IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Court Number: **6321 of 2005**

BETWEEN:

GLENN ALEXANDER THOMPSON
& CHERYL MAREE THOMPSON *Plaintiffs*

- and -

MACEDON RANGES SHIRE COUNCIL *First Defendant*

- and -

THE COLIBAN REGION WATER AUTHORITY *Second Defendant*

PLAINTIFFS' APPEAL SUBMISSIONS
PART 1.

Date of Document: - 30th October 2006
Filed on behalf of: The Plaintiffs
Prepared by: The Plaintiffs.

Tel - 02 63 69 1940
Fax - 02 63 62 0015

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1) This is a large submission. It needs to be.

2) At the root of the present proceeding is an allegation that certain things were done for the purpose of avoiding the effect of section 9 of the Sale of Land Act 1962.

3) Fundamental to any submission on my case is an understanding of the Law and in particular, section 9 of the Sale of Land Act 1962, section 97 of the Transfer of Land Act 1958 and section 569 of the Local Government Act 1958.

4) Also fundamental is that the principle things complained of were fraudulently concealed by the Defendants.

5) I stand before you today, unrepresented, because at the hearing before the Master my ex-Counsel misrepresented the Plaintiffs' case, the law and me personally. They failed to follow my written instructions, my affidavit and the present Amended Statement of Claim and even misrepresented the Law.

6) My case is set out in my affidavit of 18th October 2005 and in the present amended Statement of Claim but on Friday 11th November 2005, just two days prior to the hearing before the master, for abundant caution I sent my ex-Counsel a three page email which clearly and concisely set out key aspects of my case and the Law. I confirmed receipt of that email with the secretary to my ex-senior Counsel.

7) He failed to understand or heed what I told him and what was set out before him.

8) Without reference to the documents for the moment;

   a) My email set out, amongst other things, the method the Defendants used to avoid the effect of section 9 and it specifically said, that the thing which caused my loss and damage was "*The Council sealed the plans in full knowledge that the services were not present and that there was no lawful means of compelling anyone to provide those services.*" This was to reinforce and confirm what was set out in my Affidavit and the Statement of Claim.

   b) At paragraph 53(i) of my Affidavit of 18th October 2005 I said that the things concluded or discovered by me in August 2000 were, "*I further concluded that at the time of sealing the series of residential plans the Council was not only fully aware that no services existed but it was also fully aware that there was no lawful means of providing or compelling the provision of those services*"

   c) At paragraph 55(b) of my Affidavit of 18th October 2005 I also say "*My present cause of action is that the Council did in breach of its specific duty seal the residential series of plans and the industrial series of plans and the plans of cluster subdivision in full knowledge that the allotments thereby created were unusable due to a lack of services and in full knowledge that there was no lawful means to compel or cause construction of those services in order to make the allotments useable.*"

9) These things have nothing to do with unlawful plans of subdivision.

10) These things which are set out in my email and paragraphs 53(i) and 55(b) of my affidavit were the means by which the Defendants facilitated avoidance of the effect of s.9 of the Sale of Land Act. These things are set out in the present Amended Statement of Claim.

11) The facts at the root of these things and the fact of the avoidance of the effect of s.9 were fraudulently concealed from the Plaintiffs by the Defendants until discovered by the Plaintiffs in August 2000.

12) My ex-Counsel made nonsense submissions about unlawful sealing of unlawful plans of subdivision and further nonsense submissions that the unlawful 2-lot plans of subdivision were the means to avoid

s.9 of the Sale of Land Act. He also made nonsense and misleading submissions that these things related to the unlawful plans were concealed from me, whereas the facts are:-

a) The unlawful plans were not concealed and not concealable.

b) The unlawful nature of the plans was not concealed from me.

c) Not only was the unlawful nature not concealed it is so obvious as to be not concealable.

d) The unlawful plans do not and cannot facilitate avoidance of section 9 of the Sale of Land Act.

e) That the unlawful plans were contrived to avoid what I now know to be a mistaken understanding of section 9 of the Sale of Land Act was known to me since the early 1980's and the fact of this knowledge was set out at paragraph 51 of my Affidavit and additionally set out in my email of 11th October 2005 and additionally set out in a document entitled "Book of Pleadings" which was prepared by me and gets substantial review in this submission.

13) These submissions by my ex-Counsel were not tenable and law, had no basis in fact and specifically misrepresented me. I will provide adequate detail of these submissions in part two if this submission.

14) My ex-Counsel did not mention the fact that the matters referred to in my email and paragraphs 53(i) and 55(b) of my Affidavit of 18th October 2005 were the means by which the Defendants facilitated voidance of the effect of section 9 of the Sale of Land Act. This was despite the fact that I expressly instructed him as to that fact and despite the fact that this is the sole method of avoiding the effect of s.9.

15) Except to the extent that I rely upon the submissions made to demonstrate the erroneous base and nature of his submissions I now completely disavow the entire submissions made by my ex-Counsel before the Master. These submissions purported to be on my behalf but were not. They specifically defied my express instructions and ignored the law and my affidavits and the present Amended Statement of Claim.

16) This is why I stand before you today, unrepresented.

17) As I will also detail a little later, in part 2, under the topic "credibility", Mr. Delaney and his phalanx of legal professionals also had a completely nonsensical understanding of section 9 of the Sale of Land Act, Mr. Delaney's submission was from an even more nonsensical misunderstanding than that of my ex-Counsel.

18) By reference to documents and in particular the aforementioned "Book of Pleadings" Major General Garde also made reference to s.9 of the Sale of Land Act and he also adopted the complete submissions of Mr. Delaney. Mr. Garde did not correct either Mr. Delaney or my ex-Counsel. Mr.

Garde did not advise the Master of the correct understanding of s.9. It is impossible to know what the Major General's understanding was.

19) With the greatest respect to the Master, as I will show a little later, the transcript indicates that he also held the same mistaken understanding of s.9 as did my ex-Counsel.

20) On the submissions made on the mistaken understanding of three Q's C, three junior Counsel, an army of lawyers and on the mistaken view of the Master as to s.9 my true case was neither put, nor argued against by the Defendants or adjudicated by the Master. They may as well have argued about the price of fish.

21) Shortly, in graphic detail, I will show that the Defendants and their array of legal professionals deliberately concocted the purported basis for their present applications and misled the Master on every issue put up by them.

22) I have personally attended at this Honourable Court on previous occasions, one such occasion was in 1988 when I alone briefed Mr. John Styring of Counsel for the purpose of an appeal, further details of which are set out later in this submission. The respondent at that time was the present First Defendant.

23) On that occasion I wrote the complete basis, at law and fact, for the submission and I sat with Mr Styring and instructed him as he made the submission.

24) The appeal was heard by the Chief Justice and on granting my appeal he said to the effect "While I cannot order it, I recommend that the solicitors and Counsel for the respondent not get paid." The Chief Justice also said to the effect "the matter should never have come to court in the fist place"

25) The same is true here. By the time I finish this submission it will be seen that the present applications by the Defendants are nothing more than concoctions, fabrications without any basis in either fact, logic or law.

26) I will show that each of Mr. Delany, his junior and instructing solicitors, do not and cannot, hold a belief as to the truth of their submissions.

27) I will also particularly show that each of Major General Garde and his junior and particularly his instructing solicitor Mr. Steven Edward, do not and cannot, hold a belief as to the truth of their submissions.

28) This submission has been pre-prepared to set out my case and although the present hearing is a re-hearing de novo it also addresses the submissions made by the Defendants to the Master. The reason for this is that the defendants are locked into repeating the falsehoods which misled the Master and it goes to the costs submission which I shall be making at the end of this submission.

29) The one certainty is that the Defendants cannot tell the truth before this Court and if the Defendants raise new falsehoods then I shall deal with them ad-lib as I read this submission.

30) In relation to the Defendants submissions, in a nutshell and without reference for the moment, in addition to wrong submissions on s.9:-

a) **The submissions of the First Defendant misled the Master into believing, amongst other things**:-

i) that my knowledge of a first water supply was or included knowledge of the time at which the water main of a second, totally unrelated water supply were laid whereas the fact is it is impossible to confuse the two water supplies and I did not. Additionally Mr. Delaney must have been fully aware that the first water supply was unlawful and completely outside the subdivision concerned. Notably, Mr. Delaney, while including other details of the first water supply, omitted to provide to the Master those details which showed it to be unlawful and his submission therefore to be without any basis in either fact logic or law. .

ii) that avoidance of Section 9 of the Sale of Land Act 1962 is something to do with unlawful plans of subdivision and in particular 2-lot plans whereas this is simply untrue and not tenable at law.

iii) That a plan of subdivision which was discovered by them in previous proceedings was said by me to be the critical document which led to my discovery of the present causes of action. This is simply false, nowhere do I say or imply any such thing and in any event it is not possible..

b) In respect to the submissions of Mr. Delaney I will show that it is not possible that Mr. Delaney or his junior or his instructing solicitor held a belief that his submission was anything other than misleading.

c) **From and including paragraph 1 of their written Outline of Submissions the submissions of The Second Defendant were simply false and misleading from top to bottom.**

i) This document purports to be authored by and authorised by Major General Garde AM. RFD. QC, and Sharon Burchell.

ii) Paragraph 1 states "*The Plaintiffs allege that they are owners of certain parcels of land* .... ". Whereas:-

(1) The entire reason for the present proceeding is that I do not own the land having lost it to the fraud of the Defendants. **Paragraph 1 is false**; and;

(2) It is self evident that the purported facts of paragraph 1 cannot co-exist with the purported facts of either paragraph 5 or paragraph 6 of that same submission.

iii) Paragraph 3 states "*The Plaintiffs allege that there was a requirement imposed by the Shire of Kyneton under s569E(1) and (1A) ... .* ". Whereas:-

(1) Paragraph T5 of the present Amended Statement of Claim clearly alleges that the s.569E Notice was never served. Therefore no such requirement was imposed. **Paragraph 3 is false.**

iv) Paragraph 5 states " ..... *Woodleigh Heights land, ... the land was sold by public auction by .... (AGC) on 17th November 1984.*". Whereas:-

(1) Paragraph W47 of the present Amended Statement of Claim clearly states that the proposed auction by AGC was cancelled and was cancelled because of the fraud of the Defendants. **Paragraph 5 is false**; and;

(2) It is self evident the purported facts of paragraph 5 cannot co-exist with the purported facts of paragraph 6 of that same submission.

v) Paragraph 6 states "*... .. ... the Plaintiffs say .... .. the auction scheduled for ... 1985 was cancelled* ... " and further states. " .... *the Plaintiffs sold their land in 1989 .....* ". Whereas:-

(1) Paragraph W71 of the present Amended Statement of Claim clearly states that Esanda exercised their right of mortgagee sale. The reason for this was because that due to the fraud of the Defendants the Plaintiffs could not sell their land with its lawful entitlement to a water supply. **Paragraph 6 is false**; and;

(2) It is self evident that the purported facts of paragraph 6 cannot co-exist with either paragraphs, 1 or 5 of that same submission.

vi) The document is a nonsense, it should be relegated to the rubbish bin and completely disregarded by the Court it then goes on to purport to present various legal arguments.

vii) This document authored by and authorised by Major General Garde and Sharon Burchell and presented to the Court by Major General Garde, is simply self contradicting, false and misleading nonsense. It totally misrepresents my case by presenting a fabricated case of their own concoction.

viii) Four of the first six paragraphs are simply false and cannot co-exist with the other paragraphs.

d) As I will shortly show the remaining submissions of the Defendants were false and must have been known to be false at the time that they were made. As I will also show the submission of the Second Defendant was also characterised by the false affidavits of Mr. Steven Mark Edward.

e) Over the years I have come to expect these types of misrepresentations from legal professionals, particularly from the Major General. I first met him at the bar table in 1988 when he was a mere Lieutenant Colonel. At that time the Lieutenant Colonel falsely represented that the plainly unlawful Water Supply Agreement giving rise to the first water supply, which Mr. Delaney referred to, was a lawful and enforceable agreement. I will provide full details of the serious misrepresentations of the Major General a little later in this submission under the topic "Credibility" wherein I both advance my present submission and lay the most substantial grounds for the indemnity and incidental costs submission which I make at the end of this submission.

31) Because of the misrepresentations of the Defendants and the failure of my ex-Counsel and the consequential judgement, I have perhaps excessively attended to detail, however in the circumstances and having regard to the seriousness of the issues, including the misrepresentations by the Defendants and Counsel for the Defendants before the Master, I feel the need for that attention to detail.

32) The present application by the Defendants relies upon defences under the Limitations of Actions Act, Res Judicata and Anshun and additionally relies upon what purport to be Terms of Settlement in earlier proceedings.

33) **Fraudulent concealment of the present rights of action by the Defendants is the complete answer to each of these things.**

34) The Plaintiffs rely on s.27 of the Limitations of Actions Act.

35) This is a simple matter made complex by an almost overwhelming plethora of dishonest and fraudulent acts over almost a quarter of a century and now additionally complicated by the false submissions made by the Defendants and my ex-Counsel at the hearing before the Master

36) Necessary to my s.27 argument is an understanding of the issues and the numerous acts of fraud which concealed those issues during the period 1979 until August 2000.

37) The proceeding involves two subdivisions, one known as Tylden Rd, the other as Woodleigh Heights.

38) The Plaintiffs acquired the land in the circumstances and manner set out in paragraphs 1 to 16 of my first Affidavit sworn 18th October 2005.

39) The most simple issue in respect to each subdivision is that with the knowledge and consent of the Second Defendant the First Defendant sealed the plans of subdivision in full knowledge that the required services were not present and that there was no lawful means of compelling the subdivider, Buchanan, or anyone else to provide those services.

40) The Defendants fraudulently concealed the facts behind these issues during the period 1979 until discovered by me in August 2000.

