a rates claim brought by the First Defendant, began reviewing all the documents available to him. Upon examining the documents within the black folder (given to him in 1988 [scil 1991]), it became apparent to him that there were two versions of plans for the industrial allotments of the Tylden Road subdivision, namely complete versions and clipped versions. The clipped versions had been clipped in the copying in such a manner as to remove or omit the identifying number which was present on the complete version.
- He noticed that the black folder also contained copies of residential series of Tylden Road plans and those plans had also been clipped and he recognised the clipped plans to be identical to those which had been admitted into evidence in the Magistrates' Court proceeding in the Court of Appeal (seeking payment under the guarantee in 1987)."

114 According to his primary affidavit the firstnamed plaintiff then reflected on the Magistrates Court proceedings, and states:

"(i) In the Magistrates Court, a bundle of documents was tendered which contained, inter alia, the following documents:-

- (1) A large plan showing all of the residential allotments and the complete road. ...
- (2) The three plans comprising the Industrial series of plans none of which show all allotments and all of which have been clipped in the manner described above. ...
- (3) The seven plans comprising the Residential series of plans none of which show all allotments and all of which have been clipped in the manner described above. ...
- (4) Council minutes for 20th February 1980 containing at item 8 a minute of resolution that the Council serve Notice of Requirement on the subdivider in relation to the subdivision referred to in items 8(a) and 8(b) of the Engineers Report of 20th February 1980. ...
- (5) Engineers report of 20th February 1980 containing:-
 - (a) at item 8(a) a reference to a 16 lots plan of subdivision owned by Buchanan (note the reference to 16 is a typographical error and should be 18). ...

(b) at item 8(b) a reference to a 6 lot plan of subdivision (industrial) owned by Buchanan.

(6) Copy of a Notice of Requirement dated 20th February 1980 and bearing the plan reference number 79305/G and a statement that the plan referred to was lodged with the Council on 12th February 1980 and a statement that the Notice of Requirement related to the road shown on the plan. ...

(ii) With reference to the bundle of documents and in particular the documents identified above Graeme Wilson gave evidence inter alia, :-

(1) That the Council had approved a planning permit for the Tylden Rd subdivision permitting 18 residential allotments and 6 industrial allotments.

(2) that the large plan and the series of plans were all filed with the Council of 12th February 1980.

(3) That the Council considered the large plan on 20th February 1980 and resolved to issue and serve on the developer a notice of requirement in relation to the roads shown on the plan and for the provision of water.

(4) That pursuant to the resolution of Council the Council did serve on the developer the Notice of Requirement dated 20th February 1980.

(5) That the large plan was processed in seven parts, those parts being sealed by Council on 21st May 1980 with a road-making endorsement placed thereon.

d) Upon further examination and close reading of the documents it became apparent that the Notice of Requirement which had been admitted into evidence in the Magistrates Court and in the Supreme Court of appeal and which was discovered in the County Court proceeding contained the reference number 79305/G which was sequentially similar to the numbers disclosed on the non clipped versions of the Industrial Plans.

e) From this I was able to deduce that the Notice of Requirement tendered in evidence in fact related to one of the residential series of plans and not to the large Plan ... and which large plan showed the whole of the residential allotments and the whole of the road to be constructed.

f) As a result of perusing the documents in the black folder ... and reviewing the documents tendered in the Magistrates Court and the evidence given by Wilson in that Court I came to a number of conclusions. Those conclusions were:-

i) As the residential series of plans were filed with the Council on or after the 4th March 1980 the Notice of Requirement given in evidence had been falsely dated 20th February 1980. ...

ii) The plan of subdivision considered by the Council on 20th February 1980 had been abandoned by both the Council and Buchanan and not further processed. The seven plans comprising the residential series of plans were processed in substitution.

iii) That the Notice of Requirement had in fact been fabricated and that Wilson's evidence in the Magistrates Court could not be correct.

115 As I have already noted the amended statement of claim served in the Tylden County Court proceeding expressly alleged:

- (a) There were no proper or sufficient notices given by the subdivider pursuant to s.569(1) of the LGA in respect of the plans of sub-division pursuant to which lots purchased by the plaintiffs were created;
- (b) Such plans including plan 79305G did not show at all or show clearly all new streets and roads required to be made in connection with the sub-division; and
- (c) The firstnamed defendant did not serve or cause to be served *any* or any proper requirements with respect to the making of such roads pursuant to s.569E(3)(b).

116 It seems to me that it is clear that at the date of this document in May 1991 the plaintiffs were fixed with knowledge of what is now said to be the central fact namely that valid notices of requirements were not served pursuant to s.569E(3)(b) in respect of the relevant lots.

