

summary judgement affidavit and the Edward affidavit. Each of those affidavits alleges that the causes of action in the 1988 and the 1995 proceedings are the same as the cause of action in the present proceedings.

- a) I refer to the Dixon summary judgement affidavit and note that in the table in paragraph 22 of that affidavit the deponent represents that cause of action in the 1988 proceeding is the same as in the present proceeding in relation to the Tylden Rd. land. I deny this. I note that the table makes no reference to paragraphs T5, T6, T8, T9, T10, T11, T12, T14, T15 or T18. ("the omitted paragraphs") The reference to paragraph T7 is potentially misleading because the table truncates its content. I say that the omitted paragraphs relate to the true cause of my loss and damage in respect to the Tylden Rd land and the facts and circumstances set out in those paragraphs were not pleaded in the 1988 proceedings because they were concealed from me by the defendants conduct until August 2000.
- b) I again refer to the Dixon summary judgement affidavit and note that in the table forming paragraph 47 of that affidavit represents that the cause of action in the 1995 proceeding is the same as in the present proceeding in relation to the Woodleigh Heights land. I deny this. I note that the table makes no reference to paragraphs W8, W9, W10, W11, W12 or W14 ("the further omitted paragraphs"). I say that the reference to paragraph W13 is potentially misleading because the table truncates its content. I say that the further omitted paragraphs relate to the true cause of my loss and damage in respect to the Woodleigh Heights land and the facts and circumstances set out in these paragraphs were not pleaded in the 1995 proceedings because they were concealed from me by the defendants' conduct until August 2000.
- c) I refer to the Edward affidavit and note that Mr. Edward alleges that the paragraphs identified by him from the present proceeding contain the same subject matter as in the 1988 and 1995 proceedings. I deny this allegation. The present proceedings plead that the conduct of the Water Board was carried out in full knowledge that the plans of subdivision were sealed by the Council in the manner alleged in the present statement of claim and in full knowledge that the said conduct exacerbated and concealed the true cause of my loss and damage as now known. In the 1988 proceeding the conduct of the Water Board was simply that it had called upon my bank guarantee by mistake of law and in the 1995 proceeding the Water Board together with the Council falsely represented that a reticulated water supply was not available to my land.

43) I say that the present proceedings are quite different from the previous proceedings, set out below is a comparison of the previous proceeding and the present proceeding in respect to both the Tylden Rd. land and the Woodleigh Heights land.

44) **The Tylden Rd. 1988 proceeding.**

- a) The 1988 proceeding related only to the residential allotments. The 1988 proceeding did not concern the industrial allotments.

b) The 1988 Tylden Rd proceeding was predicated upon the belief that the Council had:-

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

c) The cause of action was that the Council and Water Board had acted in mistake of law in:-

- i) Accepting my bank guarantees;
- ii) Holding that the notices of requirement applied to me
- iii) Calling upon my bank guarantees
- iv) Constructing the roads and water works at my cost
- v) Holding me liable for overrun of costs.

d) My state of knowledge at the time of initiating the proceedings was that whilst the Council and Water Board had each acted in mistake of law in respect to the Notices of Requirement, they had nevertheless acted lawfully and without malice and had lawfully sealed the plans and lawfully issued the Notice of Requirement.

45) The present proceeding insofar as they relate to Tylden Rd.

- a) The present proceeding relates to both the industrial allotments and the residential allotments.
- b) The present proceeding is firstly predicated on the allegations that the Council:-
 - i) Sealed the plans of subdivision in direct contravention of its statutory duty to refuse to seal them (See section 569B(7) of the Local Government Act 1958) and/or purported to lawfully seal the plans for an ulterior purpose, namely to avoid the provisions of s9 of the Sale of Land Act.
 - ii) Unlawfully sealed the plans in full knowledge that:-
 - (1) No services were present.
 - (2) There was no lawful means of ensuring the provision of those services.
 - (3) The allotments so created were unusable and that there was no lawful means of ensuring that they be made useable.
 - (4) There was no planning permit permitting any one of the subdivisions created.
 - (5) Each of the subdivisions created was in breach of the Shire of Kyneton Interim Development Order then in place.
- c) The present proceeding is further predicated on the allegation that after the Council did those things referred to in paragraph 45(b) of this affidavit, the Council and Water Board then engaged in a course of conduct which exacerbated the loss and damage and also concealed from me the true cause of my loss and damage.

46) Woodleigh Heights. 1995 proceedings

- a) The Woodleigh Heights 1995 proceeding was predicated upon my belief that the Council had:-
 - i) Lawfully sealed the Plan of Cluster Subdivision.