

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL AND EQUITY DIVISION

S CI 2010 6342

No \_\_\_\_\_ of 2010

BETWEEN:

WOOLWORTHS LIMITED (ACN 000 014 675) and Others  
(according to the Schedule attached)

Plaintiffs

and

MANNINGHAM CITY COUNCIL

Defendant

WRIT

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<b>Date of document:</b>	23 November 2010
<b>Filed on behalf of:</b>	the Plaintiffs
<b>Prepared by:</b>	Solicitor's Code: 8469
Mallesons Stephen Jaques	DX 101
Level 50, Bourke Place	T +61 3 9643 4114
600 Bourke Street	F +61 3 9643 5999
Melbourne Vic 3000	Ref: R Lawson/MAT
	Matter no: 03-5502-4654

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TO THE DEFENDANT(S)

TAKE NOTICE that this proceeding has been brought against you by the plaintiffs for the claim set out in this writ.

IF YOU INTEND TO DEFEND the proceeding, or if you have a claim against the plaintiffs which you wish to have taken into account at the trial, YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearance stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by -

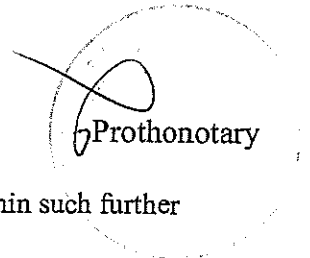
- (a) filing a "Notice of Appearance" in the Prothonotary's office in the Law Courts, 436 Lonsdale Street, Melbourne, or, where the writ has been filed in the office of a Deputy Prothonotary, in the office of that Deputy Prothonotary; and
- (b) on the day you file the Notice, serving a copy, sealed by the Court, at the plaintiffs' address for service, which is set out at the end of this writ.

IF YOU FAIL to file an appearance within the proper time, the plaintiffs may OBTAIN JUDGMENT AGAINST YOU on the claim without further notice.

**THE PROPER TIME TO FILE AN APPEARANCE** is as follows -

- (a) where you are served with the writ in Victoria, within 10 days after service;
- (b) where you are served with the writ in a State other than Victoria or in the Australian Capital Territory, the Northern Territory of Australia or the Jervis Bay Territory, within 21 days after service;
- (c) where you are served with the writ in New Zealand or in Papua New Guinea, within 28 days after service;
- (d) where you are served with the writ in any other place, within 42 days after service.

**FILED** 23 November 2010



**THIS WRIT** is to be served within one year from the date it is filed or within such further period as the Court orders.

IN THE SUPREME COURT OF VICTORIA  
AT MELBOURNE  
COMMERCIAL AND EQUITY DIVISION

No of 2010

**BETWEEN:**

**WOOLWORTHS LIMITED (ACN 000 014 675) and Others**  
(according to the Schedule attached)

Plaintiffs

and

**MANNINGHAM CITY COUNCIL**

Defendant

**STATEMENT OF CLAIM**

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<b>Date of document:</b>	23 November 2010
<b>Filed on behalf of:</b>	the Plaintiffs
<b>Prepared by:</b>	Solicitor's Code: 8469
Mallesons Stephen Jaques	DX 101
Level 50, Bourke Place	T +61 3 9643 4114
600 Bourke Street	F +61 3 9643 5999
Melbourne Vic 3000	Ref: R Lawson/MAT
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**The Parties**

1. Firth One Pty Ltd ("**Firth One**"):
  - (a) is and at all material time was incorporated; and
  - (b) is the registered proprietor of the land known as 6 Jackson Court, Doncaster, being more particularly described in Certificate of Title Volume 8135 Folio 661, being lot 10 on LP 33809 ("**the Firth One Land**").
2. Mercato Pty Ltd ("**Mercato**"):
  - (a) is and at all material times was incorporated;
  - (b) is the registered proprietor of the land known as 898 Doncaster Road, Doncaster, being more particularly described in Certificate of Title Volume 8372 Folio 723 and ("**the Mercato Land**");

