

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

No. S CI 2010 6342

BETWEEN:

**WOOLWORTHS LIMITED** (ACN 000 014 675)  
**AND OTHERS** (according to the Schedule attached)

Plaintiffs

- and -

**MANNINGHAM CITY COUNCIL**

Defendant

## DEFENCE

Date of document: 17 February 2011  
Filed on behalf of: The Defendant  
Prepared by  
**Maddocks**  
Lawyers  
140 William Street  
MELBOURNE VIC 3000

Solicitor's Code: 230  
DX 259 Melbourne  
Telephone No. (03) 9288 0555  
Fax No. (03) 9288 0666  
Ref: TGM:DJW:5752120  
Attention: Darren Wong  
Email: [darren.wong@maddocks.com.au](mailto:darren.wong@maddocks.com.au)

To the Plaintiff's Statement of Claim dated 23 November 2010, the Defendant says as follows:

### As to paragraph 1:

1. It admits paragraph 1, and says further that Firth One only became the registered proprietor of the Firth One Land on 18 March 2009.

### As to paragraph 2:

2. (a) It does not admit paragraph 2(a).
- (b) It says that Mercato Investments Pty Ltd 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 ("the Mercato Land"). It otherwise denies each and every allegation in paragraph 2(b).

- (c) It says that Mercato Investments Pty Ltd became the registered proprietor of the Mercato Land on 15 January 2002. It otherwise denies each and every allegation in paragraph 2(c).
- (d) It says that Mercato Investments Pty Ltd leases the Mercato Land to Woolworths Limited pursuant to a lease dated 22 July 2009. It otherwise denies each and every allegation in paragraph 2(d).

**As to paragraph 3:**

- 3. It admits paragraph 3.

**As to paragraph 4:**

- 4. (a) It admits paragraph 4(a).
- (b) It admits paragraph 4(b).
- (c) It admits paragraph 4(c).
- (d) It does not admit paragraph 4(d).
- (e) It admits paragraph 4(e).

**As to paragraph 5:**

- 5. (a) It says that it is the successor in law of the City of Doncaster and Templestowe. It otherwise denies each and every allegation in paragraph 5(a).
- (b) It admits paragraph 5(b).
- (c) It says that 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**") is the President Councillors and Ratepayers of the Shire of Doncaster and Templestowe, and that all property of the City of Doncaster and Templestowe vested in the Defendant when it was established. It

otherwise denies paragraph 5(c).

**As to paragraph 6:**

6. It says that, on 28 October 1954, the Council of the Shire of Doncaster and Templestowe resolved to advise Spencer Jackson that the Council approves the plan of sub-division of land at Doncaster Road, East Doncaster, and that the seal of the Council would be affixed to the same at the meeting immediately following the completion of roadways and drainage. It otherwise denies each and every allegation in paragraph 6.

**As to paragraph 7:**

7. (a) It admits paragraph 7(a).  
(b) It admits paragraph 7(b).  
(c) It admits that lots 107 and 108 were set apart as reserves. It otherwise does not admit paragraph 7(c).  
(d) It says that, 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 Purchasers 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."*

It otherwise denies each and every allegation in paragraph 7(d).

- (e) It admits paragraph 7(e).

**As to paragraph 8:**

8. It admits paragraph 8.

**As to paragraph 9:**

9. It admits that:

- (a) by instrument of transfer 2721584, dated 9 December 1954, lot 107

and lot 108 (being the Car Park Land) were transferred to the President Councillors and Ratepayers of the Shire of Doncaster and Templestowe;

- (b) the transfer was by way of gift; and
- (c) on 15 April 1955, the President Councillors and Ratepayers of the Shire of Doncaster and Templestowe became the registered proprietor of lots 107 and 108, being the land more particularly described in Certificate of Title Volume 8125 Folio 503, with that Certificate of Title relevantly describing lots 107 and 108 as being "appropriated or set apart as Reserves".

It otherwise denies each and every allegation in paragraph 9.

