

112 The plaintiffs contend that the relevant right of action has been concealed by the fraud of the defendants.

113 Master Efthim summarised the thrust of the firstnamed plaintiff's primary affidavit as to the background to this aspect of the matter as follows:

"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 [scii 1991]), 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)."

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According to his primary affidavit the firstnamed plaintiff then reflected on the Magistrates Court proceedings, and states:

"(i) In the Magistrates Court, a bundle of documents was tendered which contained, inter alia, the following documents:-

- (1) A large plan showing all of the residential allotments and the complete road. ...
- (2) The three plans comprising the Industrial series of plans none of which show all allotments and all of which have been clipped in the manner described above. ...
- (3) The seven plans comprising the Residential series of plans none of which show all allotments and all of which have been clipped in the manner described above. ...
- (4) Council minutes for 20th February 1980 containing at item 8 a minute of resolution that the Council serve Notice of Requirement on the subdivider in relation to the subdivision referred to in items 8(a) and 8(b) of the Engineers Report of 20th February 1980. ...
- (5) Engineers report of 20th February 1980 containing:
 - (a) at item 8(a) a reference to a 16 lots plan of subdivision owned by Buchanan (note the reference to 16 is a typographical error and should be 18). ...

OSBORN
OMITTED
FINN
SUBPARAGRAPH
See PARA 35
OF MASTER EFTH (m)