- ✓
- (c) became the registered proprietor of the Mercato Land on 15 January 2002;  
and
  - (d) leases the Mercato Land to Woolworths Limited (“**Woolworths**”) pursuant  
to a lease.
3. Woolworths:
- (a) is and at all material times was incorporated;
  - (b) is and at all material times was the parent company of Woolworths  
Properties Pty Limited (“**Woolworths Properties**”) within the meaning of  
*Corporations Act 2001* (Cth);
  - (c) is the occupier of the Mercato Land pursuant to a lease; and
  - (d) carries on the business of a retail liquor supplier on the Mercato Land under  
the trading name “Dan Murphy’s”.
4. Woolworths Properties:
- (a) is and at all material times was incorporated;
  - (b) is and at all material times was a wholly owned subsidiary of Woolworths;
  - (c) was formerly known as Woolworths Properties Limited;
  - (d) is and at all material times was in the business *inter alia* of acquiring and  
developing land for supermarket and related retail land uses; and
  - (e) was the registered proprietor of the Mercato Land between 11 September  
1964 and 20 June 1968.
5. Manningham City Council (“**the Council**”):
- (a) is the successor in law to the Council of the Shire of Doncaster and  
Templestowe;
  - (b) is and at all material times was a body corporate pursuant to section 5 of the  
*Local Government Act 1989* (Vic) and capable of being sued; and

- (c) is the registered proprietor of the land contained in Certificate of Title Volume 8125 Folio 503, and specifically that part of the land contained in Certificate of Title Volume 8125 Folio 503 which comprises lot 108 on LP 33809 (“**the Car Park Land**”).

#### **Car park land**

6. On 28 October 1954, the Council of the Shire of Doncaster and Templestowe approved and agreed to seal LP 33809 by resolution.
7. LP 33809 had the effect of subdividing the land described in Certificate of Title Volume 7287 Folio 287 (“**the Parent Title**”) into a total of 108 individual allotments as follows:
- (a) lots 1 to 45 were of a size which contemplated commercial land used and configured to have a frontage to a subdivisional road named Jackson Court;
  - (b) lots 46 to 106 were of a size which contemplated conventional residential development;
  - (c) lots 107 and 108 were set apart as reserves for the benefit of the purchasers of the lots created by LP 33809;
  - (d) under the heading “notations” contained on LP 33809 the following appears:

*“The Registered Proprietor has set apart lots 107 & 108 as Reserves for the benefit of Lots on this plan and has agreed to transfer the said land to the Council. Sec 568 sub-sec.10 L.G.A.1946”*; and
  - (e) the words “Reserve for Parking” appear on the area delineated as lot 108 on LP 33809, being the car park land.

#### **PARTICULARS**

LP 33809 is in writing. A copy of LP 33809 is in the possession of the Plaintiffs’ Solicitors and may be inspected by appointment.

- ✓
8. By instrument of transfer 2695132, dated 30 November 1954, lots 107 and 108 (being the Car Park Land) on LP 33809 were transferred out of the Parent Title and were thereafter described in Certificate of Title Volume 8122 Folio 612.
  9. By instrument of transfer 2721584, dated 9 December 1954, lots 107 and 108 (being the Car Park Land) were transferred to the Council of the Shire of Doncaster and Templestowe and thereafter described in Certificate of Title Volume 8125 Folio 503. The transfer was by way of gift.

### **PARTICULARS**

The transfer is recorded by Instrument No. 2721584. A copy of the transfer is in the possession of the Plaintiffs' Solicitors and may be inspected by appointment.

10. On 15 April 1955, the Shire of Doncaster and Templestowe became the registered proprietor of the Car Park Land.
11. Since about 1956, the Car Park Land has been used and developed as a public reserve for car parking.

### **Firth One Land**

12. The Firth One land:
  - (a) was and remains lot 10 on LP 33809;
  - (b) enjoys a frontage to Jackson Court;
  - (c) overlooks the Car Park Land which is situated directly across Jackson Court to the west; and
  - (d) benefits from and has always benefitted from publicly available at grade parking spaces which are situated in close proximity to the Firth One Land and provided on the Car Park Land.