117 Longstanding knowledge of this fact is further confirmed by a book of pleadings discovered in the Tylden County Court proceeding by the plaintiffs and containing handwritten notations by the firstnamed plaintiffs . As Master Efthim observed, it is clear these notes were made prior to 1993. Master Efthim further highlighted the relevant extracts from the document in his decision which I shall amplify:

Page 2

- *'On 12 February 1980, Buchanan lodged a notice to the effect of the 13th schedule of the LGA.'*

Page 5

- *'Notwithstanding that it was illegal Buchanan has sold at least 2 of the allotments ... 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 subdivision of more than two allotments etc. Buchanan then lodged seven separate plans which were contrived to create several subdivisions of two lots each.'*

Page 6

- *'Buchanan lodged 30th schedule notices in relation to these new contrived plans.'*

Page 7

- *'The Council served a separate 'Notice of Requirement' in relation to each of the contrived plans which were numbered 79305E-79305K. The Notices of Requirement were dated 20/2/80 but served by registered mail of 6/3/80 ie 2 days after the contrived plans were lodged.'*

Page 8

- *'Although Buchanan thought that 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.'*

Page 10

- *'Buchanan therefore approached the Council' (that notation is on a letter written by Mr Buchanan to Mr Wilson, Shire Engineer of the Shire of Kyneton. The last paragraph of that letter states 'Would it be possible for approval to be given at the next Council meeting to accept the bank guarantees so that the requirement on the subdivision may be lifted'.)*

Page 14

- *'At the time of providing the guarantee I had the reasonable expectation that the Council and Water Trust would only accept the guarantees in relation to a legally enforceable agreement between themselves and Buchanan or a legal requirement upon Buchanan.'*

Page 15

- *'As I now know the Council and the Water Trust accepted the guarantees for the purpose of giving effect to the unlawful intention indicated in Council's letter of 7 May 1980 which was an intention to act in breach of Section 569E(3)(a) of the LGA.'*

Page 17

- *'The Council however always intended that the requirements were "secretly still on foot"....But without authority of law' (Here there is knowledge of alleged covert or secret activity).*

C3

- *'The claim was derived from the evidence of the Shire Engineer's given at the Bendigo Magistrates' Court.'*

C4

- *'Discovery however indicates that the Council's evidence at Bendigo was false. Discovery reveals that the "relevant" 30th schedule notices were dated 4th March 1980.'*

C6

- *'I think it is significant that Mr Wilson did not evidence a 30th Schedule Notice at the Bendigo Magistrates court. To have done so would have shown that the "Notices of Requirement" predated the 30th Schedule Notices which is impossible.'* (Precisely the point now made)

C12

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

C15

- *'Subsequently upon receipt of my guarantee Council gave effect to its original intent by lying to the Registrar of Titles'.*

118 These extracts demonstrate that the plaintiffs were well aware as at the date of the annotations (prior to the delivery of the amended statement of claim in the County Court proceeding) that:

- (a) The Council served separate notices of requirement in relation to each of the 'contrived' plans which were approved being 79305E to 79305K.
- (b) The notices of requirement were dated 20 February 1980, but were served by registered mail on 6 March 1980 (two days after the contrived plans were lodged).
- (c) The relevant 30th schedule notices were dated 4 March 1980 i.e. post dated the purported requirement of 20 February 1980.
- (d) There was no notice of requirement served or pursued in respect of the original proposal to subdivide the whole of the land

pursuant to global plans of subdivision for industrial lots and residential lots respectively.³²

119 The critical deduction which the firstnamed plaintiff says he made in 2000 at paragraph 53(e) of his primary affidavit was in fact made by him in or prior to 1993. I do not accept that the documentary evidence permits the conclusion that it was in 2000 that he first understood as follows:

"From this I was able to deduce that the Notice of Requirement tendered in evidence in fact related to one of the residential series of plans and not to the large Plan referred to in paragraph 53(c)(i)(1) of this affidavit and which large Plan showed the whole of the residential allotments and the whole of the road to be constructed."

120 The conclusions said to have been reached in 2000 in paragraph 53(f) of the firstnamed plaintiff's primary affidavit were in fact reached by him by 1993. I do not accept that the documentary evidence permits the conclusion that it was in 2000 he first understood as follows:

"As a result of perusing the documents in the black folder referred to in paragraph 26 of this affidavit and reviewing the documents tendered in the Magistrates' Court and the evidence given by Wilson in that Court I came to a number of conclusions. Those conclusions were:-

- i) As the residential series of plans were filed for Council on or after 4th March 1980 the Notice of Requirement given in evidence had been falsely dated to 20th February 1980. ...
- ii) The plan of subdivision considered by the Council on 20th February 1980 had been abandoned by both the Council and Buchanan and not further processed. The seven plans comprising the residential series of plans were processed in substitution.
- iii) That the Notice of Requirement had in fact been fabricated and that Wilson's evidence in the Magistrates' Court could not be correct."

121 It follows that I do not accept that there is an arguable case that the plaintiffs became aware of relevant facts in 2000 of which they had not previously been aware in or before 1993.

³² These facts embrace what the firstnamed plaintiff characterised in submission as the "essential components" of the claim at p.31 of the plaintiffs' appeal submissions.

