

ON 20/8/93

IN THE FEDERAL COURT OF AUSTRALIA )  
NEW SOUTH WALES REGISTRY )  
GENERAL DIVISION )

No G0029 of 1992

ALEC FINLAYSON PTY LIMITED

Applicant

ARMIDALE CITY COUNCIL

First Respondent

BASIA HOLDINGS PTY LIMITED

Second Respondent

**THIRD FURTHER AMENDED**  
**STATEMENT OF CLAIM**

1. The Applicant is duly incorporated and entitled to sue in its corporate name and style.
2. The First Respondent is a body corporate pursuant to Section 22 of the Local Government Act, 1919 (NSW) (the "L G Act").
3. The Second Respondent is duly incorporated and is entitled to be sued in its corporate name and style.
4. Prior to 9 August 1984 the Second Respondent was the registered proprietor of all of the land comprised in Lot B, Deposited Plan 161700 being a parcel of land situated between Martin Street, the Northern Railway line and White Avenue in the city of Armidale ("the plant site").

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This Third Further Amended Statement of Claim is filed by Messrs Hunt & Hunt, Solicitors, of Gateway, 1 Macquarie Place, Sydney. DX 214, Sydney. Telephone: (02) 391 3000. Ref: JLR:HST:FIN:1021105

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5. At all material times the plant site referred to in paragraph 5 hereof and the land referred to in paragraph 29 hereof ("the east Martin Street land") were, and still are, within the area administered by the First Respondent pursuant to and for the purposes of the L G Act and the Environmental Planning and Assessment Act 1979 ("the EPA Act").
6. At all material times from 26 January 1968 to 5 September 1975 the plant site and the east Martin Street land were affected by the provisions of the Interim Development Order No. 1 (City of Armidale) (hereinafter called "the IDO") made pursuant to Part XIA Local Government Act 1919.
- 6A. Under the provisions of the IDO the plant site and the east Martin Street land were zoned "industrial".
7. From about 1967 to the late 1970's the plant site was used for the purpose of the treatment and impregnation of timber with creosote and copper-chrome arsenate ("CCA") with the consent of the First Respondent.
8. Between 1968 and the late 1970's there was spillage dripping, leakage and dumping of creosote and CCA onto and into the soil on the plant site and the east Martin Street land and there were complaints to the First Respondent in respect of the said spillages from neighbouring residents and occupiers of land adjacent to the plant site.
9. By reason of the matters referred to in paragraphs 7 and 8 hereof and by the process of leaching and transmission by surface and underground water, the plant site and the east Martin Street land became contaminated by creosote and CCA.
- 9A. The First Respondent caused and/or contributed to the contamination of the plant site and the East Martin Street land.

Particulars

- (a) The First Respondent consented to and/or permitted the use of the plant site and the east Martin Street land as a timber impregnation plant and/or treated timber storage area and the use of initially creosote and subsequently creosote and CCA in the timber impregnation process without imposing appropriate conditions to ensure there was no soil contamination.
- (b) The First Respondent required the installation of an underground creosote arrestor on the plant site.
- (c) The First Respondent required the clearing of a pond on the east Martin Street land of creosote.
- (d) The First Respondent required the operator of the plant to take steps to prevent creosote or CCA escaping from the plant site.
- (e) The First Respondent was or ought to have been aware of and permitted the dumping on the plant site of creosote and CCA.

10. At all material times the Respondents and each of them knew or ought to have known the matters alleged in paragraphs 7, 8 and 9 hereof.

10AA. At all material times after the commencement of the operation of the timber impregnation plant the First Respondent controlled and supervised and/or publicly purported to control and supervise the escape of pollutants from the plant site.

10AB. At all material times after the said rezoning the First Respondent knew or ought to have known that:

- (a) potential purchasers of the said lands and or the Applicant would not expect the said lands to be contaminated; and

(b) it was not or was unlikely to be reasonably practicable for a potential purchaser of the said lands and/or the Applicant to determine whether and to what extent the said lands were contaminated.

10AC. In or about 1980 the operation of the timber plant ceased and the First Respondent permitted the use of the plant site as a transport depot.

10AD. The First Respondent failed to make any appropriate inspection of the plant site to determine if any contamination had been cleaned up after cessation of the timber plant operation.