### **Mercato Land**

13. The Mercato land was:
  - (a) part of the land described in the Parent Title;

- (b) within an area denoted on LP33809 as “Not in Subdivision”;
- (c) originally shown as lot 2 on LP 45904 in the Parent Title; and
- (d) by instrument of transfer B370372, transferred out of the Parent Title on 22 February 1962 and thereafter described in Certificate of Title Volume 8372 Folio 723.
14. On 11 September 1964, Woolworths Properties became the registered proprietor of the Mercato Land.
15. In or about 1965, Woolworths Properties obtained the requisite planning permission to use and develop the Mercato Land for the purpose of a “Supermarket” as follows:
- (a) on 2 September 1965, the Shire of Doncaster and Templestowe issued Permit 65/139 pursuant to the *Town and Country Planning Act 1961* (Vic) for the use of the Mercato Land, expressly allowing “the use of land at 898 Doncaster Road (lot 2, LP45904) for the purpose of a Supermarket in accordance with endorsed plans” (“**the Shire Permit**”);

#### PARTICULARS

The Shire Permit is in writing. A copy is in the possession of the Plaintiffs’ Solicitors and may be inspected by appointment.

- (b) on 3 September 1965, the Shire of Doncaster and Templestowe endorsed plans pursuant to the Shire Permit (“**the Shire Endorsed Plans**”);

#### PARTICULARS

The Shire Endorsed Plans are in writing. A copy is in the possession of the Plaintiffs’ Solicitors and may be inspected by appointment.

- (c) on 30 September 1965, the Melbourne and Metropolitan Board of Works issued Permit 36015A pursuant to the *Town and Country Planning Acts* for the use of the Mercato land, expressly allowing “Lot 2, Lodged Plan No. 45904, Doncaster Road, Shire of Doncaster and Templestowe, to have

buildings and works erected thereon in accordance with the attached endorsed plan” (“**the MMBW Permit**”);

#### **PARTICULARS**

The MMBW Permit is in writing. A copy is in the possession of the Plaintiffs’ Solicitors and may be inspected by appointment.

- (d) the MMBW Permit allowed the construction of buildings subject to conditions which included condition 2 which stated as follows:

*The area set aside for the parking of vehicles and so delineated on the endorsed plan shall be made available for such use and shall not be used for any other purpose.*

- (e) on or about 30 September 1965, the MMBW endorsed plans pursuant to the MMBW permit (“**the MMBW Endorsed Plans**”);

#### **PARTICULARS**

The MMBW Endorsed Plans are in writing. A copy is in the possession of the Plaintiffs’ Solicitors and may be inspected by appointment.

- (f) both the Shire Endorsed Plans and the MMBW Endorsed Plans depict a large area of car parking surrounding the Mercato Land which bears the various designations “Shire of Doncaster and Templestowe Car Park – estimated capacity 170 cars”, and “Council Car Park”; and
- (g) both the Shire Endorsed Plans and the MMBW Endorsed Plans show an area at the southern end of the Mercato Land with dimensions of 98 feet long by 28 feet wide, containing the following notation “land given to Council for car park”.

16. The layout of the supermarket approved by the Shire Permit and the MMBW Permit relied upon the Car Park Land to meet the anticipated parking demand that would be generated by members of the general public visiting the supermarket as customers.



17. On 24 June 1966, the Shire of Doncaster and Templestowe entered into an agreement with Woolworths Properties (then known as Woolworths Properties Ltd) ("**the Car Park Agreement**") by which:
- (a) The parties to the Car Park Agreement recorded that the Shire of Doncaster and Templestowe:
    - (i) was the owner of the Car Park Land; and
    - (ii) intended to appropriate the whole of the Car Park Land for parking purposes and for the purpose of gaining access to the nearby shopping centre;
  - (b) Woolworths Properties:
    - (i) paid to the Shire of Doncaster and Templestowe the amount of \$10,000; and
    - (ii) gave to the Shire of Doncaster and Templestowe certain rights of carriageway over the Mercato Land and appurtenant to the Car Park Land and its use as a public car park; and
  - (c) the Shire of Doncaster and Templestowe agreed:
    - (i) to construct the car park on the Car Park Land; and
    - (ii) to grant to Woolworths Properties a licence over the Car Park Land to use that land, in common with others, for the purpose of car parking and for carriageway purposes.