122 Further in my view the "holistic" view of s.9 of the SLA put forward by the plaintiffs adds nothing of relevance to the self-evident proposition that unless notices were validly given under s.569E(3) LGA, no effective requirement would be imposed on the owner/subdivider.³³

123 Indeed the better view is that s.9 of the SLA was primarily directed to avoiding the possibility a series of terms contracts could come into existence, with respect to one lot in a plan of subdivision when there was no certificate of title available to that particular lot.³⁴

124 It was s.569E(3)(e) of the LGA which prevented approval by the Registrar of a plan of subdivision when a valid s.569E requirement was not stated to be complied with.

Concealment

125 There is a further fundamental problem confronting the plaintiffs' case as to fraudulent concealment of relevant facts.

126 The black folder comprised documents discovered in the County Court proceedings. In this regard I accept the conclusions of Master Efthim at paragraphs [53] and [54] of his decision.

"53. It is clear from Mr. Thompson's first affidavit that critical documents from the black folder which led to this matter being

³³ This is not to deny that the provisions of the LGA were relevant to the mischief the SLA sought to address. Voumard, *The Sale of Land in Victoria*, 4th ed. states at 553:

"Also because of defects in the provisions of the Local Government Act relating to the sale and conveyance or transfer of land, subdividers frequently accepted deposits and sold land before the plan of subdivision was sealed by the local municipal council. They proceeded in the expectation that the plan would be sealed within the time prescribed by the *Local Government Act*. In most cases as this period proved to be unrealistically short, their hopes were not fulfilled and in the terms of the legislation the contract became void and of no effect. Any person who had paid any money under such an agreement was entitled to recover the amount he had paid.

However, often by the time a purchaser realised that his contract was void and sought a return of his deposit his vendor had become insolvent or disappeared. Where purchasers had resold the land there could be in existence numerous contracts which in themselves were not void but were dependant upon a contractual transaction which had become void."

Further, as Voumard points out, the LGA did not require investigation of title by councils, before plans of subdivision were sealed.

³⁴ See Voumard, *The Sale of Land in Victoria*, 4th ed., 553.

further litigated are the complete version of the plans of the industrial allotments of the Tylden Road subdivision. In relation to these claims, I note that Michelle Elizabeth Dixon, solicitor for the First Defendant, has sworn she has reviewed the documents discovered by the First Defendant in the Tylden Road proceedings heard previously. Each of the documents described by Mr. Thompson as the complete plans were discovered by the First Defendant in the Tylden Road proceedings as discovered document number 4 in its supplementary affidavit sworn 23 May 1989. She also swears that the clipped versions of the plans were also discovered. In addition it appears from correspondence that Neville & Co. solicitors acting on behalf of Mr. Thompson requested and were provided with a copy of all the documents discovered by the First Defendant by supplementary affidavit of documents other than document No. 9 (which was not requested by them). Complete versions of plans was therefore provided to Neville & Co.

Mr Edward, solicitor, for the Second Defendant swore that he undertook inspection of documents discovered by the Plaintiffs in earlier proceedings those documents include a copy of the complete version for the plans for industrial allotments.

54. Based on the material before me there has been nothing concealed from Mr Thompson. The documents contained in the black folder had been previously discovered to Mr Thompson."

127 It cannot be that to voluntarily provide copies of discovered documents to the firstnamed plaintiff at the time of the settlement of the proceeding in 1991, was to conceal the facts (even though the firstnamed plaintiff says he was given the folder to hold on 14 June 1991 and took it home accidentally).

128 Insofar as the documents demonstrate actions now complained of, those actions have not been concealed. They were voluntarily disclosed to the plaintiffs at least 15 years ago.³⁵

129 The significance of the documents in the black folder is said to be that in reflecting upon them the plaintiffs realised that plans may have been "clipped" to conceal the fact that requirements were made with respect to parts only of the roads within the subdivision as a whole. I interpolate that there is an obvious innocent explanation

³⁵ cf *Mann v The Commonwealth* [2001] NSWCA 236 in which facts were disclosed to the plaintiff by an affidavit in a prior proceeding.

for the clipping complained of, namely that the plans were "clipped" in order to fit conveniently on to an A4 sheet during photocopying. Nevertheless if as the plaintiffs assert, such photocopying was undertaken in order to mislead the Magistrates' Court, then the underlying facts were made clear by documents discovered in the County Court action and given to the firstnamed plaintiff at the conclusion of such action. That they were understood prior to 1991 is shown both by the annotated pleadings and amended statement of claim produced in the course of the County Court proceeding.

Alleged Fraud in the Conduct of the County Court Action

130 The firstnamed plaintiff contends that the manner in which the County Court proceedings were conducted by the defendants, was fraudulently misleading as to the facts of the matter. I do not accept this for reasons I have already stated. First, the amended statement of claim and annotated book of pleadings prepared by the firstnamed plaintiff during the course of the County Court proceedings, demonstrates that he was aware of the critical facts upon which he now relies. Secondly, the voluntary disclosure of the documents upon which he now relies as demonstrating the true course of events, cannot be characterised as fraudulent. Such documents were disclosed first by discovery and secondly by personal delivery.