41) **The matters and things done by the Defendants over the years, a small portion of which is set out in this submission, are so outrageous as to be beyond normal contemplation. The very acts by Statutory Authorities, are so incredible as to be not normally considered and are to that extent self concealing.**

42) **Overview.**

a) In this submission any reference to a s.569 is a reference to s.569 of the Local Government Act 1958 and any reference to a s.9 is a reference to s.9 of the Sale of Land Act 1962 and any reference to a s.97 is a reference to s.97 of the Transfer of Land Act 1958 and any reference to a s.307 is a reference to s.307 of the Water Act 1958.

b) The Plaintiffs brought this proceeding in 2005. The primary things complained of and giving rise to the right of action occurred in 1979 and 1980, the secondary things complained of occurred in subsequent years.

c) The Plaintiffs have previously bought two proceedings against the present defendants. The first was County Court proceeding 880949 which involved matters related to the Tylden Rd land and the second was Supreme Court proceeding 7966 of 1995 which involved matters related to the Woodleigh Heights land. In this submission they are respectively referred to as the previous Tylden Rd proceeding and the previous Woodleigh Heights proceeding.

d) Both of these previous proceedings have the appearance of having been settled, what purport to be Terms of Settlement have been executed.

e) The principal questions at this time are as to whether or not the present proceeding offends either or all of Res Judicata, Anshun and the Limitation of Actions Act and whether or not the present proceeding is precluded by the purported Terms of Settlement.

f) On the face of it and on the submissions of the Defendants the Plaintiffs have four particularly high hurdles to clear, however as will be seen each of these hurdles is a mirage created by the smoke and mirrors of the Defendants deceit both past and present.

g) All four of these questions are properly answered in the negative because the present rights or causes of action were not only not previously litigated, they could not be litigated because they were concealed by the Defendants and now that the facts are known, it can be shown that the concealment of those facts was overt and fraudulent and done for the purpose of concealing the facts of and the fact of a conspiracy to enable the developer, Buchanan, to avoid the effect of s.9. Concealment may have also been for the purpose of avoiding criminal prosecution.

h) In addition the rights of action in each of the previous proceedings was specifically predicated on the express fraudulent representations of the Defendants and which representations were false and intended to deceive and to fraudulently conceal the present right of action.

i) In addition the Defendants continued to conceal the truth as now known by mounting sham defences to the previous proceedings. They also mounted sham strike out applications, these defence and applications continued to conceal the facts which were known by the Defendants to be a complete defence to those proceedings from the Courts and myself.

j) For the purpose of continuing fraud and continuing concealment **the Defendants did not raise those defences which were known and available to them** at the time of the previous proceedings.

k) **The present proceeding was not capable of being known or even suspected until all of the pieces became known over a twenty year period.**

l) In this submission I will from time to time refer to "primary fraud", "secondary fraud", "predicating facts" and similar terms in relation to each or both subdivisions, I will also refer to the specific facts and in each instance they are also to be read and/or understood as being part of or a component of the single conspiracy to avoid s.9.

m) As the facts become known from this my submission it will be seen that the Defendants perpetrated **four separate but related frauds**. Two in respect to Tylden Rd and two in respect to Woodleigh Heights.

n) The first fraud, in respect to each subdivision was that with the knowledge and consent of the Second Defendant, for the purpose of facilitating avoidance of the effect of s.9 the First Defendant sealed the plans of subdivision in full knowledge that the required services were not present and that there was no lawful means of compelling the subdivider, Buchanan, or anyone else to provide those services.

o) The first or primary fraud in respect to each subdivision was a fraud against the State and all citizens including the Plaintiffs in that **the act of sealing the plans** of subdivision was a **fraudulent representation to all people** that the plans had been lawfully sealed and the subdivisions had been or would be completed according to law.

p) The secondary fraud in respect to each subdivision was for the purpose of facilitating the provision of the missing services by fraudulent means. In these instances due to the juxtaposition of circumstances these secondary frauds were **specifically directed against my family and I** as owners of the land, but could well have been directed against any person unfortunate enough to

rely upon the representations of the Defendants and then in reliance upon those representations purchase land situate in the districts of the Defendants.

q) The act of sealing the plans included an overt act of concealment of the fact of and the facts of the primary fraud.

r) The secondary frauds depended upon the continuing concealment of the primary fraud and the secondary frauds were in themselves acts of concealment of the primary and secondary frauds.

s) In respect to each subdivision the primary fraud forms the root of the present rights of action and the secondary frauds are consequential or dependant frauds which precipitated the loss and damage occasioned by the primary frauds.

t) In respect to the primary frauds at the root of the present rights of action, at paragraph 55(b) of my Affidavit of 18th October 2005 ("my first Affidavit"), I say "*My present cause of action is that the Council did in breach of its specific duty seal the residential series of plans and the industrial series of plans and the plans of cluster subdivision in full knowledge that the allotments thereby created were unusable due to a lack of services and in full knowledge that there was no lawful means to compel or cause construction of those services in order to make the allotments useable.*"

u) In relation to Tylden Rd the predicating facts giving rise to the primary fraud are found at paragraphs T3 to T12 of the present Amended Statement of Claim and are, in summary;-

   i) that on the 20th February 1980 the First Defendant resolved to issue a s.569E Notice in relation to the first residential plan and to serve it upon the owner of the Tylden Rd land, and;

   ii) that in furtherance of its malicious conduct the First Defendant omitted to issue and serve that s.569E Notice and did not further process the first residential plan to which it related, and;

   iii) the First Defendant then processed the series of residential plans and fabricated s.569E Notices in relation to that series of plans.

v) Consequently, for the reasons which I will shortly set out, lawfully issued and served s.569E Notices were the only means to compel construction of the services and as no such notice was either issued or served[1] the Defendants were aware that there were no services present and "*there was no lawful means to compel or cause construction of those services in order to make the allotments useable*"

w) In relation to Woodleigh Heights the predicating facts of the primary fraud are found at paragraph W10 of the present Amended Statement of Claim and are, in summary, that the First Defendant sealed the plans of cluster subdivision in full knowledge that the private reticulated water supply

[1] Refer paragraph T5 of the present Amended Statement of Claim.

which was described in the submission dated 3.11.78 and referred to in paragraph W2 of the present Amended Statement of Claim and which water supply was required by law to be completed in 1979 had not been completed.

x) Consequently, for the reasons which I will shortly set out, at the time the cluster plans were sealed there was no water supply present and once the plans of cluster subdivision were sealed, there was *"no lawful means to compel or cause construction of those services in order to make the allotments useable"*

y) At paragraphs T7 and W8 of the present Amended Statement of Claim it is alleged that the purpose of the primary frauds was to avoid the effect of s.9.

z) The allegation in respect to s.9 is the uniting allegation and element between the two parts of the present Amended Statement of Claim. This is a most serious allegation and the Defendants not only did, but would not, not conceal the facts giving rise to this allegation.

aa) The fact that the 569E Notice was not served in relation to Tylden Rd and the fact that the water supply and reticulation system was not completed in respect to Woodleigh Heights are the only things pleaded which can give rise to the allegation in respect to s.9 of the Sale of Land Act and are the only things pleaded which cause a loss causing deficiency in the allotments. I will shortly define "loss causing deficiency". I will also shortly explain the only means of avoiding the effect of s.9 and as will be seen unlawful plans are simply and completely irrelevant.

bb) The secondary or dependant frauds are set out in the remaining paragraphs of the present Amended Statement of Claim.

cc) Notably the Defendants do not deny the matters presently alleged, the complete basis to the present strike out application is Anshun, Res Judicata and the Limitations of Actions Act. In other words the Defendants say that the things now alleged were not concealed and they should have been or could have been or were pleaded earlier and/or are now out of time.

dd) The previous proceedings both purport to be compromised by Terms of Settlement whereas the fact is, as I will shortly show, the previous proceedings were and the Terms of Settlement are compromised by the fraud and deceit of the Defendants.

ee) We are here today because from the previous hearing the Master determined that there was no concealment.

ff) The Master also found that the facts relied upon and damages sought are essentially the same, as in the previous proceedings and that the releases in the prior Tylden Rd and the prior Woodleigh Heights proceedings are therefore a complete answer to the present claims.

gg) The issues therefore are concealment or not and release pursuant to the purported Terms of Settlement or not.

hh) With the greatest respect to the Master, as I will shortly show, he was misled and deceived by a combination of careless and negligent submissions, classic obfuscation and damn lies.

ii) On this aspect, as previously referred to, a compounding or exacerbating factor at this time is that at the time of the hearing before the Master my most expensive ex Counsel simply got it wrong, the defence which was put up by them, purportedly on my behalf, had no relationship to either the facts, the present Amended Statement of Claim, my affidavits or my written instructions to them. At this time I do not care to hypothesise as to why this occurred, now is neither the time or place. I will attend to that detail in another place. Unfortunately at the time of the last hearing I was ill and on mind numbing prescription drugs and I spent little time in Court. It was not until I read the transcripts in December of last year that I became aware of what was wrongly said of me and my case. I immediately wrote forcefully and extensively to my ex Counsel and advised them of their serious error or neglect as the case may be and to advise them of my opinion that on their submissions and the submissions of the Defendants the Master must find against me. The result was exactly as anticipated by me. That is also why I appear today unrepresented and why I must and do disavow entirely the previous submissions made purportedly on my behalf. Also for the record, in my view, my ex Counsel could not possibly have held a belief that I would succeed on their submissions, unfortunately they did not tell me so.

jj) I am indeed fortunate that this is a re hearing de novo.

kk) I realise that by saying this I may have raised the bar which I must now clear however the facts, unfortunate as they may be, are the facts.

43) Background, relevant Legislation and essential concepts.

a) To understand this matter it is essential to know and understand the relevant law and to be possessed of the correct concepts. It is also instructional to understand a little background.

b) Surprising as it may be the present proceeding had its genesis back in the late 1940's and the 1950's. At these times subdivision and particularly residential subdivision was a fairly wild west sort of thing. Subdividers would file their plans, get them approved by careless or voracious Councils and then bulldoze a rough dirt road that not even the nightsoil cart could pass through in winter and only heavily sprung vehicles in summer. Mothers had no chance because there were no footpaths and they and their children would drown in either water or dust in the potholes. This type of subdivision in Victoria became widely known as "heartbreak subdivisions".

c) At the time of these "heartbreak subdivisions" there was a widespread practice of "Selling off the plans" or in other words selling before the bulldozer went through.

d) In order to put a stop to this type of thing the Government enacted certain legislation and it is that specific legislation which is relevant to this proceeding and which these Defendants conspired to enable the avoidance of.

e) The problem with the new legislation was that only subdividers with money enough to build the roads and other required services could carry out property development so enterprising Councils came to shonky arrangements with shonky developers to bypass the legislation and thereby attract development to their municipalities.

f) In the 1970's and 1980's Kyneton Council was one such enterprising Council and the two subdivisions referred to in the present proceedings, were the subject of such enterprising arrangements.

44) The legislation which was enacted included:-

a) s.9 of the Sale of Land Act 1962.

b) s.97 of the Transfer of Land Act 1958.

c) s.569 of the Local Government Act 1958.

45) In summary the legislation operated as follows:-

46) s.9 of the Sale of Land Act 1962 operated to prevent the sale of allotments on subdivisions consisting of 3 or more allotments until such time as the plan had been approved by the Registrar of Titles pursuant to s.97 of the Transfer of Land Act.

a) s.97 of the Transfer of Land Act operated;

i) to require plans to show all roads and allotments.

ii) To prevent the registration of plans to which s.569 of the Local Government Act applies unless:-

(1) The plan has been sealed by the Council; AND;

(2) There has been no contravention of s.9 of the Sale of Land Act.

b) s.569 of the Local Government Act operates;

i) To require a developer to give notice of his intention. s.569(1).

ii) To require plans to show all allotments and roads. s.569A(1)

iii) To compel a Council to refuse to seal plans unless certain conditions are met. s.569B(7)

iv) To give the Council the authority to require the owner of a subdivision to provide services such as roads and water or require the provision of guarantees to pay for such construction. s.569E

v) To require the Council to make a s.569E requirement when requested by the local Water Authority. s.569E(1B)

vi) To require the Council to seal the plans with an endorsement thereon if the plans are subject to s.569E. s569E(3)(a).

vii) To prevent the Registrar of Titles from approving a plan of subdivision which is affected by a requirement pursuant to s.569E. s.569E(3)(e)

47) A few important concepts.

a) A further very important provision is found at s.569B(10). This subsection provides "*The sealing of a plan of subdivision shall be **conclusive evidence for all purposes** that there has been compliance with this Act with respect to such sealing and that all preliminary steps and proceedings required to be taken in connexion therewith have been duly and properly taken*"

b) An understanding of the reason for and import of s.569B(10) is gained from the fact that in our society our entire real property system is dependant upon the concept of "indefeasible title" so the effect and purpose of s.569B(10) is to ensure that there is no possible way of challenging the validity or lawfulness of a title issued pursuant to what otherwise may have been an illegal plan or illegal subdivision or a title issued pursuant to an otherwise unlawful sealing of plans.

c) Once sealed, all things related to a plan and the sealing thereof are lawful. To be otherwise would be repugnant to and fatal to our real property system.

d) A subdivision does not exist until such time as the plans have been approved by the Registrar of Titles and indefeasible titles issued.

e) There is no such thing as an unlawful subdivision and once sealed by Council no such thing as an unlawful plan of subdivision.

f) A Notice of Requirement issued pursuant to s.569E has a life at law quite independent of the plan of subdivision or proposed subdivision to which it relates and that life exists whether or not the plan of subdivision is ultimately sealed by the Council and whether or not the plan is unlawful before it is sealed.

g) A plan of subdivision, unlawful or otherwise, cannot cause loss and damage.

h) Loss and damage can only accrue due to some deficiency in or appurtenant to the allotments intended to be created. In other words the **loss causing deficiency** must exist quite independent from the plans.

i) A loss causing deficiency in the proposed allotments may trigger the provisions of s.569B(7) and in such instances it is the loss causing deficiency which causes the sealing of the plans to be barred by statute but in no case can it be said that the sealing, unlawful or otherwise, or the plans so sealed, is the cause of loss and damage.

j) If a plan of subdivision is sealed with a loss causing deficiency in or appurtenant to the proposed allotments then once the plan is approved by the Registrar of Titles, as it inevitably will be, then the loss causing deficiency is then manifest in the allotments created.

k) One such **loss causing deficiency** is any situation where allotments do not have the services required to render them useable and there is no lawful means to compel provision of those services.

l) Two examples of such loss causing deficiencies are absent and/or fabricated s.569E Notices of Requirement and a failure to complete a subdivision in accord with the planning permit and these two deficiencies are the exact ones which respectively effected the Tylden Rd and Woodleigh Heights Subdivisions and which are now complained of.

m) Loss causing deficiencies are not and cannot be rectified by s.569B(10), they remain as immutable palpable facts which cause loss and damage.

48) Cluster Titles Act 1974.

a) With the advent of Cluster Title Subdivisions the Cluster Titles Act 1974 applied the above provisions to Cluster Subdivisions.

i) Subsection 11 of the Cluster Titles Act substantially enables s.569 of the Local Government Act in respect to cluster subdivisions.

ii) Subsection 29 provides provisions similar to s.97 of the Transfer of Land Act.

iii) Subsection 40 amended s.9 of the Sale of Land Act 1962 to apply to cluster subdivisions.