10A. In or about August 1973 the First Respondent resolved to recommend that the IDO be rescinded and to cause to be made a fresh Interim Development Order rezoning the plant site and the east Martin Street land from "industrial" to "residential".

10B. For such purposes, the First Respondent by its servants and agents inspected the plant site and the east Martin Street land in and after August 1973.

10C. Between August 1973 and 5 September 1975 the First Respondent prepared and obtained reports, made resolutions and took all necessary steps to recommend and cause the rezoning of the plant site and the east Martin Street land from "industrial" to "residential".

10D. Thereafter, on 5 September 1975 by the publication of notice thereof in the NSW Government Gazette No. 114 Interim Development Order No. 2 - City of Armidale (hereinafter called "the IDO2" was made.

10E. In the premises by virtue of the matters pleaded in paragraphs 10C and 10D above the First Respondent caused to be represented to the public generally that the plant site and the east Martin Street land were capable of and suitable for residential sub-division and residential development construction and occupation and/or that in recommending the rezoning the First Respondent

had given proper consideration to all relevant health risks in relation to the use of the land for residential purposes.

- 10F. In truth, the said lands were not suitable for residential subdivision and residential development construction and occupation at all or alternatively, not without extensive remedial work being carried out on the land prior to residential subdivision and residential development construction and occupation, and the said representation was false as the First Respondent ought to have known.
- 10G. Pursuant to IDO2, the said lands were zoned "residential 2C" under which dwelling houses were permitted to be erected on the property without any further consent of the Council under Part XIII A of the Local Government Act 1919 and inter alia, industries (other than home industries), timber yards and transport terminals were prohibited.
- 10H. Pursuant to IDO2, the said lands were permitted to be subdivided subject to the consent of the First Respondent being granted under Part XIII A Local Government Act (later Environmental Planning and Assessment Act 1979) and Part XII (of division control) Local Government Act 1919.
- 10I. The First Respondent was under a duty to the owners and occupiers of the said lands and the class consisting of the future owners and occupiers of the said lands and each and every part of it to exercise care in altering the zoning of the said lands as aforesaid and in particular to give proper consideration to any health risks in relation to the use of the said lands for residential purposes and not to cause harm, physical or mental injury or economic loss to such persons.
- 10J. The First Respondent breached the said duty of care in failing to give any or any proper consideration to the said health risks in rezoning the said lands for residential purposes without qualification.
- 10K. Further and in the alternative, in the premises at all material times after the rezoning of the plant site and the east Martin Street land the First Respondent

was under a duty to warn potential purchasers of such lands and/or the Applicant that the said lands were not or may not be suitable for residential use by reason of the said contamination.

- 10L. In breach of such duty the First Respondent failed to provide any such warning.
11. In about July 1984 the Second Respondent applied to the First Respondent for approval to sub-divide part of the plant site into nine residential lots (the "nine lot sub-division").
12. By Notice dated 9 August 1984 the First Respondent granted development consent for the sub-division of part of the plant site, being part of the land comprised in Lot B, Deposited Plan 161700, into nine residential lots, subject to conditions, none of which related to or required the assessment of the soil conditions prevailing at the time of the application but one of which required that one of the resulting lots namely lot 10 lie dedicated to the First Respondent for a park and that such lot be not less than 4,500 square metres in area.
- 12A. On 1 July 1985 the Second Respondent applied to the First Respondent to reduce the area of the said lot 10 to an area of 2,724 square metres.
- 12B. On 30 September 1985 the Second Respondent informed the First Respondent that it was proposing to sell part of the plant site and that such purchaser requested that the First Respondent consent to the said change to lot 10.
- 12C. By letter dated 14 October 1985 the First Respondent informed the Second Respondent that it consented to the said reduction in the said lot 10.
13. On 13 September 1985 the Council Clerk, on behalf of the First Respondent, certified that the nine lot subdivision complied with the requirements of the L G Act.

14. On 30 October 1985, the Second Respondent applied to the First Respondent for approval to sub-divide the balance of the land comprised in Lot B, Deposited Plan 161400 into twenty-seven residential lots (the "twenty-seven lot sub-division").
15. On 29 November 1985 the First Respondent granted development consent for the sub-division of the said land into twenty-seven residential lots, subject to conditions, none of which related to or required an assessment of the soil conditions prevailing at the time of the application.
16. On 9 December 1985 the Council Clerk, on behalf of the First Respondent, certified that the twenty-seven lot sub-division complied with the requirements of the L G Act.
- 16A. On 15 December 1987 the First Respondent granted development consent to the Applicant in respect of the development application no. 829 dated 27 November 1987 to subdivide lot 14 in the plan the subject of the development application referred to in paragraph 14 (DA 553) into lots 14 and 26.
- 16B. On 21 September 1988 the First Respondent granted development consent to the Applicant in respect of development application no. 947 dated 29 August 1988 to subdivide lot 22 in the plan the subject of DA553 into what ultimately became lots 30 and 40 in DP787459.
- 16C. In and after 1988 the First Respondent granted:
  - (a) development consents in respect of applications by the Applicant to development each of lots 2, 5, 6, 34 and 40 of the property by the construction of duplexes or triplexes; and
  - (b) approvals in respect of the building by the Applicant of houses on each of lots 1, 35, 37 and 38 of the property.

17. Between 23 October 1985 and 22 May 1989, the Applicant entered into and completed six contracts for the purchase of land from the Second Respondent, such land comprising the whole of the twenty-seven lot sub-division and five lots of the nine lot sub-division, the particulars of which are set forth in the Schedule hereto.
18. In January 1990 an inspector of the First Respondent undertook an inspection of one of the lots within the nine and twenty seven lots sub-divisions and, as a result of that inspection, engaged consultants, Sinclair Knight and Partners, to undertake comprehensive testing of the area.
19. On 25 January 1991 consultant, AGC Woodward-Clyde completed a report for the State Pollution Control Commission ("SPCC") which concluded, inter alia, as follows:
  - (a) Copper was present at concentrations above the acceptable SPCC determined threshold in a number of areas within the site tested.
  - (b) Areas within the site tested, particularly around the area of the former timber treatment plant, were contaminated by significant levels of arsenic and polycyclic aromatic hydrocarbons ("PAH").
  - (c) The potential carcinogenic risk for children at the highly contaminated area of the site tested was not acceptable.
  - (d) Land uses other than residential, for example, light industrial, would have lower associated health risks and would, therefore, be a more acceptable use of the land.
20. The First Respondent represented to the Applicant that the land comprised in the nine and twenty-seven lot sub-divisions was safe and suitable for residential purposes and/or was not unsuitable for residential purposes by reason of any health risk such as soil contamination and/or that in dealing with each of the applications referred to in paragraph 25 below the First Respondent had given



proper consideration to all relevant health risks in relation to the use of the land the subject of those applications for residential purposes.

PARTICULARS

- (aa) The First Respondent caused the property to be rezoned from industrial to residential.
- (a) The First Respondent issued development consents on 9 August 1984 in respect of the nine lot sub-division and 29 November 1985 in respect of the 27 lot sub-division.
- (b) The Council Clerk, on behalf of the First Respondent, certified on each of the said Deposited Plans of the nine and twenty-seven lot sub-divisions that the requirements of the L G Act had been complied with.
- (c) The First Respondent issued the Deposited Plans containing the said certificates to the Second Respondent to enable the same to be registered at the Land Titles Office on or about 13 September 1985 in respect of the nine lot subdivision and 9 December 1985 in respect of the twenty-seven lot subdivision.
- (d) The First Respondent approved the further sub-division of the twenty-seven lot sub-division into 17 residential allotments, registered on 10 February 1989 and being Deposited Plan 773491, and 14 residential allotments, registered on 17 March 1989 and being Deposited Plan 787459.
- (e) The First Respondent certified on each of the Deposited Plans referred to in (d) that the requirements of the L G Act had been complied with.
- (f) The First Respondent granted the consents and approvals referred to in paragraphs 12C, 16A, 16B and 16C above.

21. The First Respondent knew, or ought to have known, that the Applicant would rely upon the representation referred to in paragraph 20 hereof.
  
22. In reliance upon the representation referred to in paragraph 20 hereof and induced thereby:-
  - (a) The Applicant completed the purchase of the land comprised in the twenty-seven lot sub-divisions on 3 February 1986.
  
  - (b) The Applicant completed the purchase of five of the lots in the nine lot sub-division on 2 November 1988, 3 November 1988, 5 November 1988 and 22 May 1989.
  
  - (c) The Applicant expended moneys to develop the land and build dwelling houses on a number of the lots purchased.
  