Fraud as the Basis of the Claim

131 It may be, however, that the plaintiffs can circumvent the requirement to demonstrate fraudulent concealment pursuant to s.27(b) of the *Limitation of Actions Act* ("LAA"), by putting the case pursuant to s.27(a). It is arguable that a case of misfeasance in public office is itself a claim in "fraud" within the meaning of subsection (a).³⁶

132 For present purposes it is sufficient to say the tort of misfeasance in public office will be committed where damage is suffered as the result of an ultra vires act done by a public officer:

³⁶ *Tahche v Abboud (No 1)* [2002] VSC 36 at [40] – [41].

- (a) which he does with the intention of causing harm to the plaintiffs or
- (b) which he knows or ought to know is beyond power; and which involves a foreseeable risk of harm to the plaintiffs.³⁷

133 It is a deliberate tort in the sense that there is no liability unless either there is an intention to cause harm or the officer knowingly acts in excess of power,³⁸ or at the very least, the acts are done with reckless indifference as to the invalidity of the act and likely injury.³⁹

134 In this sense it involves an element of statutory "fraud".

135 Fraud in the sense used in s.27(a) of the LAA may be understood in the sense it has been held to be used in s.27(b). In this regard it is sufficient to cite the views expressed by Warren J (as she then was) in *Di Sante v Camando Nominees*⁴⁰ who stated at paragraphs [51] to [53]:

"[51] In New South Wales equivalent provisions to s.27 of the Victorian statute are contained in s.55 of the Limitation Act 1969. In considering the New South Wales provisions in *Hamilton v Kaljo & Ors*⁴¹ 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*⁴². There, Mahony 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 in many things, the problem of dealing with the person who 'closes his eyes to wrong' or

³⁷ *Northern Territory v Mengel* (1995) 185 CLR 307 per Mason CJ, Dawson, Toohey, Gaudron and McHugh JJ at 345-348.

³⁸ *Ibid* at 345-347.

³⁹ *Ibid* per Brennan J at 357 and Deane J at 370.

⁴⁰ [2000] VSC 211.

⁴¹ (1987) 17 NSWLR 381.

⁴² (1996) 40 NSWLR 358.

is so lacking in conscience that he is not conscious of his own lack of proper standards).'

[52] A similar view was expressed in *Grahame Allen & Sons Pty Ltd v Water Resources Commission*.⁴³

[53] 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. ..."

136 In the present case the plaintiffs allege that the defendants acted maliciously, intending to cause harm to the plaintiffs, or to a class of persons including the plaintiffs, and in the alternative acted unlawfully with reckless disregard to the possibility their conduct would cause harm to the plaintiffs or to a class of persons including the plaintiffs.

137 It follows that it is arguable that the plaintiffs' claim falls within s.27(a) of the LAA.

138 If this view be taken however, the plaintiffs faces similar difficulties to those with respect to the s.27(b) case. The matters I have canvassed above demonstrate that the Plaintiffs were aware of the fraud of the Defendants or their agent by 1993. By that date the Plaintiffs knew the Defendants had issued invalid s.569E Notices of Requirement with respect to parts of the Tylden land:

- (a) when notice of intention to subdivide had been given with respect to the whole of the Tylden Land by way of global plans of subdivision;
- (b) when the plans of subdivision the subject of such notices of requirement included parts only of the roads necessary for the whole of the subdivision;
- (c) when the Notices of Requirement were backdated to prior to the lodging of the 'contrived' plans of subdivision and were so backdated to the date of resolution to impose Notices of Requirement on the global plans of subdivision.

⁴³ (2000) 1 Qd. R 523.

139 By 1993 the Plaintiffs were aware of the facts as pleaded in the Amended Statement of Claim at T11 and T12:

“T11. Prior to sealing the series of industrial Plans and the series of residential plans on 21st May 1980, the Council ... caused to be placed upon each of the plans in the series of residential plans and also upon each of the plans in the series of industrial plans an endorsement in the following terms:

‘A requirement under s(1) & s(1A) of s569E of the Local Government Act 1958 has been made by the Council of the Shire of Kyneton in respect of this plan of subdivision.’

By so endorsing the said plans, the council purported to be complying with its statutory duty under s569E(3)(a), notwithstanding that it well knew or was recklessly indifferent to the fact that no valid s.569E notices had ever been served upon Buchanan between 18th September 1979 and 20th February 1980, in respect of the land described in either the series of industrial plans or the series of residential plans, so as to lawfully entitle the Council to make the said endorsements.

T12. Maliciously, in purported compliance with s.569E, intending to cause harm to the Plaintiffs or to a class of persons which included the Plaintiffs, and to lend verisimilitude to the unlawful manner of its approval of the subdivisions referred to in paragraphs T7 and T8 the Council fabricated Notices of Requirement. The Notices purported to have issued on 20th February 1980. The Council well knew that there was no lawful basis for the issue of Notices.”

