

1 MR DELANY: Your Honour I appear with Mr Ahern for the first
2 defendant.
3 HIS HONOUR: Yes.
4 MR DELANY: And Mr Thompson appears in person Your Honour.
5 HIS HONOUR: Yes.
6 MR GARDE: If Your Honour pleases, I appear with Ms Burchell
7 for the second defendant.
8 HIS HONOUR: Yes, Mr Garde.
9 MR DELANY: Your Honour we've provided an outline of
10 submissions which is rather longer than we had hoped to
11 Your Honour, and Your Honour may or may not have had a
12 chance to look at that, and our learned friends have also
13 provided an outline of submissions.
14 HIS HONOUR: Yes.
15 MR DELANY: But it's probably more helpful I think Your Honour
16 if we provide, before going to those, an overview of what
17 we see is the issues in the matter, because essentially
18 the case below boiled down to whether or not there was a
19 basis for the plaintiffs to contend there had been
20 fraudulent concealment so that the limitation period that
21 would otherwise have expired would be extended under the
22 Limitation of Actions Act.
23 HIS HONOUR: Well Mr Delany, I think that that's in part right,
24 but on my reading of the papers, which for a reason
25 you've just referred to took me a little longer than I
26 thought it might this morning, there seems to me to be
27 with respect to the Woodleigh Heights land, to be a term
28 in the previous release which on the face of it extends
29 to cover anything arising out of or relating to the
30 subject matter of that action.
31 MR DELANY: Yes, Your Honour.

1 HIS HONOUR: Now it seems to me that that's a form of release
2 which is relatively common and is deliberately
3 significantly broader than the terms of the release
4 relating to the other proceeding.

5 MR DELANY: Yes.

6 HIS HONOUR: So it's at least arguable with respect to the
7 Woodleigh Heights land that the short answer is that if
8 that release is given its usual meaning that's the end of
9 that claim.

10 MR DELANY: Yes, Your Honour.

11 HIS HONOUR: With respect to the other land, it seems to me on
12 the face of it that the release only covers part of the
13 area now traversed - - -

14 MR DELANY: There's no doubt about that, because the case
15 didn't involve the other land, the industrial land.

16 HIS HONOUR: And with respect to that claim then the issue, if
17 there is a short answer, the short answer is that the
18 Limitations Act knocks the claim out.

19 MR DELANY: Yes, Your Honour.

20 HIS HONOUR: And that appears to involve questions of whether
21 there was concealment, and if so whether there's an
22 argument that it was fraudulent concealment. In respect
23 of concealment, my impression is that what Mr Thompson is
24 really saying is that not that he didn't have the
25 relevant evidence, but that he did not draw relevant
26 inferences from the documents available to him until a
27 date which falls within a limitation period.

28 MR DELANY: Yes, that's the - - -

29 HIS HONOUR: Now I may be wrong about that, and everything I
30 says is subject to what Mr Thompson and others may
31 say - - -

1 MR DELANY: Yes, Your Honour.

2 HIS HONOUR: - - - but it appears to me that on the face of it,
3 that that's where he's coming from, if I can put it that
4 way. That he's saying he may have had the documents, but
5 he did not draw inferences which he says should be drawn
6 from the documents as to conscious illegality on the part
7 of the authorities.

8 MR DELANY: Yes. I think that's a fair summary of it Your
9 Honour. We say that the - there's no basis for - to
10 establish even arguable fraudulent concealment for the
11 reasons I'll come to.

12 HIS HONOUR: Yes.

13 MR DELANY: We also say that the same claims are made, claims
14 for the same damage, and that that is in answer to
15 bringing the same claims a second time. We rely on the
16 releases in both matters acknowledging Your Honour that
17 one is whiter than the other, and in relation to the
18 industrial land we rely on an ancient estoppel. All of
19 those matters were argued below, and has Your Honour been
20 provided or had access to the reasons of Master Efthim
21 below?

22 HIS HONOUR: Yes, and I've read them with some care.

23 MR DELANY: Yes, Your Honour. We would say that those reasons
24 followed a two day hearing, during which the plaintiffs
25 were represented by Mr Middleton and Mr Adams. There
26 were detailed written submissions, and that the reasons
27 are careful reasons, and we as we've said in our written
28 outline, contend Your Honour that as the Full Court said
29 that although the matter before Your Honour is a
30 re-hearing, or a hearing de novo, it's open to the judge
31 to give the decision of the master below such weight as

1 appears proper, and we would say given the manner in
2 which the matter was argued and considered, that the
3 master's decision is to be given significant weight.
4 That doesn't mean Your Honour isn't obliged to re-hear
5 the matter, but it does mean that significant weight we
6 say in this case should be placed on those reasons,
7 particularly in relation to the fraudulent concealment
8 point, which was the key point that the master based his
9 decision on, although he did deal with the other grounds.
10 Your Honour can I perhaps deal with the fraudulent
11 concealment point in a factual way at the outset by
12 saying that what the chronology of the earlier Tylden
13 Road proceeding shows, and what I propose to do Your
14 Honour, is to make some opening remarks and then go the
15 written outline but - - -

16 HIS HONOUR: Yes.

17 MR DELANY: - - - what the prior Tylden Road proceeding
18 chronology shows is that the proceeding was issued on
19 7 November 1988, and has Your Honour been provided with
20 the exhibits to Ms Dixon's first affidavit?

21 HIS HONOUR: Yes, as I understand it.

22 MR DELANY: It's a folder MAD1.

23 HIS HONOUR: Yes.

24 MR DELANY: If Your Honour just has that available.

25 HIS HONOUR: That's the one with the releases in it, among
26 other things.

27 MR DELANY: Yes, I think they're included in it Your Honour.
28 If Your Honour goes to Tab 2

29 HIS HONOUR: Yes.

30 MR DELANY: You'll see that was the, Tab 2 is the original
31 Tylden Road proceeding issued in 7 November 1988 and then

1 if Your Honour goes to Tab 3, there's the amended
2 statement of claim which I'll come back to. And then the
3 terms of settlement are at Tab 14 in relation to that
4 proceeding.

5 HIS HONOUR: Yes.

6 MR DELANY: So that, and in terms of settlement, the date of
7 14 June 1991 so the sequence is the statement of claim,
8 7 November 88, the amended statement of claim 13 May 91
9 and the terms of settlement, 14 June 91. Now that's an
10 important sequence we will submit because the document
11 that Mr Thompson relies upon as seeking to overcome the
12 limitation point is what's referred to as a complete set
13 of the industrial plans concerning the Tylden Road land.
14 And if Your Honour has the affidavit of Ms Dixon, that's
15 her first affidavit sworn on 23 September of 2005. I beg
16 your pardon, her second affidavit, 28 October 2005.

17 HIS HONOUR: Well I suspect I have the original of that. Do
18 you have a convenient working copy?

19 MR DELANY: I'll see if we can find one, Your Honour.

20 HIS HONOUR: I do have the original, if you want to highlight -
21 want me to highlight matters.

22 MR DELANY: Yes, Your Honour, we'll just make sure we've got a
23 clean one we can hand up. We do.

24 HIS HONOUR: Thank you.

25 MR DELANY: If I take Your Honour to Paragraph 7 or rather
26 Paragraph 6 and Ms Dixon says, "In the course of acting
27 in the matter, I reviewed the court documents filed on
28 the prior Tylden Road proceeding". And in Paragraph 7
29 she says, "The council gave a discovery in the prior
30 Tylden Road proceeding by way of four affidavits of
31 documents". And she refers to those and the dates of

1 them, so the first one's 5 April 89 and the second one is
2 23 May 89. And then in Paragraph 8 she says that
3 produced and showed to her as Exhibit 11 is a copy of a
4 consolidated list of documents which lists each document
5 discovered in the prior proceeding according to the
6 number - particular affidavit. And then in 9, she says
7 this, "I have reviewed the documents discovered by
8 counsel in the prior Tylden Road proceeding. Each of the
9 documents which comprises Exhibit 7 to Mr Thompson's
10 affidavit described by Mr Thompson as complete plans was
11 discovered by counsel in the prior Tylden Road proceeding
12 as discovered Document 4 in the supplementary affidavit
13 of documents sworn 23 May 1989". And she describes the
14 plans and says over at the top of Page 5, "I've compared
15 those plans to - the complete plans to Exhibit", that's
16 Exhibit GAT7 of the Thompson affidavit, "And not been
17 able to identify any differences between the two" -
18 that's the two documents, that is between the ones
19 Mr Thompson exhibits and those which are in Exhibit 11 to
20 her affidavit. Except that the number 53/4 appears in a
21 different corner of the document. Now 53/4 relates the
22 numbering in the consolidated list.

23 HIS HONOUR: Yes.

24 MR DELANY: So what the effect of that, Your Honour, is that
25 first of all the document which is the complete plans
26 which are referred to were discovered on 23 May 1989. So
27 that's after the amended statement - sorry, that's two
28 years before the amended statement of claim in the
29 proceeding. And secondly - - -

30 HIS HONOUR: That should interpolate, given that they're said
31 to have been handed - Mr Thompson by counsel, is that

1 right?

2 MR DELANY: That's a later event Your Honour, yes.

3 MR THOMPSON: That's the black folder, yes.

4 MR DELANY: That's, that's - - -

5 HIS HONOUR: Yes, but given that counsel are said to have given
6 the documents to Mr Thompson, the proposition that they
7 were discovered in the proceeding is inherently probable.

8 MR DELANY: I accept that Your Honour.

9 HIS HONOUR: It would be very peculiar if counsel had in
10 possession a graph folder of documents, original
11 documents which had not been discovered.

12 MR DELANY: Yes, I agree with that Your Honour.

13 HIS HONOUR: It would require one to infer almost, well I won't
14 go into that. But it - one would expect that if that's
15 the origin of the documents, that they were discovered.

16 MR DELANY: Yes, Your Honour and so the position is that as
17 we've just been going through, that they were discovered
18 in the affidavit of documents sworn on 23 May of 89 so
19 that's two years before the amended pleading. Secondly,
20 as appears from Paragraph 11 of Ms Dixon's second
21 affidavit, Nevile & Co who were the solicitors acting for
22 Mr and Mrs Thompson in that prior Tylden Road proceeding
23 requested and were provided with a copy of all the
24 documents discovered by the council on about 17 May 89
25 and I can just explain to Your Honour, there was a
26 unsworn affidavit of documents provided and the documents
27 were sought and then provided on about 17 May before the
28 actual affidavit was sworn on 23 May.

29 HIS HONOUR: Even if they hadn't been requested, it's difficult
30 to say they're concealed once they're discovered.

31 MR DELANY: I accept that Your Honour. That's what we say is

1 the correct position. And what also appears from this
2 affidavit, Your Honour, in Paragraph 12 is that there was
3 inspection of the documents by the solicitors then acting
4 and also as appears from Paragraph 12.7, there was
5 inspection of the documents by Mr Thompson himself in
6 July of 1989. And there are in all, I'm instructed, 122
7 documents were discovered including these documents. So
8 the position Your Honour is that the documents were
9 themselves discovered. Now Your Honour - and were
10 discovered when the Tylden Road proceeding was on foot
11 and before the amendment to the statement of claim.

12 Now Your Honour if we go to the amended statement of
13 claim which is at Tab 4 - sorry Tab 3 of Exhibit MED1,
14 Your Honour will see that in Paragraph 4 - so this is
15 13 May 91 amended statement of claim concerning Croydon
16 Road. Paragraph 4 says, "In February and March 1980
17 Mr Buchanan lodged with the council in purported
18 compliance with s.569(1) of the Local Government Act,
19 notices of intention to subdivide the land". And then in
20 Paragraph 7, it's pleaded that, "On about 20 February
21 1980 the first defendant served the subdivider with a
22 written notice of requirement under 569E(1) requiring him
23 to construct works" and so on.

24 And then Paragraph 8 is an amendment to the original
25 statement of claim, Paragraph 8 says, "On 21 May 1980 the
26 first defendant" that's the council, "sealed the
27 following plans of subdivision provided by the
28 subdivider".

29 HIS HONOUR: Yes.

30 MR DELANY: Now those are the plans of subdivision which are

31 the complete plans as we understand it that are referred

1 to by Mr Thompson in the context of what's now before the
2 court. And the sequence of the plans is pleaded in
3 Paragraph 8, but they're the residential - these are the
4 residential plans.

5 HIS HONOUR: Yes.

6 MR DELANY: Now, then - - -

7 HIS HONOUR: They're the ones that Mr Thompson says he didn't
8 understand, in particular as I understand it, he says
9 that he didn't understand the G - - -

10 MR DELANY: He - - -

11 HIS HONOUR: The character of G is that right?

12 MR DELANY: That's his point Your Honour, and I'll come to
13 whether he understood or not earlier in a moment, because
14 there's a book of pleadings where there's various hand
15 written annotations that I need to take Your Honour to.
16 So they're the residential plans that were referred to in
17 the amendment, and then the cause of action if Your
18 Honour goes to Paragraph 18 it's alleged that on about
19 19 November 1980, the council withdrew the requirement in
20 relation to the land, that's concerning the construction
21 of roads and so on - - -

22 HIS HONOUR: Yes.

23 MR DELANY: And notified the Registrar of Titles that the
24 subdivider had complied the conditions and then 19, "On
25 about 28 November 1980, the Registrar approved the plans
26 of subdivision" and then 20, "In the premises, the
27 council was not entitled to call up the first bank
28 guarantee" can I assume Your Honour understands how that
29 guarantee came about?

30 HIS HONOUR: Yes.

31 MR DELANY: And I should just say Your Honour, that an

1 understanding of the issues that underpin this case can
2 helpfully be gained from reading Justice Kaye's judgment
3 which is Exhibit 3 to Mr Thompson's affidavit. It's
4 quite a useful - to set out the background of what had
5 gone on before with the guarantee, and it seems to me
6 what prompted this initial action.

7 HIS HONOUR: Yes.

8 MR DELANY: I won't take Your Honour to it, but it's a useful
9 outline and we'll provide to Your Honour's associate
10 copies of the legislation which referred to - as it was,
11 I won't go through it, but we'll provide it to Your
12 Honour, so Your Honour has it.

13 HIS HONOUR: I think I still have a working knowledge of 69E as
14 I'm sure Mr Garde does, but I doubt whether anyone else
15 in the room does.

16 MR DELANY: Well I have no working knowledge whatsoever Your
17 Honour of 569. I've read it, but I wouldn't profess a
18 working knowledge.

19 MR GARDE: I've got to say it's ingrained in one's memory, one
20 is very scarred.

21 MR DELANY: Well now Your Honour - so Paragraph 20 is that the
22 allegation that the council is not entitled to call up
23 the guarantee and - in for the following reasons, and
24 over on p.9A, the failed to comply properly or order
25 division 569 and 569E and then details are set out
26 including in (ii) that the plans of subdivision sealed by
27 the council contravened (a) 569(1)(a), (b) 569(1)(a), (c)
28 and that the Plans E, F, G and H did not show at all, or
29 showed distinctly all new streets and roads and so on.

30 And then over at p.10, the further allegation in (v)
31 that "the purported requirements have been withdrawn by

1 the council within the meaning of 569E(3) and (vi) that
2 in contravention of 569E(3)(d) the first defendant caused
3 to be lodged with the Office of Titles a statement to the
4 effect that purported requirement/requirements had been
5 complied with by the owner when in fact they hadn't been"
6 and the first defendant, that's the council, knew that
7 such requirement or requirements had not been complied
8 with, so there's an allegation of knowledge that the
9 requirements hadn't been met. And (b) "there was no
10 other valid or enforceable basis upon which the first
11 defendant" - that's the council, "could retain or call up
12 the guarantee".

13 HIS HONOUR: Yes.

14 MR DELANY: And then 21, "By reason of those matters the
15 request in relation to the guarantee was (a) contrary to
16 law, (b) wrongful in breach of warranty (c) negligent and
17 in breach of duty owed to the plaintiffs" and 22, "by
18 reason of the matters detailed the acceptance of the sum
19 of 25,000 was contrary to law, wrongful and negligent".
20 And then in Paragraph 25, an allegation is made that when
21 the council made the representation, namely that the bank
22 guarantee was required to be called on, that it intended
23 and knew the plaintiffs would rely on what it said.

24 So essentially there's a cause of action in there
25 for breach of duty and there are allegations that - of
26 non-compliance with the relevant statutory provisions
27 concerning subdivision. And the particulars of loss Your
28 Honour are provided in the next document behind Tab 4 and
29 they are the particulars - and in Paragraph 6, "had the
30 sum not been requested and accepted by the council" so
31 that's the sum in relation to the guarantee, "that the

1 plaintiffs would have sold the allotments at a
2 substantial profit shortly after the road had been
3 constructed, and they claim a loss of profit of
4 \$200,000".

5 So that's the claim that was made. Now Your Honour
6 it's perhaps convenient to go next to the book of
7 pleadings which is exhibited to Mr Edwards's affidavit
8 and it's an exhibit which in my papers is part of SME1,
9 Exhibit SME1, Volume 2. Now Your Honour the - has Your
10 Honour located that folder?

11 HIS HONOUR: Yes.

12 MR DELANY: And Tab 43 - - -

13 HIS HONOUR: Hang on - yes, I have it.

14 MR DELANY: Now Tab 43 is the book of pleadings and in relation
15 to the book of pleadings, the master dealt with this
16 document at Paragraph 56 through to 58 and as he
17 described it, Document 43, this is reading from Paragraph
18 56 of the master's reasons, Document 43 is a book of
19 pleadings in those proceedings that was discovered by
20 Mr Thompson. "Obviously any claim for privilege has been
21 waived, that those pleadings contain handwritten notes
22 made by Mr Thompson. There's no evidence before me of
23 when those notes were made but there's a clear inference
24 they would have been made prior to 1993". It should be
25 1991 because that's when this action was settled. Now if
26 Your Honour has that book of pleadings, it's - and turns
27 - it's quite a thick document but if Your Honour goes
28 through, there's the pleadings which combine the
29 statement of claim and the defence and then there's a
30 page which has on the top right hand corner in
31 handwriting, "No 1" and it's got an extract from s.569 of

1 the Local Government Act.

2 HIS HONOUR: I must be looking at the wrong document I think

3 Mr Delany.

4 MR DELANY: Does Your Honour have Tab 43?

5 HIS HONOUR: I do and what - - -

6 MR DELANY: The front page of it has "Book of pleadings" in

7 the - - -

8 HIS HONOUR: No, I think I'm looking at the wrong tab. What

9 should I be looking at? SME?

10 MR DELANY: My folder has SME1 and then Volume 2.

11 HIS HONOUR: Yes, I am looking at the wrong document. Yes,

12 yes, no I have that.

13 MR DELANY: Now if Your Honour goes through, probably about 25

14 or 30 odd pages, Your Honour will come to the end of the

15 pleading - - -

16 HIS HONOUR: Yes.

17 MR DELANY: - - - and then there's a handwritten page with "1"

18 on it or rather a page with "1" in the top right hand

19 corner?