  - (d) The Applicants incurred charges, disbursements and interest on borrowings in respect of the said acquisition and building works.
  
  - (e) The Applicant promoted the sale of the land and entered into Agreements for the sale of land with third parties.
  
  - (f) The Applicant entered into a contract to purchase land adjacent to the nine and twenty seven lot sub-divisions, on the east side of Martin Street being the land more fully described in paragraph 29 hereof on 22 October 1987.
  
23. The representation pleading in paragraph 20 hereof was untrue, misleading and deceptive and/or negligently made.

PARTICULARS

The land comprised in the nine and twenty-seven sub-divisions, or part thereof, was contaminated with creosote and CCA, or was liable to be

contaminated or further contaminated by surrounding land which was contaminated, and was not suitable for residential purposes or safe for occupation.

- 24A. The representation referred to in paragraph 20 was a continuing representation and in particular was not withdrawn or qualified at any time after the making of the representation.
- 24B. The Applicant relied on such continuing representation to its detriment.

PARTICULARS

If as the First Respondent alleges (which the Applicant denies) any claim in the proceedings is statute barred, in reliance on the representation the Applicant did not commence proceedings within the requisite period such that the loss and damage occasioned by the continuing representation is the loss and damage which would have been recoverable if the proceedings had been commenced within time.

- 25. Further, or in the alternative, the First Respondent was under a duty of care to the Applicant to give proper consideration to the applications referred to in paragraphs 11, 12, 12A, 12B, 14, 15, 16A, 16B and 16C hereof, and in particular to give proper consideration to any health risks in relation to residential use of the land the subject of the applications and to ensure that the Applicant did not suffer economic loss and to refuse to approve the said applications.

PARTICULARS

- (a) The First Respondent was under a duty to act reasonably in dealing with applications for sub-division.
- (b) The First Respondent and the Applicant were in a relationship of proximity in that in relation to the first application for subdivision at the time the said applications for subdivision into residential

allotments were being considered by the First Respondent, the Applicant had entered into a contract to purchase and was a future owner of the land comprised in the twenty-seven lot subdivision and was a member of a class of potential purchasers and future owners of the land comprised in the nine lot sub-division. In relation to the subsequent subdivision and other applications the Applicant was the applicant.

- (c) The First Respondent knew, or ought to have known, that said land was not suitable for residential purposes.
  - (d) Further the Applicant relies on all of the matters pleaded herein.
26. At all material times the Applicant relied upon the First Respondent to exercise its powers to cause the property to be rezoned and its powers to approve or refuse the said applications for sub-division of the land into residential allotments and the further development and building applications in a proper manner and with proper regard to whether the said residential allotments were suitable for building and development for residential purposes.
27. The First Respondent knew, or ought reasonably have known and foreseen, that the Applicant would or might rely on any decision or determination made in respect of the rezoning or in respect of the said applications by the Second Respondent for sub-division of the land into residential allotments or the said further development and building applications.
28. In breach of the said duty of care, the First Respondent failed to give any or any proper consideration to the said health risks and approved the sub-division of the land into nine and twenty-seven residential allotments, thereby permitting the creation of the allotments comprised therein and representing to the Applicant that the said allotments were suitable for residential purposes and further approved the said subsequent development and building applications.

29. Further, the Applicant became the registered proprietor of all of the land comprised in certificate of title, folio identifier 2/774911, being land adjacent to the impregnation and treatment plant referred to in paragraph 8 hereof, on the east side of Martin Street (the "east Martin Street land").
30. The east Martin Street land was purchased by contract dated 22 October 1987 completed on 26 August 1988 for a purchase price of \$48,000.00.
31. At all material times the east Martin Street land was, and still is, within the area administered by the First Respondent pursuant to and for the purposes of the Local Government Act and the Environmental Planning and Assessment Act.
32. The First Respondent represented that the east Martin Street land was suitable for residential purposes and/or was not unsuitable for residential purposes by reason of any health risk such as soil contamination and/or that in recommending the rezoning of the land the First Respondent had given proper consideration to all relevant health risks in relation to the use of the land for residential purposes.

#### PARTICULARS

As at the date of the contract and settlement thereof, the east Martin Street land was zoned by the First Respondent 'Residential 2(c) and Open Space 6(b)'.