140 Further the Plaintiffs face a final difficulty. This is that if, as the firstnamed plaintiff contends, the relevant documents demonstrate a course of conscious unlawful conduct, such documents and such course were readily discoverable by the exercise of reasonable diligence.

141 Thus if I am wrong in the conclusion that the amended statement of claim in the County Court proceedings, together with the annotated book of pleadings prepared by the firstnamed plaintiff in the context of such proceeding, demonstrate knowledge of the relevant facts and of the critical inferences the plaintiffs seek to draw from them, then such facts were discoverable and such inferences were capable of being drawn by the exercise of reasonable diligence at any time after 1991. If the firstnamed plaintiff is to be believed, what the plaintiffs did was to fail to properly inspect discovered documents and then put the black folder in a cupboard for almost

10 years, until it seemed appropriate to the firstnamed plaintiff to reconsider the facts, with a view to devising a defence to a claim by the Council for rates. This is not the exercise of reasonable diligence with respect to the discovery of the critical facts.

142 I reject the plaintiffs' submission:

"In the absence of a visible force labelled 'gravity' and in the absence of a poorly copied plan marked 'clipped' and in the absence of the holistic view of s.9 it is not open to any person to say when a confluence of concepts in time leading to a conceptual realisation of either gravity or clipped plans should or could have occurred."⁴⁴

143 I am satisfied that by the date of completion of the County Court proceedings the firstnamed plaintiff understood the sequence of unlawful actions which the defendants and a Council officer had undertaken with respect to the subdivision of the Tylden land. Further I am satisfied that even if this were not so, the documents discovered in the County Court action and personally delivered to the firstnamed plaintiff upon settlement, enabled the discovery by the exercise of reasonable diligence of the essential facts now relied on. Accordingly, there is no answer to the limitation of actions defence.

The Woodleigh Land Conclusions

Consequential Awareness

144 In the first instance the firstnamed plaintiff contends that his understanding of the character of the defendants' conduct with respect to the Woodleigh land, flowed from his understanding of the character of the defendants' conduct with respect to the Tylden land. Insofar as this is so, it falls with the limitation defence in respect of the Tylden land.

⁴⁴ Plaintiffs' appeal submissions p.47.

The Nature of the Requirement for Water Supply

145 The *Cluster Titles Act 1974* provided parallel provisions to those of the *Local Government Act* with respect to the sealing of plans of cluster subdivision. Section 6 provided:

- "(1) A plan of cluster subdivision shall not be sealed by the council unless –
 - (a) there is in operation in respect of the parcel a planning scheme or interim development order within the meaning of the *Town and Country Planning Act 1961*; and
 - (b) the cluster subdivision is permitted by or under the planning scheme or interim development order.
- (3) The sealing by the council of a plan of cluster subdivision shall be conclusive evidence that there has been no contravention of this section with respect to the sealing thereof."

146 The plaintiffs submit:

- "(a) The principle (sic) predicated fact in relation to Woodleigh Heights is that the water mains comprising the reticulation system were not completed in 1979 but were in fact laid in 1982.
- (b) These water mains comprised a component part of the private water supply and reticulation system and in the absence of that component part there was no private reticulated water supply present in 1979 as was required by law.
- (c) I learned that the principle (sic) water main for the reticulation system were laid in 1982 and not 1979 when I was shown a reticulation plan during a break in proceedings in the Practice Court in 1999."⁴⁵

147 As the plaintiffs' further amended statement of claim in the Woodleigh Supreme Court proceeding, made clear, the original planning permit did not require the supply of a reticulated potable water supply for the land as a condition of subdivision. Further, as that pleading also made clear and the documentary evidence confirms, a reticulated potable water supply was in fact connected to the subdivision by the Water Board in 1982, but not extended to the plaintiffs' allotments.

⁴⁵ Plaintiffs' appeal submissions [65].

148 It was this latter water supply to which the plaintiffs were denied access. This denial
formed the gravamen of the Woodleigh Supreme Court proceedings.

149 The reticulation plan which the firstnamed plaintiff says he was shown during a
break in proceedings in the Practice Court in 1999, was not produced in evidence
before me.

150 The firstnamed plaintiff states in his primary affidavit:

"40. I elected not to appeal because:

(a) during the course of the Practice Court hearing the
Council and Water Board showed me a reticulation plan for the
subdivision. The plan clearly showed that the principal water
mains were in fact laid in 1982 and not in 1979 as alleged by me
and, on my understanding, as required by law. At the time of
swearing this affidavit the [sic] I have been unable to locate a
copy of this plan but crave leave to file and serve a copy prior
to hearing."

151 The absence of the document relied upon is a serious gap in the plaintiffs' case. The
firstnamed plaintiff effectively invites the Court to proceed on the basis of an
inference he says he has drawn from a plan, in circumstances where the capacity to
draw an inference of the type postulated basis cannot be evaluated.

152 I am satisfied, moreover, that the overwhelming probability is that any plan shown
to the firstnamed plaintiff in 1999, described what was done in 1982, namely the
provision of a reticulated potable water supply to the cluster subdivision. It was
after all denial of access to this water supply which was the basis of the plaintiff's
actions.