20 HIS HONOUR: Yes.

21 MR DELANY: And if Your Honour then goes to p.2, you'll see a

22 handwritten entry at the top of the page on 12 February

23 1980, Buchanan lodged a notice to the effect of the 13th

24 schedule to Local Government Act and perhaps Your Honour,

25 if Your Honour has available to you, the reasons from the

26 master because he sets out in type form, in Paragraph 57

27 some of these matters I'm going to take Your Honour

28 through.

29 HIS HONOUR: Yes, well wait a moment, I've - the handwritten

30 one is next to the extract from 569, is that right?

31 MR DELANY: That's right, Your Honour.

1 HIS HONOUR: Yes.

2 MR DELANY: And then the next page was the one I wanted to take
3 you to which has "2" on the right hand corner and as the
4 master's reasons record, there's an entry there in
5 Mr Thompson's handwriting on 12 February 1980, "Buchanan
6 lodged a notice to the effect of the 13th schedule to the
7 Local Government Act or LGA". And then there's - - -

8 HIS HONOUR: If you just wait a moment, I'll just find the
9 master's reasons.

10 MR DELANY: It's p.19 of the reasons. It just makes it a bit
11 easier because they're typed.

12 HIS HONOUR: Yes, I see. Yes, I see that.

13 MR DELANY: The handwritten note on p.2 as has been pointed out
14 to me, refers to the effect of the 30th schedule but the
15 master's reasons refer to it as the 13th but the schedule
16 is then set out.

17 HIS HONOUR: It should be 13th.

18 MR THOMPSON: The 13th schedule, 13th schedule to the - - -

19 MR DELANY: And then on p.3, at the top of the page, the note
20 says, "The engineer's report to council of 20 February
21 1980 referenced the plans to council and recommended that
22 requirements be served" and then there's set out
23 subdivision requirement, "Recommended requirement be
24 served on the 569E(1) and (1)(a) in relation to 16 lot
25 plan of subdivision". And I can tell Your Honour, I
26 won't take Your Honour to it but another exhibit sets out
27 the balance of that resolution which also - which refers
28 to the six lot industrial plan.

29 So the resolution actually referred to both. And
30 then half way down the page, handwritten note, "The
31 notices of requirement were not served at this time,

1 having lodged a fee of schedule notice, and the Registrar
2 of Titles had not yet approved the plans, the allotment
3 should not be sold". And then s.9 of the Sale of Land
4 Act is set out, and I suspect Your Honour is - probably
5 has a memory of that provision as well.

6 HIS HONOUR: Yes.

7 MR DELANY: And then on the next page which is numbered 5, I

8 don't think we have a 4, the top of the page,

9 "Notwithstanding that it was illegal, Buchanan had sold

10 at least two of the allotments" those in the disposition

11 opposite, "In order to avoid the provision of s.9 of the

12 Sale of Land Act, which at that time prevented the sale

13 of allotments on subdivision of more than two allotments"

14 et cetera. "Buchanan then lodged seven separate plans

15 which were contrived to create several subdivisions of

16 two lots each".

17 HIS HONOUR: Yes.

18 MR DELANY: Now we rely on that because that's really the same

19 case that I'll take Your Honour to shortly, seems to be

20 the case that the plaintiffs wish to now run, and is

21 referred to in Mr Thompson's affidavit in opposition.

22 And then, at the top of p.6, "Buchanan lodged 30th

23 schedule notices in relation to these new contrived

24 plans".

25 HIS HONOUR: Yes.

26 MR DELANY: "The new notices are dated 4 March 1980" which is

27 also the date which the notice of disposition given as

28 the date of possession passing to the new purchasers.

29 HIS HONOUR: Yes.

30 MR DELANY: So that refers to the lodging of new schedule

31 notices after 20 February resolution. Then on p.7, the

1 note reads, top of the pages, "The council served a
2 separate notice of requirement in relation to each of the
3 contrived plans which were numbers 79305E, 79305K, the
4 notice requirements were dated 20 February 1980. It's
5 served by registered mail of 6 March 1980, i.e. two days
6 after the contrived plans were lodged". And again it's -
7 there's a back dating issue that is raised by Mr Thompson
8 in his affidavit sworn in opposition here, that issue we
9 submit is clearly identified in the notice of paragraph
10 on p.7.

11 Then on p.8, the top of the page, "Although Buchanan
12 thought he had exploited a loophole in the law, he had in
13 fact broken the law because as it was his clear intention
14 to subdivide the land into 18 allotments, he is bound to
15 give (1) being a schedule notice and one plan showing all
16 allotments.

17 HIS HONOUR: Yes.

18 MR DELANY: Then at the bottom of the page, 569A is set out and
19 the note reads, "Not one of those of the plans submitted
20 comply". And then if I go to p.9, I'll just take Your
21 Honour through the notes, top of the page,
22 "Notwithstanding the unlawful sale of the two allotments
23 to be allotments, Buchanan was unable to realise the
24 proceeds of sale due to" and then s.8A of the Sale of
25 Land Act is set out, middle of the page, "And even though
26 the plans were not yet sealed, a notice of requirement
27 had been served, therefore" and an extract from 569E(3)
28 is set out.

29 And then on p.10, "Buchanan therefore approached the
30 council" and the notation here attaches - or a photocopy
31 of the letter, and the last paragraph is a request,

1 "Would it be possible for approval to be given the next
2 council meeting (indistinct) bank guarantees so that the
3 requirements of the subdivision may be lifted" and then
4 p.11 has council's reply. And then there are other
5 handwritten entries on pp.12 and 13. On p.12 I should
6 just say to Your Honour, p.12 sets out an extract from
7 the engineer's report and refers to each of the plans
8 being separately signed and sealed and the - I'm told by
9 Mr Ahern and I'm sure he's right, that the first three
10 referred to are the industrial plans, and the next ones,
11 which are referred to as - under Paragraph 2, relate to
12 the residential, which is right, because the first
13 paragraph of the document starts off, "Lot plan of
14 subdivision industrial lots" and then Paragraph, "18 lot
15 plan of subdivision, 3 acre residential".

16 HIS HONOUR: Yes.

17 MR DELANY: And the references to - just under the start of
18 that document to Plan 79305B and 79305C and then in the
19 third - or in sub-paragraph (c) 79305/D are the same plan
20 references that can be read on the complete version of
21 the industrial plans, which are Exhibit GAT7, to
22 Mr Thompson's affidavit, and as Ms Dixon has deposed,
23 were discovered and so on.

24 Now, if I then take Your Honour to p.14, the note
25 there at about a third of the page reads - and this is
26 set out in the Master's reasons, it's a bit easier to
27 read there, "At the time of providing the guarantee I had
28 the reasonable expectation that the council and water
29 trust would only accept the guarantees in relation to a
30 legally enforceable agreement between themselves and
31 Buchanan or a legal requirement upon Buchanan".

1 HIS HONOUR: Yes.

2 MR DELANY: And then over on p.15. At the top of the page "As
3 I now know the Council and Water Trust accepted the
4 guarantees for the purpose of giving effect to the
5 unlawful intention indicating Council's letter of 7 May
6 1980, which was an intention to act in breach of
7 569E(3)(a) of the Local Government Act". Then the third
8 entry on that page "In order to give effect to their
9 intention the Council lied to the Registrar of Titles.
10 Then over on p.16, "At the time of informing the
11 Registrar of Titles the Council knew the representation
12 to be false". Then on p.17 "The Council however always
13 intended the requirements were secretly still on foot".
14 And then Your Honour there are further pages, which if I
15 ask Your Honour to go to the end of these documents,
16 sorry I should take Your Honour to p.21.

17 HIS HONOUR: Yes.

18 MR DELANY: There's another hand written note which at the top
19 of the page says "Within days of Buchanan's threat", that
20 was Buchanan's threat I think to Mr Thompson, the
21 following letter arrives - there's a letter from the
22 Shire of Kyneton in relation to the subdivision, this is
23 in 1982, and signed by Mr Porter, Shire Secretary, and
24 below the signature "I now know that this letter was sent
25 purely on the initiative of Porter.

26 There's no minute of council expressing concern.
27 Paragraph 2 is false, and at the time of writing Porter
28 knew he was lying and has since admitted so. Paragraph 3
29 was false, no one except possibly Porter considered the
30 work should be done". So all of these matters Your
31 Honour are matters that are exercising, actively

1 exercising Mr Thompson's mind at the time prior to
2 settlement of that Tylden Road proceeding, and if I just
3 take Your Honour then to Paragraph - p.29, there's a
4 further reference at the top of the page "I now know that
5 Porter deliberately lied to me.

6 In my opinion it's inconceivable that a Shire Water
7 Board secretary of some years standing was not aware of
8 the facts in this matter" and this is in relation to
9 water supply. If one goes to 30, p.30, top of the page
10 "At all times Porter knew there was no water supply
11 agreement in place, and therefore no means of forcing
12 myself or anyone else to construct the water works". And
13 p.31, top of page "3 At all times Porter knew the
14 Council requirements had been lifted", and at the bottom
15 of the page "Porter however lied to me and maintained
16 that responsibility to construct was on foot and passed
17 to me along with ownership of the land".

18 HIS HONOUR: Yes.

19 MR DELANY: Then there are some pages Your Honour which at the
20 - after p.32 commence with page numbered C1.

21 HIS HONOUR: Yes.

22 MR DELANY: These are important to the - what's in the
23 affidavit now sworn, because if Your Honour goes to p.C4,
24 the first entry is very important because it reads
25 "Discovery however indicates that Council's evidence at
26 Bendigo was false". Now that's exactly the point that
27 Mr Thompson refers to in his main affidavit in opposition
28 to this application. As he says in the next entry
29 "Discovery reveals that the relevant 30th schedule
30 notices were dated 4 March 1980, now that's - that is
31 after the date of 20 February plans. Then on C5, "Note

1 on the bottom of the previous document is inconsistent",
2 sorry "is incorrect as the plans were in fact seven in
3 number. This error however is explained and continued in
4 document discovered in defendant's supplementary
5 affidavit Document No. 2". Now that's the affidavit of
6 documents, which is second one in which the plans were
7 discovered. If Your Honour goes to the foot of that
8 page, that's C5, you'll see that there's a reference
9 there to the various Plans 7389305 G, H, I, J and K
10 identical, and the - those are two lot plans of
11 subdivision, each of them Your Honour, so that the
12 complaint that's made in Mr Thompson's affidavit in
13 opposition to this application is known at that time.
14 Then in C6 on the next page, I think it is significant
15 that Mr Wilson did not give evidence a 30th schedule
16 notice at the Bendigo Magistrates' Court. To have done
17 so would have shown that the notices of requirement
18 predated the 30th schedule notices, which is impossible.
19 That's exactly the point that is now sought to be made,
20 and if one goes Your Honour then to C12

21 The handwritten note reads, "Mr Buchanan had
22 illegally sold two of the lots and had been able to do so
23 as the council was prepared to accept plans of
24 subdivision contrived in such a manner as to appear to be
25 two lot subdivisions".

26 HIS HONOUR: Yes.

27 MR DELANY: And then at C15, "Subsequently upon receipt of my
28 guarantee, council gave effect to its original intent by
29 lying to the Registrar of Titles".

30 HIS HONOUR: Yes.

31 MR DELANY: So those are the, probably the most relevant

1 entries Your Honour. Some of which as I say are
2 reproduced in the master's reasons. Now can I take Your
3 Honour, having gone to those, to Mr Thompson's affidavit?

4 HIS HONOUR: Yes again I did tag the original this morning but
5 do you have a spare copy by any chance? The first
6 affidavit I take it, is it?

7 MR DELANY: Yes, we do Your Honour.

8 HIS HONOUR: Thank you.

9 MR DELANY: Now Your Honour the, probably the key paragraphs I
10 think start at Paragraph 53. I should just start I think
11 by taking you on to Paragraph 26 on p.5 and this is a
12 paragraph that deals with the black folder.

13 HIS HONOUR: Yes.

14 MR DELANY: And so in Paragraph 26, Mr Thompson says that on
15 the second day of the hearing, council and Water Board
16 made an offer of 40,000 to settle the matter and we're
17 here talking about the Tylden Road proceeding. And this
18 is in 2001.

19 HIS HONOUR: Yes?

20 MR DELANY: "I was advised to accept the offer of settlement, I
21 agreed. Terms of settlement were drawn and signed". The
22 terms are exhibited to Ms Dixon's affidavit. "At the
23 time of signing the terms of settlement, counsel for the
24 council and Water Board handed me a large black folder
25 containing copies of various documents. I took this
26 material home and gave it a cursory glance because I
27 considered the matter to be at an end. I archived the
28 folder and did not look at its contents until August
29 2000. Had I been aware of the matters deposed in
30 Paragraph 56 of this affidavit at the time of signing the
31 terms of settlement, I would not have settled the 1988

proceedings". Now if we go to Paragraph 56 - perhaps before I do that, if I start at Paragraph 53 where Mr Thompson deposes to his state of knowledge in August 2000 - - -

HIS HONOUR: Yes.

MR DELANY: "In relation to Tylden Road, (a) for the purpose of preparing defence and counter-claim against the council in respect of a rates payment, the council had brought against me, I began reviewing all the documents available to me. I re-examine the contents of the large black folder referred to in Paragraph 26. (b) upon examining the documents within the black folder, it became apparent to me there were two versions of the plan for the industrial allotments for the Tylden Road subdivision. Namely, complete versions and clipped versions. I recognised the clipped versions as being the same as those which had been submitted into evidence by Wilson in the 1987 Magistrates' Court proceeding and in the subsequent Supreme Court Appeal". That's the decision of Justice Kaye.

HIS HONOUR: Yes.

MR DELANY: "I also noticed that the clipped versions had been clipped in copy in such a manner as to remove or omit the identifying number which was present on the complete version now produced, shown and marked - GAT7, there's a bundle of plans comprising the complete version and GAT8 is a bundle comprising the clipped version". Now can I just ask if Your Honour has those exhibits?

HIS HONOUR: The answer is I probably do but I haven't looked at them.

MR DELANY: Well - - -

1 MR THOMPSON: I'm not sure if he's got these?

2 MR DELANY: They're the originals are they?

3 MR THOMPSON: I'm not sure if he has these. I haven't provided

4 them - - -

5 HIS HONOUR: Are they the originals - - -

6 MR DELANY: Mr Thompson helpfully has a folder Your Honour

7 which has them so, we'll hand them forward Your Honour.

8 These might be original exhibits but - - -

9 MR THOMPSON: I think these were the ones that were provided to

10 the court initially. I can't - I'm not sure - - -

11 MR DELANY: That's the next one is it?

12 HIS HONOUR: Yes.

13 MR DELANY: I'll just take Your Honour if I can to Tab 7, I

14 assume they're tabbed.

15 HIS HONOUR: Yes.

16 MR DELANY: So Tab 7 is what's described as the complete plans

17 and Tab 8 is the, what's described as the clipped

18 version.

19 HIS HONOUR: Yes.

20 MR DELANY: And if Your Honour opens up the first of Tab 7, so

21 these are the - these are three industrial plans that

22 were referred to in the council minutes that we just went

23 to and Your Honour will see that the first page has got

24 53/4 on the right hand corner? And between the two

25 boxes, one of which has "Consent of council sealed 21 May

26 1980", is a reference "79305/B". And the next one, 53/4

27 has a reference 79305D. And the third one, similarly

28 53/4 in the right hand corner and then reference

29 "79305C".

30 HIS HONOUR: Yes.

31 MR DELANY: Now if I just go back to the first one which is

1 "79305B", Your Honour will see that what's happening is
2 that one lots been subdivided out with a frontage of 22,
3 I assume it's metres. It might not be.

4 HIS HONOUR: Yes.

5 MR DELANY: And then if Your Honour goes to the last one, "C",
6 there's another lot subdivided out with 22 metre frontage
7 and the middle one has - is a four lot plan, Lots 3, 4, 5
8 and 6 in the subdivision.

9 HIS HONOUR: Yes.

10 MR DELANY: So if Your Honour then compares those to the
11 clipped version which is behind Tab 8, the difference is
12 that the clipped version as it's described in the
13 affidavit doesn't include the reference numbers to the
14 plans, but does include the plans themselves. So it
15 doesn't have the words, "Reference 79305B, 79305D or
16 79305C" so what Mr Thompson is deposing to in Paragraph
17 53B is that Mr Wilson in the Magistrates' Court produced
18 a clipped version, but not the other ones, which had the
19 numbering on them.

20 HIS HONOUR: And what is that reference number?

21 MR DELANY: That's the reference number to the plans which the
22 council in the resolution that was included as part of
23 the book of pleadings - the council's resolution
24 specifically approved those particular plans. If I just
25 take Your Honour back to the book of pleadings.

26 HIS HONOUR: Yes I see.

27 MR DELANY: Sorry Your Honour I'll just find it. At page -
28 handwritten number p.12 in Exhibit 43 of the book of
29 pleadings.

30 HIS HONOUR: Yes. Yes I see.

31 MR DELANY: The engineer's report was that the plan reference

1 79305B be signed and a seal attached subject to
2 requirement under 569E. And the same applied to B and C.
3 So they're the industrial plans.

4 HIS HONOUR: Yes.

5 MR DELANY: And although the first - the Tylden Road case
6 related to the residential plans land only, if you life,
7 the council over-discovered, so they've discovered the
8 documents relating to the industrial plans as well.

9 HIS HONOUR: Yes I see.

10 MR DELANY: So if we go back Your Honour to Paragraph 53C of
11 Mr Thompson's main affidavit.

12 HIS HONOUR: Yes.

13 MR DELANY: So 53B talked about the industrial lots, 53C
14 Mr Thompson says, "I then noticed the black folder also
15 contained copies of the residential series of the Tylden
16 Road plans of subdivision and that these plans had been
17 clipped. I recognised these clipped plans to be
18 identical with those admitted into evidence at the
19 Magistrates' Court, and the Supreme Court appeal and I
20 reflected on the Magistrates' Court proceedings" and he
21 produces a bundle of what he describes as a clipped plans
22 of the residential subdivision.

23 Then in the Magistrates' Court, a bundle of
24 documents was tendered which contained, amongst other
25 things, the following documents, and he says, "(1) a
26 large plan showing all the residential lots complete"
27 which he produces, "(2) three plans comprising the
28 industrial series of plans, none of which show all
29 allotments, all of which have been clipped, (3) the seven
30 plans comprising the residential series of plans, none of
31 which show all of the allotments and none of which show

1 the complete road, all of which had been clipped. (4)
2 Council minutes for 20 February 1980, containing an Item
3 8B minute of resolution that council serve notice of
4 requirement in relation the subdivision referred to in
5 the engineer's report" and those are the minutes, and
6 perhaps if I just take Your Honour to those. I don't
7 think I need to, it simply reads Your Honour, that the
8 recommendation of the engineer is set out and Item 8A and
9 B be adopted and the notices be served.

