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FILED IN COURT/CHAMBERS

IN THE FEDERAL COURT
OF AUSTRALIA

ON 4/8/93

NEW SOUTH WALES DISTRICT REGISTRY
GENERAL DIVISION

No. G0029 OF 1992

ALEC FINLAYSON PTY LIMITED
(A.C.N. 001 144 501)
Applicant

ARMIDALE CITY COUNCIL
First Respondent

BASIA HOLDINGS PTY LIMITED
(A.C.N. 002 375 528)
Second Respondent

BASIA HOLDINGS PTY LIMITED
(A.C.N. 002 375 528)
First Cross-Claimant

ARMIDALE CITY COUNCIL
Cross-Respondent to First Cross-Claim

ARMIDALE CITY COUNCIL
Second Cross-Claimant

BASIA HOLDINGS PTY LIMITED
(A.C.N. 002 375 528)
Cross-Respondent to Second Cross-
Claimant

**AMENDED DEFENCE OF FIRST RESPONDENT
TO FURTHER AMENDED STATEMENT OF CLAIM
(Order 11, Rule 20)**

In answer to the Applicant's Further Amended Statement of Claim filed 7 July 1993, the First Respondent:

1. Admits paragraphs 1, 2, 3, 6A, 6B, 10D and 10H.

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2. Does not admit paragraphs 4, 5, 10B, 10E, 10F, 10G, 10I, 17, 21, 22, 24A, 24B, 25, 26, 27, 29, 30, 32, 33, 36 and 38-43 (inclusive).
3. Denies paragraphs 10J, 20, 23, 34, 37 and 44.
4. Admits that the property referred to in paragraphs 6 and 31 is within the Municipality of the First Respondent but does not admit any other fact or allegation in those paragraphs.
5. In relation to paragraph 7 admits that on part of the land the timber treatment plant was used for the treatment of timber with creosote and that for part of the period alleged timber was treated with copper chrome arsenate but does not otherwise admit the facts and allegations in that paragraph.
6. In relation to paragraph 8 the First Respondent admits that between 1968 and 1971 there were discharges of creosote onto certain areas surrounding the impregnation and timber treatment plant and that it received reports of certain discharges but otherwise does not admit the allegations contained in that paragraph.
7. In relation to paragraph 9 save for the fact that certain parts of the property now contains creosote and copper chrome arsenate the First Respondent does not admit the allegations contained in that paragraph.
8. In relation to paragraph 10 the First Respondent repeats paragraphs 5, 6 and 7 of this Defence but otherwise denies the allegations contained in paragraph 10.
9. Admits that in connection with IDO 2 it considered that the property be rezoned residential but does not admit any other fact or allegation in paragraph 10A.

10. Admits that prior to 5 September 1975 it did all things it was required to do in connection with IDO 2 but does not admit any other fact or allegation in paragraph 10C.
11. In relation to paragraph 11, the First Respondent admits that on 4 July 1984 the Second Respondent submitted a development application to the First Respondent to subdivide certain property between Martin Street, the northern railway and White Avenue in the city of Armidale into 9 residential lots.
12. Admits that the First Respondent determined a development application for the subdivision of part of the land comprised in lot B, deposited plan 161700 on certain terms and conditions. The First Respondent relies upon those terms and conditions as if they were fully set out in this paragraph but does not otherwise admit any other fact or allegation in paragraph 12 of the Statement of Claim.
13. Admits that on 13 September 1985 Mr Brian Martin, the First Respondent's Town Clerk certified the linen plan in respect of the subdivision referred to in paragraph 12 of the Statement of Claim but does not otherwise admit any other fact or allegation in paragraph 13 of the Statement of Claim.
14. Admits that on 31 October 1985 the Second Respondent submitted a development application to the First Respondent to subdivide the residue of the land comprised in lot B, deposited plan 161400 but does not otherwise admit the facts and allegations in paragraph 14 of the Statement of Claim.
15. Admits that on 29 November 1985 the First Respondent approved the subdivision referred to in Paragraph 14 of the Statement of Claim and the First Respondent relies upon the terms and conditions of its approval as if it is fully set out in this paragraph but does not otherwise

admit any other fact or allegation in paragraph 15 of the Statement of Claim.