153 Such provision was of no relevance to the requirement imposed by the permit for
subdivision, which was to provide a non potable supply as part of the development
of the cluster subdivision.

154 If it is accepted for present purposes, as the plaintiffs submit, that, a precondition to
the grant of building permits on the Woodleigh Heights allotments, was that the
allotments be serviced by an approved reticulated water supply (from the Water

Board), such a requirement was not a stipulation of the original planning permit. Indeed the water supply proposal endorsed by the submission incorporated into the planning permit conditions proceeded on an entirely different basis.

155 There is no evidence whatsoever that the provision of a non potable water supply was not made in accordance with the terms of the permit by the date of cluster subdivision.⁴⁶ If, however, such infrastructure was incomplete (i.e. present but for mains, as it appears the plaintiffs now believe) and should not have been accepted by the Council as complete, there is no evidence whatsoever from which it could be concluded that such acceptance was due to misfeasance rather than incompetence. Insofar as the Water Board is concerned, it should also be said, that acceptance of the provision for non-potable water supply pursuant to the permit, had nothing to do with the statutory functions of the Water Board.

156 Further, I would add for completeness, that I am satisfied the plaintiffs' case is premised on a misreading of the relevant planning permit. The application for permit which is in evidence was in fact one both to subdivide the land and *to use the land for the purpose of a detached house on each allotment*. The application was put forward on the following basis:

"The current IDO in force in the area allows for a minimum three acre subdivision in areas under the control of the Kyneton Water Works Trust and the water available and six acre minimum subdivisions in areas where no water is available. This application seeks by supplying its own water to comply with the spirit of a three acre minimum provisions and utilises the precedents established by schemes subdivided under the *Cluster Titles Act* whereby slightly greater densities than normally in force in the area are allowed because of the more efficient planned usage possible under that Act.

Thus it is held that two acre allotments with 30 acres of private open space and an integrated pedestrian system is a preferred usage of the

⁴⁶ Plaintiffs' appeal submissions vol. 2, p.28 stated the "sole reason" the plaintiffs contend no water supply was provided in accordance with the permit, is the evidence of supply of reticulated potable water in 1982. In argument, the firstnamed plaintiff submitted the Council admitted that the water supply required by the permit was not installed. It is apparent that the Council's submissions upon which he relied are limited to the fact of the reticulated supply of potable water in 1982. They suffer from the same defect as admissions as the firstnamed plaintiff's assertion that he has seen a plan showing the 1982 reticulation. The question for me is not what was done in 1982 but what was done in 1979.

land than either three acre lots or six acre lots with no open space provisions and, in the current usage, no reticulated water or fire fighting system, no communal areas for construction of tennis courts or other facilities, no water storage for recreational purposes or for usage during a prolonged drought, and once the six acre lots are fenced, no areas that would provide an opportunity for continued habitation by native wildlife.

The provisions of the *Cluster Titles Act* 1974 cover all the usages sought by this application and a copy of the relevant section of the *Town and Country and Planning Act* is included herein."⁴⁷

157 It is apparent the application was not for conventional subdivision in accordance with minimum areas fixed by reference to water supply. Rather, it was for a cluster subdivision with site specific communal provisions. The application was not one which put forward, an "approved reticulated water supply for the purposes of the Shire of Kyneton Planning Scheme."⁴⁸ It was expressly put forward that the cluster subdivision would not meet the minimum required in this regard for conventional subdivision.

158 Ultimately the planning permit to subdivide and for "cluster type development including water/open space" was granted on the following conditions:

- "1. Allotments only to be used for pastoral purposes, excluding piggeries, kennels and poultry farms, without the prior permission of Council.
2. All dwellings to be constructed are to be of 1,000 square foot (90 square metres) in an area.
3. Allotments are not to be cleared and timber felled without the prior permission of Council.
4. That private streets and drainage are constructed at the cost of the subdivider to the stage of 18 foot sealed pavement and accord with plans and specifications prepared by the subdivider and approved by Council.
5. The prior approval of the Council of all waste disposal systems pertaining to the proposed dwelling.

⁴⁷ The IDO tendered in evidence and relied on by the plaintiffs does not in fact contain the provisions referred to, but I accept for present purposes that they were in force at the relevant time. The Amended Statement of Claim in the present proceedings alleges that the subdivisional minima constituted a "planning policy".

⁴⁸ Plaintiffs' appeal submissions p.36.

6. The corporate body shall be responsible for the proper maintenance of all private facilities including water, private roads and open space to the satisfaction of Council.
7. Delete Melvin Drive from eastern boundary of Lot 10 Eastwood and replace with Fire Access easement.
8. The development to be carried out in accordance with the plans and subdivision which formed part of this application."