10 And then in Sub-paragraph (5), the engineer's report
11 of 20 February 1980 contained an Item 8A, a reference to
12 the 16 lot plan of subdivision owned by Buchanan. (B) at
13 Item 8B, a reference to the 6 lots of plan of subdivision
14 industrial owned by Buchanan. (6) Copy of a notice of
15 requirement dated 20 February 1980 and bearing the plan
16 reference number, 79305G, and a statement that the plan
17 referred to was lodged with the council on 12 February
18 1980 and a statement that the notice of requirement
19 related to the roads shown on the plan.

20 Now Exhibit 13 is that document and if I just take
21 Your Honour to that, that's Exhibit 13 to Mr Thompson's
22 affidavit. And that's the council notice - - -

23 HIS HONOUR: Yes.

24 MR DELANY: - - - to Mr Buchanan under 569E(1) and (1)(a) of
25 the Local Government Act and it refers in the first
26 paragraph, it says, "You are the owner of all the piece
27 of land being Crown portion 129, part Crown portion 132"
28 I can tell Your Honour, that's a reference to the
29 residential land and refers to plan of subdivision
30 reference 79305G, "Was lodged with the council on
31 12 February 1980". And then under the resolution is

1 dated 22 February 1980.

2 Now if I just go back to the affidavit so that we
3 can go through what Mr Thompson says the significance of
4 this is, at the foot of p.13 he refers to evidence that
5 Mr Wilson gave in the Magistrates' Court, that the
6 council had approved a planning permit for the 18
7 residential and 6 industrial lots.

8 HIS HONOUR: Yes.

9 MR DELANY: On p.14, "that the large plans (indistinct) plans
10 were all filed with council on 12 February 1980, council
11 considered the large plan on 20 February 1980 and ...
12 (reads) ... falsely dated 20 February 1980". Secondly -
13 or (ii), "The plan of subdivision considered by the
14 council on 20 February 1980 had been abandoned by both
15 ... (reads) ... were processed in substitution". And
16 (3), "The notice of requirement had in fact been
17 fabricated and Wilson's evidence in the Magistrates'
18 Court could not be correct. (G) At the time of Wilson
19 giving his evidence the council was fully aware of, or
20 recklessly indifferent to the existence of the following
21 facts; (1) that the large plan was not a plan
22 subdivision, and not the plan considered by council on
23 20 February 1980, (2) the council - the plans considered
24 by the council on 20 February had been abandoned by the
25 council and Buchanan, not processed further. (3) The
26 notice of requirement given, dated 20 February 1980 and
27 given in evidence relates to the plan bearing the
28 identifying number 79305G and not the plan considered by
29 the council on 20 February 1980" - - -

30 HIS HONOUR: I don't quite understand how that fits with Point
31 1?

1 MR DELANY: I'm not sure either Your Honour.

2 HIS HONOUR: If there is a complaint, isn't it that there was a
3 large plan first, but in fact what then happened was that
4 council - - -

5 MR DELANY: Left it to one side and proceeded on the basis of
6 these seven two lot plans, which they didn't properly
7 deal with.

8 HIS HONOUR: Yes.

9 MR DELANY: That's his complaint - - -

10 HIS HONOUR: Rather than that the large plan was not a plan of
11 subdivision?

12 MR DELANY: That's right I think Your Honour.

13 HIS HONOUR: The complaint is really that it was a plan of
14 subdivision but it wasn't proceeded with?

15 MR DELANY: That's right, and that there was some back dating
16 in relation to the seven lots, or the seven plans.

17 HIS HONOUR: In the sense that - - -

18 MR DELANY: The notice of requirement was dated prior to the
19 date of the plans - or prior to the date of the 30th
20 schedule relating to those plans. I think that's the
21 complaint.

22 HIS HONOUR: So the notice of requirement is transferred over
23 from the global plan to the - - -

24 HIS HONOUR: To the - - -

25 MR DELANY: - - - individual plans.

26 HIS HONOUR: I understand.

27 MR DELANY: Now of course, then what happened factually is that
28 the - - -

29 HIS HONOUR: And that - - -

30 MR DELANY: - - - the council released Buchanan from that
31 requirement on the provision of the guarantee as I

1 understand it, I think there's no contest about that.

2 HIS HONOUR: Well - - -

3 MR DELANY: That that happened.

4 HIS HONOUR: It may well be able to do that under the Act,

5 because all it requires is an agreement that's

6 enforceable against somebody.

7 MR DELANY: Well I bow to Your Honour's recollection of the Act

8 and Mr Garde's (indistinct) to that.

9 HIS HONOUR: But it - yes.

10 MR DELANY: But it - as we understand it - - -

11 HIS HONOUR: The real (indistinct) of it is that the

12 requirement's not imposed in respect to the plans that

13 are actually sealed, and pursuant to which Mr Thompson

14 obtains lots - - -

15 MR DELANY: Title. That's right, that's his complaint as we

16 understand it.

17 HIS HONOUR: Yes. Yes?

18 MR DELANY: So that what Mr Thompson says in Paragraph (vii) is

19 that the plans comprising industrial series and the

20 residential series were lodged after - on or after

21 4 March and not on 12 February.

22 HIS HONOUR: Yes.

23 MR DELANY: He says that "the copies of the plans given in

24 evidence and comprising industrial series and residential

25 series of plans had been clipped in copying so as to omit

26 the above mentioned identifying numbers. That the

27 clipped copies of the residential plans prevented the

28 court and myself from becoming aware of the true fact

29 that the notice of requirement did not relate to a plan

30 showing - creating 18 residential lots and six industrial

31 lots and showing the complete road. Each of the plans

1 comprising the industrial and residential series of plans
2 constituted a separate and distinct subdivision each
3 requiring a separate planning permit. There was never
4 any application for a planning permit, nor was any
5 planning permit issued permitting any one of the
6 subdivisions created by each of the plans comprising the
7 industrial series and residential series. Upon reaching
8 the above conclusion it became apparent to me for the
9 first time that the council had acted maliciously or
10 recklessly by sealing the plans contrary to its lawful
11 obligation to refuse to do so. That Wilson's evidence
12 given in the Magistrates' Court had the effect of
13 concealing the council's true conduct from the council
14 and myself".

15 Now Your Honour raised the point in our initial
16 discussion with me as to - that Mr Thompson had the
17 documents, back then but didn't really appreciate their
18 significance, we would say Your Honour, that the
19 handwritten entries in the book of pleadings indicate
20 that he did appreciate the significance and indeed before
21 the settlement of the first Tylden Road proceeding.

22 Well that's right but there's an intermediate
23 proposition that may be sufficient for your purposes and
24 that is that the notes confirm that the documents were
25 not concealed but were discovered.

26 MR DELANY: That's right, Your Honour.

27 HIS HONOUR: So the documents were discovered, he makes notes
28 about them and then he's given the discovered documents
29 by council. He doesn't look at them again for - - -

30 MR DELANY: That's right.

31 HIS HONOUR: Another eight years or something.

1 MR DELANY: Yes.

2 HIS HONOUR: And at that point he says he draws inferences
3 which he hadn't previously drawn. He may say that
4 honestly but you say, if you go back to the notes, the
5 inferences had been previously drawn.

6 MR DELANY: That's right.

7 HIS HONOUR: So not only were they not concealed but they're
8 import was properly appreciated.

9 MR DELANY: That's right, Your Honour. That's what we would
10 say.

11 HIS HONOUR: Yes.

12 MR DELANY: Now Your Honour, I think that really completes what
13 I wanted to take Your Honour to in terms of the affidavit
14 material. I need to deal with the Woodleigh Heights
15 matter however.

16 HIS HONOUR: Yes.

17 MR DELANY: Can I just say this in relation to Woodleigh
18 Heights, the first matter we would say in relation to
19 Woodleigh Heights is that there is no claim or case
20 advanced in the affidavits sworn by Mr Thompson to the
21 effect that anything was concealed in relation to
22 Woodleigh Heights. So there's no document or - there's
23 no allegation that a document concerning Woodleigh
24 Heights was concealed. Rather the matter's put on the
25 basis that there was concealment of documents or that in
26 - that in 2000 there was an appreciation anew, if you
27 like about the impact of documents in the Tylden Road
28 matter and that that led Mr Thompson to review the
29 position concerning Woodleigh Heights. So that we would
30 say to Your Honour that whatever the claim is now sought
31 to be agitated in relation to Woodleigh Heights that

1 it's, there's just no basis to extend the limitation
2 period or no basis on which it would cease to run under
3 27.

4 HIS HONOUR: Is that because you've just put to me that it's
5 the facts relating to Tylden Road that are relied
6 on - - -

7 MR DELANY: Yes, that's as we understand it, yes.

8 HIS HONOUR: As forming the basis of inferences about Woodleigh
9 Heights?

10 MR DELANY: Yes, so there's no other document or - as we
11 understand it, it's put that - if Tylden Road had
12 involved some concealment then perhaps there was some
13 concealment in relation to the Woodleigh Heights claim.
14 And the key to that Your Honour seems - - -

15 HIS HONOUR: Perhaps before you go to that, just to finish off
16 Tylden Road, do you want to go back to the amended
17 statement of claim and say what the release - do you want
18 to come to that - - -

19 MR DELANY: If I can come to that later Your Honour.

20 HIS HONOUR: Yes but we haven't quite - - -

21 MR DELANY: No, I accept that, I accept that.

22 HIS HONOUR: Because I apprehend from what you've said to me
23 that you say the amended statement of claim does
24 raise - - -

25 MR DELANY: It certainly raises these plans of which complaints
26 now lie.

27 HIS HONOUR: The subject matter of this proceeding, you say?

28 MR DELANY: That's right, yes.

29 HIS HONOUR: Yes.

30 MR DELANY: But it doesn't include the industrial land so it
31 doesn't help me in relation to the industrial land. We

1 agree that the claim didn't plead a claim in relation to
2 the industrial land.

3 HIS HONOUR: Precisely.

4 MR DELANY: So the release we say, is a complete release in
5 relation to the residential land for the reasons Your
6 Honour has just referred to but not in relation to the
7 industrial - we can't say that and we don't.

8 HIS HONOUR: Yes.

9 MR DELANY: Now Your Honour, the Woodleigh Heights issue is
10 dealt with in Mr Thompson's affidavit. Probably I think
11 most relevantly in Paragraph 40 where in Paragraph 40(a)
12 this is, Mr Thompson referred to the proceedings before
13 Justice Beach where specific performance by him of the
14 terms of the settlement was ordered. And in Paragraph
15 40, he says, "I elected not to appeal" that's from
16 Justice Beach's decision, "Because (a) during the course
17 of the practice court hearing, the council and Water
18 Board showed me a reticulated plan, a reticulation plan
19 for the subdivision. The plan clearly showed that the
20 principal water mains were in fact laid in 1982 and not
21 in 1979 as alleged by me and on my understanding, is
22 required by law. At the time of swearing this affidavit,
23 I haven't been able to locate a copy of the plan. (b) at
24 the time of showing me the reticulation plan, the council
25 and solicitors for the council and Water Board pointed
26 out that the plan disclosed that the water main was in
27 fact laid in 1982 and not 1979 as alleged by me. They
28 said words - they said to me words to the effect, how to
29 explain that. My entire cause of action hinged upon the
30 assertion that the subdivision had been completed
31 according to law and therefore a reticulated water supply

1 should have been present in 1979 at the time of pursuing
2 of the plans of subdivision. Because of my ignorance of
3 the true facts, as now pleaded in Paragraphs W1 to 13, in
4 the present statement of claim, the evidence disclosed by
5 the reticulation plan that a water main had not been
6 installed until 1982 seemed to me to be fatal to my
7 prospects of ultimate success after appeal". Now in
8 relation to - I have to say I confess some difficulty
9 understanding the Woodleigh Heights plan but the
10 complaint seems to be as we understand it, that it wasn't
11 disclosed that the water main had not been installed
12 until 1982, this is in 40(d) and it's that non-disclosure
13 that - or prior to then it seems to be relied upon. What
14 we would say to Your Honour and if I can just take Your
15 Honour to this shortly by reference to our outline. At
16 Paragraph 95 of the outline.

17 HIS HONOUR: So as I understand it, Mr Thompson believes he
18 says that when he bought the land, the water had been
19 laid on, and it's in that framework that this is to be
20 understood?

21 MR DELANY: I think so Your Honour, yes. And he says - and
22 what - perhaps if I just take Your Honour through this, I
23 hope in a logical fashion by reference to the outline in
24 Paragraph 92 - - -

25 HIS HONOUR: Now wait a moment, where are we going now?

26 MR DELANY: I'm going to our outline, our submissions.

27 HIS HONOUR: Yes.

28 MR DELANY: I'm doing this Your Honour because they set out the
29 substance of the documents that I think are relevant to
30 this point.

31 HIS HONOUR: Yes.

1 MR DELANY: So the point as we understand is that Mr Thompson
2 apprehends that the laying of the water mains, not in
3 1979, but in 1982, was an important new matter. And
4 Paragraph 92 we summarise what Mr Thompson deposes to in
5 relation to the 1999 Practice Court hearing, where he was
6 given the reticulation plans, and the plans showed as
7 follows, and then if we go to Paragraph 93, it's - the
8 water reticulation plan discussed with Mr Thompson that
9 he asserts he reflected on in August 1980 after reviewing
10 the unrelated documents in the black folder, that's the
11 Tylden Road documents.

12 He was - after reflecting on the reticulation plans,
13 he realised that if the reticulated water supply was not
14 present in 1979, it was instead laid in 1982, then the
15 council had in fact sealed the plans of cluster
16 subdivision in contravention of the statutory duty to
17 refuse to seal them. But what we submit Your Honour is
18 what Mr Thompson fails to mention, and what the
19 documentary evidence establishes, is that he was aware
20 and had been aware, at least from August 1987 that the
21 reticulated water supply had been laid in 1982 and not
22 1979.

23 HIS HONOUR: Yes.

24 MR DELANY: And his own correspondence we say establishes that,
25 and we set out in Paragraph 95 an extract from his letter
26 of 24 August 1987 to the council where he sets out the
27 history of the water supply in Woodleigh Heights- he says
28 and these are extracts from his letter, "Some time in 80
29 or 81, the timing of which is irrelevant, the council
30 approved the re-subdivision into 131 lots. (27) By a
31 minute dated 6 November 1980, the Kyneton Water Board

1 resolved to advise the development committee it'd supply
2 a million gallons annually in any reticulated area. (28)
3 By letter of 5 March 81, Buchanan requested a water
4 supply of a million gallons to service Woodleigh Heights.
5 (30) Kyneton Water Board did subsequently enter into
6 water supply agreement between itself and Woodleigh
7 Heights to supply water to the whole of the subdivision.
8 (33) Subsequent to the making of the agreement, so it
9 must be after 1981, trenches were dug, and pipes laid
10 along a considerable length" - - -

11 HIS HONOUR: Well more particularly it must be after 1979.

12 MR DELANY: That's right Your Honour, yes.

13 HIS HONOUR: On any view.

14 MR DELANY: Yes. So that's the first matter Your Honour. The
15 second is that if we go to Paragraph 96 of the
16 submissions, the agreement between the Kyneton Water
17 Board and Woodleigh Heights of the supply of water to the
18 whole of the subdivision, dated 1 January 1982, was
19 discovered on 15 April 1998 by the Water Authority in the
20 prior Woodleigh Heights proceeding".

21 HIS HONOUR: Yes.

22 MR DELANY: And the clauses that we set out in Paragraph 97
23 provide for the pipeline to be installed, if Your Honour
24 just looks at the foot of Clause 2, taken over and
25 maintained by the trust in July 1982, subject to the
26 pipeline passing performance tests. So what we submit
27 Your Honour in 98 is that the August 87 letter and the
28 1982 reticulation agreement demonstrate that Mr Thompson
29 was aware from at least August 1987 if not September 1985
30 that the reticulated water supply wasn't present in 1979,
31 but was in fact provided for in 1982.

1 So again we say Your Honour in relation to - if
2 there's any documentary question, and there doesn't
3 really seem to be, but if there were any documentary
4 question concerning Woodleigh Heights, then there's been
5 no concealment, and therefore there's no basis for time
6 not to run, or for time to be extended.

7 HIS HONOUR: When's this proceeding issued?

8 MR DELANY: The Woodleigh Heights one or the present one?

9 HIS HONOUR: The present one?

10 MR DELANY: The present one is issued in 31 May 2005.

11 HIS HONOUR: I see.

12 MR DELANY: So these documents, well the correspondence in 1987
13 seems to make the position pretty clear. So Your Honour
14 we say that when one looks at those matters as the master
15 did, that the master was correct to find, as he found in
16 Paragraph 54 in relation to the Tylden Road proceeding
17 that there had been nothing concealed because the
18 documents had previously been discovered. And was
19 correct to find, as he did in Paragraph 58, again in
20 relation to Tylden Road, that there was nothing that had
21 been concealed and that the notations on the book of
22 pleadings can only lead to the conclusion there could not
23 have been any concealment, and similarly, as the master
24 found in 79, the master said, "I am at a loss to
25 understand how there's been any concealment in relation
26 to the Woodleigh Heights land" and we would say, with
27 respect, that that's indeed so.

28 And that the objective evidence establishes it as
29 the master states in Paragraph 60 of his reasons, that
30 Mr Thompson was aware from at least 1987 that the
31 reticulation water supply was laid in 1982.

1 HIS HONOUR: In Paragraph 98 you say Mr Thompson was aware from
2 at least August 1987, if not September 85, that a copy of
3 the 82 Water Articulation Agreement was provided to him.
4 MR DELANY: That's by way of discovery.
5 HIS HONOUR: But in - - -
6 MR DELANY: So it should be April 1998 I think that that's the
7 year.
8 HIS HONOUR: Well that's what I'm asking you, is it - which is
9 the correct date in 96 you say April 98 and in this one
10 you say September 85.
11 MR DELANY: I'll check that Your Honour. It's a difference
12 between discovering something and providing it, possibly
13 the same.
14 MR THOMPSON: Yes I think Your Honour that they're - I think
15 they're both right, in that I think that the document was
16 provided later, but we'll check that.
17 HIS HONOUR: If they're both right, the first step really is
18 that in September 85 he gets a copy of the agreement,
19 then in 87 he writes a letter demonstrating that he's
20 aware of the agreement.
21 MR DELANY: Yes.
22 HIS HONOUR: And then in 98 it's discovered to him. Is that
23 right?
24 MR DELANY: I'm checking that Your Honour, but I think that's
25 right, that in 98 it was discovered sorry. It was
26 discovered on 15 April 98.
27 HIS HONOUR: Yes, but it would make sense that before he wrote
28 the letter of 87, he was given a copy of the agreement.
29 MR DELANY: Yes, Your Honour.
30 HIS HONOUR: But at the moment you're not showing me where that
31 happens, but I take it that somewhere in this great

1 thicket of documents - - -

2 MR DELANY: I'm sure Mr Ahern will find it Your Honour.

3 MR THOMPSON: Your Honour I was given that in 1985, just before

4 a Supreme Court proceeding that I had back then against

5 Woodleigh Heights Resort Developments.

6 HIS HONOUR: I see, thank you.

7 MR THOMPSON: One day prior to the hearing.

8 MR DELANY: Your Honour I think the answer is in Tab 26 to

9 Exhibit MED1. This is - that's an affidavit sworn by

10 Mr Thompson in 1998 in the Woodleigh Heights proceeding,

11 and if Your Honour goes to the exhibit to that affidavit

12 which is a letter of 24 August 1987 is Exhibit G21. This

13 is what we extracted in the submissions Your Honour, or

14 some parts of it, but if Your Honour goes to

15 paragraph numbered 112 Your Honour will see "The Board

16 under cover of letter dated 12 September 85 made a copy

17 of the agreement available after my solicitor threatened

18 to take legal action to force the Board to make a copy

19 available", so that's when it was provided to

20 Mr Thompson.

21 HIS HONOUR: Yes, I see, so - - -

22 MR DELANY: Which would fit with the sequence that Your Honour

23 was referring to earlier.