**As to paragraph 10:**

- 10. It says that, on 15 April 1955, the President Councillors and Ratepayers of the Shire of Doncaster and Templestowe became the registered proprietor of the Car Park Land. It otherwise denies each and every allegation in paragraph 10.

**As to paragraph 11:**

- 11. It does not admit paragraph 11.

**As to paragraph 12:**

- 12. (a) It admits paragraph 12(a).
- (b) It admits paragraph 12(b).
- (c) It admits paragraph 12(c).
- (d) It admits that the Firth One Land benefits from publically available at grade parking spaces which are situated in close proximity to the Firth One Land and provided on the Car Park Land. It otherwise denies paragraph 12(d).

**As to paragraph 13:**

13. (a) It admits paragraph 13(a).
- (b) It admits paragraph 13(b).
- (c) It admits paragraph 13(c).
- (d) It admits that, by instrument of transfer B370372, the Mercato Land was transferred out of the Parent Title, and that it is currently described in Certificate of Title Volume 8372 Folio 723. It otherwise does not admit paragraph 13(d).

**As to paragraph 14:**

14. It admits paragraph 14.

**As to paragraph 15:**

15. (a) It admits that, 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 898 Doncaster Road (lot 2, L.P. 45904) for the purpose of a Supermarket in accordance with the endorsed plan” (“**the Shire Permit**”). It otherwise denies each and every allegation in paragraph 15(a).
- (b) It admits paragraph 15(b).
- (c) It says that, on 30 September 1965, the Melbourne and Metropolitan Board of Works issued Permit 36015A pursuant to the *Town and Country Planning Acts* for the development 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**”). It otherwise denies each and every allegation in paragraph 15(c).
- (d) It admits paragraph 15(d).

- (e) It admits paragraph 15(e).
- (f) It admits paragraph 15(f).
- (g) It admits paragraph 15(g), and says further that the area in question at the southern end of the Mercato Land has not been given to the Defendant and remains part of the Mercato Land.

**As to paragraph 16:**

16. It does not admit paragraph 16.

**As to paragraph 17:**

17. It admits that, on 24 June 1966, the Shire of Doncaster and Templestowe entered into an agreement with Woolworths Properties Ltd (**“the Car Park Agreement”**). It says further that:
- (a) the parties to the Car Park Agreement recorded that the President, Councillors and Ratepayers of the Shire of Doncaster and Templestowe (**“the Municipality”**):
    - (i) was the owner of the Car Park Land; and
    - (ii) intended to appropriate the whole of the Car Park Land for car parking purposes and for the purpose of gaining access to nearby shopping centres;
  - (b) under the Car Park Agreement, Woolworths Properties:
    - (i) agreed to pay the Municipality the amount of \$10,000 upon the execution of the agreement (clause 1);
    - (ii) granted to the Municipality the right to use (in common with others) a certain part of the Mercato Land for carriageway purposes (clause 2);
  - (c) under the Car Park Agreement, the Municipality:

- (i) agreed to complete or cause to be completed the construction of the car park and access ways on the Car Park Land (clause 4); and
  - (ii) granted to Woolworths Properties Ltd a licence to use in common with others the Car Park Land for car parking purposes and other carriageway purposes, on the basis that the Municipality could cancel or withdraw that licence in specified circumstances (clause 3); and
- (d) it otherwise denies each and every allegation in paragraph 17.

**As to paragraph 18:**

18. It does not admit paragraph 18.

**As to paragraph 19:**

19. It says that, by 1970 the Car Park Land was developed so that it was sealed, line-marked, laid out and signposted as a public car park. It otherwise does not admit the allegations in paragraph 19.

**As to paragraph 20:**

20. It does not admit the allegations in paragraph 20.

**As to paragraph 21:**

21. It admits paragraph 21.

**As to paragraph 22:**

22. It does not admit paragraph 22.

**As to paragraph 23:**

23. It says that, in 2009, the Mercato Land commenced use as a liquor retail shop trading as "Dan Murphy's". It otherwise does not admit paragraph 23.