159 The plaintiffs do not challenge the validity of the permit but rely on its terms.

160 In my opinion the reference to the development in condition 8 is in fact a reference to the cluster type residential development forming a part of the subject matter of the permit. Condition 8 does not impose a requirement which must be met prior to the sealing of the plans of subdivision. The permit conditions and in particular conditions 1 and 3 make clear that in the first instance the allotments could not be cleared or used for purposes other than pastoral use, without the further permission of Council. Nevertheless, it was envisaged that the cluster type development would result in time in the construction of dwellings. Condition 8 imposed a precondition to use of development upon the land not upon the subdivision of the land.

161 Mr Thompson submitted to me that the condition was intended to ensure the lots were "useable". The difficulty with this proposition is that in the first instance the permit clearly envisaged the lots would not be used for other than pastoral purposes. Conversely they could not be used for residential purposes without a prior secondary permission.

162 In my view the effect of the water supply conditions is plain and it is not that for which the plaintiffs contend. It should also be noted, however, that even if the construction which I prefer is regarded as being no more than reasonably open to the Council, then the inferences the plaintiffs seek to draw as to deliberate bad faith in sealing the plan cannot be drawn.

163 In summary:

- (a) The permit did not require provision of a reticulated potable water supply by the Water Board or at all;
- (b) The permit did require secondary approval for commencement of residential use subsequent to subdivision;
- (c) The permit did not require completion of the reticulated non-potable water supply as a condition of subdivision;
- (d) Nevertheless, there is no evidence the non-potable water supply was not fully installed in 1979;
- (e) Evidence of installation of a reticulated potable water supply in 1982 is not inconsistent with the prior installation of a reticulated non-potable water supply.

Alleged Discovery of New Facts Relating to the Woodleigh Land

164 Not only am I satisfied that the plaintiffs' case with respect to the Woodleigh land is premised on a series of misconceptions. I am also satisfied that the plaintiffs have produced no evidence of facts not known prior to the settlement of the Woodleigh Supreme Court proceeding.

165 That this is so is demonstrated by the amended statement of claim in the Woodleigh Supreme Court proceeding which I have analysed above at [63] and which adverted to the fact of a water agreement between WHRD and the Water Board. The relevant amended statement of claim was dated 17 March 1999. The present proceeding was not instituted until 31 May 2005.

166 Further, the agreement between the Water Board and WHRD "for the supply of water to the whole of the Woodleigh Heights subdivision" dated 1 January 1982 was discovered on 15 April 1998 by the Water Board in the Woodleigh Heights Supreme Court proceeding. 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 authorised 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."

167 I accept the plaintiffs' submission that this is an agreement for the supply of (potable) water to the Woodleigh land.

168 I also observe, however, that water supply pursuant to the agreement could not simply be connected to the non-potable system of mains envisaged by the original permit (as the firstnamed plaintiff appears at one point in time to have assumed) if only because:

- (a) such non-potable system did not extend to the roadway; and
- (b) it was designed and sized to flow from the far corner of the land towards the roadway and not vice versa.

169 The plaintiffs' prior knowledge of the fact of construction of a potable water supply pursuant to the agreement is also demonstrated by the plaintiffs' August 1987 letter to the Council. The relevant parts of this letter are summarised by Master Efthim at paragraph [60]:

"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.

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."

170 The August 1987 letter and the 1982 water reticulation agreement demonstrate that the firstnamed plaintiff was aware from at least August 1987 that a reticulated potable water supply was in fact provided for in 1982.

171 The subsequent pleadings in the Woodleigh Supreme Court proceeding are entirely consistent with this fact.

172 The plaintiffs have produced no new evidence beyond that available at that date.

Lack of Fraudulent Concealment

173 As set out by me above there is no evidence of fraudulent concealment of the relevant facts by the defendants.

174 Moreover, if (contrary to the views I have expressed above) a non-potable water supply was required at the time of subdivision, then this is in my view a case where there is no evidence it was not so supplied, rather than a case where evidence of a cause of action or fact can be identified, and subjected to analysis by reference to s.27(a) or (b) of the LAA.

The Release

175 If, however, I am wrong with respect to the above matters then in my view it is apparent that the release given with respect to the Woodleigh Supreme Court proceedings is a complete bar to the present action.

176 I accept that as the firstnamed plaintiff submits, a release is prima facie restricted to the matters forming the subject matter of the dispute which the settlement agreement concludes.⁴⁹ But in the present instance the parties have expressed the relationship between the subject matter of the proceeding and future claims in the widest possible terms. The words utilised in the release could scarcely be broader: “all actions, suits, demands, and costs, arising out of or in any way related to the subject matter of the proceedings”. The phrase “related to” has been recognised as having a deliberately broad intent.⁵⁰ In *IBM Australia Ltd v National Distribution Services Ltd*, Clarke and Handley JJA commented on the wide scope that should be given to the words “related to” or “in relation to” in an arbitration agreement. Handley JA relevantly stated that:⁵¹

“The arbitration clause in this case covered ‘any controversy or claim arising out of or related to this Agreement or the breach thereof’. That part of the submission which contained an agreement to refer controversies or claims ‘arising out of the Agreement or the breach thereof’ appears to cover every conceivable claim which either party might have against the other in contract. In a particular context the same words may also cover other claims as well. However that may be this clause contains, in addition, an agreement to refer controversies and claims ‘related to this Agreement or the breach thereof’. These are wide words which should not be read down in the absence of some compelling reason for doing so... These words can only have been added to include within the submission claims other than in contract such as claims in tort, in restitution, or in equity. I can see no basis for excluding claims arising

⁴⁹ *Grant v John Grant & Sons Pty Ltd* (1954) 91 CLR 112 at 131.