24 HIS HONOUR: Yes, that means that what's said in

25 Paragraph - - -

26 MR DELANY: That's where the reference in Paragraph 98 of our

27 submissions to September 1985 comes from.

28 HIS HONOUR: Yes, I understand your submission, and you say

29 that that means Paragraph 40 of Mr Thompson's affidavit

30 can't be right, is that right?

31 MR DELANY: Your Honour's a step ahead of me, I'll just find

1 Paragraph 40. Yes, that's right Your Honour, because he
2 knew from 1985.

3 HIS HONOUR: It can't be that his action had been premised on
4 anything other than that fact?

5 MR DELANY: That's right Your Honour, yes. Your Honour - - -

6 HIS HONOUR: To go back to your submission, you simply say that
7 it was open to Mr Thompson to reflect on any legal
8 consequence of these matters since at least August 87?

9 MR DELANY: Yes, Your Honour.

10 HIS HONOUR: And in fact he did so reflect, because he wrote
11 letters about them.

12 MR DELANY: Yes. Now Your Honour in the - if I just return now
13 to the written submissions, and I don't propose to go
14 through them in detail, we can - we will provide to Your
15 Honour a folder of the cases so that if Your Honour
16 wishes to refer to them they're available. We deal with
17 the question of what's required for fraudulent
18 concealment - - -

19 HIS HONOUR: Yes.

20 MR DELANY: I'll just locate the paragraph. In Paragraph 73 we
21 set out what the cases in our submission establish.
22 First that the concealment must be actual, secondly that
23 what must be concealed must be the right of action, not
24 just evidence - - -

25 HIS HONOUR: Mr Delany I think I might take a five minute
26 break.

27 MR DELANY: Yes, Your Honour.

28 MR DELANY: This is a logical point at which to make a stop.
29 (Short adjournment.)

30 HIS HONOUR: Yes, Mr Delany?

31 MR DELANY: Yes, Your Honour. I was just taking Your Honour to

1 the discussion in our outline of this issue of cause on
2 concealment and - - -

3 HIS HONOUR: It's a bit more than an outline Mr Delany.

4 MR DELANY: It is. I said I wasn't going to read it Your
5 Honour. We tried to print it down, we had a lot of
6 trouble because the facts are quite complex. We have
7 actually reproduced the relevant section which is s.27
8 and Your Honour will find that, it starts on p.20 - your
9 print might have been different, it was derived
10 electronically, Paragraph 67?

11 HIS HONOUR: Yes?

12 MR DELANY: So s.27 provides "Where in the case of any action
13 for which a period of limitation is proscribed by this
14 Act, the Act is based on the fraud of the defendant or
15 his agent or any person from whom he claims, or his agent
16 or (b) the Act is based on the fraud of the defendant, or
17 his agent or any", it seems to be repetitious. "The
18 period, at the end of it, the period of limitation shall
19 not begin to run until the plaintiff has discovered the
20 fraud or the mistake as the case may be, or could with
21 reasonable diligence have discovered it". Now what we
22 say here Your Honour is that the limitation periods for
23 these claims have long since passed as we say in
24 Paragraph 25. On the plaintiff's case as pleaded in this
25 proceeding, the causes of actions were complete in 1980
26 in the case of the Tylden Road industrial land. In 1983
27 in the case of the Tylden Road residential land in 1984
28 in the case of the Woodleigh Heights land. And so
29 they're long since statute barred. So if the, if I take
30 Your Honour then to Paragraph 72, what we say is to make
31 out an arguable case for postponement until 31 May 2005

1 which is the date the proceeding was issued in reliance
2 on s.27, what it would be necessary for the plaintiff to
3 establish is first, concealment. Secondly, fraudulent
4 intention to conceal. Thirdly, that the plaintiffs could
5 not have discovered the cause of action so fraudulently
6 concealed with reasonable diligence prior to 31 May 99
7 which is the six years prior to issue. And what we say
8 Your Honour is the cases establish - and I'm not going to
9 take Your Honour to the cases themselves unless Your
10 Honour wishes to but I think that the - we extracted
11 later on in the submission probable the key passages we
12 rely on. But the cases establish that the concealment
13 must be actual. What must be concealed must be the right
14 of action, not just evidence. So for example, it's not
15 enough to find an extra document or something like that.
16 That wouldn't constitute concealment.

17 HIS HONOUR: When you say, "Actual", do you mean intentional?

18 MR DELANY: Yes, Your Honour. I'll come to that. And that the
19 fraud or conscious wrongdoing on the part of council, the
20 council in this case, in concealing the existence of a
21 cause of action is what's needed and the onus is on the
22 plaintiffs to show they acted with reasonable diligence.
23 And if I take Your Honour to Paragraph 99 - - -

24 HIS HONOUR: Just in passing - - -

25 MR DELANY: Yes?

26 HIS HONOUR: If it's really Mr Palmer who's been purely in
27 misfeasance in public office, isn't there a serious
28 argument that you can't proceed against the authority?
29 Or is that something that would have to resolved on - - -

30 MR DELANY: Well we don't like the pleading in this case.

31 HIS HONOUR: Yes.

1 MR DELANY: But we haven't, we haven't brought this application
2 on the basis the pleading is defective or that the cause
3 of action - because Mr - it's actually the individual
4 rather than the council if there was a misfeasance, he
5 can't attack the council. We haven't really relied on
6 that point. We've said in our outline that if you're
7 going to plead misfeasance in public office, you've got
8 to identify the public officer.

9 HIS HONOUR: Yes.

10 MR DELANY: And there would have to be an argument here that it
11 was Mr Porter and not - - -

12 HIS HONOUR: That's what Mr Thompson's note seems to say.

13 MR DELANY: Yes.

14 HIS HONOUR: Mr Porter acted without any authority of the
15 council or of - as I understand it.

16 MR DELANY: Yes. But the pleading is difficult Your Honour to
17 - we've taken the view, we could have brought a pleading
18 summons and had an argument about whether it discloses a
19 cause of action and so on. We could have put a lot of
20 energy into that and Your Honour we decided that wasn't
21 the most expeditious way of dealing with the case.

22 HIS HONOUR: Yes.

23 MR DELANY: Now if the case were to proceed and we say it
24 shouldn't but if it were to proceed then that's probably
25 an argument that we'll have, we would have to have. Or
26 it is an argument we'd have to have about the pleading
27 but for the moment we haven't embarked on that.

28 HIS HONOUR: Well the only reason I raise it is if you're
29 right, and what has to be concealed is the existence of
30 the cause of action, in a sense that begs the question,
31 what the cause of action is - - -

1 MR DELANY: Well - - -
2 HIS HONOUR: But I may be - - -
3 MR DELANY: Well we've assumed that the cause of action is
4 there.
5 HIS HONOUR: Yes. As pleaded.
6 MR DELANY: Well, as pleaded, or in the affidavits.
7 HIS HONOUR: Yes.
8 MR DELANY: So really taken the view - - -
9 HIS HONOUR: The complaint is that made in the affidavits?
10 MR DELANY: Yes.
11 HIS HONOUR: Yes, I understand.
12 MR DELANY: So we - so that's the way we've approached it. Now
13 if we go to Paragraph 99 of the outline, where we refer
14 to a decision in Hamilton - I think Your Honour has the
15 folder of cases.
16 HIS HONOUR: Yes.
17 MR DELANY: I'm told that this case is at Tab 10 of the folder.
18 HIS HONOUR: Yes.
19 MR DELANY: And this is a decision of Justice McLelland and the
20 case involved - arose in the context of directors
21 concealing a contract from - former directors concealing
22 a contract - the existence of a contract from the
23 company, and at Point 2 of the headnote, "the
24 postponement of the limitation bar under the Limitation
25 Act 1969 s.51B ... (reads) ... or moral turpitude". And
26 the - if I take Your Honour to p.385 at the foot of the
27 page His Honour says, in the last paragraph, third lines,
28 "It's forever contended the cause or causes of action
29 were fraudulently concealed ... (reads) ... and so on of
30 their breaches of duty". And then over to the next page,
31 386, Paragraph B, "It's been submitted on behalf of the

1 plaintiff the expression 'fraudulently concealed' does
2 not necessarily import dishonesty", and then Point C,
3 "The question of what is sufficient to constitute fraud
4 for this purpose has been discussed in several modern
5 English cases" and then reference is made to those, and
6 the last one of which is Tito v Waddell. In the last
7 mentioned case, Vice-Chancellor Megarry was driven to
8 say, "Indeed as the authorities stand, it can be said
9 that in the ordinary use of language ... (reads) ...
10 proposition is based rather on dicta than decision. I do
11 not consider they should be applied for the purpose of
12 construing the New South Wales Act". And then His Honour
13 goes further down to (f), "For my own part I would regard
14 as a misuse of language and unsound ... (reads) ... some
15 form of dishonesty or moral turpitude". So that was -
16 that's the first decision that we would go to.

17 The second one Your Honour is a decision of
18 Justice Vass in CE Heath Underwriting v. Daroway, which
19 is at Tab 3 of the folder, and in that case His Honour
20 gave consideration to what fraud meant for the purposes
21 of the Victorian Act, that is under s.27B. And what had
22 happened in that case Your Honour was that the case
23 concerned an adjustment of workers compensation premiums.
24 And there were wage records which a witness swore had
25 been lost or destroyed and the question arose whether
26 they'd been fraudulently concealed or whether they were
27 lost or destroyed after the auditor had asked for them.

28 Now if Your Honour - does Your Honour have that tab?

29 HIS HONOUR: Yes.

30 MR DELANY: If Your Honour goes to p.3 of 65, Your Honour will
31 see under the heading "Issues" about Point 3, "The

1 principle issues in this case are the title of the second
2 plaintiff ... (reads) ... statute barred" and then
3 further down, "(B) whether in respect of any that would
4 otherwise have accrued outside the statute of limitation
5 period 27B of the Act postponed the commencement of the
6 running of the period until a date within six years of
7 the filing of the writ".

8 Now if I ask Your Honour then to go to p.30, there's
9 a heading at about Point 6 of the page, "Limitation of
10 actions when concealment may occur" and then there is
11 over on the next page, p.31, heading, "(B) meaning of
12 fraud" at about Point 3, "I next turn to the meaning of
13 fraud in 27B ... (reads) ... avail itself of lapse of
14 time". And then halfway through that next paragraph,
15 after referring to the English cases, His Honour says,
16 "On the other hand in Hamilton v. Keljo,
17 Justice McLelland expressed the view if the English
18 authorities meant fraud that did not mean fraud, they
19 should not be applied for the purposes of construing s.55
20 of the New South Wales Act.

21 And the passages are set out from Justice
22 McLelland's judgment. At about Point 7 of the page, "the
23 plaintiff's counsel acknowledged ...(reads)...
24 Justice Deane in Hawkins v. Clayton." And His Honour
25 says "True, Justice Deane in Hawkins v. Clayton at 590
26 ...(reads)...concealment of the cause of action." His
27 Honour is true added in Prentice's "compare s.55(1)
28 Limitation Act," I am afraid that I'm unsure the precise
29 signification of the abbreviation "cf." in that
30 parenthesis. In any event His Honour's remarks about
31 55(1) were (indistinct) because the case was concerned,

1 not with that section, but with s.14(1).

2 Then His Honour says in that last line, "On the
3 whole, whilst acknowledging the claim ...(reads)...
4 intentional concealment is requisite." So His Honour,
5 there, took the view that the New South Wales position as
6 articulated by Justice McLelland was appropriate to be
7 applied in Victoria. Now, Your Honour, in the next case
8 that is, I think, relevant is Seymour's case, the
9 decision of the New South Wales Court of Appeal. That's
10 at Tab 20. In that case, in the head note, "holding to
11 s.55(1)B of the Limitation of Actions Act ...(reads)...
12 situation involves wrongdoing.

13 And if I take Your Honour to - just find the
14 passage, Your Honour, in Justice Mahoney's judgment.
15 It's at p.372, at - just after Paragraph B. The
16 paragraph begins, "in my opinion the section is not
17 confined to ...(reads)...in the wide sense of these
18 terms." And then the next paragraph, "Nor in my opinion
19 is fraudulently wide enough ...(reads)...description of
20 equitable fraud." So this judgment seems to take a
21 slightly wider view than Justice Badden-Darroway. But
22 not as wide as was contended before him. Then in E, "In
23 my opinion, there must be in what is involved
24 ...(reads)... lack of proper standards." So then there
25 are two further Victorian cases of single judges. The
26 first is a judgment of Justice Eames in Skrijel -
27 S-k-r-i-j-e-l - v. Mengler. Which is at Tab 21, and as
28 it turns out, Your Honour, that's a misfeasance in public
29 office case.

30 HIS HONOUR: Yes.

31 MR DELANY: Involving a claim against a - involving alleged

1 fraudulent concealment of fingerprinting material. And
2 what Justice Eames held to be the position is at p.8 of
3 13 in Paragraphs 45 and 46. His Honour says in 45, "I'm
4 not persuaded the defence ...(reads)... right to bring
5 the proceeding." And His Honour said, "Fraud in this
6 context involves a consciousness that ...(reads)...
7 Seymour v. Seymour." Now, I should say, Your Honour,
8 that whilst we're going through these authorities, and
9 they're referred to in our outline, we would say that in
10 the first place, there's no concealment here, because the
11 document was discovered, but if there was to be extensive
12 limitation period, it would also be necessary for the
13 court to find that there'd been fraudulent concealment,
14 in the sense that discussed at Paragraph 46 as an example
15 by Justice Eames in this judgment.

16 And then, if we go to the final decision on - - -
17 HIS HONOUR: So do you say that the provision of documents to
18 Mr Thompson, is entirely inconsistent.

19 MR DELANY: That's right, Your Honour. And that's - - -

20 HIS HONOUR: Any - any Marmion intent to keep him in the dark.

21 MR DELANY: That's right, and discovery is the obvious one, and
22 then the provision of the folder is the - if for some
23 reason it hadn't been discovered, but I don't think
24 there's any contest it was a provisions of a folder, is
25 another example, if you like of exactly the opposite
26 behaviour. And also the provision of the water agreement
27 in 1985. That's entirely inconsistent with their
28 wrongdoing or seeking to take advantage of a situation.
29 The other two cases, Your Honour, is the decision of
30 Justice Warren in DeSante v. Commando Nominees. And
31 that's at Tab 6.

Paragraph 51, Your Honour, of Her Honour's judgment, at Paragraph 42 on p.17, Her Honour deals - sets out the section postponement of limitation periods in cases of fraud or mistake. And at Paragraph 45 she notes that they're cast in identical terms to those considered in earlier English decisions. And goes through some of those cases and then at Paragraph 51, Her Honour notes that the provisions those of which s.55 of the New South Wales Act is equivalent, sets out the views of Justice McLelland in *Hamilton v. Keljo*, notes that *Hamilton* was considered by the New South Wales Court of Appeal in *Seymour v. Seymour*. And says, Acting Chief Justice Mahony, with whom Justice of Appeal Marr and Acting Justice of Appeal Aberdeen, agreed, held that the New South Wales provision required a consciousness of wrongdoing. And refers then to another Queensland decision where a similar view was expressed. So as we would understand Her Honour was adopting a New South Wales position. And just in terms of discovery, the final case I'll refer Your Honour to was another New South Wales decision which is at Tab 13. This is a decision in 2001 of *Mann v. Commonwealth* and in that case, if I take Your Honour in the judgment of Justice of Appeal Hanley at Paragraph 7.

What had happened in that case was that there were issues about discovery and inspection and in Paragraph 7, His Honour said, "Mr Rubinstein was allowed to take particulars of the documents but wasn't furnished with copies. On his return to the United Kingdom, he swore an affidavit in support of an application to the High Court for further and better discovery by the plaintiffs. An

1 order requiring discovery was made and was complied with.
2 It's evident that the documents in question were in the
3 possession of Mr Mann and his company. (8), the present
4 procedure commenced in 1994 against the Commonwealth and
5 the State of New South Wales based upon the disclosures
6 in 1987 by officers of various departments of
7 communications which had passed between the parties in
8 1983.

9 The causes of action pleaded in the further amended
10 statement of claim were breach of a duty of confidence on
11 the part of both defendants and so on. And then (10),
12 the breaches of duty relied on occurred in March 1987 and
13 came to the knowledge of Mr Mann no later than October
14 1987 and probably some days before that when Mr
15 Rubinstein's affidavit referring to his inspection of the
16 documents were served ... (reads) ... Prima facie,
17 therefore time for the purpose of the Limitation Act
18 commenced to run in March 1987 and all causes of action
19 were statute barred six years later".

20 And then in Paragraph 14, "Mr Mann seeks to escape
21 from this situation by relying on s.55 of the Limitation
22 Act which provides, where there's a cause of action based
23 on fraud or where the cause of action or the identify of
24 a person ... (reads) ... between March 87 and the cause
25 of action accrued in the time it would normally have
26 commenced to run, and his discovery of the existence of
27 his cause of action did not count". But Paragraph 18 is
28 the important one Your Honour, "The service of the
29 affidavit by Mr Rubinstein more than sufficiently brought
30 home to Mr Mann the knowledge that the Commonwealth and
31 the State public servants had disclosed to Mr Rubinstein

1 the documents he listed in his affidavit ... (reads)
2 ...This information enabled Mr Mann had he been so
3 advised, to commence proceedings then and there against
4 the present respondents". So in that case, what the
5 court was saying was that once the affidavit of documents
6 was sworn, that described the documents, that was
7 sufficient to disclose to Mr Mann that there'd been a
8 disclosure, he said wrongfully, breach of confidence and
9 therefore the fact of the affidavit of documents was self
10 sufficient.

11 In (19) His Honour said, "In my judgment therefore,
12 even if there was a period of fraudulent concealment
13 between March and October 1987 and I'm not just saying
14 there was, it came to end on service of Mr Rubinstein's
15 affidavit upon... (reads) ... in these proceedings." And
16 Justices of Appeal Powell and Stein agreed. So that's a
17 case that has some parallels, Your Honour to the present
18 because it involves a document being discovered although
19 it goes a step back and says it's enough, I want you to
20 get the affidavit.