49) Subsections 307AA(2) and 307AA(8) of the Water Act 1958.

a) Subsection 307AA(2) provides:-

i) that the Second Defendant may enter into an agreement with the **owner** of any land providing for the supply of water to that land; and;

ii) providing for the construction or installation of such works as may be specified in the agreement to serve the land.

b) This subsection does not provide for agreements with anyone but the owner of the land.

c) The works permitted are to serve the land, not provide piping or reticulation within the land.

d) Subsection 307AA(8) provides:-

i) Any works constructed or installed pursuant to an agreement shall be deemed to have been constructed by and shall vest in the Second Defendant.

e) The operation of ss.307AA(8) effectively and specifically precludes a Water Supply Agreement from providing for the construction of any works which cannot vest in the Second Defendant or in other words it precludes any works on private property.

50) The Shire of Kyneton Interim Development Order

a) Clause 2b of the Shire of Kyneton Interim Development Order provides.

i) No person shall subdivide land except in accordance with the provisions of a permit issued by the First Defendant. [2]

51) The Woodleigh Heights Planning Permit.

a) Planning Permit 2191 was issued by the First Defendant in 1978. [3]

b) condition 8 of that permit required "*The Development to be carried out in accordance with the plans and submissions which formed part of the application*"

c) condition 6 of that planning permit required "*The Corporate Body shall be responsible for all private facilities including water, ... "*

52) Reticulated water supplies.

a) A reticulated water supply is a supply of water to the boundary of a parcel of land via a network of pipes.

b) A reticulated water supply system has three component parts:-

i) A water source

ii) A network of pipes comprising the reticulation system.

iii) Water flowing within the network of pipes from the water source to the supply point(s).

c) In the absence of any one or more of the component parts there is no reticulated water supply.

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[2] See GAT-27
[3] See GAT-5

53) A further critical understanding is the correct understanding and concepts of the private reticulated water supply and system in question in relation to the Woodleigh Heights subdivision as distinct from a reticulated water supply and system provided by the Second Defendant.

54) **A reticulated water supply vis-à-vis an approved Reticulated Water Supply**

i) An approved Reticulated Water Supply is a reticulated water supply which has the status of Reticulated Water Supply for the purpose of the then Shire of Kyneton Planning Scheme.

ii) Knowledge of a reticulated water supply does not constitute or include knowledge of an approved Reticulated Water Supply

iii) Knowledge of or belief in the private water supply and reticulation system which was apparently present in 1979 does not include knowledge of or belief in an approved Reticulated Water Supply.

iv) A reticulated water supply provided by the Second Defendant is an approved Reticulated Water Supply.

v) A precondition to the grant of building permits on the Woodleigh Heights allotments was that the allotments be serviced by an approved Reticulated Water Supply.

b) **The Woodleigh Heights private water supply and reticulation system.**

i) The Woodleigh Heights subdivision was in an area where under the Shire of Kyneton Planning Scheme subdivision into allotments less than 6 acres in area was prohibited unless the proposed allotments were serviced by an approved Reticulated Water Supply.

ii) The area where the Woodleigh Heights subdivision was located was not serviced by a reticulated water supply provided by the Second Defendant and so subdivision into allotments of less than 6 acres was effectively prohibited.

iii) To overcome this problem the subdivider, Kenneth Raymond Buchanan proposed a completely private and self contained water supply and reticulation system.

iv) This private water supply and reticulation system is detailed in the **submission dated 3/11/78** and referred to in the particulars to paragraph W2 of the present Amended Statement of Claim.[4]

v) As detailed in the submission this private water supply and reticulation system consisted of a lake with a surface area of approximately 6 acres, a rising main, a 100,000 gallon header tank and a system of pipes comprising the reticulation system.

[4] See GAT-5B at GAT-5 and in particular the Engineering Report of that submission.

vi) Although unusual, being a country boy the concept of private or community based water supplies and electricity systems was well known to me and I had personal knowledge off such things in small rural communities.

vii) In 1979 at the time of purchase I was aware that the water supply was a private system, the lake and the water tanks were present as highly visible palpable facts and were also depicted on the glossy brochure[5] and marked "water" and because neither I nor any ordinary person would have an expectation that allotment holders were expected to visit the tanks with their teapots and toilet buckets I had a more than reasonable basis for a belief that a reticulation system was also present but installed underground and therefore not visible and not depicted on the glossy brochure.

viii) The private water supply and reticulation system defined in the submission constituted an approved Reticulated Water Supply for the purpose of the Shire of Kyneton Planning Scheme.

ix) The operation of the Shire of Kyneton Interim Development Order required compliance with Planning Permit 2191 and accordingly pursuant to condition 8 of that permit the private water supply and reticulation system was required by law to be competed in 1979 at the time that the plans were sealed and condition 6 of that permit required it to be under the control of the Body Corporate.

x) The private water supply and reticulation system as defined in the submission was entirely contained within the common property and was common property.

xi) As the Plaintiffs now know the principle water main comprising the reticulation system were not completed in 1979 as required by law but were instead laid in 1982. As a consequence, as alleged in paragraph W10 of the present Amended Statement of Claim there was no reticulated water supply present when the plans were sealed in 1979.

c) A reticulated water supply provided by the Second Defendant.

i) The Woodleigh Heights subdivision was completely outside the Kyneton Waterworks Urban District and part within and part without the Kyneton Waterworks District. The Second Defendant had power to provide water to land within its district by agreement under s.307AA(2) but could only do so with the approval of the Governor in Council in respect to land outside its Waterworks District.

ii) The reticulation system of the Second Defendant is entirely contained within public lands and generally along public road or within easements over private lands.

[5] See GAT-1

iii) The water source for a reticulated water supply provided by the Second Defendant is from a reservoir operated by it.

iv) Water provided by the Second Defendant is provided at a water meter adjacent to the boundary of a parcel of land. The reticulation system and the water upstream from the water meter is the property of the Second Defendant. The water and reticulation system immediately downstream from the water meter is the property of the consumer.

v) A reticulated water supply lawfully provided by the Second Defendant is an approved Reticulated Water Supply.

d) The principal distinctions between the Private reticulated water supply and a reticulated water supply provided by the Second Defendant.

i) The private reticulated water supply system referred to in paragraph W2 of the present Amended Statement of Claim is entirely contained within the common property of cluster subdivision CS1134 and is the property of the Body Corporate of CS1134 and cannot and does not include any component which is not within the common property and not the property of the Body Corporate.

ii) The reticulated water supply system of the Second Defendant is entirely contained within public lands or easements over private lands and is the property of the Second Defendant and does not and cannot include any component which is not the property of the Second Defendant.

iii) A reticulated water supply provided by the Second Defendant may provide a source of water either in lieu of or to augment the water source of the private system but not vice versa.

iv) The supply points of the private system were each individual parcel of land being an allotment

v) A reticulated water supply provided by the Second Defendant cannot be provided to the individual parcels of land, being the allotments of the cluster subdivision, without a separate Water Supply Agreement pursuant to s.307AA(2) with each individual owner of each individual allotment

vi) A reticulated water supply provided by the Second Defendant cannot be provided to the individual allotments except in breach of condition 6 of the planning permit which required the Body Corporate to be responsible for all private facilities including water.

vii) Evidence of or knowledge of the reticulated water supply provided by the Second Defendant does not and cannot provide evidence of, or knowledge of, a first instance of any component part of the private reticulated water supply and system.

viii) Evidence of or knowledge of the reticulated water supply provided by the Second Defendant does not and cannot provide evidence of or any basis for knowledge that any component part of the private reticulated water supply did not pre-exist.

ix) It is impossible to confuse the private water supply and/or reticulation system of the Woodleigh Heights subdivision with a reticulated water supply provided by the Second Defendant. There is simply no common factor.

55) **The Book of Pleadings.**

a) The Second Defendant has exhibited a document entitled "Book of Pleadings" at tab 43 of SME 1 Volume 2.

b) I am most grateful to Mr. Edward for exhibiting this document.

c) This document was prepared by me subsequent to Discovery and immediately prior to drafting of the Amended Statement of Claim in County Court proceeding 880949.

d) At the time of the hearing before the Master, with devastating effect both Defendants relied upon a fallacious misconstruction of its contents and the Master also relied upon that misconstruction and to some extent his own misconstruction in his written Reasons for Decision.

e) I now also rely on the content of that document albeit with the proper construction.

f) A little later in this submission I will provide an analysis of its content. For the present moment I am merely introducing it as I will make reference to it from time to time in this submission.

g) This document was prepared by me for the exclusive use of my legal advisers at the time of County Court proceeding 880949.

h) Before being wrongly obtained and exhibited by Steven Mark Edward, solicitor for the Second Defendant this document was a privileged document. At the time of wrongly obtaining it and wrongly exhibiting it Mr. Edward was fully aware that he was not entitled to it, that it was my private and confidential property and that it was privileged and never was either a discovered or discoverable document.

i) A little later in this submission I will show that Mr. Steven Mark Edward, solicitor for the second Defendant lied on Affidavit in regard to how he came by this document.

j) As the Defendants have exhibited and relied upon the Book of Pleadings and the Master also relied upon it, I too am entitled to rely upon it. The probability is that if I had exhibited it and sought to rely upon it as I now do the Defendants would have objected.

56) **The Black Folder.**

a) In the submissions of the Defendants and in this submission and in my affidavits there is reference to a "Black Folder". Counsel for the Defendants left this book in my possession at the time of the purported settlement of the previous Tylden Rd proceeding. Although I have not checked for completeness it appears to contain copies of the documents discovered by the Defendants in that proceeding.

57) **The relationship of the Defendants. Shared knowledge and joint sealing of plans.**

a) At the relevant times the predecessors to the Defendants were corporate entities. At all relevant times the Secretary of each predecessor was one and the same person and at all relevant times Councillors of the First Defendant were also Members of the Second Defendant appointed by the First Defendant.

b) The personal knowledge of the Secretary of one Defendant was also personal knowledge of the Secretary of the other Defendant. The personal Knowledge of some Councillors of the First Defendant was also personal knowledge of some Members of the Second Defendant and vice versa. Consequently the corporate knowledge of one Defendant was, and was intended to be, also corporate knowledge of the other Defendant.

c) s.569B(2)(ac) required the First Defendant to refer all plans of subdivision to the Second Defendant.

d) s.569B(7)(c) required the First Defendant to refuse to seal a plan of subdivision without the consent of the Second Defendant or where the Second Defendant has refused to consent without the consent of the Governor in Council.

e) s.569E)(1B) required the First Defendant to make a s.569E(1A) requirement if requested and in the terms requested by the Second Defendant.

f) As a consequence the sealing of plans of subdivision is in effect a joint sealing by both Defendants and the issue and service of s.569E Notices is a joint issue and service.

58) **Synopsis of and hypothesis for the misfeasance.**

a) I set out this section of my submission so that the Court may gain an understanding as to why these things occurred and thereby gain a better insight into the matters alleged and the detail of this submission.

b) Although styled misfeasance in the present Amended Statement of Claim the fact is that the things complained of are fraudulent in nature and the concealment of the facts constituting the present causes of action specifically fraudulent.

c) My family and I were the subject of four related frauds at the hands of two statutory authorities, the Defendants. Even the suggestion that this sort of thing would occur invokes incredulity.

d) The further suggestion of fraudulent conspiracy places me in the category of ridiculous and ridiculed conspiracy theorists however the facts, once detailed and known, speak for themselves.

e) As will be shown the first two or primary frauds are that, in relation to each subdivision the Defendants conspired with Buchanan for the purpose of enabling him to sell allotments before he was lawfully entitled, the effect and purpose of which was to facilitate avoidance of the effect of section 9 of the Sale of Land Act 1962.

f) The purpose and effect of the conspiracy was to facilitate the unlawful sale of allotments for the purpose of raising funds to complete the works necessary to make the allotments useable. Such conspiracies attracted and facilitated substantial development at Kyneton and I understand other local government municipalities.

g) The method used had nothing to do with 2 lot plans of subdivision or any other form of unlawful plans.

h) As discovered by me in August 2000 and as I will describe a little later on the method used was for the First Defendant to seal plans of subdivision in full knowledge that the allotments so created were unusable because the required services were not present and there was no lawful means of compelling Buchanan or anyone else to provide those services.

i) The scheme relied upon a bargain between thieves so to speak, the bargain being between Buchanan and the Defendants. The bargain was that notwithstanding that there was no compulsion at law Buchanan would complete the services once having sold a few allotments and having thereby raised the capital to pay for the missing services. Buchanan in return or as a consequence would carry out development which may otherwise not occur.

j) Development enhances the status of local authorities and in all likelihood, in these instances, also enhanced the stature of the officers of the Defendants and provided a permanent, essentially perpetual increased income stream for the Defendants.

k) The problem in this instance was that in April 1982 I discovered the fact of various unlawful land transactions, including in particular the selling of allotments twice over and after informing Buchanan and the solicitors, Palmer Stevens and Rennick of my discoveries, I then informed the Police. At this time I became subject to numerous threats including threats of violence and threats

to bankrupt me. In relation to this aspect an additional interesting fact is that at least one allotment which had been sold twice over was also rated twice over[6] by the First Defendant.

l) Although being deeply concerned for myself and my family I refused to be intimidated.

m) Immediately, essentially instantly, following these threats the Defendants without any lawful basis or legitimate reason and on the face of it, possibly at the behest of Buchanan and/or the solicitors Palmer Stevens & Rennick, began the chain of events which see us here today. [7]

n) By letter dated 12th May 1982 and 4th June 1982 the Defendants began the chain of events which purported to require me to construct the roads and waterworks on the Tylden Rd land. [8]

o) It may be that Buchanan reneged on the abovementioned thieves' bargain or it may be that the Defendants colluded with Buchanan. It does not matter which, the only certainty is that no matter what the reason, the Defendants embarked upon a fraud against my family and I, which had the obvious potential effect of implementing Buchanan's threat to bankrupt me.

p) Whether it was because Buchanan reneged or because the Defendants colluded with Buchanan the fact is that the Defendants had two subdivisions without services and no lawful means at all of compelling Buchanan or anyone else to provide those services. If Buchanan did not, or would not, provide those services, the Defendants were left with no means other than fraudulent means to secure construction of those services.

q) The Defendant did use fraudulent means and these means constitute the two secondary frauds.