#### PARTICULARS

The Car Park Agreement is in writing. A copy is in the possession of the Plaintiffs' Solicitors and may be inspected by appointment.

18. In or about 1967, Woolworths Properties constructed a supermarket on the Mercato Land.
19. In furtherance of the Car Park Agreement, Woolworths properties made a financial contribution to the cost of constructing the whole or part of the Car Park Land, and

the Car Park Land was constructed, sealed, line-marked, laid out and signposted as a public car park.

20. On or about 24 May 1968, the Mercato Land commenced to be used for the purpose of a supermarket.
21. On or about 20 June 1968, Woolworths Properties transferred the Mercato Land to Australasian Temperance and General Mutual Life Assurance Society Limited by instrument of transfer D109793.
22. From 20 June 1968, Woolworths Properties, or a wholly owned subsidiary of Woolworths, was:
  - (a) the occupier of the Mercato Land pursuant to a lease; and
  - (b) continued, until 2008, to use the Mercato Land for the purpose of a supermarket.
23. From about 2008, the use of the Mercato Land:
  - (a) changed to a liquor retail shop trading as “Dan Murphy’s”; and
  - (b) continued and continues to be operated by Woolworths, or a wholly owned subsidiary thereof.
24. From 1968, members of the general public who were and remain customers of either the former supermarket or the current liquor retail store have had and have access to at grade car parking provided on the Car Park Land.

#### **Council Proposal**

25. On or about March 2009, the Council called for “Expressions of Interest” by publishing a document entitled “Expressions of Interest – For development of Council-owned land at 898A Doncaster Road, Doncaster East – to construct and operate a supermarket” in which the Council described its proposal for the replacement of the existing public car park on the Car Park Land with a:
  - (a) large-plate supermarket development with deck parking; or

- (b) stand-alone large plate supermarket with deck car parking constructed separately on the existing adjacent public car park to the south; or
- (c) stand-alone large plate supermarket with deck car parking constructed partly on the adjacent public car park to the South and partly on the existing public car park located on the intersection of Bullen Street and Lord Street.

### PARTICULARS

The document entitled “Expressions of Interest – For development of Council-owned land at 898A Doncaster Road, Doncaster East – to construct and operate a supermarket” is in writing. A copy is in the possession of the Plaintiffs’ Solicitors and may be inspected by appointment.

- 26. Between March 2009 and June 2009, the Council received six expressions of interest.
- 27. At its meeting on 25 August 2009, the Council resolved to adopt the recommendations made to it by the Officers of the Council contained in a report of the same date (“**the Council Officers’ Report**”) which recommendations were as follows:
  - (a) to appoint ALDI Stores Ltd as the preferred developer for the sale of the Car Park Land and the development of that land;
  - (b) to notify ALDI Stores Ltd of its preferred developer status;
  - (c) to authorise the Chief Executive Officer, or any person acting in that position, to negotiate the terms of a Heads of Agreement with ALDI Stores Ltd for the sale of the Car Park Land; and
  - (d) to present a further report to the Council seeking endorsement of the Heads of Agreement.

### PARTICULARS

The Council Officers’ Report is in writing. A copy is in the possession of the Plaintiffs’ Solicitors and may be inspected by appointment.

## **Council's Planning Application**

28. The Car Park Land is subject to the provisions of the Manningham Planning Scheme ("**the Planning Scheme**").
29. The Council is the Responsible Authority for the administration of the Planning Scheme under the *Planning and Environment Act 1987* (Vic).
30. On 13 October 2009, Lawlor and Loy Pty Ltd, surveyors acting on instruction from the Council (in its capacity as the registered proprietor of the Car Park Land) applied to the Council in its capacity as Responsible Authority for a planning permit pursuant to clause 52.02 of the planning scheme ("**the Planning Application**") to:
  - (a) remove the reservation status from the Car Park Land pursuant to section 24A of the *Subdivision Act 1988* (Vic);
  - (b) create a new, separately disposable allotment named lot 1 on proposed plan of subdivision PS 630019P ("**the Proposed Plan**") which comprises the land which is bounded by the Mercato Land on the west, Doncaster Road to the north, Jackson Court to the east and an east west line which extends from the southern boundary of the Mercato land in an easterly direction terminating at Jackson Court ("**Proposed Lot 1**"); and
  - (c) create a new Reserve for Parking over the remainder of the Car Park Land not contained within the boundaries of proposed Lot 1 ("**the New Reserve**").