21 HIS HONOUR: Mr Delany, I understand what you've taken me
22 through and that all goes to the second alternative in
23 s.27. But the first one is simply that the action is
24 based upon the fraud of the defendant or his agent.

25 MR DELANY: Well this is a pleading which is misfeasance in
26 public office, a deliberate tort.

27 HIS HONOUR: Yes, yes.

28 MR DELANY: On the previous occasion in the Water Board case,
29 Mr Thompson pleaded actual fraud and said in his
30 affidavit that he wasn't able to say who had committed
31 the fraud or how it happened but he doesn't, as we

1 understand it, seek to make a claim based on fraud in
2 this case.

3 I don't recall Mr Middleton and his junior
4 suggesting that this was a case thought to be pleaded in
5 fraud.

6 HIS HONOUR: And he did so plead in the Woodleigh Heights
7 proceeding.

8 MR DELANY: Yes, Your Honour, I'll just find the part of our
9 outline and then I can give Your Honour references to
10 that.

11 HIS HONOUR: This comes back in a sense to the matter I was
12 floating earlier, that on the documentation it seems to
13 be an allegation insofar there is one of conscious
14 improprieties made against Mr Porter by the - - -

15 MR DELANY: That's in the notes, in the book of pleadings
16 concerning Tylden Road, and in relation to the Woodleigh
17 Heights pleading, Mr Thompson's summary judgment
18 affidavit in Paragraph 50(a) says that the alleged fraud
19 in that proceeding in 1995 but he couldn't say or
20 demonstrate what the fraud was or who was responsible for
21 it". That's extracted at Paragraph 23 of our
22 submissions.

23 HIS HONOUR: Yes, I see.

24 MR DELANY: So this is a case, that I don't think I need to
25 take Your Honour to this, but our instructor's affidavit
26 sets out a comparative table of the pleadings in the
27 actions previously and now and it's pretty plain I think,
28 that they're both claims in tort. This one is sought to
29 be pleaded as an intentional tort, but it's still a claim
30 in tort, rather than a claim for fraud. And although the
31 pleading's unsatisfactory, it's a pleading signed by

1 senior and junior counsel and if there was to be a fraud
2 pleading, you'd expect it to be there. And I don't
3 understand Mr Thompson's affidavit itself to assert
4 fraud. Misbehaviour, yes, but fraud, no. The passage
5 that I've just mentioned indicates that Mr Thompson
6 acknowledges that he had alleged fraud in the 1995
7 proceeding concerning Woodleigh Heights.

8 HIS HONOUR: To work forward in sub-s.(b), as the breadth of
9 meaning that you say it has, why wouldn't it cover an
10 action directed to causing harm to the plaintiff by a
11 class of persons including the plaintiff by imposing
12 requirements which were unlawful?

13 MR DELANY: Intentionally imposing requirement with intention
14 of seeking to harm.

15 HIS HONOUR: Or consciously acting unlawfully. Isn't that
16 what's said against Mr Porter?

17 MR DELANY: That's what's said in the hand written notes, yes.
18 But I'm not sure that that's - I'm sure that's not
19 articulated in the present affidavit. Nor is it in the
20 pleading.

21 HIS HONOUR: I've made it too complicated. If (b) - if fraud
22 means what you say in (b), doesn't it mean more than just
23 a claim for common law fraud in (a)?

24 MR DELANY: Yes, yes, yes it does.

25 HIS HONOUR: And couldn't it potentially extend to sudden
26 claims for (indistinct) in public office.

27 MR DELANY: Potentially it could. I think I'd have concede
28 that Your Honour. Assuming that it does extend to this
29 one, as the notes to the pleading show, it was within the
30 knowledge, the fraud if there was one, was known by the
31 plaintiffs before 1991 - before the Tylden Road

1 proceeding was resolved in 1991. I must say our focus is
2 green as Your Honour would appreciate on the extension of
3 limitation period because that's the way the case - the
4 affidavit was put, that I didn't find out about these
5 things until 2000, August 2000 and that prompted me then
6 to bring this action.

7 HIS HONOUR: The way I read the affidavit, what Mr Thompson's
8 really saying is, he didn't draw the inference of
9 underlying fraud if you like until that point in time.
10 That's why I'm raising this sub-Paragraph (a) because he's
11 unrepresented and - - -

12 MR DELANY: Yes, Your Honour, no I understand that. We would
13 say Your Honour, that assuming there was an arguable case
14 for fraud, and we don't concede that, it was identified
15 by Mr Thompson clearly in his own notes in 1991, and
16 that's the answer. Your Honour, I think the authorities
17 that we've just been going through are referred to in
18 Paragraphs 99 through to 104 and I don't want to further
19 develop those paragraphs. The other requirement is that
20 there can't be any - is that once documents are provided
21 to a person, there can't be - there's an onus on the
22 person to show that without reasonable diligence, they
23 couldn't have discovered them earlier.

24 HIS HONOUR: Yes.

25 MR DELANY: We say that there's no evidence here to - as would
26 enable that onus to be discharged.

27 HIS HONOUR: Well that - it maybe stronger than that, and that
28 maybe the simple answer to what I put to you a moment
29 ago. If the real complaint is that an inference wasn't
30 drawn, but what's pointed to is what this man had in his
31 cupboard for eight years and he says that when you look

1 at it it's plain, then it couldn't with reasonable
2 diligence have been discovered at the start of the eight
3 years.

4 MR DELANY: Yes, that's right.

5 HIS HONOUR: It's kind of a self destroying argument - - -

6 MR DELANY: Yes, because it was easy enough to find when you
7 actually read it, he could have read it earlier and
8 there's no reason why he couldn't have.

9 HIS HONOUR: You would contest perhaps that some of the
10 inferences Mr Thompson seeks to draw necessarily flow
11 from the documents.

12 MR DELANY: That's right, but that's - - -

13 HIS HONOUR: But you say that if he's right that they're
14 obvious, as he appears to assert in his affidavit, well
15 they've always been obvious.

16 MR DELANY: Yes, and of course, we take it back before the
17 handing over of the black folder and go back to the
18 discovery in 1989.

19 HIS HONOUR: Yes.

20 MR DELANY: Now Your Honour, the other matters that I should
21 deal with are probably these. We say that the claims
22 that are made or sought to be made now in the 2005
23 proceeding, are essentially the same claims that were
24 made in the earlier proceedings. And there are two
25 separate points there, and I leave to one side the
26 industrial land for Tylden Road. There are really two
27 points there, one is what is the effect of the releases
28 in each of the cases, and secondly, what is the effect of
29 the judgment itself in the cases.

30 So that if one looks at the releases first of all,
31 and we deal with these in our outline at Paragraph 48 in

1 relation to Tylden Road. Paragraph 49 sets out the terms
2 of settlement in relation to Tylden Road and it's all
3 claim suits and demands right through to the subject
4 matter of this proceeding. As we say in Footnote 60, the
5 amended statement of claim alleges the council acted
6 unlawfully in sealing and lodging the plans of
7 subdivision, and that the loss that was occasioned was
8 the loss on the sale. Now, that's the same loss with one
9 gloss that I will come to.

10 So we would say, if one looks at it this way, let's
11 assume that I could sue someone in contract for a
12 particular loss, and I brought that claim, it wouldn't be
13 open to me to sue them in tort for the same loss once
14 that release is in place. Now here, the amended
15 statement of claim contained an amendment to the
16 particulars concerning Tylden Road, and what was done was
17 - but this is after we've served the application - and
18 what was done was to say well, "We now say we didn't
19 suffer our loss when we sold the Tylden Road lots, but we
20 suffered a loss when we purchased them". Now - - -

21 HIS HONOUR: So there's an amended statement of claim in the
22 Tylden proceeding itself, and then there's an amended
23 statement of claim in this proceeding.

24 MR DELANY: Your Honour is right.

25 HIS HONOUR: And in this proceeding you're saying that whereas
26 the amended statement of claim in the Tylden proceeding
27 ultimately crystallised in a claim for loss upon sale.

28 MR DELANY: Yes.

29 HIS HONOUR: It's now said that the loss was suffered when
30 purchased.

31 MR DELANY: Yes Your Honour, that's right. And so that's in

1 relation to the residential land only.

2 HIS HONOUR: yes.

3 MR DELANY: We say, Your Honour, that that doesn't got over the

4 - it's not a matter that overcomes the release here when

5 one looks at the fact that it relates to the same land,

6 and both cases assert unlawful behaviour on the part of

7 Porter. And what we say, Your Honour, is that if -

8 perhaps I should take Your Honour to the amendment. Does

9 Your Honour have the amended statement of claim of

10 4 November in this case?

11 HIS HONOUR: Yes I do but just before we come to that, I wanted

12 to go back to the statement of claim in Tylden.

13 MR DELANY: Yes. That's I think at Tab 3 of Exhibit MED1.

14 HIS HONOUR: Yes.

15 MR DELANY: The further and better particulars are at Tab 4, so

16 29C in the amended statement of claim says,

17 "Consequential loss is sustained by the plaintiffs as a

18 result of the sale of the 15 allotments, the sale of

19 which was forced by the 1st defendant's wrongful request

20 for an acceptance of the sum". Then the particulars say

21 the plaintiffs purchased the land in 1980 for 92,000,

22 they sold the 15 lots for 100,000 in April 83. Then in

23 Paragraph 4, "The purchaser from the plaintiffs then sold

24 the allotments as follows", and there are some prices set

25 out. "The last 12 of the 15 allotments were sold, one

26 for a total of 269,000". "6, Had the sum not been

27 requested and accepted, the plaintiffs would have sold at

28 a substantial profit shortly after the road had been

29 constructed, so loss of profit was 200,000".

30 HIS HONOUR: Is this one of Mr Salanty's company's they're

31 purchasing?

1 MR DELANY: The name does seem to have a similar ring about it,
2 but I'm not sure Your Honour.
3 HIS HONOUR: I see Mr Thompson nodding.
4 MR DELANY: It's in the right area for Mr Salanty too I think.
5 HIS HONOUR: Yes.
6 MR DELANY: The land.
7 HIS HONOUR: Well - - -
8 MR DELANY: Then if Your Honour has the amended statement of
9 claim in this case, 4 November 2005.
10 HIS HONOUR: Yes.
11 MR DELANY: Your Honour will see on p.35, and the same
12 amendment is made in relation to the residential lots,
13 initially the pleading said in D3(i) "By reason of the
14 misfeasance pleaded suffered a financial hardship
15 beginning when the bank guarantees were caught up and
16 consequentially to that they were forced prematurely to
17 sell the 15 allotments". It now says "The place as bona
18 fide purchaser to the value without notice bargain are
19 entitled to receive indefeasible title of 15 allotments
20 with roads and water, or at least a legally enforceable
21 right to such services as a result of the misfeasance
22 they received instead indefeasible title of 15 lots
23 without services and without legally enforceable means to
24 compel the construction or installation of the services
25 have accordingly suffered loss which quantifies the
26 difference between the market fee at the date of purchase
27 of the allotments without services and the market value
28 of the same allotments with services". And then two,
29 reference is made to the contract to Shellman Two.
30 Three, Shellman Two were able to sell the entirety of the
31 lots with services for an average price of 22,473", the

1 difference between the average price paid by Shellman Two
2 and the sale - and the average price obtained on sale is
3 reflective of the difference in the value of the land
4 without services as purchased from the plaintiffs, and
5 the value of the land with services as sold by Shellman
6 Two and the loss - - -

7 HIS HONOUR: They need to deduct the costs of the services.

8 Anyway, keep going.

9 MR DELANY: - - - so it's actually the same claim. Although it
10 starts off differently, it comes to the same ending. In
11 other words, we put our loss by reference to what
12 Shellman Two obtained. So we say that although there's
13 been an amendment, the amendment which was done after
14 this application was instituted, it doesn't help that the
15 same loss is in fact claimed, because it's measured again
16 by reference to how much Shellman Two sold the serviced
17 lots for. So the earlier particulars didn't have all of
18 the sale prices in Shellman Two and that's why the
19 estimate was 200,000, whereas here it's put at a higher
20 figure. Just while we're on that amended pleading, I
21 should mention to Your Honour that the particulars of
22 loss and damage concerning Woodleigh Heights were also
23 amended at that same time. They were the only amendments
24 Your Honour to the pleading, and they're in D5 on p.36.
25 This is in relation to the water, where in the new
26 Paragraph D5(i) it said "The plaintiff's loss is
27 quantified as the difference between the market value at
28 the date of purchase and the plaintiff's unusable
29 allotments, and the market fee of those lots had they
30 been supplied with water at the date of purchase and
31 accordingly rendered useable".

1 So Your Honour that - we say that the claim is, even
2 as amended in relation to Tylden Road is caught by the
3 release, which we've reproduced at Paragraph 49, given
4 that the same loss is claimed and by reference to the
5 same matters.

6 HIS HONOUR: Well the other thing is - - -

7 MR DELANY: Both claims in tort as well Your Honour, based on
8 unlawful acts.

9 HIS HONOUR: My reading of Paragraph 10 was that yes, that at
10 the end of sub-paragraph 6 it says "And the first named
11 defendant knew that such requirement or requirements had
12 not been complied with". So the claim was made on the
13 basis that the first named defendant acted knowingly in
14 breach of the Act.

15 MR DELANY: Your Honour's looking at the earlier statement by
16 him, is that right?

17 HIS HONOUR: I thought I was looking at - - -

18 MR DELANY: Sorry, which - are you looking at the - in this
19 proceeding.

20 HIS HONOUR: I'm looking at what was pleaded in the - the
21 original Tylden Road - - -

22 MR DELANY: Yes.

23 HIS HONOUR: You've taken me to the loss - - -

24 MR DELANY: Yes.

25 HIS HONOUR: What I'm saying is that it may not have been
26 expressed to be a claim for misfeasance of office, but as
27 I understood, the amended pleading that I see behind Tab
28 3, it was bought on the basis that this was done
29 knowingly.

30 MR DELANY: Yes, yes, I agree.

31 HIS HONOUR: And once that's the subject matter of the

1 proceeding, that is, actions done knowingly in breach of
2 the Act, that seems to be - to me to be precisely what's
3 now said. But it may be that I have read it too quickly.
4 MR DELANY: Can I just enquire which paragraph Your Honour had
5 just referred to because I - - -
6 HIS HONOUR: Well, 20, say it's from 20, "An apprentice's first
7 offender was not entitled ...(reads)...for the following
8 reasons", and there's a series of pleadings. And it
9 concludes by saying - - -
10 MR DIMSEY: Yes.
11 HIS HONOUR: That it was done knowingly.
12 MR DELANY: Yes, that's, yes, I took Your Honour to that
13 earlier, yes.
14 HIS HONOUR: Yes. Now - - -
15 MR DELANY: So it's a knowing - it's a knowing, unlawful act,
16 it's a slightly different one, but it's still a knowing,
17 unlawful act.
18 HIS HONOUR: Well, it - - -
19 MR DELANY: Slightly different point.
20 HIS HONOUR: It is, yes.
21 MR DELANY: But it's clear that the counsel who's said to have
22 engaged in unlawful acts knowingly, when it caused the
23 office of titles to be notified the requirements had been
24 complied with.
25 HIS HONOUR: That's right.
26 MR DELANY: And that must be really the same position here, if
27 the case is to be made out as it's now sought to be.
28 HIS HONOUR: Well, I - that was the way I perhaps saw it,
29 to - - -
30 MR DELANY: Well, I think Your Honour's correct.
31 HIS HONOUR: You see, when you plead, in 21 that it's contrary

1 to law and wrongful. Apart from pleading that it's in
2 breach of the warranty and negligent. It doesn't go as
3 far as pleading misfeasance in public office, but it
4 seems to me that - - -

5 MR DELANY: Mightn't have been as developed in 1991 with
6 Mr (indistinct) pleading, Your Honour.

7 HIS HONOUR: Well, that's true. We were still in desert
8 country, weren't we.

9 MR DELANY: Well before (indistinct).

10 HIS HONOUR: Yes, well, look, I think we'll adjourn until
11 quarter past two.

12 LUNCHEON ADJOURNMENT

13

UPON RESUMING AT 2.15 P.M.:

HIS HONOUR: Yes Mr Delany.

MR DELANY: Your Honour, before lunch we were just dealing with the release in relation to the Tylden Road proceeding, and that was at Paragraph 49 of the outline that we had provided. Can I turn then to the Woodleigh Heights proceeding, and that's discussed in terms of the release in the outline at Paragraphs 52 and 3, and as Your Honour earlier observed, the release in relation to that case was wider, being a release from action suits to demands in costs arising out of or in any way related to the subject matter of the proceeding.

Now I haven't actually taken Your Honour to the pleading in the Woodleigh Heights proceeding, it's quite a long document and so what I'd prefer to do is just take Your Honour to the extracts which are in Ms Dixon's affidavit, and that's in her first affidavit sworn 23 September 2005 in Paragraph 47. I think a working copy was handed up earlier along with that affidavit. It's in a folder marked "First Defendant's Affidavits" I'm told. So this is the first affidavit sworn 23 September 2005.

HIS HONOUR: Yes.

MR DELANY: If Your Honour turns to p.15, Paragraph 47 sets out common allegations made in the Woodleigh Heights proceeding, and made in the 2005 proceeding. So it's in the prior Woodleigh Heights proceeding, and the 2005 proceeding. Just running through very briefly those allegations, or some of them, at the foot of p.15c "The Woodleigh Heights Estate was in 1978 part within and part outside the water works district of the water authority".

1 HIS HONOUR: Yes.

2 MR DELANY: Over the next page, p.16(iii) 22 November 1978

3 "Buchanan applied to the Council to develop the estate",
4 (iv) "The application provided the installation of a
5 privately owned and operated water supply and
6 reticulation system forming part of the common property",
7 (iv) "A planning permit issued", (vi) "It was a condition
8 of the permit that the development include construction
9 and installation of water supply and reticulation
10 system", (vii) "The master plan of subdivision was
11 registered", (viii) "There was a vendor terms contract of
12 sale with Buchanan to purchase the Woodleigh Heights
13 land".

14 Over to p.17 (x) "Council did not refer the cluster
15 plan of subdivision to the water authority", (xi)
16 "Buchanan made application for a cluster re-development",
17 (xii) "Council approved the cluster re-development issue
18 to planning permit". Then (xiv) "In about April 82 the
19 plaintiffs became aware that Lot 28 on the cluster plan
20 had been sold to Woodleigh Heights, a company associated
21 with Buchanan".

