

- (a) *Subject to sub-sections (1AA) and (1A), actions founded on simple contract (including contract implied law) or actions founded on tort including actions for damages for breach of a statutory duty;"*

33. The Defendants rely on Section 5 as a complete defence and bar to the Plaintiffs claim. It is submitted that the Plaintiffs must prove that the cause of action accrued within the limitation period proving that damage was suffered within the relevant period. However in the present case there is no doubt that the proceedings are out of time by over a decade.

34. In order to overcome Section 5 (1) of the *Limitations Actions Act* 1958 the Plaintiffs rely on Section 27 of the Act which states:

*"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."*

35. Mr. Thompson, in order to demonstrate that his action has not been statute barred, has sworn in his first affidavit as follows:

- He initiated proceedings in the County Court in 1988 in relation to the Tylden Road land to recover moneys mistakenly paid pursuant to bank guarantees. He also claimed damages for losses occasioned by the mistaken calling up of the bank guarantees.
- On the second day of the hearing, the Defendants made an offer of \$40,000.00 to settle the matter and he agreed. Terms of settlement were drawn. At the time of signing the terms of settlement counsel for the Defendants handed to Mr. Thompson a large black folder containing copies of various documents. He took this material home and gave it a cursory glance but because he considered the matter to an end, did not look at the contents until August 2000.
- During the period from 1985 until 1989, the Defendants refused to allow him access to the relevant files. In March 1995, he was finally granted access to files and upon

reviewing these files he issued 1995 proceedings against the Defendants in relation to the Woodleigh Heights land.

- In 1999, those proceedings were settled at mediation and it was agreed that the Defendants pay \$25,000.00 to the Plaintiffs by a particular date. Mr. Neville, solicitor, accompanied Mr. Thompson at the mediation but was not instructed to act.
- The Defendants issued proceedings in the Practice Court of this Court seeking specific performance of the terms of settlement. Mr. Thompson was ordered to perform the terms of settlement by Beach J.
- He did not appeal against the decision because during the course of the Practice Court hearing, the Defendants showed Mr. Thompson a reticulation plan for the subdivision. This plan seemed to Mr. Thompson to be fatal to any prospects of ultimate success after appeal.
- In August 2000, Mr. Thompson for the purpose of preparing a defence and counter claim against the First Defendant in respect to a rates claim brought by the First Defendant, began reviewing all the documents available to him. Upon examining the documents within the black folder (given to him in 1988), it became apparent to him that there were two versions of plans for the industrial allotments of the Tylden Road subdivision, namely complete versions and clipped versions. The clipped versions had been clipped in the copying in such a manner as to remove or omit the identifying number which was present on the complete version.
- He noticed that the black folder also contained copies of residential series of Tylden Road plans and those plans had also been clipped and he recognised the clipped plans to be identical to those which had been admitted into evidence in the Magistrates' Court proceeding in the Court of Appeal (seeking payment under the guarantee in 1987).
- As a result of perusing the documents in the black folder Mr. Thompson came to a series of conclusions and it became apparent to Mr. Thompson for the first time that the First Defendant had acted maliciously or recklessly by sealing the residential plans contrary to its lawful obligations to refuse to do so and that the evidence of Mr. Wilson (an employee of the First Defendant) given to the Magistrates' Court had the effect of concealing the First Defendant's true conduct from the Court and himself.

36. In relation to the Woodleigh Heights Land, Mr. Thompson swears that he: