

85. What Mr Thompson deposes to in respect of the 1999 Practice Court hearing⁷⁵ is as follows:

- (a) that during the course of the hearing the Council and the Water Authority showed Mr Thompson a reticulation plan for the Woodleigh Heights subdivision;
- (b) that the plan showed that the principal water mains were in fact laid in 1982 and not in 1979 as alleged by Mr Thompson and, on Mr Thompson's understanding, as required by law;
- (c) that 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) that 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."*

86. It was this reticulation plan 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*

⁷³ See para 54(a) of the Thompson summary judgment affidavit. Emphasis added

⁷⁴ See para 55 of the first Dixon summary judgment affidavit and tab 31 of the exhibit folder

⁷⁵ At para 82 of the Thompson summary judgment affidavit

*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 ...".*⁷⁸

87. What Mr Thompson fails to mention and what the objective documentary evidence establishes, is that he was aware and had been aware, at least since August 1987 (if not before), that the "reticulated water supply" had been laid in 1982 and not 1979.

88. The objective documentary evidence, in particular Mr Thompson's own correspondence, establishes that Mr Thompson was aware from at least 1987 that the reticulated water supply was laid in 1982. By a letter dated 24 August 1987, Mr Thompson advised the Council as follows 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.*

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.*

⁷⁸ See para 54(a) of the Thompson summary judgment affidavit.

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."*

89. The 24 August 1987 letter is exhibit "GT-1" to the affidavit of Mr Thompson sworn 14 December 1998 in the prior Woodleigh Heights proceeding⁷⁷.

90. 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" was dated 1 January 1982 ("the 1982 water reticulation agreement"). A copy of this agreement is exhibited to Thompson 3⁷⁸. 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."

91. What the August 1987 letter and the 1982 water reticulation agreement clearly show 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 laid down 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

⁷⁷ Tab 26 of the exhibit folder
⁷⁸ See exhibit GAT-26

able to make the allegations he now seeks to advance (some eighteen years later) in respect of the Woodleigh Heights land.

92. It should be noted that a copy of the 1982 water reticulation agreement was discovered by the Water Authority in the prior Woodleigh Heights proceeding⁷⁹

D. SECURITY FOR COSTS APPLICATION

93. In the event that the judgment is not entered in the proceeding in favour of the Council or the proceeding permanently stayed, the Council seeks:

- (a) pursuant to the inherent jurisdiction of the Court;
- (b) alternatively pursuant to Rule 62.02(1)(a),

that the plaintiffs provide security for the Council's costs to trial of this proceeding in the amount of \$162,000.00 or such other amount as may be fixed by the Court.

94. Aside from Rule 62.02(1)(a) which enables a Court to order security in respect of an interstate Plaintiff, the Court has inherent jurisdiction to order security for costs in circumstances where:

- (c) the plaintiffs are impecunious and the prospects of success are poor⁸⁰;
- (d) the plaintiffs are impecunious, the prospects of success are poor and the costs to be incurred by the defendant in defending the proceeding will be substantial⁸¹.

95. The grounds relied upon by the Council in seeking an order for security for costs are set out in paragraph 3 of the Dixon security for costs affidavit. These grounds are set out below.

⁷⁹ See exhibit SME-2 vol 2, tab 32 to the affidavit of Steven Edward sworn 12 September 2005 – document no 22

⁸⁰ See *Knight v Beyond Properties Pty Ltd* [2005] FCA and *Chang v Comcare Australia* [1999] FCA 1677

⁸¹ See *Morris v Handley* [2000] NSWSC 957 and *Knight v Beyond Properties Pty Ltd*, *supra*