22 Then (xv) "In late 81 the plaintiffs incorporated
23 company Woodleigh Heights Marketing", (xvi) "In May 83
24 the nine lots comprising Woodleigh Heights land were
25 transferred by the plaintiffs to that company", (xvii)
26 "In 83 that company executed a declaration of trust"
27 that's said to be in favour of the plaintiffs, (xviii)
28 "In August 83 that company", I beg your pardon,
29 "Buchanan's company entered into contracts with the
30 plaintiffs to purchase all of Woodleigh Heights except
31 Lot 28"

(xix) "That company failed to complete the contracts of sale", and then (xx) "WHRD" which is Buchanan's company, "represented to the plaintiffs that if they attempted to rescind the contracts and sell to anyone other than it, then it would prevent them from having access to water, thereby rendering the land worthless", (xxi) The plaintiffs made enquiries of the council and water authority to see whether or not what they were told by Buchanan's company was true", (xxii) "The council and water authority told the plaintiffs that the cluster subdivision was outside the urban district of the Kyneton Water Trust area". Accordingly under the Water Act water can only be supplied pursuant to a private agreement at the discretion of the authority", and then (13) "Council and the water authority made representations to the plaintiffs. First, there was a lawful agreement for supply of water. Secondly, under the Water Agreement Buchanan's company owned and operated supply and reticulation system for the subdivision. Thirdly, the plaintiffs' allotments could not obtain access to the water supply and reticulation system except with the consent of Buchanan's company.

Fourthly, the body corporate wasn't entitled to access the water supply or reticulation system". Then there's there set out what happened in relation to mortgages and defaults and sale. Then over on p.20, Paragraph 29, "On about 13 November 84 the water authority represented to AGC that the plaintiffs' land did not have access to water and sewerage, and that such services would not be provided". In reliance on that the plaintiffs and AGC agreed to postpone an auction.

1 Then next, by 29 November 84, AGC enquired as to the
2 availability of water and sewerage. 32, by letters of
3 3 May 85 and 7 May 85, the Water Authority said that
4 water couldn't be supplied because it was outside the
5 water district. Then over on p.21 there was then a sale
6 or proposed rather, (indistinct) were engaged and because
7 water wasn't available, the auction was cancelled and
8 then there was a mortgagee sale. Now there's one matter
9 that's not set out in that table that's relevant and in
10 the amended statement, further amended statement of claim
11 in the Woodleigh Heights proceeding which I don't think
12 Your Honour needs to locate, it's at Tab 16 of MAD1. The
13 allegation is made that the defendants at the time they
14 made or caused to be made the representations, that's in
15 relation to the situation concerning water, knew them to
16 be false and untrue or made them recklessly, not caring
17 whether they were true or false. And then 58(b) in the
18 alternative, the representation was an expression of an
19 opinion or opinion of law and the defendants did not in
20 fact hold such opinion and or knew at the time of
21 expressing such opinion that it was incorrect. So that
22 was the nature of the claim previously made and the loss
23 was said in 67(a) to be the difference between what the
24 land was sold for, 135,000 and what the land would have
25 been sold for on the basis there was an entitlement to
26 improve private water supply and reticulation system,
27 431,000 and the loss and damages then 296,500.

28 Now we would say Your Honour that whilst it's not
29 entirely clear what's sought to be caught now in relation
30 to the Woodleigh Heights proceeding, whatever it is when
31 one looks at the issues raised by that earlier statement

1 of claim, certainly concerning the Woodleigh Heights land
2 it's the same land and it concerns issues of failure to
3 supply water. And it concerns actions or inactions on
4 the part of the council and also on the part of the Water
5 Authority and we would say that the release which we've
6 reproduced in Paragraph 53(b) is wide enough or more than
7 wide enough to cover any fresh claim relating to such
8 allegations. The allegations now seem to be that the
9 sealing of the cluster plan of subdivision was unlawful
10 because it didn't have water and it shouldn't have been
11 lodged with the Registrar of Titles. Now they're not
12 matters that specifically were pleaded before but they
13 do, we would say, arise out of and are related to the
14 subject matter of the proceeding. Because the particular
15 cluster plans of subdivision and the sealing of them are
16 matters which are pleaded as shown in that table that we
17 went through. I haven't taken Your Honour to the
18 pleading really because it's a very long one, 46 pages
19 and I don't really think it's necessary to do so. I
20 think that the summary was a fair representation of the
21 matters that are pleaded. So Your Honour, we would say
22 in both cases, the releases are sufficient to provide a
23 complete answer to the proposed - to the claim. But also
24 in relation to the - - -

25 HIS HONOUR: I must say when I read the pleading relating to
26 that cluster plan point, the condition on the face of it,
27 it doesn't seem to say quite what the plaintiff said but
28 that again, that's perhaps too fine a point.

29 MR DELANY: Well Your Honour's I think paid more attention to
30 that paragraph than I have. So all I'll say, there's a
31 lot of material - - -

1 HIS HONOUR: There's a question as to whether, I think it says,
2 "The development to be carried out in accordance with the
3 plans and submission which form part of this
4 application". There's a question as to what that means.
5 MR DELANY: There is and the plaintiff says that when he went
6 and had a look, there was going to be a lake and all
7 those sorts of things. And it's not clear what it does
8 refer to.
9 HIS HONOUR: But more to the point, it permits and constrains
10 development to what's shown in the plans. Whether it
11 requires everything shown in the plans is another
12 question.
13 MR DELANY: Yes, I follow Your Honour.
14 HIS HONOUR: Because there's a different form of
15 condition - - -
16 MR DELANY: Yes.
17 HIS HONOUR: - - - that was customarily used at that time to
18 achieve that.
19 MR DELANY: Well - - -
20 HIS HONOUR: But that's again - - -
21 MR DELANY: The condition that Your Honour refers to is pleaded
22 in W6 of the present pleading of particulars. "The
23 development to be carried out in accordance with the
24 plans and submissions which form part of this
25 application". That pleading was included in the old
26 pleading at Paragraph 9 so it's the same plea to the
27 extent that that plea is exactly reproduced.
28 HIS HONOUR: Yes, well it seems to me that - yes, well that's,
29 isn't it W5 of the amended statement of claim?
30 MR DELANY: Yes, it's W5 of the amended statement of claim.
31 I've just got to check that my note's accurate. I think

1 it corresponds and I will check.

2 HIS HONOUR: And it's the same as? It's in what's you've just

3 taken me through presumably.

4 MR DELANY: It's the same as Paragraph 9 so my note tells me.

5 I better just check.

6 HIS HONOUR: Of the original?

7 MR DELANY: Yes, well the original's actually the further

8 amended but, yes, the - nine, nine which I'm now reading

9 from exhibit or Tab 16 in the Folder MAD1 which is the

10 further amended statement of claim in the original

11 Woodleigh Heights.

12 HIS HONOUR: Yes.

13 MR DELANY: Nine says it was a condition of PP2191 that

14 Woodleigh Heights be developed in accordance with plans

15 and submissions comprising the application of cluster

16 subdivision including the construction and installation

17 by Buchanan's of the water supply and reticulation system

18 as set out in the submission.

19 HIS HONOUR: Yes.

20 MR DELANY: So that's exactly the same paragraph of the

21 particulars as Your Honour points out and may not support

22 that plea. Whether they do or not probably doesn't

23 matter for our purposes, the point is that exactly the

24 same plea in the same language, which is W9, appears in

25 Paragraph 9 of that amended pleading.

26 HIS HONOUR: Yes I see. Just wait a moment.

27 MR DELANY: So Your Honour, that's all I wanted to say in

28 relation to those pleadings, and as I say we rely on the

29 terms of the release. There's also the proposition Your

30 Honour in relation to the Tylden land which is a little

31 different, and the prior Tylden proceeding, that there

1 was an order made in the proceeding striking out the
2 proceeding, and that is exhibited at Tab 15, part of
3 Folder MED1, an order of Judge Howden that by consent
4 settled action to be struck out.

5 Now in terms of the Woodleigh Heights proceeding, we
6 don't have an order dismissing or striking out the
7 proceeding, although one could readily infer that one or
8 the other has occurred, but what we would say Your Honour
9 is that as well as the terms of settlement providing an
10 obstacle to the plaintiffs, so too does the order of the
11 court in relation to Tylden Road, and we refer Your
12 Honour to - and take Your Honour to a case in the book of
13 authorities which is at Tab 15 of Neil Pearson & Co.

14 That case at Tab 15 is in the New South Wales Court
15 of Criminal Appeal, and it concerned the relevance in
16 proceedings before the New South Wales Criminal Court of
17 a determination in the Federal Court in a related matter.
18 At p.450 in the judgment of Justice Kirby, who was at
19 that time the Acting Chief Justice, is a heading "The
20 preclusive effect of Prior Judicial Determinations" and
21 His Honour says "issue estoppel and abuse of process
22 argument advanced by the respondent have traditionally
23 been considered to be forms of estoppel by record".

24 Then E "As the phrase estoppel by record suggests
25 the doctor initially operated only on decisions of courts
26 of record. Since this is no longer the case there have
27 been calls for a change of semantics". Then between F
28 and G, "the original form of estoppel by record is raised
29 due to Carter". At the foot of the page, last two lines,
30 "Raised due to Carter operates so that once a cause of
31 action between certain parties has been finally

1 determined by a common tribunal neither of those parties
2 can allege", sorry, "challenge the adjudication in
3 subsequent litigation between them.

4 This is because the very right or cause of action
5 claimed or put in suit is passed into judgment, so it's
6 merged and has no longer the independent existence.
7 Raised due to Carter has two effects, first it prevents
8 the unsuccessful", sorry "the successful party from
9 bringing again the same cause of action. Secondly, it
10 prevents the unsuccessful party from denying the
11 correctness of the decision reached by the initial
12 tribunal. The second manifestation of estoppel by record
13 is issued estoppel'.

14 Then further down His Honour says, a few lines down
15 "The only difference lies in whether the issue said to
16 have been resolved constituted the tribunal's formal
17 conclusion, or whether the issue was subsidiary or unlay
18 the conclusion". Then the term issue of estoppel appears
19 to have been coined by Justice Higgins and a passage is
20 set out, and then at just above F "The third and most
21 limited form of estoppel by record of court occurs when a
22 court prevents a party from litigating an issue, because
23 to do so would amount to an abuse of process. This
24 mechanism will most often be employed whether alone or
25 technically gained by an early determination; the parties
26 should in substance be so adjudged". We looked Your
27 Honour and had difficulty on the last occasion, and
28 haven't found any cases that really deal with what the
29 precise status of an order made by consent striking out a
30 proceeding is, but we would say that it is either, that
31 it gives rise to an issue of estoppel in the form of

1 estoppel by record, as discussed by His Honour here at
2 Paragraph B, because it's not the result obviously of a
3 judicial process of determination and reasoning. If not,
4 that it falls within the third form to which Justice
5 Kirby refers, and that as His Honour says in that case,
6 "Although a party might not be technically bound by the
7 earlier determination by the court, they should in
8 substance be so adjudged". Now we would say Your Honour
9 that the position concerning the Tylden Road matter is
10 clearly that the order of Justice Howden puts to rest any
11 ability on the part of the plaintiffs to bring such a
12 claim because of estoppel by record

13 And my attention has been drawn Your Honour to what
14 actually finally became of the Woodleigh Heights
15 proceeding. Your Honour will recall that that matter
16 came before Justice Beach on an application for specific
17 performance of the terms of settlement. His Honour's, in
18 exhibit - in the Folder MED1, Tab 31 is His Honour's
19 reasons for judgment. And His Honour ordered in
20 Paragraph 24, "Finally I order that this proceeding now
21 stand dismissed".

22 HIS HONOUR: Yes.

23 MR DELANY: So I was wrong when I said I didn't think the order
24 had been exhibited. So we would say Your Honour that
25 independently of the releases, that there's an estoppel
26 that operates to prevent as one would expect the policy
27 of the law would provide to prevent someone coming back
28 for a second shot at a case that's been settled and
29 orders have been made accordingly. Now Your Honour the
30 final matter that I'll just touch on briefly is the claim
31 in relation to the Tylden Road industrial land and we

1 deal with that in Paragraphs 58 and 59 of our outline.
2 And as we understand the complain concerning the Tylden
3 Road industrial land of which the plaintiffs are still
4 registered proprietors, it is that the land comprises one
5 lot rather than six. And we apprehend that to be the
6 complaint by reference to D2 in the amended statement of
7 claim. If that is the complaint, then Your Honour we
8 would say that the plaintiffs knew of that fact when they
9 were registered on title in September 1981. And so if
10 there was to be an action brought, it should have been
11 brought years and years ago in relation to such a claim.

12 HIS HONOUR: Which paragraph is this?

13 MR DELANY: Paragraph 58 of our outline.

14 HIS HONOUR: Yes and which paragraph of the statement of claim?

15 Amended statement - - -

16 MR DELANY: It's D2 and the outline tells us and I hope it's
17 right that it's at p.34 so - - -

18 HIS HONOUR: Page 34.

19 MR DELANY: Thirty four. I'll just locate it Your Honour.

20 HIS HONOUR: I must say all this numbering is extremely
21 difficult to follow.

22 MR DELANY: It is. This is in the particulars of loss.

23 HIS HONOUR: Yes, I see, yes.

24 MR DELANY: And on p.34, D2 says in "(1) the plaintiffs
25 bargained for the parent allotment on the base it was
26 subject to a lawful six lot plan of subdivision which
27 when duly processed would give them indefeasible title to
28 each of the six lots". The loss is therefore the value
29 at the time of purchase of the land assuming the plan was
30 lawfully sealed and approved. And it's taken as from
31 December 1980. Now the, a copy of the title - and I must

1 say I don't know that we've got these exhibits here Your
2 Honour. It was a separate application in relation to
3 security for costs in the alternative and the title in
4 question is Exhibit MED2 to another affidavit sworn by
5 our instructor in relation to that proceeding. No, it
6 isn't, I'm told it's in the folder that Your Honour has.
7 So we - the first submission we make is that if the
8 complaint is a valid one then it's something of which the
9 plaintiffs knew and were apprised when they were
10 registered on title on 4 September 81.

11 And secondly, we say that if - that the subject
12 matter of the claim is so closely connected with that of
13 the prior Tylden Road proceeding and I think I said our
14 client over-discovered by discovering the industrial
15 plans that if the plaintiffs wanted to sue they should
16 have done so in that action. And they're estopped on the
17 basis of Anshun from doing so now. And I won't take Your
18 Honour to the passage in Anshun but the reference that we
19 rely on is at p.602 of the judgment.

20 HIS HONOUR: And likewise because it was disclosed, there's a
21 limitations defence is there not?

22 MR DELANY: Yes, Your Honour. That's right.

23 HIS HONOUR: Just pardon me for a moment. I don't think

24 Mr Thompson's going to agree with you that the complaint
25 is simply that it comprises one lot and not six lots. I
26 think what he says is was one lot with an entitlement to
27 create six lots.

28 MR DELANY: Well I accept that the way that the claim's
29 pleaded, it's put on the basis that, in those paragraphs
30 at p.34 - - -

31 HIS HONOUR: "Was subject to a lawful six lot plan of

1 subdivision which when duly processed" - - -

2 MR DELANY: But then the loss in two, is described as the value

3 at the time of purchase, assuming it was lawfully sealed

4 and approved, lawfully subdivided into six - - -

5 HIS HONOUR: I see.

6 MR DELANY: Each of which was ultimately registered.

7 HIS HONOUR: Well - - -

8 MR DELANY: What we would say Your Honour is that it can't have

9 been later than let's say 1990 that someone would have

10 realised that the plan of subdivision hadn't yet

11 materialised.

12 HIS HONOUR: Well under that - I understand that point. But

13 I'm - what I'm saying to you is that I'm not sure that

14 your characterisation of the complaint in 58 is correct.

15 Thompson

16 MR DELANY: It might be more accurately said that there was a

17 right to have six lots. And we would say that assuming

18 that's the matter in which the claim is sought to be put,

19 that it must have been obvious to any person within, call

20 it a reasonable time, after December 1980, that the six

21 lots weren't going to issue and I suspect there's

22 material we'll have a look at that tells us when it was

23 that that was realised, but it must have been the case by

24 1990 at the latest, ten years later that you'd know it

25 wasn't (indistinct) issue. So we would say that it's

26 clearly statute (indistinct). There doesn't seem to be

27 any basis other than the matters that are referred to in

28 relation to residential land that would give a basis for

29 postponing the limitation period.

30 HIS HONOUR: Yes.

31 MR DELANY: Your Honour we do rely on the written submissions

1 but I think I've more than covered the issues, so that's
2 all I wanted to put Your Honour at this stage.

3 HIS HONOUR: Yes, thank you.

4 MR GARDE: If Your Honour pleases, we have prepared an outline
5 which substantially resembles I must say the outline of
6 the last occasion but updated slightly for additional
7 material, that could be distributed. We have also
8 prepared a bundle of cases which I won't refer to in any
9 detail but which to some extent supplement the cases that
10 you've been separately supplied with.

11 In terms of Coliban of the - as the successor of the
12 trust and subsequently the Kyneton Water Board, it's
13 convenient to turn to the amended statement of claim and
14 see what is alleged, and frankly, there's not a lot
15 alleged against Coliban as a consequence of which what we
16 will say will be relatively brief Your Honour. But if
17 Your Honour has near to hand the amended statement of
18 claim of 4th November 2005, one can immediately turn to
19 p.15 and look at Paragraph 229.

20 In fact in relation to the Tylden Road claim, the
21 claims advanced in relation to the Kyneton Shire
22 Waterworks Trust are to be - are set out from T29 through
23 to T34 and at T29, Your Honour will see that it's alleged
24 that in or about October 1980, The Trust, (indistinct)
25 acting maliciously and intending to cause harm to the
26 plaintiffs or to a class of person which included the
27 plaintiffs acted to unlawfully receive and accept from
28 the plaintiff a bank guarantee in the sum of \$11,500".

29 I referred to in Paragraph T919 in respect of the
30 purported obligation on the part of Buchanan to supply
31 water to the subdivision. To that the claim, and there's

1 really - it's fair to say, really in terms of the Trust,
2 a claim for suggested non-compliance of s.307AA which
3 I'll come to, and a claim in relation to calling up the
4 bank guarantee. There the two issues only that are
5 identified in this pleading and Your Honour will see
6 looking into Paragraph T29, that refers back to Paragraph
7 50 to T19 and in T19, it's said that "Buchanan requested
8 that the plaintiffs provide to the Kyneton Shire
9 Waterworks Trust a bank guarantee in the sum of \$11,500
10 to secure his obligation to supply water to the
11 subdivision".

12 The plaintiffs provided each of the said guarantees
13 and that the substance of that. Then it said in T29B,
14 that because the subdivision was within the waterworks
15 district, but outside the urban district, for the
16 purposes of the Water Act, the only possible means of
17 supplying water to the subdivision was under a water
18 agreement pursuant to s.307AA of the Act. Accordingly,
19 s.307AA was the only possible source of power that may
20 have entitled the Trust to receive any monies from any
21 person in respect of the supply of water within the
22 waterworks district".

