

- (ii) that the development of the subdivision be carried out in accordance with plans and the submission which formed part of the application (condition 8 of PP 2191).

Common property is defined in the Section 3 of the Act as

"land as is for the time being delineated as common property on a plan of subdivision in cluster form or on a registered cluster plan".

The registered Cluster Plan depicts common property.²⁷ The submission details arrangements for the supply of water and the plans in the submission depict water reticulation pipes laid in common property.

It is beyond dispute that all allotment holders in *any* cluster subdivision are entitled to an undivided share of common property. Woodleigh Heights Resort Development Pty Limited ("WHRD") were but one of a number of allotment holders within CS1134.

Notwithstanding this, the Second Defendant entered into an exclusive agreement for the supply of water to WHRD.²⁸

The Second Defendant perpetuated this ineffective water agreement over a number of years as the reason that water could not be made available to the Plaintiffs allotments within CS1134. The true position was that a reticulated water supply stipulated by the planning permit was absent *ab initio* as a result of the First Defendants misfeasance in sealing the plans unlawfully and the Second Defendants complicity in that unlawful sealing.

3.2 Concealment by other conduct – both Defendants

a) Concealment in the 1995 proceedings:

The Plaintiffs instituted these proceedings in the belief that a water supply was present in the common property and available to their allotments in CS1134, the availability of such water supply being stipulated by law.²⁹

The Defendants defended this action in the knowledge that:

- a) no reticulated water supply had been laid in common property or at all at the time of the Plaintiffs purchase in 1979 because of the First Defendants misfeasance;
- b) a water main providing water to CS1134 was not laid until 1982.

The circumstances described in b) above were not disclosed to the Plaintiffs until four years after they had instituted the proceedings and only after the proceedings had settled. The circumstances described in a) above were never disclosed.

b) Concealment in the 1988 proceedings:

In the 1988 proceedings the Defendants failed to comply with orders for discovery and/or provided documents during the course of discovery which were edited and photocopied in such a way as to

²⁷ See GAT-25 to third Thompson Affidavit

²⁸ See GAT-26 to third Thompson Affidavit

²⁹ Condition 8 of PP 2191 read together with clause 2(b) shire of Kyneton interim development order. See GAT-27