33. In reliance upon the representation referred to in paragraph 32 hereof and induced thereby the Applicant purchased the east Martin Street land and incurred expenses in attempting to subdivide the same.
34. The representation pleaded in paragraph 32 hereof was untrue, misleading and deceptive and/or negligently made.

#### PARTICULARS

The east Martin Street land became contaminated, or liable to be contaminated, by creosote and CCA through the process of leaching and transmission of surface and underground water from the said impregnation and treatment plant and surrounding land and was, thereby, not suitable for residential purposes.

35. Further, or in the alternative to paragraphs 29 to 35 hereof, the Respondent was under a duty of care to the Applicant to give proper consideration to appropriate zoning for the east Martin Street land.

#### PARTICULARS

- (a) The First Respondent knew, or ought reasonably to have known, that the east Martin Street land was, or was liable to be, contaminated by the process of leaching referred to in the particulars to paragraph 34 hereof.
- (b) The First Respondent and the Applicant were in a relationship of proximity in that at the time the First Respondent determined the zoning of the east Martin Street land the Applicant was a member of a class potential purchasers and was a future owner of the said land.
36. In breach of the said duty of care, the First Respondent zoned the east Martin Street land as "Residential 2(c)".
37. Further, or in the alternative, the Second Respondent promoted and represented to the Applicant that the land the subject of the nine and twenty-seven lot sub-divisions was suitable for building and development for residential purposes.
38. In reliance on the representation pleaded in paragraph 38 hereof and induced thereby the Applicant did the things and undertook the expenses pleaded in paragraph 22 hereof.

39. The representation pleaded in paragraph 38 was untrue, misleading and deceptive.

PARTICULARS

The Applicant repeats the particulars to paragraph 23 hereof.

40. In the premises, the Second Respondent engaged, in trade and commerce, in conduct which was misleading or deceptive or likely to mislead or deceive in contravention of the provisions of 52(1) of the Trade Practices Act.
41. Further, or in the alternative, the Second Respondent was under a duty of care to the Applicant to disclose all material facts in its possession in relation to the land the subject of the nine and twenty-seven lot sub-divisions prior to exchange and/or settlement of the said contracts for the sale of land, including the fact that the said land was contaminated with creosote and CCA and was not suitable for residential purposes.
42. In breach of the said duty of care, the Second Respondent did not disclose the said material facts to the Applicant.
43. By reason of the breaches aforesaid, the Applicant has suffered loss and damage.

PARTICULARS

- (a) The Applicants paid the purchase price as particularised in the Schedule hereto and expended monies to develop the said land.
- (b) The Applicant has been unable to sell seven of the lots purchased from the Second Respondent and the same are of no value or, alternatively worth substantially less than the sum expended to acquire and develop the said lots.

- (c) The Applicant has paid costs and disbursements and paid interest on borrowings in respect of the said acquisitions.
- (d) The Applicant has suffered damaged and loss of goodwill in respect of the operation of its business as a builder and developer, the details of which will be provided prior to the hearing.
- (e) The Applicant is liable to suffer claims against it by the purchasers of the lots sold to third parties.
- (f) The Applicant purchased the east Martin Street land which is of no value or alternatively worth substantially less than the sum expended to acquire and develop the same.
- (g) If the Applicant had known that any part of the nine and/or twenty - seven lot sub-divisions, or the land surrounding the said sub-divisions, was contaminated or liable to be contaminated, the Applicant would not have purchased any of the land contained in the said sub-divisions and would have purchased land elsewhere in the Armidale area for the purposes of development and resale as part of its business as a developer and builder.

DATED:

J G HARROWELL by his Partner



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Solicitor for the Applicant



SCHEDULE

<u>PROPERTY</u>	<u>DATE PURCHASED</u>	<u>TITLE REFERENCE</u>	<u>PURCHASE PRICE</u>
Martin St Armidale	03.02.1986	FI 11/718207	\$90,000.00
Lot 1, Martin Street	02.11.1988	FI 1/718207	\$12,500.00
Lot 6, Martin Street	02.11.1988	FI 6/718207	\$15,000.00
Lot 5, Martin Street	02.11.1988	FI 5/718207	\$15,000.00
Lot 7, Martin Street	02.11.1988	FI 7/718207	\$15,000.00
Lot 2, Martin Street	02.05.1988	FI 2/718207	\$15,000.00