23 And then it said that "The relevant provisions of
24 s.307AA could never have applied to the plaintiff because
25 they were not, and could never have been, the owners of
26 the subdivision within the meaning of s.307AA at the
27 relevant time and were not and could never have been
28 parties to an agreement for the supply of water as
29 provided for by s.307AA". And we apprehend that what the
30 substance of that is that it's said that s.307AA
31 authorises a water authority to deal with the owner of

1 land. The owner of the land was Mr Buchanan or his
2 company. The plaintiffs were not the owners of the land
3 therefore the bank guarantee would not or should not have
4 been received. And that's - we understand what's thought
5 to be said. In D is said that there'd been no request
6 received by the Council from the past. E says, and that
7 confirms what I said a moment ago, as we understand this,
8 "It can be only be (indistinct) requirement placed upon
9 Buchanan and not the plaintiffs.

10 Alternatively, the Trust, in engaging in the conduct
11 described in this paragraph did say with reckless
12 disregard to the existence of any lawful authority to do
13 so". Then in T31, that "Maliciously intending to cause
14 harm to the plaintiffs or a class of persons which
15 included the plaintiffs, the Trust between 12 May 1982
16 and 4 November 1982 demanded on pain of calling upon the
17 guarantees referred to in Paragraph T19 above, that the
18 plaintiffs install a water supply system to the
19 subdivision". In or about November 1982, the Trust
20 notified the plaintiffs that it had "Resolved to commence
21 construction of the waterworks and call upon the
22 plaintiffs guarantee to facilitate such construction"

23 And on 10 December 1982 the trust in substance
24 called up the guarantee and that the Westpac Bank
25 complied with the trust's request in due course. And the
26 other paragraphs essentially expand on what I've just
27 read out in terms of alleging reckless disregard, the
28 probability that such harm would occasion - the
29 probability that such conduct would occasion harm to the
30 plaintiffs and that Mr Porter was an officer of the board
31 acting in the course of his employment. So that's the

1 substance of the claim. Quite apart from the fact that
2 we would contend if we had to that that should be struck
3 out, it's apparent that the damage, the drama to this is
4 that a bank guarantee in the sum of \$11,500 was
5 inappropriately called up on 10 December 1982.

6 So it's very apparent indeed that the claim made
7 against the trust is well and truly out of time from a
8 limitations point of view. But it goes beyond that Your
9 Honour because when one goes back to look at the claim
10 that was originally made against the trust, then the
11 Kyneton Water Board in the Tylden Road County Court
12 proceedings and in this respect it's convenient if Your
13 Honour, if Your Honour would go once again to
14 Mr Edwards's exhibit SME Volume 2 which contained the
15 book of pleadings which was Tab 43. That was SME volume,
16 SME1 Volume 2? And I suppose Your Honour I'm one of the
17 few who remembers when books of pleadings used to be
18 prepared but it's in fact convenient to - convenient to
19 look at the book of pleading in the sense that you get
20 the defence as well as the statement of claim.

21 HIS HONOUR: Just one moment. SME Volume 2 - - -

22 MR GARDE: It's SME1, it's a bit hard Your Honour, it's Exhibit
23 SME1 but the second volume of that exhibit.

24 HIS HONOUR: Yes. And what, which tab?

25 MR GARDE: And it's Tab 43.

26 HIS HONOUR: Yes.

27 MR GARDE: And this conveniently embodies as it were the
28 respective claims. But if one then turns to Paragraph
29 33, Your Honour what I'm about to highlight is that the
30 claims made here were the same claims in essence pleaded
31 with more detail. But nonetheless the same claims. Your

1 Honour will there see at Paragraph 33 further and
2 alternatively in about October 1980 at the request of the
3 subdivider, the plaintiffs provided a signed requisition
4 to the manager of the bank for the issue to the second
5 named defendant of a bank guarantee, the second bank
6 guarantee. And I won't read out the rest of that. And
7 we note looking at the book of pleadings that the second
8 named defendant admitted the allegation in substance.
9 It's then Paragraph 34 of the statement of claim said in
10 or about October 1980, the bank issued the second named
11 defendant with the second bank guarantee for the sum and
12 for the purpose. It's then said in Paragraph 35 that
13 there were implied warranties that were given in
14 consideration of the issue of the second bank guarantee
15 by the second named defendant to the plaintiffs.

16 Then turning through to Paragraph 36, it's pleaded
17 that between February 1983 and March 1984, the second
18 named defendant caused a water main to be constructed on
19 the land in connection with the subdivision of the land
20 and then purported pursuant to the provisions of the
21 Water Act so that in this, in these proceedings there was
22 in fact an affirmative plea that the actual construction
23 of that main in 83 and 84. Then Your Honour will see
24 that on the next page, that on 10 December 1982, the
25 second named defendant requested Westpac as successor in
26 title to the bank for payment upon the second bank
27 guarantee of the sum of \$11,500. And then it's pleaded
28 in 38 that the money was accepted by the second named
29 defendant. Then in Paragraph 39 that the plaintiffs had
30 reimbursed Westpac. Then in 40, that there was not at
31 any time an agreement in existence between the second

1 named defendant and the plaintiffs or between the second
2 named defendant and the subdivider in relation to the
3 construction of the water main. Then at 41, the plans
4 and specifications for the main it's alleged were not
5 approved as required by the Water Act. 42 goes on with a
6 variety of other supplementary allegations but leads on
7 in 42(f) to the allegation that the second named
8 defendant was not at any material time lawfully entitled
9 to request or accept from the plaintiffs the sum of
10 \$11,500 or any other sum in connection with the
11 subdivision of land or the construction of the main.

12 HIS HONOUR: Yes.

13 MR GARDE: And Your Honour will then see that it was, at 43,
14 alleged to be contrary to law, wrongful, in breach of the
15 third warranty, negligent, in breach of a duty owed by it
16 and those allegations are put in different ways.

17 Then back, at the bottom of that page in or about
18 November 1982 the plaintiffs informed the second named
19 defendant that they intended forthwith to cancel the
20 second bank guarantee. Then 46, there were
21 representations, the second representation was there
22 alleged, which I won't read out. Then there's 47,
23 allegation of reliance, 48, duty of care in relation to
24 making the second representation, 49, "That as a
25 consequence of the second representation and the fourth
26 warranty, the plaintiffs did not cancel the second bank
27 guarantee".

28 Then in 50, "That the plaintiffs have since
29 discovered and the fact is that by reason of the matters
30 detailed in Paragraph 42 hereof, the second
31 representation was untrue, made in breach of the said

1 duty to take care of a fourth warranty was broken". Then
2 in - then there claims for - in 51, for "The sum of
3 \$11,500 as being the loss and damage, interest and
4 consequential losses. The consequential losses being
5 sustained by the plaintiffs as a result of the sale of
6 the 15 allotments, the sale of which was forced by the
7 second named defendant's wrongful request for and
8 acceptance of the said sum".

9 Then a - Your Honour will see in Paragraph 53 as an
10 alternative claim, "That by reason of the matters
11 detailed in Paragraph 42, the sum of \$11,500 was paid by
12 Westpac as agents for the plaintiffs and received by the
13 second named defendant in purported discharge of a demand
14 made contrary to law and under colour of an office". So
15 the colour of an office features there, and in the
16 premises the second named defendant has had and received
17 the said sum to the use of the plaintiffs.

18 Then there's in 54 an alternative way for the
19 \$11,500 to be claimed - this is a claim in mistake and in
20 restitution. Then in 55, allegations about the fact that
21 the "Second named defendants carried out works to the
22 land, and in so doing acted to their financial
23 detriment", and that's set out. Then there's a claim in
24 estoppel, and that perhaps is enough. In substance what
25 we say, having regard to all of that Your Honour, is that
26 the Tylden Road claim now advanced is the same as, in
27 substance the Tylden Road claim formerly advanced, and in
28 terms of the form of the release acknowledging that, it
29 is narrower than the form of release adopted in relation
30 to the Woodleigh Heights proceeding, that the plaintiffs
31 - this is the Tylden Road proceeding release, "The

1 plaintiffs release the defendants from all claims, suits
2 and demands whatsoever the subject of this proceeding".

3 There could not be any doubt but that the \$11,500
4 bank guarantee was the subject matter of the Tylden Road
5 proceedings, and so the release granted we submit in
6 relation to the Tylden Road proceeding is perfectly
7 apposite to exclude the plaintiffs from alleging, as they
8 do in the current amended statement of claim, the various
9 allegations about the second bank guarantee in the sum of
10 \$11,500. So we say about that Your Honour two things.

11 First, it's very definitely out of time, if being
12 some 23 years until the latest proceedings were
13 commenced, from the date when damage must have been
14 suffered which was when the bank guarantee was called up.
15 Secondly, that review of the Tylden Road pleading shows
16 very clearly that the subject matter is the same. So we
17 say that about the Tylden Road claim, and whilst I'm
18 looking at the pleading it's convenient to look also at
19 the Woodleigh Heights pleading, which I'll do now.

20 Again, there's only a few paragraphs here to be
21 looked at, and I'll invite Your Honour to turn over to
22 Paragraph W62, and at W62 you have the allegations made
23 against the Board that after receipt of the letter
24 referred to in Paragraph W61, which apparently was a
25 letter from Woodleigh Heights Resort Development Pty Ltd
26 to the Water Board informing the Board of that company's
27 obligations imposed under the terms of settlement, and
28 His Honour's orders requesting the Board to make a fresh
29 agreement with the body corporate of cluster subdivision
30 1134. I'm not sure that that is an accurate reflection
31 of what took place, but that's what it says. Then we

1 have W62, it said that "In furtherance of the malicious
2 acts of Woodleigh Heights Resort Development pleaded in
3 the preceding paragraphs or to frustrate and defeat the
4 spirit and effect of the orders of His Honour referred to
5 in Paragraph W56 above". Then there is particularised a
6 meeting of the Water Board on 31 October 1985,
7 acknowledging receipt of the letter from WHRD, and it
8 said noting as follows, "The original agreements
9 apparently we made in the belief that Woodleigh Heights
10 Resort Developments Pty Ltd was the body corporate",
11 which is not the case. Thus fixed with knowledge it had
12 entered into a water agreement with the wrong entity in
13 the first place

14 And that it was in breach of s.6(1)(b) of the
15 Cluster Titles Act. The IDO then in force and PP2191
16 that the Water Board deliberately failed to either accede
17 to the request by WHRD referred to in Paragraph W61 above
18 or rectify the breach of PP2191. And then in W63 it's
19 alleged that there was a reckless disregard. In W64 it's
20 alleged that what took place was that the Water Board or
21 someone on behalf of the Water Board wrote to the
22 plaintiff's agent at the time when the allotments or a
23 number of them were up for sale by auction and stated
24 that water was not available to the plaintiff's
25 allotments. That no agreement was in existence between
26 the Board and any other parties to supply individual
27 blocks and thirdly, that there was no guarantee that the
28 Board would supply water or waste water services to the
29 allotment. So that it's said that in substance that
30 through this letter to the agent in essence advising of
31 the position, there was misrepresentation and malicious

1 conduct of a very serious order.

2 And it's said that the false representations were
3 made with the intention that the plaintiffs and or the
4 plaintiff's agent would act upon them. And it's then
5 said that Parkinson made these representations acting in
6 the course of his employment with the Water Board and
7 that acting upon the false representations referred to,
8 both the plaintiffs and the plaintiff's agent were
9 deceived into believing that there was no water available
10 to the plaintiff's land nor any immediate prospects of
11 water being supplied to the said land. The auction then
12 scheduled for 23 November 1985 was cancelled. And then
13 it's subsequently alleged in W70 that between November
14 1985 and November 1989, the plaintiffs unsuccessfully
15 attempted to establish legal entitlement to the supply of
16 water and ultimately in November 1989 that Esanda
17 exercised its right of mortgagee sale over the
18 plaintiff's land and sold the land to a company known as
19 Deckwood.

20 The directors of which were, it's said, relatives
21 and associates of Mr Buchanan. So again on any point of
22 view in terms of the limitation period, the limitation
23 period is long expired at the time when this proceeding
24 was issued. So we say that but additionally we also say
25 if you go back and look at the previous pleading and I am
26 looking now Your Honour, this is the lengthy document
27 that our learned friend referred to, the further
28 statement of claim. If Your Honour can find Exhibit SME2
29 Volume 2 which is another of Mr Edwards's exhibits.
30 SME2, Volume 2?

31 HIS HONOUR: Yes. Yes I have it.

1 MR GARDE: My learned friend assists by writing, it's Tab 16 to
2 Ms Dixon's - - -
3 HIS HONOUR: I've just got out the one you referred - - -
4 MR GARDE: Very good, let's stick with that Your Honour. It's
5 Tab 42 in that bundle.
6 HIS HONOUR: Yes.
7 MR GARDE: This - - -
8 HIS HONOUR: Wait a moment. I don't seem to have tab - - -
9 MR GARDE: Yes, we have a spare - - -
10 HIS HONOUR: It's folded in.
11 MR GARDE: Very good.
12 HIS HONOUR: Yes.
13 MR GARDE: If I can say to Your Honour I recall this pleading
14 went through a number of applications and in any event,
15 Justice Ashley deliberated on this particular proceeding
16 as to which I might say one of the defences was, it was
17 out of time under the limitation period. Albeit being a
18 1995 action so that was one matter that was the subject
19 of discussion in the course of those proceedings.
20 HIS HONOUR: Yes.
21 MR GARDE: But if I can jump into this because it is lengthy
22 and invite Your Honour to turn directly over to p.13?
23 HIS HONOUR: Yes.
24 MR GARDE: And you'll see it's said there that the plaintiffs
25 were in default under various mortgages. If I jump over
26 now to p.15 Your Honour will see that it's said that
27 LJ Hooker Real Estate Agents at Kyneton were appointed by
28 AGC as agents to sell the plaintiffs' land and the
29 auction date of 17 November 1984 was fixed. That's p.15.
30 And then it's said in 16, Paragraph 39A that on or about
31 13 November 1984 the Board represented to Hooker Kyneton

1 and AGC that water and sewerage were denied to the
2 plaintiffs' land and could not be obtained. That's said
3 to be the second representation. 39B alleges that
4 Mr Porter repeated the second representation to AGC on or
5 about the same date. 40A says that the representation
6 was communicated by LJ Hooker Kyneton and AGC to the
7 plaintiffs.

8 40B says in reliance upon the second representation,
9 the plaintiff and AGC agreed that the proposed auction of
10 the plaintiffs' land set down for 17 November 1984 be
11 cancelled and they instructed Hooker Kyneton to do so.
12 So that - the auction was cancelled. At p.18, in
13 Paragraph 41 by letters dated 29 November 1984 AGC
14 requested advice from the Board and the Council as to the
15 availability of sewerage and mains reticulated water for
16 plaintiffs' land et cetera. Paragraph 42A, in December
17 there was a response, and that's said to be the third
18 representation. Then in 44A the Board responded to AGC's
19 letter of 29 November 1984, and a subsequent letter by
20 AGC dated 9 April 1985 in which it represented that the
21 Board was not in a position to supply water to the
22 plaintiffs' land. Then that's known as the fourth
23 representation.

24 In Paragraph 45 the Board represented to AGC, and
25 that set out essentially the reasons why that was the
26 case. The water had been supplied by - to - it's been
27 supplied to WHRD as an outsider of the water agreement on
28 the basis that all costs for construction of the mains
29 were paid for by that company. That the Board had no
30 mechanism by which the allotments referred to might be
31 supplied with water, except with the agreement of that

1 company. Then in D, that "WHRD Pty Ltd either all of
2 owns, operates or controls the water mains referred to in
3 sub paragraph A".

4 Then if I move through this, there are a whole
5 series of allegations associated with that Your Honour,
6 but importantly Your Honour will see that the
7 representations were, amongst other things, alleged to
8 have been fraudulent. At Paragraph 31 the fourth
9 representation for example is alleged to be false and
10 untrue for the following reasons.

11 The fifth representation at Paragraph 32 was false
12 and untrue for reasons that are there listed. Those
13 reasons go on for two pages. At paragraph - sorry at
14 p.34 the implied part of the fifth representation of the
15 Board was said to be false and untrue for the following
16 reasons, and without reading more of these pages there
17 are pages of particulars as to why what was done was
18 false and untrue. At p.40 there are allegations that the
19 representations were made recklessly, not caring whether
20 they were true or false.

21 At 58B "That the defendants did not in fact hold the
22 opinion insofar as what had been said reflected an
23 opinion or an opinion of law. That they didn't in fact
24 hold such an opinion, and knew at the time of expressing
25 such an opinion, it was incorrect". Then the pleading
26 moves off into negligence, which I won't read. So it's a
27 pleading which in many ways alleges fraud in the very
28 context and circumstances of the allegations now made.
29 So Your Honour if I return to look at what's in the
30 current pleading from W62 onwards, through to W71, the
31 allegations made in W64 that "Water was not available to

1 the plaintiff's allotments, that no agreement was in
2 existence between the Board and many other parties to
3 supply individual blocks, and that there was no guarantee
4 that the Board would supply water or waste water services
5 to the allotments".

6 Those representations were all representations
7 alleged in the earlier proceedings. Indeed the earlier
8 proceedings put in more alternative ways those
9 allegations, and so we say from the point of view of the
10 release that was executed in the Woodleigh Heights
11 proceedings that on any view the allegations now made
12 arise out of or are in any way related to the subject
13 matter of the earlier proceedings. So we say therefore
14 Your Honour that on both counts of - they're statue
15 barred, and secondly they're caught by the releases in
16 each of the Tylden Road and Woodleigh Heights proceedings
17 that the current claim cannot stand.

18 In relation to the suggested fraudulent concealment
19 Your Honour, we don't apprehend that the particular
20 matter, namely the plan that's been the subject of
21 submissions this morning, and it is said was in the black
22 folder, has any bearing on the claims that I've just been
23 referring to in the context of Tylden Road and Woodleigh
24 Heights. So the particular matter that is averted to is
25 not a matter that is pertinent to any allegation against
26 the Water Works Trust or against the Kyneton Water Board
27 as we understand it. Just to further make good that
28 particular submission if I can invite Your Honour to go
29 back to Tab 43, that was the book of pleadings document.

30 HIS HONOUR: Yes.

31 MR DELANY: If Your Honour can locate that once again in

1 Exhibit SME1 Volume 2? Now our learned friend read a
2 good deal of that, and I will not do the same, but that's
3 the Tylden Road pleading book. But if I invite Your
4 Honour to jump over to Paragraph W - it's a bit hard to
5 do this, but after the C28, C38 there's WB1 and then WB2,
6 dealing with the Water Board explicitly. That is towards
7 the back of that bundle Your Honour, the last 35 odd
8 pages appear to relate to the Water Board.

9 Although there are some statements that were read
10 out this morning that also relate to the Water Board. I
11 don't know if Your Honour can find that. If Your Honour
12 then turns to WB1, this is a sort of annotation, or an
13 annotation of comments on the pleading. WB2 Your Honour
14 will see is annotated, "The Water Board however did
15 accept my guarantee and did enable Council to give effect
16 to this unlawful intent. At the time of lifting the
17 requirement there was no Water Supply Agreement in place
18 with Buchanan. My guarantee therefore was immediately
19 placed at risk. The Water Board accepted by guarantee
20 for the purpose of letting Buchanan off the hook so to
21 speak. I did not supply the guarantee for the purpose
22 stated in the minute".