r) In the case of Tylden Rd the secondary fraud by the Defendants was as now set out in the present Amended Statement of Claim and in summary was by falsely representing that a s.569E Notice of Requirement had been served and that I was the owner liable at law to construct the services required by those s.569E Notices and in my default call upon my bank guarantees and construct the services at my cost.

s) In the case of Woodleigh Heights the secondary fraud was to induce the private company Woodleigh Heights Marketing Pty. Ltd. to complete the reticulation system and to reward that company by entering into the plainly illegal [9] 1982 water supply agreement which purported to give control of the water supply within the subdivision to that company and to then do those additional things now set out in the present Amended Statement of Claim which ultimately

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[6] Page 20 Book of Pleadings, SME 1 Volume 2 Tab 43..
[7] Pages 20 to 23, Book of Pleadings, SME 1 Volume 2 Tab 43.
[8] See Bank Guarantees and correspondence at GAT-2
[9] Refer GAT-26 – The Water Supply Agreement was ultravires because in breach of s307AA(2) of the Water Act 1958 it was with an entity which was not the owner of the land in respect of which the water was provided. The Agreement was also in breach of clause 6 of Planning Permit 2191. (Refer GAT-5A) The agreement was also used for fraudulent purpose as set out in the present Amended Statement of Claim and in particular to purport to provide water for the sole use of the concumer including in respect to land not owned by it including the Plaintiffs Land. . .

resulted in interests associated with that company acquiring my land at a price which represented a value without access to water.

t) In the case of both Tylden Rd and Woodleigh Heights there is no possibility of the Defendants or their respective officers holding a belief that what they were doing was anything other than unlawful and fraudulent. In this regard due to my copious writings[10] and my two personal addresses to joint meetings of the Defendants [11] it can be demonstrated that each and every Councillor and each and every Water Board member was completely familiar with all of the details as were the solicitors for both Defendants. Those solicitors being Palmer Stevens & Rennick and Maddock Lonie and Chisholm, the latter being the predecessor to the present solicitors for the First Defendant. Mr. Ian Lonie was the solicitor acting.

u) In the case of both Tylden Rd and Woodleigh Heights the Defendants plainly knew full well that the things done by them against my family and I in relation to the secondary frauds exploited, and were only possible because of, the circumstances which resulted from the initial conspiracies being the primary frauds.

v) In the case of Tylden Rd Buchanan and the Defendants and their officers and their solicitors knew of the primary fraud and knew full well that no lawful s.569E Notice had ever been served.

w) In the case of Woodleigh Heights Buchanan, and the Defendants and their officers and their solicitors knew of the primary fraud and knew full well that the private reticulation system had not been completed.

x) Whether or not the things done to my family and I were done in collusion with, or at the behest of Buchanan and whether or not the Defendants were aware of Buchanan's threats of violence and bankruptcy, is irrelevant. The certain fact is that each of the Defendants knew full well that the things which were done to my family and I by them were unlawful and caused my family and I great financial difficulty and had the reasonably foreseeable effect that these things may well have resulted in my bankruptcy.

y) The further certain fact is that the things done were done by the Defendants alone. They alone held purported power and purported authority to do the things done so whether or not done in collusion with or at the behest of Buchanan it is the Defendants who hold sole responsibility.

z) The fact that the things done had the potential to give effect to Buchanan's threat to bankrupt me, may be fortuitous and may well be by collusion. My financial difficulty was known and was also

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[10] Including my letter dated August 2007 upon which the Defendants now rely. See GAT-A exhibited at Affidavit referred to in next footnote.

[11] Transcripts of addresses are exhibited at GAT-B and GAT-D to my Affidavit of 23rd February 1998 at Tab 24 of SME2 Volume 1. (Exhibit note for GAT-B is missing.)

reasonably foreseeable and the fact that my Woodleigh Heights land had been rendered useless to anyone except interests associated with Buchanan had the obvious, and I say known and intended, effect of ensuring a forced sale of my Woodleigh Heights land and of ensuring it was saleable only to those interests.

aa) To say that so many Councillors and Water Board members would not be party to such things is to ignore the fact that the Council and Water Board were stuck with the fact of and the facts of the initial conspiracy to avoid the effect of s.9. They had two subdivisions without services. It was a clear case of expose themselves and the conspiracy at that time, or unlawfully use Council and Water Board funds to do the required works, or defraud my family and I and do the things now set out in the present Amended Statement of Claim. The certain fact is that the Defendants did not expose themselves and did not use their own funds. They as a matter of fact did conceal the primary frauds and did do the things now set out in the present Amended Statement of Claim and perpetrated the secondary frauds against my family and I.

bb) The two primary frauds were for the purpose of facilitating avoidance of the effect of s.9 and the two secondary frauds were for the purpose of concealing the primary frauds and facilitating construction of the required services which were absent due to the primary frauds.

cc) As I will detail a little later the Defendants have retained and continue to enjoy the benefit of the frauds and the Plaintiffs continue to suffer the loss occasioned by their fraud.

59) **Avoiding s.9 of the Sale of Land Act 1962.**

a) s.9 of the Sale of Land Act 1962 provides:-

> "*Where a notice of intention to subdivide land into three or more allotments ... . has been given or is required to be given ..... no person shall sell any such allotment unless .... the allotment is an allotment on a plan of subdivision approved by the Registrar pursuant to s.97* ... .. "

b) In paragraphs T7 and W8 of the present Amended Statement of Claim it is said that the purpose of doing the things alleged was to avoid the "effect' of s.9. The word "effect" provides an important distinction from the literal provisions of s.9 because as was discovered by me in August 2000 it was the "effect' rather than the literal provisions which the Defendants and Buchanan conspired to avoid.

c) On a literal reading the provisions of s.9 appear intended to prevent the sale of allotments on subdivisions consisting of three or more allotments until such time as the plans have been approved by the Registrar of Titles pursuant to s.97.

d) I will address "effect" as distinct from literal provisions a little later.

e) In considering the following discussion "sale" and "sell" is defined in the Sale of Land Act 1962 as "*includes an agreement for sale an offer to sell and the giving of an option to purchase*".

f) On an ordinary understanding to "sell" means to complete a "sale" or in other words effect transfer of Title and obtain settlement. This ordinary understanding is an included meaning of "sell" in s.9.

60) **Avoiding s.9. The simplistic or mistaken view. Buchanan's intentions as to avoidance.**

a) During the period 1979 to 1980 Buchanan had done the following things in relation to Tylden Rd:-

i) In 1979 he had offered me two of the allotments at a cheap price for the stated purpose of raising funds to construct the roads.[12]

ii) On 12th February 1980 he had filed a single plan showing all 18 residential allotments.

iii) On 4th March 1980 he had filed seven plans including six which were 2-lot plans of subdivision.

iv) He had advised me that he had sold two of the Tylden Rd allotments to an employee of his solicitors Palmer Stevens and Rennick.[13]

v) He had advised me that he could not settle the sales to the employee of Palmer Stevens and Rennick until bank guarantees for the road and waterworks had been filed with the Defendants.[14]

b) At these times I knew nothing of s.9 let alone intended breaches of s.9.

c) In 1982 I learned that Buchanan and his solicitors Palmer Stevens & Rennick were involved in dishonest land transactions.[15]

d) In 1983 my then solicitor Danny Ginsburgh advised me that somehow Buchanan managed to manipulate the plans of subdivision to avoid the provisions of s.9 of the Sale of Land Act thereby enabling him to sell allotments and raise capital for the provision of roads and water which he ordinarily had an obligation to provide, or make provision for, prior to sale. [16]

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[12] Paragraph 5 First Thompson Affidavit.
[13] Paragraph 10 First Thompson Affidavit.
[14] Paragraph 12 First Thompson Affidavit. Page 5 Book of Pleadings, SME 1 Volume 2 Tab 43.
[15] Page 20 Book of Pleadings, SME 1 Volume 2 Tab 43..
[16] Paragraph 51, page 12 First Thompson Affidavit.

e) By 1983, for a variety of reasons I knew Buchanan to be dishonest and while I had reason to suspect the motives of the Defendants' then Secretary Mr. Stan Porter, I had no cause to suspect the Defendants, per se, of dishonesty. [17]

f) In 1987 the First Defendants proceeded against me in the Magistrates Court. At this time I personally learned the relevant legislation.

g) From the legislation and Buchanan's offer to sell allotments to me and the advice of Danny Ginsburgh and the fact of the contrived 2-lot plans of subdivision and the fact of the sales to the employee of Palmer Stevens & Rennick it was clear that Buchanan's intentions were to avoid what I then understood the provisions of s.9 to be. On that understanding avoidance is the only possible purpose for the contrived 2-lot plans and the fact of the two sales is clear evidence of that intent.

h) **Notably the submissions of my ex-Council are commensurate with them holding a similar misunderstanding of the provisions of s.9 as that conveyed to me by Danny Ginsburgh in 1983.**

i) Having regard to a correct understanding of the provisions of s.9 Buchanan's scheme to avoid s.9 depended upon deceptions as to intent. **2-lot plans of subdivision do not facilitate avoidance of s.9.** Although clearly for the purpose of avoiding the literal provisions of s.9 the 2-lot plans do not facilitate avoidance of s.9 because s.9 does not apply to plans per se. The fact is that s.9 applies to intention to subdivide so that where the intent is to subdivide into three or more allotments then s.9 applies no matter how many allotments may be shown on the plans filed. Contrived 2 lot plans are in fact a breach of s.569(1) because clearly any such contrived 2-lot plan submitted together with or as part of a Notice in the form of the Thirtieth Schedule do not disclose the developers intentions as required by s.569(1). Additionally any such plans are in clear breach of s.569A(1) because any such plan does not show all allotments. It follows therefore that there is no such thing as avoiding s.9 by means of contrived 2-lot plans. Any sales made, whether from a complete plan disclosing the true intention, or from contrived plans intended to deceive as to intention are sales made in breach rather than avoidance of s.9. 2-lot plans may purport to provide deception as to intent, 2-lot plans purport to but do not facilitate avoidance of a mistaken understanding of s.9.

j) Once having breached, as distinct from avoided, s.9 by entering into the contracts of sale with the employee of his most accommodating solicitors Palmer Steven & Rennick, Buchanan found that he could not obtain settlement on those sales.[18]

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[17] Paragraph 51 First Thompson Affidavit, Page 20 Book of Pleadings, SME 1 Volume 2 Tab 43.
[18] Page 9 Book of Pleadings, SME 1 Volume 2 Tab 43.

k) While it was clear that Buchanan had contrived to avoid the provisions of s.9 by preparing the obviously unlawful plans and he had in fact breached s.9 by entering into contracts of sale with the employee of Palmer Stevens & Rennick, it was equally clear that he had been prevented from completing the sales because of the specific actions of the Defendants.

l) Buchanan had been prevented from completing the sales because the First Defendant had sealed the contrived plans of subdivision with a s.569E(3)(a) endorsement on them and the Registrar of Titles was thereby prevented from approving the plans because of the operation of s.569E(3)(e).

m) Buchanan was not able to complete the sales until the Bank Guarantees had been filed with the Defendants and the First Defendant had advised the Registrar of Titles that the s.569E requirement was at an end and the Registrar of Titles had then approved the plans of subdivision and issued separate titles.

n) It was clear therefore, that while there may have been a technical breach of s.9 in that contracts had been entered into, it was also clear that the sales could not be completed until such time as the Registrar of Titles had approved the plans pursuant to s.97 and separate titles had issued.

o) In other words it is impossible to complete a sale made in breach of or in avoidance of the literal provisions of s.9 until such time as the Registrar of Titles has approved the plan. It follows therefore that it is impossible to complete a sale in breach of s.9.

p) The contrived series of plans did not and cannot facilitate either avoidance of or breach of s.9.

61) **The Defendants intentions and state of mind at the time of processing the contrived plans.**

a) In this matter the intent and state of mind of the Defendants at the time of processing the plans is as important as the facts.

b) At the time of the Magistrates Court hearing in 1987 the First Defendant exhibited the documents referred to in paragraph 53(c)(i) of the first Thompson Affidavit.[19] These documents included purported copies of the contrived series of plans. At the time they were assumed to have been photocopied poorly, at that time there was no concept of "clipped" plans.

c) The First Defendant gave the evidence set out in paragraph 53(c)(ii) of the first Thompson Affidavit. The relevant evidence for the present moment being that the plan of subdivision which showed all 18 allotments had been processed in several parts, those parts being sealed by the First Defendant on 21st May 1980.

[19] GAT-24

d) This evidence was entirely consistent with a common practice of developing subdivisions in stages, excepting that normally staged subdivisions have a time period between a Council sealing the plans for each stage.

e) Accordingly as the series of plans had not and could not facilitate avoidance of s.9 and as the processing of staged developments was both lawful and legitimate then at that time there was simply no basis at all, either at law or logic, to fix the Defendants with any knowledge of or any complicity in, Buchanan's intention to avoid s.9 and no basis to show anything other than that claimed by the First Defendant in the Magistrates Court, which was that the plan showing all allotments had been processed in several parts.

f) This evidence that the plan had been processed in several parts was later repeated in discovery in the previous Tylden Rd proceedings. In that proceeding the Defendants discovered the single plan of 20th February 1980 together with a single Notice to the effect of the Thirtieth Schedule. On the 30th Schedule Notice was a handwritten note which said "Note, Plans submitted in 5 sections, 30th schedules all identical to this"

g) It was not until August 2000 that I realised the Defendants true state of mind which was to give effect to the conspiracy to avoid the effect of s.9.

62) **Avoidance of s.9. The holistic view. An oxymoron. Avoiding the effect of s.9 by complying with s.9.**

a) On the simplistic view s.9 is intended to prevent the sale of allotments on subdivisions consisting of three or more allotments until such time as the plan has been approved by the Registrar of Titles.

b) In August 2000, in the circumstances which I shall describe a little later, I arrived at a holistic view of the purpose and effect of s.9 and at that time I first became aware of an insidious method of avoiding s.9 by complying with it.

c) On a holistic view the effect of s.9 is derived from 3 Acts.:-

i) Pursuant to s.9 the sale of allotments on subdivisions consisting of three or more allotments is prevented until such time as the Registrar of Titles has approved the plans.

ii) The Registrar of Titles, in turn is prevented by s.97 from approving the plans unless the plan is a plan in accord with the plan sealed by the Council and the plan is not subject to the provisions of s.569E

iii) The Council may only seal a plan if it is not prevented from doing so by the operation of s.569B(7) and pursuant to s569E(3)(a) it must endorse the plan if the plan is subject to s.569E.

d) From this holistic view it is clear that the effect of s.9 is quite different from the apparent literal provisions. On the holistic view the true purpose and effect is not to prevent sales until the Registrar of Titles approves the plans, but is instead to prevent the sale of allotments on subdivisions consisting of three or more allotments until such time as the plans have been lawfully sealed by the Council and the required services are present and the allotments are useable and then until such further time as the Registrar of Titles approves the plans pursuant to s.97.

e) On this holistic view avoidance of the effect of s.9 is facilitated or effected by the Council unlawfully sealing plans of subdivision in full knowledge that the required services are not present and that there is no lawful means of compelling provision of those services.

f) Once sealed in this manner the Registrar of Titles will approve the plans pursuant to s.97 and the developer is then free to sell the land in compliance with the provisions of s.9 but in certain avoidance of the obvious intended and holistic effect of s.9.

g) With the co-operation of a dishonest Council and a bargain between thieves a developer can avoid the effect of s.9 while complying with the literal provisions of s.9.

h) As discovered by me in August 2000 this is what happened in respect to both Tylden Rd and Woodleigh Heights.