## **PARTICULARS**

The Planning Application is in writing. A copy is in the possession of the Plaintiffs' Solicitors and may be inspected by appointment.

31. Firth One, Mercato and Woolworths each lodged a written objection to the grant of a planning permit.

32. On 3 March 2010, the Council issued a Notice of Decision to Grant a Planning Permit for the removal of the reservation status over the Proposed Lot 1 and the creation of the New Reserve (“**Notice of Decision**”).

### **PARTICULARS**

The Notice of Decision is in writing. A copy is in the possession of the Plaintiffs’ Solicitors and may be inspected by appointment.

33. On 23 March 2010, Firth One, Mercato and Woolworths Limited each applied to the Victorian Civil and Administrative Tribunal (“VCAT”) for review of the Council’s decision to issue the Notice of Decision.
34. On 28 October 2010, VCAT granted leave for Firth One, Mercato and Woolworths Limited to withdraw their application for review of the Notice of Decision. Following VCAT’s orders, Council issued planning permit number PL09/020654 on 11 November 2010.
35. Pursuant to section 24A(2) of the *Subdivision Act* 1988 (Vic), the Council is not permitted to certify a plan of subdivision which removes a reservation unless it is satisfied that the land to which the reserve applies need no longer be used for the purpose for which it is currently reserved or used.
36. The whole of the Car Park Land is:
- (a) land needed for the purpose of car parking within this area;
  - (b) critical to the supply of car parking in the commercial area of Jackson Court as a whole;
  - (c) regularly and fully utilised by vehicles parking in the available spaces; and
  - (d) in every day use by members of the general public, customers and staff of the commercial land uses on Jackson Court on a daily basis including to the Firth One Land and the Mercato Land.
37. Acting reasonably, the Council could not be satisfied that the Proposed Lot 1 need no longer be used for the purpose for which it is currently reserved and used.

## **Trusts**

38. By reason of the matters contained in paragraphs 1, 5-12, 15-19, 24 and 36 the whole of the Car Park Land is held by the Council on trust:
- (a) for the benefit of the registered proprietors from time to time of the lots contained in LP 33809;
  - (b) for the purpose of supplying car parking for members of the general public visiting the commercial centre at Jackson Court; and
  - (c) *inter alia* specifically for Firth One in its capacity as the registered proprietor of Lot 10 on LP 33809.
39. Further and alternatively, by reason of the matters contained in paragraphs 5-11, 15-19 and 36, the car park land:
- (a) is dedicated to public use;
  - (b) is the subject matter of a public charitable trust; and
  - (c) is held by the Council, as trustee, and is impressed with the obligation to apply the subject matter of the trust for the purpose of the charitable trust, namely for the purpose of supplying car parking to serve the needs of the public visiting the commercial centre at Jackson Court.

## **Breaches of Trust and Section 24A of the Subdivision Act**

40. The Council is proceeding to:
- (a) subdivide the Car Park Land;
  - (b) alienate part of the Car Park Land;
  - (c) act in breach of the trust set out in paragraph 38;
  - (d) act in breach of the public charitable trust set out in paragraph 39; and
  - (e) act contrary to section 24A of the Subdivision Act 1988 (Vic) in that it is not open to the Council or no Council acting reasonably could be satisfied that

the Car Park Land need no longer be used for the purpose for which it is reserved viz public car parking.

41. By reason of the breach of trust and/or public charitable trust, the plaintiffs have suffered loss and damage.

#### **PARTICULARS**

- (a) Loss of value of land, loss of car parking, customers, goodwill and inconvenience.
- (b) Particulars will be provided prior to trial.