**As to paragraph 24:**

24. It says that, from the time the Car Park Land was sealed, line-marked, laid out and signposted as a public car park, members of the general public – including those members of the general public who were customers of either the former supermarket or the current liquor retail store – have had access to at grade car parking provided on the Car Park Land. It otherwise does not admit paragraph 24.

**As to paragraph 25:**

25. It admits paragraph 25.

**As to paragraph 26:**

26. It admits paragraph 26.

**As to paragraph 27:**

27. It admits paragraph 27.

**As to paragraph 28:**

28. It admits paragraph 28.

**As to paragraph 29:**

29. It admits paragraph 29.

**As to paragraph 30:**

30. It admits paragraph 30.

**As to paragraph 31:**

31. It admits that it received a written objection to the grant of a planning permit from Firth One and Woolworths. It otherwise denies each and every allegation in paragraph 31.

**As to paragraph 32:**



32. It admits paragraph 32, and says further that:

- (a) the Notice of Decision recorded that the permit is subject to five conditions, including a condition that requires the owner of Proposed Lot 1 to enter into an agreement with the Defendant to secure at least 61 car spaces on that lot which must be made available to the public during normal operating hours of the Jackson Court Shopping Centre; and
- (b) the effect of that condition is that the number of car parking spaces to be provided on the Car Park Land will be equal to, or greater than, the number of car parking spaces currently provided on that land.

**As to paragraph 33:**

33. It admits paragraph 33.

**As to paragraph 34:**

34. It admits paragraph 34.

**As to paragraph 35:**

35. It admits paragraph 35.

**As to paragraph 36:**

- 36. (a) It denies each and every allegation in paragraph 36(a).
- (b) It denies each and every allegation in paragraph 36(b).
- (c) It denies each and every allegation in paragraph 36(c).
- (d) It admits paragraph 36(d).

**As to paragraph 37:**

37. It denies paragraph 37. Further, and without limiting the generality of that denial, it says that, acting reasonably, it is open to it to be satisfied that:

- (a) the Car Park Land in its entirety need no longer be used for the purpose of car parking only; and
- (b) part of the Car Park Land – being Proposed Lot 1 – needs to be used as a supermarket and as a car park (with the car spaces being provided underground) to help ensure the long term viability of the Jackson Court Neighbourhood Activity Centre.

**As to paragraph 38:**

38. It denies paragraph 38. Further, and without limiting the generality of that denial, it says that:

- (a) there was no intention that the Municipality would hold the Car Park Land subject to a general law trust, as that land was only transferred to the Municipality:
  - (i) to comply with its request, made under section 568(10) of the *Local Government Act* 1946 (Vic), for the transfer; and
  - (ii) to ensure that the Municipality did not rely upon that provision to refuse to cause LP 33809 to be sealed;
- (b) by reason of the matters alleged in sub-paragraph (a), its obligations in relation to the reserve derive from statute, not equity;
- (c) alternatively to sub-paragraphs (a) and (b), if there were an intention to create a general law trust (which is denied), that trust was only for the benefit of the original purchasers of the lots in LP 33809, and none of the Plaintiffs is an original purchaser of any of those lots;
- (d) by reason of the matters alleged in sub-paragraph (c), none of the Plaintiffs has standing to complain about any alleged breach of the alleged general law trust;
- (e) alternatively to sub-paragraphs (a) to (d), if a general law trust had been created for the benefit of the purchasers of the lots in LP 33809

and their successors or assigns (which is denied), that general law trust was brought to an end by the enactment of section 24A of the *Subdivision Act 1988* (Vic); and

- (f) alternatively to sub-paragraphs (a) to (e), if there remains in existence a general law trust for the benefit of the purchasers of the lots in LP 33809 and their successors or assigns (which is denied), it has not breached that trust because it intends to pursue a development option under which the number of car parking spaces on the Car Park Land after it has been developed will be equal to or greater than the number of car parking spaces currently provided.