63) **The Causes of action.**

a) As stated earlier the cause of action in respect to both Tylden Rd and Woodleigh Heights " .... *is that the Council did in breach of its specific duty seal the residential series of plans and the industrial series of plans and the plans of cluster subdivision in full knowledge that the allotments thereby created were unusable due to a lack of services and in full knowledge that* ***there was no lawful means to compel or cause construction of those services in order to make the allotments useable.***"

b) **This is a single cause of action, arising from a single conspiracy** which was implemented in respect to at least two subdivisions in the municipality of the First Defendant and the district of the Second Defendant.

c) **This conspiracy was a conspiracy to defeat the laws of the State of Victoria.**

d) The conspiracy was for the purpose of providing profit and benefit to the conspirators without regard to the loss and damage which may be occasioned to any unsuspecting purchaser of the subject allotments.

e) In relation to Tylden Rd the facts giving rise to this are, that the First Defendant sealed the plans of subdivision in full knowledge that the services were not present and that no lawful s.569E

Notice was issued or served and therefore *"there was no lawful means to compel or cause construction of those services in order to make the allotments useable"*

f) In relation to Tylden Rd the facts pleaded in regard to this are found at paragraphs T1 to T12 of the present Amended Statement of Claim. The essential components are found in paragraphs T5 and T12 which respectively allege that the First Defendant "*omitted to issue 569E Notices in respect of the first industrial plan and in respect of the first residential plan*" and the First Defendant "*fabricated Notices of Requirement*".

g) In relation to Woodleigh Heights the facts giving rise to this are, that the First Defendant sealed the plans of cluster subdivision in full knowledge that the private reticulated water supply and reticulation system which was required by law to be present, was not present and that *"there was no lawful means to compel or cause construction of those services in order to make the allotments useable"*

h) In relation to Woodleigh Heights, the facts pleaded in relation to this are found at paragraphs W1 to W10 of the present Amended Statement of Claim. The essential component being that, for the reasons set out in paragraphs W1 to W10 the private reticulated water supply and reticulation system was required by law to be completed in 1979 at the time of the sealing of the plans, whereas the fact is that as alleged in paragraph W10(b) ".. *no reticulated water supply system had been installed .. … .. "*

i) In relation to Tylden Rd and Woodleigh Heights, at paragraphs T7 and W8 it is respectively alleged that the purpose of doing these things was to avoid the effect of s.9 of the Sale of Land Act. This is a most serious allegation and the Defendants not only did but would not, not conceal the facts giving rise to this allegation.

64) **The Defendants do not deny the predicating facts nor do they put forward an affirmative defence.**

a) The present proceeding relies upon two predicating facts, one for each subdivision.

b) At the present time the Defendants are seeking summary dismissal based upon Res Judicata. The principles of Res Judicata require the Defendants to bring forward their entire summary dismissal defence at this time.

c) If, in the case of Tylden Rd the s.569E Notice was in fact lawfully issued and served then insofar as the Tylden Rd aspect is concerned, the Defendants could seek summary dismissal on this point alone, but they do not.

d) If, in the case of Woodleigh Heights the primary mains comprising the reticulation system were in fact laid in 1979 then insofar as the Woodleigh Heights aspect is concerned the Defendants could seek summary dismissal on this point alone, but they do not.

e) At the present time the Defendants rely upon the assertion that the issues could have or should have been or were previously pleaded or are out of time. They do not deny them.

65) **The Defendants admit to and rely upon the principle predicating fact in relation to Woodleigh Heights.**

a) The principle predicating fact in relation to Woodleigh Heights is that the water mains comprising the reticulation system were not completed in 1979 but were in fact laid in 1982.

b) These water mains comprised a component part of the private water supply and reticulation system and in the absence of that component part there was no private reticulated water supply present in 1979 as was required by law.

c) I learned that the principle water main of the reticulation system were laid in 1982 and not 1979 when I was shown a reticulation plan during a break in proceedings in the Practice Court in 1999.

d) The Defendants do not deny that I was shown the reticulation plan in those circumstances but instead appear to confirm or admit to the fact that it was shown to me in the Practice Court. This admission is set out in paragraph 85 of the Outline of Submissions of the First Defendant where it is said, "*It was this reticulation plan that Mr. Thompson asserts he reflected upon .. .. ..*"

e) Then at paragraph 87 the First Defendant says, "*What Mr. Thompson fails to mention .. .. is that he was aware ... . that the reticulated water supply had been laid in 1982 and not 1979*".

f) Then at paragraph 91 the First Defendant says " ... . *Mr. Thompson was aware from at least August 1987 ... . that the reticulated water supply was not present in 1979 but was in fact laid down in 1982*".

g) In paragraphs 87 and 91 the First Defendants assert that I was aware of the fact that the water supply was not present in 1979 but was in fact laid down in 1982, this assertion as to my knowledge of that fact includes an explicit assertion of and an admission as to that fact.

h) An assertion as to knowledge of a fact includes an assertion as to that fact.

i) In his written Reasons for Decision the Master accepted and relied upon this specific argument by the Defendants, so that the fact is, not only do they admit to and rely upon that fact and admission, they have also obtained and rely upon a judgment based substantially on that admission

j) The Defendants therefore admit to and rely upon the principal predicating allegation of the present Amended Statement of Claim in relation to Woodleigh Heights.

k) Interestingly and obviously the thing now admitted by them was a complete defence to the previous Woodleigh Heights proceeding, but as mentioned elsewhere in this submission the Defendants ran sham defences and sham strike out applications which concealed rather than relied upon the fact now relied upon.

66) **That the Defendants do not deny the predicating facts and in the case of Woodleigh Heights they admit to and rely upon the predicating fact is prima facie evidence of those facts and prima facie evidence of concealment in that those facts have always been true and could have been used as complete defences to the previous proceedings but were not.**

67) **Concealment of the predicating facts and cause of action -Tylden Rd.**

a) Concealment of the predicating facts includes concealment of the conspiracy to avoid the effect of s.9.

b) Concealment of the predicating facts occurred as a matter of palpable fact. In the final analysis, the cause of action in respect to Tylden Rd is reduced to the fact that the s.569E Notice which the First Defendant resolved to issue and serve was never either issued or served. The plan to which it was to relate was in fact abandoned and not further processed after 20th February 1980.

c) To conceal this fact the First Defendant fabricated Notices of Requirement in relation to each of the plans in the series of residential plans and then sealed each of those plans with a s.569E(3)(a) endorsement thereon and then subsequently purported to lift or withdraw those requirements.

d) The First and Second Defendants each purported to accept and hold my Bank Guarantees in purported pursuance of the requirement purportedly effected by the s.569E Notice which was allegedly served in relation to the single plan of 20th February 1980 showing all 18 allotments.

e) In order to further conceal this fact and to fraudulently obtain a wrongful judgment in the Magistrates Court and in the subsequent Supreme Court appeal, the First Defendant perjured itself both orally and on Affidavit.

f) The proceeding in the Magistrates Court was for the purpose of recovering from me $3,708.00 being overrun in the costs of road construction. The Council alleged that I was responsible as I was the owner of the land for the purpose of s.569E of the Local Government Act 1958 and that the First Defendant had on or about 20th February 1980 served a s.569E Notice of Requirement pursuant to the First Defendants resolution of 20th February 1980.

g) The evidence given by the First Defendant in the Magistrates Court is set out at paragraph 53c)ii) of my first Affidavit. It is self evident that the evidence as set out in that paragraph was essential

to and was the only possible basis for the First Defendants case against me in the Magistrates Court.

h) In addition to the false evidence in the Magistrates Court, as set out in paragraphs 57(4) and 57(12) of my first Affidavit, in their four separate defences [20] both Defendants, on four separate occasions, falsely admitted to paragraph 7 of the Statement of Claim and Amended Statement of Claim in the previous Tylden Rd proceeding, County Court proceeding 880949.

   i) Paragraph 7 of the said Statement of Claim and the said Amended Statement of Claim was based upon the false evidence given in the Magistrates Court and in the subsequent Affidavit in the Supreme Court. Evidence which I accepted as being truthful as it was given under oath from the mouth of a statutory authority.

   ii) In addition paragraph 7 of the said Amended Statement of Claim was further based on the false admission to paragraph 7 of the said Statement of Claim.

   iii) Paragraph 7 alleged that on or about 20th February 1980 the First Defendant served a s.569E Notice of Requirement.

   iv) At the time of admitting to paragraph 7 each of the Defendants knew full well that the admission was false and each of the Defendants knew full well that the principle basis for my belief in the allegation made in paragraph 7 was the perjury perpetrated in the Magistrates Court and repeated in the Supreme Court. In addition each of the Defendants knew full well that their admission to paragraph 7 in each of their defences was the repeating of that perjury on a further four separate occasions.

i) The concealment was specifically intended to and did conceal from all of the Magistrates Court, the Supreme Court, the County Court and myself the fact that the s.569E Notice was never either issued or served.

j) In addition to the false admissions, in documents discovered in the previous Tylden Rd proceeding the Defendant repeated the evidence given in the Magistrates Court to the effect that the plan of 20th February had been processed in several parts. They discovered a single plan showing all 18 residential allotments and a single Notice to the Effect of the 30th Schedule to the Local Government Act 1958. The 30th Schedule Notice discovered had the words "Note, Plans submitted in 5 sections, 30th schedules all identical to this". [21] This statement and therefore discovery was false and misleading. The plan had in fact been abandoned and the series of plans processed in substitution. This concealed the fact that the series of s.569E Notices which appeared

[20] SME 1 Volume 1 at tabs 2, 17, 37 and at SME 1 Volume 2 at tab 41
[21] GAT-14

to have been issued as a series pursuant to the 20th February resolution were in fact not issued pursuant to the 20th February resolution and in fact had no supporting resolution of either Defendant at all.

k) Concealment of the cause of action was overt and continuous during the period 1979 until discovered by me in August 2000.

l) This is concealment of the worst type. It is specifically concealment by perjury. It is also consciously and deliberately dishonest concealment for dishonest purpose and of demonstrable extreme moral turpitude. Concealment was for the purpose of bringing a false action against me in the Magistrates Court and for deceiving the Chief Justice at the time of the appeal and for the purpose of concealing the conspiracy to avoid the effect of s.9 of the Sale of Land Act and for the purpose of facilitating construction of the services which were absent due to the conspiracy to avoid the effect of s.9.

m) Concealment was also for the purpose of running a sham defence in the County Court proceeding and for the purpose of obtaining a fraudulent settlement where the Terms of Settlement were executed by the Defendants in full knowledge that the facts had been concealed by perjury and false admissions and falsified documents and false and incomplete discovery.

n) Concealment may well have also been for the purpose of avoiding any potential criminal charges.

68) **Concealment of the predicating facts and cause of action – Woodleigh Heights.**

a) Concealment of the predicating facts includes concealment of the conspiracy to avoid the effect of s.9.

b) Concealment of the predicating facts occurred as a matter of palpable fact. In the final analysis the cause of action is reduced to the fact that the principle water mains comprising the private reticulation system, comprising a major component part of the private water supply and reticulation system was not present when the plans of cluster subdivision were sealed by the First Defendant in 1979.

c) Concealment of this cause of action was overt and continuous during the period 1979 until discovered by me in August 2000.

d) Concealment of this cause of action is interesting because it occurred in several forms and stages and was insidious.

e) To understand and appreciate the concealment it is necessary to consider and understand some facts, concepts and a little logic.

f) The **first fact** is that the private reticulated water supply described in the submission[22] referred to in paragraph W2 of the present Amended Statement of Claim, was required by law to be complete at the time of the sealing of the plans in 1979[23] and did constitute an approved Reticulated Water Supply for the purpose of the Shire of Kyneton Planning Scheme;

g) The **second fact** is that the principal water mains of the said private reticulation system were not completed in 1979 but were instead laid in 1982;

h) The **third fact** is that in 1979 the lake and the large concrete header tanks were as a matter of fact completed and palpably present and marked "Water" on the 1979 glossy brochure[24] and, as previously stated, unless there was an expectation that allotment holders were expected to visit the tanks with their teapots and toilet buckets, there existed a more than reasonable basis for a belief that a reticulation system was also present but installed underground and therefore not visible and not depicted on the glossy brochure;

i) The **fourth fact** is that in the absence of knowledge of the submission referred to in paragraph W2 of the present Amended Statement of Claim there was no means to know or show that the water supply which was apparently present in 1979 was or constituted an approved Reticulated Water Supply for the purpose of the Shire of Kyneton Planning Scheme;

j) The **fifth fact** is that the act of sealing the plans of cluster subdivision was and includes a representation to all people that the cluster subdivision had been completed according to law;

k) The **sixth fact** is that the sealing of the plans in the manner alleged did facilitate avoidance of the effect of s.9.

l) **A little logic.**

   i) Concealment of the first fact includes concealment of the second fact. In other words one cannot know that a thing has not been done as required by law without first knowing that it was required by law to be done.

   ii) Knowledge of the first fact does not include knowledge of the second fact. In other words knowledge that the private water reticulation system was required by law to be completed does not include knowledge that it was or was not completed as the case may be but does include a more than reasonable basis for a belief that it was completed as required by law. This reasonable basis for a belief is particularly true because of the third fact.

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[22] See GAT-5B at GAT-5

[23] By operation clauses 1 & 2(b) of the Shire of Kyneton Interim Development Order and clause 8 of Planning Permit 2191. See Gat-27 and GAT-5.