23 Then there are some pages of pleading again copied,
24 and we note that WB10 says, towards the bottom "and there
25 was no agreement under s.307AA of the Water Act, refer
26 previous page. The provisions of 307AA5 do not apply".
27 Then at the top of the next page WB11 "The only lawful
28 means of carrying out the works was pursuant to 3071H" I
29 think that is. Then a little later, "The approval of the
30 Governor in Council was neither sought nor obtained".
31 Then there are some other observations.

1 Then at WB13 "The approval of the Minister therefore
2 was for works within the green district to be carried out
3 by agreement under s.307AA. As we have noted already,
4 the land was not in the urban district, there was no
5 agreement. Therefore no approval at all for the works
6 carried out". There's more discussion of 307AA on the
7 next two pages, and then at WB25 if I jump over to that
8 "I do not deny the validity of my guarantees. I do say
9 that neither authority had the right to accept my
10 guarantee for the purpose of enabling Buchanan to realise
11 upon his unlawful sales by giving effect to the unlawful
12 intent evidenced in Council's letter to Buchanan of
13 07.05.1980, nor could my guarantee induce Council to
14 misinform the Registrar of Titles as it did in its letter
15 of 24 November 1980".

16 Then under the heading of Council "And the Water
17 Board are estopped from making the defence claim in
18 Paragraphs 55 and 56". Little - there's a reference to
19 the bank guarantee in the form of a recommendation from
20 the Council minutes it would appear, similarly the Water
21 Trust with the Water Works. Then over the page Your
22 Honour WB26, "Both Council and the Water Trust claim to
23 have the right to carry out the works in the event that I
24 defaulted upon my legal obligation to construct the
25 works, and I say further that both Council and the Water
26 Board claim that this legal obligation arose from what I
27 now know to be a requirement and which they claim to be
28 current and binding on myself and myself alone as owner
29 of the land".

30 Then we've got Mr Wilson who appears again, and
31 Mr Wilson for Council gave evidence to this effect in the

1 Bendigo Magistrates' Court, and there's more discussion
2 of that. And then over the page in the second part,
3 "Council and the Water Trust misrepresented both fact and
4 legislation so that I believed I was in default and then
5 called upon my guarantees upon my default or did the
6 works because of my default. Both claimed they would do
7 the work" and there are then some calculations of costs
8 and other matters. WB31, "In the case of the Water Board
9 the particulars recite that the works were carried out at
10 a cost", which was set out.

11 "However the Water Trust called upon my guarantee in
12 the amount of \$11,500, and it said not accounted to me
13 for the difference". There is further discussion of the
14 Water Board's position in WB32 and WB33. At the top of
15 WB34, "The land was at all material times outside the
16 Kyneton urban district and not supplied with water". So
17 Your Honour all of that makes it clear that there was a
18 very considerable state of knowledge and understanding at
19 the time of the Tylden Road proceedings, and we for our
20 part are at a loss to follow how the suggested plan in
21 the black folder could have a bearing upon the claims
22 made against the Kyneton Water Works Trust or Water
23 Board.

24 Now in addition to that what took place is set out
25 in Mr Edwards's affidavit, which I will now come to.
26 Mr Edwards has sworn a number of affidavits. The
27 principal affidavit which he swore in support of the
28 application was dated 12 September 2005. We can hand one
29 up Your Honour, the paper in this matter is just
30 absolutely voluminous. In this affidavit Mr Edwards sets
31 out the details of the claims, which I won't read in his

1 first two pages. At Paragraph 10 he comes to the
2 previous Tylden Road action.

3 His exhibit is SME1, Volumes 1 and 2, set out and
4 enclosed conveniently in a chronological order the court
5 documents relating to that matter. And he refers in
6 Paragraph 11 to the fact that the action came on for
7 trial, referring to the settlement of the action on 14
8 June 1991 and producing a copy of the terms of
9 settlement. He then refers to the form of release which
10 I've earlier mentioned in Paragraph 12 which is Clause 5.

11 HIS HONOUR: Yes.

12 MR GARDE: And then he goes on to look at the subject matter of
13 the previous Tylden Road action and the present action.
14 And in Paragraph 16, refers to the fact that in the case
15 of a guarantee in the sum of \$11,500 in both actions, the
16 plaintiffs allege that the trust called up the guarantee
17 on 10 December 1982 following earlier demands to the
18 effect that the water main and water works had not been
19 constructed and proceeded to cause the water main and
20 water works to be constructed in 1983 and 1984. And in
21 Paragraph 17, he refers to the fact that it was alleged
22 that the trust had acted wrongfully and without lawful
23 authority when it did so. And that in both proceedings
24 the plaintiffs allege that the Tylden Road land was not
25 at any time situated within the urban district or the
26 rural district of the Kyneton Shire Water Works Trust.
27 Paragraph 18, that both claims make allegations
28 concerning George Stanley Porter now deceased, formerly
29 the shire secretary of the Shire of Kyneton, the
30 secretary of the trust and in both claims the plaintiffs
31 further say that they additionally suffered a loss of

1 profit in that they were called on to sell the
2 residential allotments prematurely to a company called
3 Chelmantower for \$100,000 and so on.

4 And then in his Paragraph 20 he comes to the deal
5 with the Woodleigh Heights action which is again set out
6 as to court papers in the various volumes being a part of
7 Exhibit SME2. And then he refers to the fact that the
8 matter, this is Paragraph 22, was the subject of a
9 mediation conducted by Mr Golvan. And he refers to the
10 fact that he instructed me and that we attended the
11 mediation as did the first plaintiff and Mr Neville, a
12 solicitor and Mr Langmead who appeared for the first,
13 third and fourth defendants. At Paragraph 23, the
14 release is there referred to. And then in Paragraph 26
15 as Your Honour is aware because the plaintiffs indicated
16 that they would not adhere to the terms of settlement,
17 the matter came on for Justice Beach and as a
18 consequence, the action was dismissed and an order made
19 for specific performance. As to the subject matter of
20 the Woodleigh Heights action and the present action,
21 Mr Edwards sets out that - they concern the same subject
22 matter; that the Supreme Court action in the present
23 proceedings as they effect the Woodleigh Heights land and
24 claims for damages, interest and costs, involved the same
25 parties of Mr Parkinson and Mr Wilson, the relevant
26 officers of the predecessors of the defendants also being
27 named as parties in the Supreme Court action.

28 And in Paragraph 30, I won't read it out, they go on
29 - he goes on to refer to the allegations made in both
30 proceedings. And he then goes on his Paragraph 33 to say
31 in both actions, the plaintiffs allege that prior to the

1 auction, AGC enquired of the Board and the council
2 whether there was access to sewerage and mains
3 reticulated water. In both actions the plaintiffs
4 alleged that in response to those enquiries, the Board's
5 officers misrepresented the situation by indicating that
6 the plaintiffs' land did not have access to an approved
7 reticulated water supply. As a result they say that the
8 auction scheduled by AGC for 23 November 1985 was
9 cancelled. Then the sale in 1989 to Deckwood is referred
10 to. So Your Honour it is on that basis that we do submit
11 that not only are the present Tylden Road and Woodleigh
12 Heights claims statute barred but they're also barred by
13 reason of the releases in each case. As to the document
14 in the black folder, what took place as far as the second
15 defendant is concerned is set out by Mr Edwards in a
16 further affidavit which was dated 3 November 2005. Again
17 I would invite Your Honour to look at that affidavit. If
18 it's not convenient we can hand up a copy of it.

19 HIS HONOUR: If you can, that would be - - -

20 MR GARDE: Yes, that will be done. And Your Honour will see
21 that this affidavit followed Mr Thompson's affidavit of
22 18 October 2005 which has been referred to by our learned
23 friend. And then in Paragraph 4, that in the previous
24 Woodleigh Heights proceedings, the first named plaintiff
25 for the purpose of discovery swore a further affidavit of
26 documents, a copy of which was Item 66 listed in Exhibit
27 SME2, Volume 3. The further affidavit of documents was
28 sworn by the first named plaintiff on 22 December 1998
29 and the third schedule of that further affidavit of
30 documents lists at Item 93, plans of subdivision, Tylden
31 Road property. And what took place was that Mr Edwards

1 attended at the plaintiffs' solicitor's premises in
2 Orange, New South Wales on 4 and 5 February 1999 to
3 inspect documents discovered by the plaintiffs. He says,
4 "I did not have enough time on those two days to inspect
5 all the documents produced by the plaintiffs but the
6 documents I then inspected included a surveyor's plan of
7 the subdivision of Tylden Road.

8 "I do not recall that plan of subdivision being
9 ...(reads)...appear to be" - that doubtless should be,
10 Your Honour, "identical to the items numbered 2, 3, and 4
11 ...(reads)...top right hand side of the page." And he
12 goes on to say that "The document being Exhibit GAT9
13 ...(reads)...top right hand side of the page." So the
14 substance of all that is that the plans, which are said
15 to have been revisited or discovered when the black
16 folder was opened in the year 2000, were plans which
17 Mr Edwards copied during the inspection in March 1999.
18 So they were found by him in the course of a very large -
19 or as part of a very large number of papers held by the
20 plaintiffs, which were the subject of his inspection and
21 which he took, in all, some six days to photocopy. So
22 even with the Xerox photocopy machine, taken with him.
23 So - - -

24 HIS HONOUR: So this is in 19 - - -

25 MR GARDE: 99, this is March 1999, Your Honour. So the dates -
26 the first two days were 4 and 5 February 1999. And then
27 because that was not sufficient, he went back from 23 to
28 26 March 1999, inclusive. I need to correct that, Your
29 Honour, I'm instructed that on the first two days,
30 Mr Edward undertook a physical inspection, on the four
31 days, he undertook copying, so that's what took blocks.

1 There are a number of exhibits to his affidavit which
2 refer to the various letters. There are other parts of
3 that affidavit, which I won't for the present purposes
4 read as to the role of Nevile & Co. and so on. But, Your
5 Honour, as part of that bundle, there is an Exhibit SME6.
6 I don't know if Your Honour can find Exhibit SME6.
7 Exhibit SME6 is an address delivered by Mr Thompson, on
8 24 August 1987, to the council, one would apprehend, and
9 possibly the - - -

10 HIS HONOUR: Wait a moment, I don't have SME6 in this
11 photocopy.

12 MR GARDE: That's all right.

13 HIS HONOUR: We'll go to - - -

14 MR GARDE: We'll see if we can find SME6, Your Honour.

15 HIS HONOUR: (Indistinct) the material, presumably.

16 MR GARDE: My learned friend, Mr Delany says this was the
17 letter, I thought it was an address, but it may've been a
18 letter, I may be wrong in that, but it's a - MED, Tab 26
19 is another source of it, Your Honour.

20 HIS HONOUR: Where's that? Where is it in MED, Tab 26.

21 MR DELANY: It's an exhibit for that affidavit, Your Honour.

22 The affidavit at Tab 26 is the 14 December 98 affidavit.

23 And the letter is Exhibit GT1 to that affidavit.

24 HIS HONOUR: Yes, I see.

25 MR GARDE: Thank you for that. The first page says, after
26 referring to section numbers of the Water Act and the
27 Local Government Act, 1958.

28 In the second last paragraph, "I advised the Kyneton
29 Water Board and Kyneton Council ... (reads) ... is
30 maintained in safety deposit". Then if I just touch on
31 some aspects of this which concerns the Kyneton Water

1 Works Trust, or the Kyneton Water Board, in Paragraph 5,
2 on the next page, under the heading of "Facts". "The
3 Tylden Road subdivision was at the time ... (reads) ...
4 of the Water Act". The history is then recited and if I
5 invite Your Honour to jump over now to Paragraph 34,
6 where it's said that the laying of these pipes was
7 unlawful for three reasons, "firstly because they were
8 laid pursuant to an unlawful agreement, secondly because
9 the approval ... (reads) ... either an urban or rural
10 district".

11 And then in Paragraph 36, "In April/May 1982 I
12 became aware of certain serious matters related to the
13 ... (reads) ... when the works will be completed". And
14 then on the next page, at Paragraph 45, "But the Water
15 Board failed to make any demand on the subdivider ...
16 (reads) ... or associated parties". Then there is a
17 further material, Paragraph 56, "The Water Board made a
18 demand on the guarantee provided by myself ... (reads)
19 ... for the purpose of facilitating an unlawful water
20 supply". And then at 59, "There was no water supply
21 agreement in existence and therefore no lawful basis upon
22 which water could be supplied to the Tylden Road
23 subdivision". Then more references to 307 and 307AA.

24 And that perhaps is enough Your Honour, but it's -
25 this letter contains in essence the blow by blow version
26 advance by the first named plaintiff and with a copy
27 going to the, we notice Mr Max McDonald, MLA.

28 HIS HONOUR: So you say it raises all the relevant factual
29 matters and it makes allegations that the actions were
30 unlawful - - -

31 MR GARDE: In many different ways Your Honour, yes.

1 HIS HONOUR: Yes.

2 MR GARDE: Yes we do. So it's all - the complaint is, in
3 essence, all set out there. And it's been visited in
4 previous proceedings and now in these proceedings. So
5 they're the matters we particularly draw attention to
6 Your Honour. We would adopt what our learned friends
7 have said in terms of his submissions as to the law and I
8 need not say very much about our outline of submissions
9 which has been circulated, but if Your Honour has that
10 available - - -

11 HIS HONOUR: Yes.

12 MR GARDE: I've only referred to two of Mr Edwards' affidavits,
13 I should mention that he subsequently in relation to the
14 matter of inspection at Orange, that I mentioned, he
15 subsequently swore a later affidavit which exhibited the
16 correspondence that lead up to the inspection actually
17 being undertaken on those days.

18 HIS HONOUR: Yes.

19 MR GARDE: That's there if there's a need to look at it. We
20 have in our Paragraph 11, provided a chronology of the
21 Tylden Road proceedings, and Mr Edwards' exhibits set
22 them out fully. Now Paragraph 12, we've done the same in
23 relation to the Woodleigh Heights proceedings and in our
24 Paragraph 13, we submit that the present proceedings seek
25 to reagitate issues that were raised in result in earlier
26 proceedings between the plaintiffs and the second
27 defendant. Alternatively, to agitate issues that could
28 have been raised and resolved in those earlier
29 proceedings as matters that are interrelated with the
30 subject matter of the prior proceedings, to agitate
31 matters that were resolved by settlement in the prior

1 proceedings, and to agitate issues that are in any event,
2 manifestly statue barred.

3 We then on p.6 go on to refer to the Anshun v Anshun
4 doctrine. And we submit that even if the view were taken
5 that there's some element that's wider than the previous
6 proceedings, nonetheless the Anshun doctrine would
7 require that any such subject matter be brought with the
8 earlier proceedings, we've set out a range of authorities
9 dealing with that.

10 And at Paragraph 22, we've submitted that the
11 present proceedings seeks substantially the same relief
12 as the prior proceedings and the grounds relied on are
13 the same or alternatively a matter which might have been
14 brought forward in the prior proceedings. The present
15 proceeding doesn't add anything in relation to the former
16 Tylden Road and Woodleigh Heights proceedings, and it's
17 contended it's an abuse of process for a party to seek to
18 litigate the same issues in subsequent or in this case,
19 multiple proceedings. And the Neil Pearson case was read
20 by our learned friend, I won't spend more time on that.

21 In our Paragraph 23 we refer to the well known case
22 of Henderson v. Henderson and the obligation that that
23 gives rise to which we have sought to set out in bold,
24 and the quotation there from Vice Councillor Wydram, that
25 of course that the parties at litigation are required to
26 bring forward in essence the whole of the subject matter
27 which is to be in contest, and that of course they will
28 be barred if in fact whether it's from negligence,
29 inadvertence of even accident, omitted part of the case.

30 In Paragraph 25 we've referred to the releases which
31 in our submission clearly cover the situation in both

1 proceedings. From Paragraph 28 onwards we've dealt with
2 the proceedings being statute barred under s.51A of the
3 Limitations of Actions Act 1958. At the top of p.10 in
4 Paragraph 31, whatever date you chose, and there are some
5 fairly clear dates in this case, we submit, that whatever
6 date you choose for the occurrence of damage, on any view
7 the proceedings are well out of time.

8 We then deal with the Tylden Road action in more
9 detail, there's an analysis not dissimilar to that which
10 we apprehend has been undertaken by our learned friends
11 in their submission, but we've sought to prepare a table
12 which in essence cross references particular paragraphs.
13 And we've done that also in relation to the Woodleigh
14 Heights claim in our Paragraphs 37 onwards, and at the
15 top of p.14 and 15 it's been done in tabular form.

16 From Paragraphs 45 onwards, we simply draw attention
17 to the circumstances relating to this plan of subdivision
18 which doesn't appear to us to have any significance
19 whatever in the context of our client, and the
20 circumstances of Mr Edward's attendance. Then finally,
21 Your Honour, we would respectfully draw attention to the
22 master's decision and rulings which in essence upheld the
23 dismissal of the proceedings, of course on the basis of
24 the fact that they were statute barred, that there wasn't
25 any concealment, let alone any fraud, in our case it has
26 no bearing.

27 And there's a further problem which I should just
28 mention to Your Honour in terms of that provision. The
29 concealed fraud has to be on the part of the defendant or
30 the agent of the defendant. In our case, of course, if
31 the Kyneton Water Board or Kyneton Shire Water Works

1 Trust, it's not alleged, and could not be alleged to be
2 pertinent to the defendant. In fact as I have mentioned,
3 Mr Edward discovered the plans in 1999 in the course of
4 his inspection of documentation available at the Orange
5 premises. So there's that additional problem for that
6 matter in our case.

7 So finally, the master also upheld the Anshun
8 intention, so Your Honour, we would simply submit for all
9 those reasons, the appeal should be dismissed.

10 HIS HONOUR: Yes.

11 MS GARDE: Other than that, Your Honour, I have the unusual
12 pleasure of adopting what my learned friend, Mr Delany,
13 has said.

14 HIS HONOUR: Yes, Mr Thompson.

15 MR THOMPSON: Sorry, Your Honour, I really didn't expect to get
16 on today, thank you.

17 HIS HONOUR: Well, Mr Thompson, if you tell me that you don't
18 want to open now and you will be in a better position to
19 do so at half past ten, I won't make you talk for 15
20 minutes.

21 MR THOMPSON: Well, Your Honour, if you wouldn't mind, I would
22 much prefer, because then it will be nice and continuous
23 and I will be ready.

24 HIS HONOUR: Yes, well if you assure me that you will be nice
25 and continuous and that you will be ready, we will
26 adjourn until half past ten tomorrow morning.

27 MR THOMPSON: Thank you.

28 ADJOURNED TO WEDNESDAY 1 NOVEMBER 2006