16. Admits that on 15 December 1987 Mr Brian Martin, the First Respondent's Town Clerk, certified the linen plan in respect of the subdivision referred to in paragraph 14 of the Statement of Claim but does not otherwise admit any other fact or allegation in paragraph 16 of the Statement of Claim.
17. Save for the fact that the First Respondent does not admit that the testing was comprehensive, the First Respondent admits the balance of paragraph 18 of the Statement of Claim.
18. The First Respondent admits that on 25 January 1991, AGC Woodward-Clyde completed a report for the SPCC which reached certain conclusions which are set out in the report, but otherwise does not admit the contents of paragraph 19.
19. Denies the facts and allegations in paragraphs 20, 23, 34, 37 and 44 in the Statement of Claim.
20. The First Respondent denies paragraphs 24 and 35 and says further that if it is found to be at any relevant time a trading corporation, then the conduct complained of did not constitute the First Respondent being engaged in trade or commerce within the meaning of the Trade Practices Act 1974.
21. In relation to paragraph 28, the First Respondent admits that it approved the sub-division of the property into 9 and 27 residential allotments, but denies that such approval was in breach of the said duty of care.
22. Further in answer to the Statement of Claim the First Respondent says that if the Applicant has suffered loss and damage as alleged (which is

not admitted), then such loss or damage has been caused by or contributed to by the negligence of the Applicant.

PARTICULARS OF CONTRIBUTORY NEGLIGENCE

- (i) The Applicant purchased the property knowing that it had previously been used as an impregnation plant.
 - (ii) Knowing that the property had previously been used as an impregnation plant, the Applicant failed to ascertain prior to purchase and prior to subdivision, whether the land was in any way contaminated.
 - (iii) Alternatively, failing to take reasonable steps when deciding to purchase and or subdivide the subject property to ascertain the prior uses to which the subject property had been put.
 - (iv) The Applicant by itself, its servants or agents graded and relocated soil and the land when it knew or ought to have known that this soil may be contaminated.
 - (v) The Applicant by itself, its servants or agents was negligent in relocating soil on the land without carrying out reasonable enquiries to ascertain if it was contaminated when it knew or ought to have known that the soil may be contaminated.
 - (vi) The Applicant failed to disclose to purchasers from it the prior use of the property as a timber treatment plant and the existence of contamination arising therefrom.
23. In further answer to Paragraphs 4, 23, 24 and 35 of the Statement of Claim the First Respondent:
- (a) denies that it was a trading corporation for the purposes of the

Trade Practices Act 1974;

- (b) denies that any conduct alleged against it occurred in trade and commerce for the purposes of the Trade Practices Act 1974 of the Fair Trading Act 1987;
- (c) denies that any conduct alleged against it occurred in connection with the supply or possible supply of goods or services to a consumer;
- (d) denies that it was a supplier within the meaning of the Fair Trading Act 1987;
- (e) denies that any conduct alleged against it occurred in connection with the sale or grant or possible sale or grant of an interest in land or in connection with the promotion of the sale or grant of any interest in land within the meaning of either the Trade Practices Act 1974 or the Fair Trading Act 1987;
- (f) none of the conduct alleged is conduct to which the Fair Trading Act 1987 applies."
- (g) the First Respondent says that the Applicant is statute barred from commencing proceedings under the Trade Practices Act 1974 (as amended).

24. In further answer to Paragraphs 4, 23, 24 and 35 of the Statement of Claim the First Respondent says that the Applicant is statute barred from commencing proceedings under the Trade Practices Act 1974 (as amended).

25. Further in answer to the Statement of Claim the First Respondent says that at all material times the Applicant knew that the relevant properties referred to in the Statement of Claim, had been used for the

purpose of treatment and impregnation of timber with Creosote and copper-chrome arsenate ("CCA").

26. At all material times the Applicant knew that there were spillages of Creosote and CCA into the soil surrounding the impregnation and treatment plant.
27. In the premises the Applicant purchased and/or subdivided the subject land with the full knowledge that the subject land had been used for the purpose of the treatment and impregnation of timber with Creosote and CCA and accepted or assumed full responsibility for such side effects and characteristics as continued to exist arising from such prior use of the land.
28. Further and in answer to the Statement of Claim the First Respondent says that if the Applicant's land has been contaminated with Creosote and CCA and rendered unsuitable for residential purposes then the land has been contaminated by the acts of the Applicant by itself, its servants or agents.

PARTICULARS

- (i) Grading and relocating contaminated soil across the site.
- (ii) Failing to carry out reasonable enquiries to ensure that soil to be moved in and about the site was not contaminated.

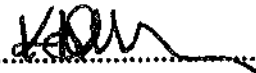
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25. In further answer to paragraphs 17, 20-23 (inclusive), 25-28 (inclusive), 38, 42 and 43 of the Statement of Claim the First Respondent says:

- (i) That the Applicant entered into a contract dated 23 October 1985 for the purchase of the whole of the land comprising the 27 lot subdivision;

(ii) The proceedings were commenced against the First Defendant after 23 October 1991;

(iii) The Applicant's claim in respect of the purchase of that land is statute barred by a virtue of the provisions of the Limitation Act (NSW) 1969.

Dated:


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Solicitor for the First Respondent
KEVIN ALLAN GIBBONS