[24] See GAT-1

iii) Due to the fourth fact knowledge or belief as to the third fact does not include knowledge or belief as to the first fact and does not include knowledge of or basis for a belief as to an **approved** Reticulated Water Supply.

iv) Knowledge of the second fact does not give rise to knowledge of the sixth fact. In other words knowledge that the reticulation system was incomplete and that the plans were sealed unlawfully does not give rise to or include knowledge of the conspiracy to avoid the effect of s.9.

v) Concealment of the first fact and of the second fact each includes concealment of the sixth fact.

vi) The representation according to the fifth fact includes a representation as to the first fact however this representation could only be known to those persons having knowledge of the submission referred to in paragraph W2 of the present Amended Statement of Claim. It follows therefore that the representation according to the fifth fact was a fraudulent representation which concealed the first, second and sixth fact from all those persons not aware of the submission and concealed the second and sixth fact from all persons being aware of the submission.

vii) Actionable knowledge of the sixth fact is dependant upon an understanding of the holistic effect of s.9 and also the extensive corroborating facts and circumstances now set out.

m) The stages of concealment were:-

i) 1979 to about April 1984, passive concealment by misrepresentation according to the fifth fact and silence as to the first and second fact.

ii) April 1984 until August 1995, active, overt concealment of the first fact, which includes concealment of the second fact and sixth fact.

iii) August 1995 until August 2000. Concealment of the second and the sixth fact.

n) During the period 1979 until 1984 I assumed and believed that the subdivision had been completed according to law but had no occasion to consider the status of the water supply. During this period the Defendants concealed the first and second fact by their silence.

o) During the period about April 1984 until the land was sold in 1989 the Defendants made and maintained the representations set out in paragraphs W32, W33, W43, W49 and W64 of the present Amended Statement of Claim. These representations were and included representations to the effect that I and/or my land did not have access to an approved reticulated water supply and these representations therefore denied and concealed the first and second fact and these

representations could only be made by the Defendants in the secure knowledge that the first and second fact was concealed because the Defendants were obviously aware that the first fact gave the lie to the representations. The making of these representations also depended upon secure knowledge that the submission containing the details of the first fact was concealed.

p) During the period 1989 when the land was sold until August 1995 the Defendants maintained the representations set out in paragraphs W32, W33, W43, W49 and W64 of the present Amended Statement of Claim and thereby continued the concealment.

q) In August 1995 in the circumstances set out in paragraph 24 of my Affidavit dated 18th February 1998 [25] I discovered the submission referred to in paragraph W2 of the present Amended Statement of Claim and thereby gained knowledge of the first fact but not of the second fact which remained fraudulently concealed.

r) From the time that I obtained a copy of the submission referred to in paragraph W2 of the present Amended Statement of Claim the act of sealing the plans of cluster subdivision included a specific representation to me of the first fact and an overt concealment of the second fact and as a consequence the Plaintiffs issued Supreme Court proceeding 7966 of 1995 which was entirely predicated upon that representation as to the first fact.

s) As Supreme Court proceeding 7966 of 1995 was entirely predicated on the first fact [26]a complete defence to that proceeding was the second fact. In other words proceeding 7966 of 1995 was completely predicated on the allegation that in 1979 the private water supply and principal water mains were complete in 1979 and that it constituted an approved Reticulated Water Supply for the purpose of the Shire of Kyneton Planning Scheme and as a consequence I and/or my land had a right of access to that private approved Reticulated Water Supply. Plainly a complete defence to this allegation was the fact that the water supply and reticulation system was not completed as then alleged by me and as a consequence I and/or my land in fact did not have and could not have a right of access to the private reticulated water supply as alleged because it simply did not exist.

t) The Defendants were fully aware that Supreme Court proceeding 7966 of 1995 was entirely predicated upon the fraudulent representation of the First Defendant according to the fifth fact and which representation included a representation to the effect that the private water supply and primary reticulation system had been completed according to the first fact. At this time the Defendants were also fully aware that a complete defence to that proceeding was the now admitted fact of the second fact.

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[25] Refer Tab 20 SME 2 Volume 1

[26] Refer paragraphs 8 to 14, paragraph 13 in particular, Amended Further Statement of Claim at SME2 Volume 4 Tab 72.

u) The Defendants mounted sham Defences and sham strike out proceedings which did not rely upon the second fact despite it being a complete defence and being known to them and being available to them.

v) The Defendants did not discover the Reticulation Plan which was subsequently shown to me in the Practice Court and which, when the date of the laying of the mains was pointed out, contained evidence of the complete defence which was plainly known to the Defendants and in their possession including in their physical possession in the Practice Court.[27]

w) The Defendants concealed the second fact during the entire period that Supreme Court proceeding 7966 of 1995 remained on foot during the period 1995 until 1999.

x) This is also concealment of the worst type, it is specifically concealment by fraudulent misrepresentation. It is also consciously and deliberately dishonest concealment for dishonest purpose and transcends mere moral turpitude. Concealment was for the purpose of concealing the fact and facts of the conspiracy to avoid the effect of s.9 of the Sale of Land Act from the Court and myself and for the purpose of obtaining what I say to be fraudulent Terms of Settlement of the Supreme Court proceeding.

y) Concealment may well have also been for the purpose of avoiding any potential criminal charges.

69) **Discovering the perjury and the conspiracy to avoid the effect of s.9 and the present cause of action.**

a) At paragraphs 48 to 54 of my first Affidavit I describe my process of discovering the present rights of action.

b) Discovery is an interesting concept:-

i) Plainly the discovery of anything, whether it be a new planet, a new principal of law or even ones glasses beside the bed each morning, requires pre-existing knowledge and concepts pertinent to the thing discovered and then a conceptual realisation. Sometimes discovery is simply a eureka moment, an instant when there is a sea change conceptual realisation which brings in the new and exposes the old as nonsense.

ii) Take for example the so called, much celebrated, discovery of gravity by Sir Isaac Newton. Plainly for all time every man who ever lived had seen apples falling. Sir Isaac was the first to realise that the apples don't fall at all, he realised the great truth that the apple and the earth attract each other and accelerate towards each other and he is now credited with discovering

[27] Refer Affidavits of Discovery of First, Second, Third and Fourth Defendants at SME2 Volume 2 Tabs 32, 54, 55 & 57.

that which every man who ever lived had observed the effect of but had not even begun to conceptualise.

iii) Plainly Newton's discovery or conceptual leap does not minimise Galileo or Socrates or any of the millions of other great and intellectual predecessors of Newton who had plainly observed apples falling but had not conceptualised why. Nor can it be said that Newton should have or even could have made that conceptual leap 1 hour, 1 day or 1 week prior to the instant that he did. Similarly had Newton not sat under the apple tree on that particular day at that instant and with the mindset of the moment he may never have made that leap. The conceptual leap, as with any conceptual leap, was the product of the confluence of Newton's pre-existing concepts and the circumstances of an instant in time.

iv) Galileo and Socrates would and great successors do pay homage to a great man and a great conceptual discovery. Only fools and the ignorant would say that it was obvious, apples have always fallen, gravity was there for all to see.

v) Up until the discovery by Newton his great and worthy predecessors were all deceived and lulled by their respective contemporary misconceptions.

vi) Newton saw the earth and the apple accelerate equally towards each other, as they in fact do, no one else had previously conceptualised the earth also moving, accelerating towards the apple, as it does. Most people still do not, they merely see the apple fall.

c) A further important understanding is that discovery always has a hypothesis as a precursor. By reasoning the hypothesis is then developed and validated. In the case of Newton he probably first hypothesised that there is a force causing the fall. Eureka, an attraction between bodies. Eureka, Gravity.

d) Back now to the matter in hand and the purpose of the allegory.

e) My pre-existing knowledge and concepts were derived from all those things which had gone before.

f) The significant pre-existing knowledge and concepts were:-

i) **In relation to Tylden Rd.**

(1) **That the First Defendant had sealed the plans according to law.**

(2) **The Defendants had on or about 20th February 1980 served a s.569E Notice pursuant to the resolution of the First Defendant of 20th February 1980 and which affected the plan of subdivision considered by the First Defendant on that day.**

(a) This was given in evidence by the First Defendant in the Magistrates Court and repeated on Affidavit in the Supreme Court and then admitted to by both Defendants on four separate occasions in the County Court.

(3) **The Defendants had NOT aided and abetted Buchanan's obvious attempt to avoid the literal provisions of s.9 of the Sale of Land Act 1962.**

(a) On the simplistic view of avoiding the provisions of s.9 while it is clear that the series of 2-lot plans of subdivision were filed for the purpose of facilitating avoidance it was equally clear that by serving the s.569E Notice and by sealing the plans with a s.569E(3)(a) endorsement thereon the First Defendant had prevented approval of the plans by the Registrar of Titles and had thereby very effectively stymied Buchanan's effort to avoid s.9. In addition, as previously explained by me, 2-lot plans simply do not facilitate either avoidance of or breach of s.9. I will also speak more of this a little later in relation to the Book of Pleadings.

(4) **The First Defendant had processed the plan of 20th February 1980 in several parts.**

(a) This was given in evidence, on oath, by the First Defendant in the Magistrates Court and repeated in the Supreme Court appeal. – This was the only possible purportedly legitimate reason for the sealing of the plans comprising the series of residential plans. This was also the only possible explanation consistent with the Minutes of the First Defendant which were also exhibited. In the circumstances where it appeared that the Defendants had not colluded with Buchanan and in the circumstances where staged development is a legitimate reason for a series of plans I had accepted this proposition.

(b) As previously discussed this was also reinforced by the handwritten note on discovered documents in the previous Tylden Rd proceeding.

(5) **In the Magistrates Court the First Defendant exhibited a single s.569E Notice, a single plan showing all allotments and the complete road and also exhibited and discovered a series of plans which were obviously photocopied on a copier which was either too small or which did not have a reduction facility.**

(a) These documents were exhibited in the Magistrates Court and the Supreme Court and then discovered in the County Court. The single s.569E Notice was the only possibility consistent with the Minutes of the First Defendant which were also exhibited and discovered. The series of plans were consistent with the Minutes of the First Defendant which were also exhibited. No weight at all was given to the obvious fact that the plans had been copied in the said manner. The documents were exhibited as true and correct

copies and in support of evidence given on oath. There was no reason to suspect or conceptualise "clipped" which has an entirely different connotation to poor copies. I will speak more of this a little later and in relation to the Book of Pleadings.

ii) **In Relation to Woodleigh Heights:-**

(1) **That the First Defendant had sealed the plans according to law and the sealing included a representation to all people that the subdivision had been completed according to law and accordingly the private water supply and reticulation system was complete in 1979.**

(2) **There was no concept of avoiding section 9 of the Sale of Land Act.**

(a) On the then existing simplistic concept the method utilised by Buchanan was to prepare unlawful 2 lot plans of subdivision and this plainly was not only not done, but could not be done in relation to plans for a cluster subdivision and in any event at that time insofar as the Defendants were concerned, I could not show and was not aware of any complicity by the Defendants in Buchanan's intent to avoid s.9 in relation to Tylden Rd.

(3) **A fraud had obviously occurred but I could not say how or by whom.**

(a) My concept of the fraud as alleged in Supreme Court proceeding 7966 of 1995 was clearly no longer tenable because of the facts set out in the Reticulation Plan which had been shown to me in the Practice Court by the Defendants in 1999. At the time of being shown the reticulation plan the clear and unambiguous implied representation of the Defendants, was that the principle water mains of the reticulation system had been lawfully laid in 1982 and not 1979 as previously understood by me. On my knowledge of the law I could not reconcile the two competing propositions and could not say how it had been lawfully laid in 1982. That a fraud had occurred remained obvious because the circumstances at Woodleigh Heights wherein all of the allotments except my allotments had access to a water supply was so obviously and so grossly iniquitous as to be certainly fraudulent.

g) For the purpose of preparing a defence and counterclaim against the First Defendant I first reviewed the legislation with a view to trying to understand how it could be that the primary reticulation system was lawfully laid in 1982 as evidenced by the reticulation plan shown to me in the Practice Court and not 1979, as I understood the law to require.

h) While reviewing the legislation it occurred to me that if the legislation was read holistically the clear purpose of section 9 of the Sale of Land Act was not to literally prevent sales of allotments

on subdivisions consisting of three or more allotments but was instead for the purpose of preventing the sale of allotments on subdivisions consisting of three or more allotments until such time as section 569 of the Local Government Act had been complied with and the plans of subdivision had been sealed according to law and the allotments were therefore guaranteed to be useable.

i) It then occurred to me that unlawfully sealing plans of subdivision without services being present was in fact an insidious method of facilitating the avoidance of the effect of section 9 of the Sale of Land Act 1962 and for facilitating the purpose of that avoidance which was to effect settled sales.

j) This then raised the astonishing spectre that this is what may have happened in relation to Woodleigh Heights because this was a complete explanation for all that had occurred in respect to Woodleigh Heights and was also a complete explanation for the construction of the water mains in 1982 instead of 1979.

k) Before I could conclude this as a fact, let alone actionable fact, I needed to conclusively demonstrate that this is what was in the mind of the Defendants at the time of sealing the plans and of concealing the facts of the sealing. To do this I required some convincing and hopefully corroborating evidence.

l) I already had compelling evidence as to the intent of Buchanan to avoid and breach s.9 in relation to Tylden Rd. Namely the contrived 2-lot plans and the fact of the sales in clear breach of s.9.

m) I then began reviewing all of the documents available to me, during this process I re-examined the contents of the Black Folder.

n) Upon examining the Black Folder and observing incomplete and complete copies of the industrial plans in order it occurred to me for the first time that the plans of subdivision which were exhibited in the Magistrates and Supreme Court and discovered in the County Court may not be just incomplete copies which had been copied on a copier which was too small, for the first time it became apparent to me that they may well have been clipped for a purpose and it may have been that omitting or clipping of the identifying number was significant.

o) With this in mind I then reflected on the Magistrates Court proceeding.

p) My object was to discover as to whether or not I could advance my thought that the plans may have been clipped for a purpose.

q) In the Magistrates Court, a bundle of documents was tendered which contained the documents set out in paragraph 53(c)(i) of my first Affidavit and Wilson for the First Defendant gave evidence as set out in paragraph 53(c)(ii) of my first Affidavit.

r) The s.569E Notice which was in evidence in the Magistrates Court bore the plan reference 79305/G. From the time of the County Court proceeding I was aware that this reference number in fact related to one of the plans in the series of plans however at the time this meant nothing as the Defendants had discovered a number of single documents as being representative of a number or sequence of similar documents and at the time of the previous Tylden Rd proceeding that was the concept in respect to this particular Notice of Requirement and the fact of a number or series of such notices was consistent with the notion that the single plan had been processed as a series of plans and it followed that the single s.569E Notice which had been issued had also been issued as a series.