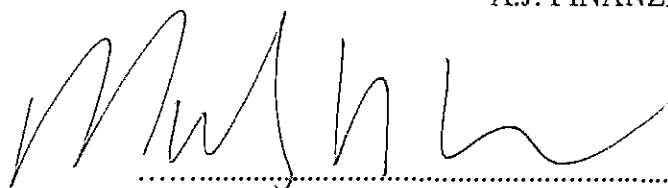
#### **AND THE PLAINTIFFS CLAIM:**

- A. Declarations that Lot 108 on LP 33809 being part of the land described in Certificate of Title Volume 8125 Folio 503 is held by the Council on trust for Firth One and the registered proprietors of the lots contained in LP 33809.
- B. Alternatively, declarations that Lot 108 on LP 33809 being part of the land described in Certificate of Title Volume 8125 Folio 503 is held by the Council as a public charitable trust for the purpose of providing car parking to serve the needs of the public visiting the commercial centre at Jackson Court.
- C. Declarations that the Council's proposal to subdivide and alienate part or all of Lot 108 on LP 33809 being part of the land described in Certificate of Title Volume 8125 Folio 503 for the development of a supermarket is a breach of trust.
- D. Declarations that the Council's proposal to subdivide and alienate part of all of Lot 108 on LP 33809 being part of the land described in Certificate of Title Volume 8125 Folio 503 for the development of a supermarket is a breach of a public charitable trust.
- E. Injunctions restraining the Council from taking any step in furtherance of its proposal to subdivide and alienate all or part of Lot 108 on LP 33809 being part

of the land described in Certificate of Title Volume 8125 Folio 503 for development of a supermarket.

- F. Further and alternatively, declarations that it is not open for the Council to be alternatively that no Council acting reasonably could be satisfied that the land described as Lot 108 on LP 33809 being part of the land described in Certificate of Title Volume 8125 Folio 503 need no longer be used for the purpose for which it is reserved, namely car parking.
- G. Injunctions preventing the Council from certifying any plan of subdivision pursuant to section 24A of the *Subdivision Act* 1988 (Vic) which purports to remove any part of Lot 108 on LP 33809 being part of the land described in Certificate of Title Volume 8125 Folio 503 from the reservation status "Reserve for Parking" Or from alienating and developing part or all of that land.
- H. Damages.
- I. Interest.
- J. Costs.
- K. Such further or other relief as the Court thinks just.

G.H. GARDE  
A.J. FINANZIO

A handwritten signature in black ink, appearing to read 'Mallesons Stephen Jaques', written over a horizontal dotted line.

Mallesons Stephen Jaques  
Solicitors for the Plaintiffs



- 1 Place of trial - Melbourne
- 2 Mode of trial - Judge alone
- 3 This writ was filed for the Plaintiffs by Mallesons Stephen Jaques, solicitors, of Level 50, Bourke Place, 600 Bourke Street, Melbourne, 3000.
- 4 The addresses of the Plaintiffs are -  
  
Woolworths Limited  
1 Woolworths Way  
Bella Vista NSW 2153  
  
Woolworths Properties Pty Ltd  
1 Woolworths Way  
Bella Vista NSW 2153  
  
Mercato Investments Pty Ltd  
Suite 304, 22-28 St Kilda Road  
St Kilda VIC 3182  
  
Firth One Pty Ltd  
18 Hume Street  
Greensborough VIC 3088
- 5 The address for service of the plaintiffs is -  
  
Mallesons Stephens Jaques, Level 50, Bourke Place, 600 Bourke Street, Melbourne, 3000 (Attention: R Lawson/MAT 03-5502-4654).
- 6 The address of the Defendant is -  
  
699 Doncaster Road, Doncaster 3108.

**IN THE SUPREME COURT OF VICTORIA AT MELBOURNE  
COMMERCIAL AND EQUITY DIVISION**

No                      of 2010

**SCHEDULE OF PARTIES**

**WOOLWORTHS LIMITED (ACN 000 014 675)**                      First Plaintiff

**WOOLWORTHS PROPERTIES PTY LTD (ACN 000 039 252)**                      Second Plaintiff

**MERCATO INVESTMENTS PTY LTD (ACN 098 903 489)**                      Third Plaintiff

**FIRTH ONE PTY LTD (ACN 114 289 155)**                      Fourth Plaintiff

and

**MANNINGHAM CITY COUNCIL**

Defendant