**As to paragraph 39:**

39. It denies paragraph 39. Further, and without limiting the generality of that denial, it says that:

- (a) none of the Plaintiffs has standing to bring an action to establish the existence, or breach, of a public charitable trust;
- (b) there was no intention that the Municipality would hold the Car Park Land subject to a public charitable trust, as that land was only transferred to the Municipality:
  - (i) to comply with its request, made under section 568(10) of the *Local Government Act 1946* (Vic), for the transfer; and
  - (ii) to ensure that the Municipality did not rely upon that provision to refuse to cause LP 33809 to be sealed; and
- (c) alternatively to sub-paragraph (b), if the Car Park Land is subject to a public charitable trust (which is denied), it has not breached that trust because it intends to pursue a development option under which the number of car parking spaces on the Car Park Land after it has been developed will be equal to or greater than the number of car parking spaces currently provided.

**As to paragraph 40:**

40. (a) It admits paragraph 40(a).
- (b) It admits paragraph 40(b).
- (c) It denies each and every allegation in paragraph 40(c).
- (d) It denies each and every allegation in paragraph 40(d). Further, and without limiting the generality of that denial, it says that none of the Plaintiffs has standing to bring an action to establish the existence, or breach, of a public charitable trust.
- (e) It denies each and every allegation in paragraph 40(e).

**As to paragraph 41:**

41. It denies each and every allegation in paragraph 41.

Dated: 17 February 2011

JASON PIZER

EMRYS NEKVAPIL

MADDOCKS LAWYERS  
Solicitors for the Defendant

Form 4A

Rule 4.09

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

No. S CI 2010 6342

BETWEEN

WOOLWORTHS LIMITED (ACN 000 014 675) AND OTHERS

Plaintiffs

and

MANNINGHAM CITY COUNCIL

Defendant

OVERARCHING OBLIGATIONS CERTIFICATION

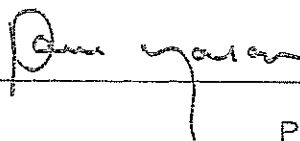
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Date of document: 15 February 2011  
Filed on behalf of: The Defendant  
Prepared by:  
Maddocks  
Lawyers  
140 William Street  
Melbourne VIC 3000

Solicitor's Code: 230  
DX 259 Melbourne  
Tel: (03) 9288 0555  
Fax: (03) 9288 0666  
Ref: TGM:DJW:5752120  
Attention: Terry Montebello  
E-mail Address: terry.montebello@maddocks.com.au

In accordance with section 41 of the Civil Procedure Act 2010, I PAUL MOLAN certify to the Court that I have read and understood the overarching obligations set out in sections 16 to 26 of that Act and the paramount duty set out in section 16 of the Act.

Date: 15 February, 2011



Signed  
Paul Molan

Form 4B

Rule 4.10

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

No. S CI 2010 6342

BETWEEN

WOOLWORTHS LIMITED (ACN 000 014 675) AND OTHERS

Plaintiffs

and

MANNINGHAM CITY COUNCIL

Defendant

PROPER BASIS CERTIFICATION

Date of document: <sup>5</sup>14 February 2011

Filed on behalf of: The Defendant

Prepared by:

**Maddocks**

Lawyers

140 William Street

Melbourne VIC 3000

Solicitor's Code: 230

DX 259 Melbourne

Tel: (03) 9288 0555

Fax: (03) 9288 0666

Ref: TGM:DJW:5752120

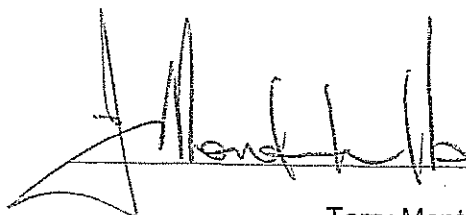
Attention: Terry Montebello

E-mail Address: terry.montebello@maddocks.com.au

In accordance with section 42 of the **Civil Procedure Act 2010**, I TERRY MONTEBELLO certify to the Court that, in relation to the Notice of Defence filed on behalf of Manningham City Council, on the factual and legal material available to me at present:

- (a) each allegation of fact in the document has a proper basis;
- (b) each denial in the document has a proper basis;
- (c) there is a proper basis for each non-admission in the document.

Date: 15 February 2010



Signed

Terry Montebello, Maddocks