s) At that time it was considered representative of the number of Notices purportedly issued including the Notice which related to the plan of 20th February 1980.

t) I then discovered that on examining the complete versions of the plans that the alpha lot number or in other words the lot number in the alphabetic series "A", "B", "C" etc corresponded with the alpha portion of the plan reference numbers or in other words the plan bearing the number 79305/G was the plan having the allotment "G" on it.

u) Upon realising this I was in a position to demonstrate that at the time of giving his evidence Wilson was absolutely aware that the s.569E Notice which he had exhibited in the Magistrates Court in fact related to one of the series of plans and specifically not to the plan which the First Defendant had considered on 20th February 1980 as represented in evidence by Wilson. The critical point here is not what I knew by the time of the County Court proceeding but is what Wilson and the First Defendant knew at the time of the Magistrates Court proceeding.

v) The significance of this was that the First Defendant was suing me in the Magistrates Court for overrun of road construction costs. Plan 79305/G does not show all of the road in respect to which I was being sued. Notices of Requirement by their specific terms relate to the road shown on the plan to which it relates. The plan of 20th February however showed the whole of the road so if no s.569E Notice existed in relation to the Plan of 20th February then the First Defendant, having brought a false action against me was left with no option other than to fabricate the documents by clipping the identifying numbers off and lying to the Court about the facts.

w) It followed therefore that if there existed a s.569E Notice which related to the plan of 20th February 1980 then it would have been exhibited and there would be no need to exhibit the wrong

s.569E Notice and no need to exhibit incomplete or poorly copied plans or as I now conceptualised them to be, "clipped" plans.

x) It followed therefore that there was in fact no s.569E Notice in relation to the plan of 20th February 1980 and that each of the plans in the series of plans had been clipped to conceal this fact.

y) From this and now with the benefit of the things learned from discovery in the subsequent County Court proceeding and in particular that the series of plans had in fact been filed on 4th March 1980, it became obvious that the plan of 20th February 1980 had in fact been abandoned and the series of plans had been subsequently filed and accepted and processed in unlawful substitution for the plan of 20th February and that the evidence given by Wilson in both the Magistrates Court and Supreme Court was false and was known to be false at the time it was given.

z) It then followed that the series of s.569E Notices which purported to have been served, including the one with the reference number 79305/G were served without an enabling resolution of the First Defendant and were therefore without authority of law and were in fact fabricated.

aa) Upon coming to these conclusions I had not only the demonstrable intent of Buchanan to avoid s.9 and the fact of his sales in breach of s.9 but I also had compelling evidence that the Defendants had knowingly and deliberately conspired with Buchanan to this effect in relation to Tylden Rd and the specific method was in accord with my new and holistic understanding of the law which was specifically to seal the contrived series of plans in full knowledge that services did not exist and in full knowledge that there was no lawful means to compel construction of those services.

bb) Upon coming to these realisations in August 2000 I was possessed for the first time of the concepts now set out and which had been concealed from me and the Courts. I therefore for the first time had compelling evidence as to the intent and state of mind of the First Defendant at the time and that the state of mind was that it had abandoned the plan of 20th February 1980 and then accepted the filing of and processed the contrived series of plans in substitution and the evidence was that the intent and state of mind of the First Defendant was to aid and abet Buchanan in his clear intent to avoid s.9.

cc) As the s.569E Notices did not have Authority of law and had been fabricated, then the First Defendant and Buchanan were plainly aware of this fact and so when Buchanan made his threat to bankrupt me all he needed to do was to renege on the thieves bargain and leave the Defendants with no option other than to use their own money or defraud me for the purpose of facilitating construction of the missing services, as they did. With gusto I might add.

dd) It may well be of course that Buchanan did not renege, there may well have been a further agreement between thieves to implement Buchanan's threat and on this point there is a complete dearth of effort by the Defendants to have Buchanan complete the works. Immediately following the threat of Buchanan to bankrupt me the Defendants did as a matter of fact implement the secondary frauds which were specifically directed against my family and I. [28]

ee) I then turned my mind again to Woodleigh Heights.

ff) In considering all of the facts with regard to Woodleigh Heights and the law it was apparent that there was only one lawful scenario and that was that the private reticulated water supply be present in 1979 at the time that the plans were sealed. That the primary reticulation system had been constructed in 1982 and not 1979 and that the Defendants had perpetrated the secondary fraud to effect that construction was clear evidence that the plans had been sealed in full knowledge that the services did not exist and that there was no lawful mean of compelling those services.

gg) This was entirely consistent with Buchanan's known intention to avoid section 9 of the Sale of Land Act and in accord with my new holistic understanding of the law and in accord with the new concept in relation to Tylden Rd.

hh) In addition the fraud which I now saw to be the secondary fraud that had demonstrably occurred in relation to Woodleigh Heights, but which I could not previously explain, could now be explained and was completely consistent with this scenario.

ii) As the Woodleigh Heights subdivision had not been completed in accord with the planning permit and the law and as the sealing of the plans had extinguished any compulsion to provide those services then the First Defendant and Buchanan were aware of this fact and so when Buchanan made his threat to bankrupt me all he needed to do was to again renege on the thieves bargain and leave the Defendants with no option other than to use their own money or defraud my family and I as they did. With the same gusto as with Tylden Rd I might add.

jj) Now to put the Newton allegory in context.

i) Prior to my discovery in August 2000 my then contemporary pre-conceptions in relation to Tylden Rd were based upon a reasonable acceptance of the things said by the First Defendant under oath and of the documents exhibited in the Magistrates and Supreme and County Courts which at that time appeared to include poorly photocopied documents. This pre-conception was at that time bolstered by the false admissions of both Defendants in the County Court and

[28] Refer pages 20 to 23 Book of Pleadings, SME 1 Volume 2 Tab 43.

also by a stand alone and simplistic understanding of s.9 of the Sale of Land Act rather than the holistic understanding attained by me in August 2000.

ii) Interestingly, for the Defendants to now say that I should or could have been aware of the present cause of action back at those times is for the Defendants to say that I and my Counsel and perhaps the Magistrate and Chief Justice, should have been aware of their perjury and I should also have been aware of their false admissions in the County Court. It is also to say that I and the Magistrate and the Chief Justice should have had the conceptual leap from incomplete copies to clipped and falsified plans at the time they exhibited and discovered them which is also to imply that Galileo or even Socrates should have conceptualised gravity when they saw an apple fall. It is also to imply that if Newton had not already discovered gravity the present Counsel for the Defendants would have done so upon observing an apple fall. Such assertions by the Counsel for the Defendants are crass nonsense.

iii) It is also to say that from any one of the previous proceedings, including the Magistrates Court proceeding, which were seemingly unrelated proceedings that the conspiracy to avoid s.9 should also have been known.

iv) In the absence of a visible force labelled "gravity" and in the absence of a poorly copied plan marked "clipped" and in the absence of the holistic view of s.9 it is not open to any person to say when a confluence of concepts and time leading to a conceptual realisation of either gravity or clipped plans should or could have occurred.

v) In the matter of the applications of the Defendants in present consideration the old concept was based upon the perjury and false admissions of the Defendants. Do they now say that I and the Court should have given no weight to the evidence given under oath? Should I and the Court have known on the day that the First Defendant perjured itself? Should I have known at the time that both Defendants made false admissions in their pleadings? Should the Magistrate and the Chief Justice and I have known that the plans were clipped for the purpose of perjury and were not merely poor and incomplete copies.

vi) It is unreasonable for any of these questions to be answered in the affirmative. The persons, entities and bodies upon which I and the Courts relied were not masked bandits, they were statutory authorities and their utterances were made under oath and the "clipped" plans were exhibited and discovered as documents upon which the Magistrate, the Chief Justice, the County Court and I could rely and I and the Magistrate and the Chief Justice did so rely and I continued to do so until my discoveries of August 2000. To this day the Magistrate, the Chief Justice, their respective Courts and the County Court remain ignorant of the fact that they were deceived by a Statutory Authority exhibiting clipped plans masquerading as poor copies.

kk) In the present matter the reticulation plan which was shown to me in 1999 in the Practice Court created the situation where I had no answer to what had occurred in relation to Woodleigh Heights. This was the catalyst, the question, the falling apple, which led to a conceptual sea change in my understanding of s.9.

ll) Hours of considering the law in this context led directly to what I now call the holistic view of s.9.

mm) The holistic view of s.9 provided a hypothetical answer to Woodleigh Heights in a eureka moment.

nn) After concluding the holistic view of s.9 and after reviewing the Magistrates Court proceeding and appeal, I, by chance, looked though the Black Folder and found poor copies of plans and good copies of plans in sequence and for the first time hypothesised that they may have been "clipped" instead of copied poorly. From this, in the manner previously described, I discovered that the First Defendant had perjured itself and fabricated documents by clipping to conceal the fact that the s.569E Notice had never been issued. From this the hypothesis that the Defendants had conspired with Buchanan to facilitate avoidance of s.9 developed. The rest was an intellectual exercise which validated the hypothesis.

oo) The present rights of action were discovered, validated and corroborated in August 2000.

pp) Neither the Defendants nor any other person can say that this conceptual discovery could have or should have occurred at any other time. It was a consequence of a confluence of knowledge, the unknown, circumstance and time which may never have occurred had it not occurred at the time that it did in August 2000.

qq) The assertion by the Defendants that nothing was concealed is crass, almost offensive nonsense.

rr) The assertion by the Defendants that the documents in the Black Folder, and particularly the complete plans as presently alleged by them, disclosed these things is also crass nonsense concocted by them to deceive the Court as successfully occurred.

70) **The settled cause of action.**

a) Whether or not the Defendants were aware of s.9 or its provisions is irrelevant. The certainty is that the Defendants had a duty to administer and comply with the provisions of the Local Government Act 1958, the Water Act 1958, the Cluster Titles Act 1974 and the Shire of Kyneton Interim Development Order and the Planning Permits and the Defendants did for common purpose fail to comply with and administer the said Acts, Orders and Permits and the effect of such failure was known by the Defendants to lead to approval of the plans by the Registrar of Titles and to

thereby facilitate unlawful settled sales and the further effect whether known to the Defendants or not, was to facilitate avoidance of the holistic effect of s.9.

b) Upon discovering these things in relation to Tylden Rd and Woodleigh Heights I had the trifecta, I had:-

   i) That Buchanan's demonstrable intent was to avoid s.9 and the fact of Buchanan's breach of section 9 of the Sale of Land Act 1962; and;

   ii) That the First Defendant had sealed the Tylden Rd plans in full knowledge that the s.569E Notice had never been served, was evidence of the intent and state of mind of the Defendants at the time of the sealing of the Tylden Rd plans and which intent and state of mind was to seal the plans unlawfully and this facilitated the avoidance of the effect of s.9 of the Sale of Land Act 1962.

   iii) That the First Defendant had sealed the Woodleigh Heights plans in full knowledge that the subdivision had not been completed according to law was evidence of the intent and state of mind of the Defendants at the time of the sealing of the Woodleigh Heights plans and which intent and state of mind was to seal the plans unlawfully and this facilitated the avoidance of the effect of s.9 of the Sale of Land Act 1962.

c) In addition I had a further trifecta.

   i) The previously mentioned trifecta could not occur by chance.

   ii) I had the numerous instances of perjury, false affidavits and false admissions the effect of which was to conceal the facts of and the fact of the conspiracy to avoid section 9 of the Sale of Land Act.

   iii) I had the secondary acts of fraud against my family and I in respect to both Tylden Rd and Woodleigh Heights and which frauds depended upon the circumstances created by the conspiracy to avoid section 9 of the Sale of Land Act 1962 and which frauds were necessary to effect construction of the missing services in the circumstance where Buchanan reneged upon the thieves bargain or alternatively where the Defendants did carry out the secondary frauds directed at my family and I at the behest of Buchanan and/or Palmer Stevens & Rennick. .

d) The second trifecta is not possible without the first.

e) The first and second trifectas are not possible in the absence of any one or more of the parts.

f) The two trifectas provide compelling evidence of an intent and state of mind of the Defendants to conspire with Buchanan the effect of which conspiracy was to facilitate avoidance of section 9 of the Sale of Land Act 1962.

g) My knowledge of the first trifecta was not possible prior to August 2000 and I submit it is not open to any person to say that this knowledge could or should have occurred earlier.

h) The corroborating nexus of each part of the two trifectas was essential to sustain the most serious allegations made in the present proceeding.

i) I therefore settled upon the cause of action now disclosed in the present Amended Statement of Claim.

71) **The Defendants have retained and continue to enjoy the benefit of their fraud.**

a) Councils and Water Boards and their respective officers, Councillors and Member are enhanced in stature by securing and facilitating development within their districts. The Tylden Rd and Woodleigh Heights developments were both secured and facilitated by the primary fraud and the secondary frauds and they may never have been developed if it were not for those frauds and the conspiracy to avoid the effect of s.9.

b) By concealing the fraud by perjury, false admissions, false affidavits and committing the secondary frauds and by avoiding proceedings and judgment on the matters alleged the Defendants and their respective officers, Councillors and Member have, to date, avoided the consequences of due process

c) By securing and facilitating the developments the Defendants have obtained and will retain in essential perpetuity an income stream from the product of their frauds.