⁵⁰ *IBM Australia Ltd v National Distribution Services Ltd* (1991) 22 NSWLR 466 at 483 per Clarke JA, at 487 per Handley JA; cf *Fountain v Alexander* (1982) 150 CLR 615 at 629 per Mason J; *Perlman v Perlman* (1984) 155 CLR 474 at 489 per Mason J.

⁵¹ (1991) 22 NSWLR 466 at 487.

under statutes which grant remedies enforceable in or confer powers on courts of general jurisdiction.”

Likewise in the present case the words “in any way related to” are clearly intended to extend to new causes of action with respect to any of the aspect of the facts alleged in the settled proceeding.⁵²

177 The present claim "relates" to the alleged failure to provide water supply to the plaintiffs' land which formed part of the subject matter of the previous proceeding. It further "relates" to the loss in respect of which the plaintiffs have previously made claim, namely the alleged loss of the difference between the price achieved upon mortgagee sale of the land and the price that would have been achieved if the land had been sold on the basis that it was serviced by a reticulated water supply system.

178 I would only add that if the plaintiffs are correct and that at the time of the purchase of the land by them the engineering proposal described in the permit application documents had not been fully implemented, then the resultant loss to them would not be the amount previously claimed and now again claimed. The loss would be loss of value flowing from the need to provide for mains reticulation of non potable water. It would not be the loss in value flowing from the fact that reticulated potable water supply was subsequently refused to the plaintiffs' land. Even if this confusion were removed however and assuming some residual loss could still be hypothesised, I would be of the view that the current proceedings fall within the ambit of the release previously given.

⁵² The similar phrase “with respect to” has also been recognised as having a wide application: see *Trustees Executors & Agency Co Ltd v Reilly* [1941] VLR 110 at 111, Mann CJ noted:

“The words ‘in respect of’ are difficult of definition but have the widest possible meaning of any expression intended to convey some connection or relation between the two subject matters to which the words refer.”

Mann CJ’s comments have been cited with approval in: *Powers v Maher* (1959) 103 CLR 478 at 485; *State Government Insurance Office (Q) v Crittenden* (1966) 117 CLR 412 at 416; *McDowell v Baker* (1979) 144 CLR 413 at 419; *Alexander and Ors v Perpetual Trustees WA Ltd & Anor* (2004) 216 CLR 109 at 139 – 140.

179 The release was entered into as the result of a mediation. There is no reason to doubt
that the objective intention of the parties was as stated in it, namely to arrive at a
settlement where a price was paid to settle not only the then claim, but all potential
future claims in respect of the parties' dealings concerning the water supply to
Woodleigh land.

Issue Estoppel

180 The decision of Beach J estops the plaintiffs from seeking to resile from the release
relating to claims in respect of the Woodleigh land.

Summary with Respect to the Woodleigh Land

181 In summary:

- (a) The plaintiffs' claim is premised upon a misconception that the planning permit required water supply to be provided as a pre-condition to subdivision;
- (b) Insofar as it did require provision of water supply, such supply was of reticulated non-potable water plus rainwater tanks to houses;
- (c) There is no evidence as to whether such non-potable supply was reticulated prior to the provision in 1982 of a reticulated potable water supply to the subdivision by the Water Board from the adjacent roadway;
- (d) The plaintiffs were aware in 1987 of the fact of such potable water supply by the Water Board;
- (e) There is no evidence the defendants concealed relevant facts;
- (f) There is no evidence of new facts on the basis of which the plaintiffs could seek to avoid the limitations defence;
- (g) The plaintiffs' claim is barred in any event by the terms of the release given to the defendants in settlement of the Woodleigh Supreme Court claim;

- (h) The plaintiffs are estopped from denying the effect of such release by the decision of Beach J.

Conclusion

- 182 The above conclusions are sufficient to demonstrate the plaintiffs' claim cannot succeed. Insofar as such conclusions are ones of fact I have reached such conclusions on the basis of agreed documentary evidence as to the underlying circumstances.
- 183 I have not found it necessary to consider whether the plaintiffs' claims are further barred either by estoppel by record, or *Anshun* estoppel. In this regard I would simply record that if the plaintiffs' allegations as to statutory fraud and fraudulent conduct thereafter and as to the effect of the releases given by them, were otherwise arguable, I would hesitate to conclude there was no arguable case to go to trial on the basis of the estoppels asserted by the defendants.
- 184 In all the circumstances the appeal from the Master should be dismissed.
