

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

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

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

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

¹²¹ At para 82 of Thompson 1

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

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

¹²² See para 54(a) of Thompson 1

94. However, what Mr Thompson fails to mention and what the objective documentary evidence establishes in relation to the issue of timing of the reticulated water supply, is that he was aware and had been aware, at least from August 1987, that the "reticulated water supply" had been laid in 1982 and not 1979.
95. Mr Thompson's own correspondence, establishes that he was aware from at least 1987 that the reticulated water supply had been laid in 1982. By a letter dated 24 August 1987, Mr Thompson advised the Council concerning the "reticulated water supply" on the Woodleigh Heights subdivision:

"25. Sometime in 1980 or 1981 the timing of which is irrelevant the Kyneton Council approved the resubdivision of the Woodleigh Heights Subdivision into 131 allotments.

...

27. By minute dated 6 November 1980 the Kyneton Water Board resolved to advise the Kyneton Development Committee that it could supply 1,000,000 gallons annually in any reticulated area and that any anticipated consumption in excess of that figure would be subjected to negotiation.

28. By letter dated 5th March 1981 Kenneth Buchanan requested a water supply of 1,000,000 gallons annually to service the Woodleigh Heights subdivision.

...

30. Kyneton Water Board did subsequently enter into a water supply agreement between itself and Woodleigh Heights Resort Developments Pty Ltd for the supply of water to the whole of the Woodleigh Heights Subdivision.

...

33. Subsequent to the making of the above agreement trenches were dug and pipes laid along a considerable length of Edgecombe Road **in order to facilitate the supply of water to the Woodleigh Heights Subdivision.**

...

112. The Board under cover of letter dated 12 September 1985 made a copy of the agreement available [being the agreement referred to in paragraph 30 of the August 1987 letter] after my solicitor threatened to take legal action to force the Board to make a copy available.

113. My Supreme Court action No 2360 of 1984 was settled on the day that the copy of the agreement was received at the office of my solicitor which was too late to be considered" (emphasis added)¹²³

96. Further, the agreement between the Kyneton Water Board and Woodleigh Heights Resort Developments Pty Ltd "for the supply of water to the whole of the Woodleigh Heights Subdivision" dated 1 January 1982 ("the 1982 water reticulation agreement")¹²⁴ was discovered on 15 April 1998 by the Water Authority in the prior Woodleigh Heights proceeding¹²⁵.

97. Clauses 1 and 2 of the agreement are in the following terms:

1. The Trust shall (subject as hereinafter provided) so far as it is able to do so subject to the provisions hereof and of the WATER ACT 1958 and regulations made thereunder and any BY-LAWS and REGULATIONS made by the Trust thereunder supply to the Consumer and the Consumer shall take from the Trust water for domestic purposes on the said land as and from the First day of October One thousand nine hundred and eighty-one (hereinafter called "the date of commencement").
2. The Consumer shall at its own expense and to the satisfaction of the Trust provide and install all pipes and fittings which may be necessary for obtaining such supply from the Trust's pipeline at the corner of Edgecombe Road and Dettman's Lane, and shall so long as this Agreement remains in force keep the pipes and fittings within the said property in good order and in proper repair to the satisfaction of the Trust. Any authorized Officer of the Trust may at any time or times inspect and examine all or any such pipes or fittings.

The pipeline installed along Edgecombe Road will be taken over and maintained by the Trust on the First day of July, 1982 subject to the pipeline passing performance tests to the satisfaction of the Trust."

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

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

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

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

No "fraudulent" concealment

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

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

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

¹²⁶ (1989) 17 NSWLR 38

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

¹²⁸ At 386

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