72) **The First and Second Defendants were each party to every matter and thing done.**

73) **Limitations of Actions Act 1958.**

a) The Defendants contend that the proceedings are Statute barred by the operation of ***S 5(1)(a)*** of the ***Limitation of Actions Act 1958. ("the Act")*** The Plaintiffs rely on ***S 27*** of the Act, the relevant portion of which provides relevantly as follows:

> 27. Where, in the case of any action for which a period of limitation is prescribed by this Act-
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake-
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

b) With regard to fraudulent concealment, it must be shown that facts relevant to the right of action were concealed,[29] and that the concealment was fraudulent.[30] Fraud here is being used in the sense of showing some form of moral turpitude even if short of dishonesty or common law fraud – see for example *Hamilton v Kaljo* (1989) 17 NSWLR 381, *Seymour v Seymour* (1996) 40 NSWLR 358, 372. Merely to establish ignorance of the right of action is insufficient. However there is no need to show that active measures were taken to prevent detection,[31] if the way in which the defendant has acted is itself sufficient concealment (*Bulli Coal Mining Co v Osborne* [1899] AC 351 (PC) and *Beaman v ARTS Ltd* [1949] 1 KB 550 [[1949] 1 All ER 465] (CA)).

c) In these cases, the limitation period does not begin to run until the fraud is discovered, or could with reasonable diligence have been discovered. Reasonable diligence means what an ordinary prudent person would do having regard to all the circumstances (see *Peco Arts Inc. v Hazlitt Gallery Ltd* (1983) 1 W.L.R. 1315). It seems that discovery by the plaintiff's agent or failure by the agent to exercise reasonable diligence will not be imputed to the plaintiff.

d) The "fraud" upon which the plaintiffs rely to invoke ***S.27*** is the Defendants' conduct in concealing from them the true nature of their cause of action. The plaintiffs did not discover the "fraud" until August 2000 and could not, with reasonable diligence have discovered it before that date.[32] Time therefore commences to run from the time of discovery of the "fraud" and accordingly, the Plaintiffs are not Statute Barred.

e) The facts which were concealed by the Defendants are not only relevant to the present rights of action they are central to them. The Defendants concealed the fact that the s.569E Notice was never served and they concealed the fact that the private reticulated water supply was not completed according to law and they concealed the conspiracy to avoid the effect of s.9.

f) The concealment was fraudulent and was for the purpose of, amongst other things:-

   i) concealing dishonest, fraudulent and illegal activities,

   ii) avoiding legal repercussions

   iii) avoiding possible criminal proceedings.

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[29] Concealment of the fact that the s569E Notice was not served and concealment of the fact that the private water supply and reticulation system was not complete are not only relevant to the rights of action they are central to the right of action.
[30] Concealment by perjury, false affidavits and false admission and unlawful sealing of plans and the plethora of other misrepresentations and dishonest acts provide a sufficient level of moral turpitude which includes dishonesty and fraud.
[31] The concealment was active and deliberate and intended to return benefit to the Defendants including profit, avoidance of legal repercussion, and concealment of their moral turpitude.
[32] The Plaintiffs ignorance of the true facts is described in paragraphs 48 – 52 inclusive of the 1st Thompson Affidavit and the circumstances of the Plaintiffs' discovery of the "fraud" are set out at paragraphs 53 and 54 of that Affidavit.

iv) profit

v) concealing the fact of and the facts of the secondary frauds which were directed specifically at the plaintiffs.

vi) Bringing false proceedings in the Magistrates Court.

vii) Concealing perjury and falsification of evidence in the Magistrates and Supreme Courts.

viii) Concealing false admissions in the previous Tylden Rd proceedings.

ix) Avoiding these present proceedings.

g) **The fraud was not capable of being discovered with reasonable diligence.**

i) A person is entitled to rely upon:-

(1) Titles issued by the Registrar of Titles as absolute evidence:-

(a) That the plans of subdivision were sealed according to law.

(b) That a subdivision has been completed according to law.

(2) Evidence given under oath in the Magistrates Court.

(3) Affidavit material submitted to the Supreme Court.

(4) Documents given in evidence in the Magistrates Court and the Supreme Court and discovered in the County Court.

(5) Admissions made in pleadings in the County Court.

(6) The representations of the Defendants made under colour of the office of Statutory Authority,

(7) An assumption that Statutory Authorities do not engage in conspiracies to avoid the law.

(8) The Defendants actively and deliberately concealed the predicating facts of the present rights of action.

(9) Understanding the present right of action required discovering the holistic view of s.9 and the insidious method of avoiding the holistic effect of s.9 and this remained unknown even to my ex-Counsel and the Court at the time of the hearing before the master despite all the facts being before them and in the case of my ex-Counsel set out for him in adequate terms.

(10) Discovery of the predicating facts and of the rights of action required effort and diligence beyond and above reasonable effort and diligence and beyond the capacity of most laypersons and it seems at least some legal professionals.

ii) **Fraudulent concealment and s.27 of the Limitations of Actions Act.**

(1) **I refer to and read paragraphs 57 to 62 of the Outline of submissions on behalf of the First Defendant. I also refer to and read paragraphs 43 to 49 of Master Efthim's written Reasons for Decision.**

(2) Concealment of the predicating facts of the right of action and therefore the right of action was:-

(a) **Fraudulent.**

(i) The sealing of the plans of subdivision included a fraudulent representation to all people that the plans had been sealed lawfully and the subdivisions completed according to law and which representation fraudulently concealed the fact that they had not been so sealed and completed.

(ii) The perjury in the Magistrates Court, the documents falsified by clipping, the false affidavits in the Supreme Court appeal, the false admissions in the County Court, the sham defences in the County and Supreme Courts and the sham strike out proceedings in the Supreme Court all of which omitted the true defences and the fraudulent representations set out in the present Amended Statement of claim were all fraudulent acts of concealment.

(b) Deliberate.

(i) All of the things referred to were done deliberately.

(c) With knowledge and consciousness of wrongdoing in both the matters concealed and the acts of concealment.

1. The Defendants were fully aware:-

a. that the sealing of the plans of subdivision was wrong, the perjury was wrong, the false affidavits were wrong, the sham defences and sham strike out proceedings which omitted the true defences were wrong, the clipping of documents given in evidence was wrong, the primary frauds were wrong, the secondary frauds were wrong, the conspiracy to avoid the effect of s.9 was wrong, the bringing of a false claim in the Magistrates Court was wrong, the water supply agreement was unlawful and wrong, the holding and calling up of my bank guarantees was wrong, etcetera, etcetera, etcetera.

(3) The requirements of s.27 as enunciated by the numerous authorities referred to are abundantly and overwhelmingly satisfied.

h) **I submit that the Plaintiffs must succeed on the s.27 issue alone.**

74) Res Judicata and Anshun.

a) **As the predicating facts of the present rights of action were fraudulently concealed by the Defendants and the Plaintiffs rely upon s.27 of the Limitations of Actions Act it is not necessary to consider Res Judicata or Anshun.**

b) Having said that, for abundant caution I nevertheless set out the following arguments.

c) **In respect to Anshun and Res Judicata I make three principal points:-**

i) **The subject of the previous proceedings was the product of the fraud of the Defendants, no subject matter existed except in the fraud of the Defendants, no right of action existed except in the fraud of the Defendants.**

ii) **In the previous proceedings, due to the fraud of the Defendants, there was no viable right of action.**

iii) **To the extent that a subject matter and right of action existed in the previous proceedings the present predicating facts were a complete defence to the previous proceedings yet for the purpose of concealing the present rights of action the Defendants did not raise the defences which were available to them and they could and should have raised them.**

d) **The previous proceedings vis-à-vis the present proceeding.**

i) **To the extent that the previous proceedings contain a residual subject matter:-**

(1) The previous proceedings and the present proceedings share a number of essentially identical paragraphs.

(2) The previous proceedings do not contain what I have described as the primary predicating facts of the present proceeding, namely that no s.569E Notice was served and that the water mains were not laid in 1979. The previous proceedings state and rely on the exact opposites. [33]

[33] See paragraph 14 of Further Amended Statement of Claim at SME2 Volume 4 Tab 72 for previous Woodleigh Heights and Paragraph 7 of Amended Statement of Claim at SME 1 Volume 1 for previous Tylden Rd.

(3) The present proceeding does not contain the primary predicating facts of the previous proceedings, namely that the s.569E Notice was served and the water mains were laid in 1979.

(4) The matters contained in the essentially identical paragraphs were previously the entire cause of action and the entire subject matter of the previous proceedings, they are now those things which constitute the secondary fraud which was perpetrated as a consequence of the primary fraud and conspiracy.

(5) The subject matter of the present proceeding is the conspiracy to avoid s.9 and the things done to facilitate that conspiracy and to subsequently conceal it and provide the services by means of the secondary frauds.

(6) Even if the subject matter of the previous proceeding was capable of existence outside of fraud, which is specifically denied, then notwithstanding the essentially identical paragraphs the subject matters of the previous and present proceedings are not even similar, they are in fact mutually exclusive, repugnant to one another.

(7) The context of the essentially identical paragraphs are dependant upon the principle predicating facts of each proceeding and in the context of each proceeding the essentially identical paragraphs are not even similar.

e) In the majority judgement of Gibbs C.J., Mason and Aickin JJ. In Port of Melbourne Authority v. Anshun Pty Ltd. their honours said:-

22. The critical issue, then, is whether the case falls within the extended principle expressed by Sir James Wigram V.C. in Henderson v. Henderson (1843) 3 Hare, at p 115 (67 ER, at p 319) . The Vice-Chancellor expressed the principle in these terms:

> "where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires **the parties** to that litigation to **bring forward their whole case**, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by **the parties** to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which **the parties**, exercising reasonable diligence, might have brought forward at the time." (at p598) (emphasis added)

f) **The subject matter of the previous proceedings was the product of the fraud of the Defendants. The subject matter did not exist except in fraud. There was no viable right of action.**

i) The previous proceedings were entirely predicated on the fraudulent representations of the Defendants.

(1) In the case of Tylden Rd the Defendants fraudulently represented that a s.569E Notice had been served.

(2) In the case of Woodleigh Heights the First Defendant fraudulently represented that the private water supply and reticulation system had been completed according to law.

ii) The fraudulent representations of the Defendants, then taken as fact by the Plaintiffs, were the predicating facts of the previous proceedings.

iii) These predicating facts were fabrications of the fraud of the Defendants and did not exist except in the fraud of the Defendants.

iv) The balance of the matters and things set out in both previous proceedings were dependant upon and subordinate to the predicating facts, the balance therefore cannot attain a higher status than that which they depend upon or are subordinate to. It follows therefore that there was no subject matter at all except in the fraud of the Defendants.

v) The fraud of the Defendants is the subject of the present proceeding.

vi) The previous proceedings were subject to and also the object of the fraud of the Defendants.

vii) **Nothing in the present proceeding properly belongs to the subject matter of the previous proceedings.**

g) **Notwithstanding that the predicating facts of the previous proceeding existed only in fraud the predicating facts of the previous proceeding and of the present proceeding cannot co-exist except in opposing relationship.**

h) **Res Judicata and Anshun applies to defences as it does to claims.**

In the majority judgement of Gibbs C.J., Mason and Aickin JJ. In Port of Melbourne Authority v. Anshun Pty Ltd. their honours further said:-

> *36. In these cases in applying the Henderson v. Henderson principle to a plaintiff said to be estopped from bringing a new action by reason of the dismissal of an earlier action, Somervell L.J. and Lord Wilberforce insisted that the issue in question was so clearly part of the subject matter of the initial litigation and so clearly could have been raised that it would be an abuse of process to allow a new proceeding. Even then the abuse of process test is not one of great utility. And its utility is no more evident when it is applied to a plaintiff's new proceeding which is said to be estopped because the plaintiff omitted to plead a defence in an earlier action. (at p602)*
>
> *37. In this situation we would prefer to say that there will be no estoppel unless it appears that the matter relied upon as a defence in the second action was so relevant to the subject*

matter of the first action that it would have been unreasonable not to rely on it. Generally speaking, ***it would be unreasonable not to plead a defence if, having regard to the nature of the plaintiff's claim, and its subject matter it would be expected that the defendant would raise the defence and thereby enable the relevant issues to be determined in the one proceeding****. In this respect, we need to recall that there are a variety of circumstances, some referred to in the earlier cases, why a party may justifiably refrain from litigating an issue in one proceeding yet wish to litigate the issue in other proceedings e.g. expense, importance of the particular issue, motives extraneous to the actual litigation, to mention but a few. See the illustrations given in Cromwell v. County of Sac. (1876) 94 US (24 Law Ed, at p 199) . (at p603)*

(emphasis added)

i) The present applications by the Defendants are founded in purported defences to the present proceeding.

ii) In relation to Tylden Rd there are only two possibilities, the s.569E Notice either was or was not served.

iii) In relation to Woodleigh Heights there are only two possibilities, the private water supply and reticulation system was either completed in 1979 or it was not completed in 1979.

iv) In relation to Tylden Rd the claim of the previous proceeding that the s.569E Notice been served cannot co-exist with the present claim that s.569E Notice had not been served. At the time of the previous proceeding the allegation that it had not been served could only exist in opposition to the claim or in other words as a defence to the claim.

v) The same logic applies in relation to Woodleigh Heights where the previous claim was that the private water supply and reticulation system had been completed according to law and the present claim is that it was not completed according to law.

vi) In relation to Tylden Rd:-

(1) A complete defence to the previous proceeding was that the s.569E Notice had not been served.

(2) A complete defence to the present proceeding is that the s.569E Notice had been served.

vii) In relation to Woodleigh Heights:-

(1) A complete defence to the previous proceeding was that the private water supply and reticulation system had not been completed according to law.

(2) A complete defence to the present proceeding is that the private water supply and reticulation system had been completed according to law.

viii) It is clear that the Defendants are and were at all times possessed of the knowledge as to whether the s.569E Notice was or was not served.

ix) It is also clear that the Defendants are and were at all times possessed of the knowledge as to whether the private water supply and reticulation system was or was not completed according to law.

x) Being so aware it is clear that this knowledge, one way or the other, is a complete defence to either the previous proceedings or the present proceeding.

xi) In breach of the principles of Res Judicata and Anshun the Defendants have failed to bring forward the Defences which are or were available to them. They did not bring forward these defences at the time of the previous proceedings and they have not done so in support of their present summary dismissal application.

xii) Had the Defendants raised the defences available to them at the time of the previous hearings then they would have exposed their fraud and also exposed themselves to the likelihood of the present claims or at least some permutation thereof because even of the Defendants had raised the defences available to them the present claims would have remained dependant upon the realisation of the holistic understanding of s.9.

xiii) The Defendants present Res Judicata and Anshun arguments are such utter and abject nonsense that they defy reason. The Defendants are entangled in their own deceit.

i) **The factual merits of the present proceeding have not been previously addressed or adjudicated or compromised by Terms of Settlement. This is not a case for the application of the Anshun principle against the Plaintiffs.**

j) In the final analysis the Defendants are saying that the principle predicating facts which are now claimed should have been brought earlier. Significantly these predicating facts were known only to the Defendants at the time of the previous proceedings and therefore could and should have been brought by them as defences to those earlier proceedings but were not. These predicating facts are now effectively being raised as defences by the Defendants, albeit by proxy. It may well be that with careful thought the Defendants are now prevented by Res Judicata and Anshun from now raising by proxy that which they themselves plainly could and should have raised earlier. **If this is a case for the application of Res Judicata and Anshun then these principles apply against the Defendants and not against the Plaintiffs.**

I now move to part two of my submission.

Glenn Thompson.