

- (a) concealment must be actual⁸²;
- (b) what must be concealed must be the right action, not just evidence⁸³;
- (c) fraud or conscious wrong doing on the part of the Council in concealing the existence of the cause of action is needed;
- (d) the onus of showing the Plaintiffs acted with reasonable diligence lies upon them.

The “black folder”: no concealment of the document: the “complete” plan

74. Putting the case at its highest for the Plaintiffs, the circumstances relied upon to constitute “concealment” are as follows:

- (a) shortly prior to signing the terms of settlement relating to the prior Tylden Road proceeding (14 June 1991) Counsel for the Council and the Water Authority handed to Mr Thompson a large black folder containing copies of various documents (“**the black folder**”)⁸⁴;
- (b) Mr Thompson deposes:
 - (i) he was asked by opposing Counsel to hold the black folder whilst the terms of settlement were drafted; and
 - (ii) that he, Mr Thompson, took the black folder home mistakenly⁸⁵;
 - (iii) when at home he “gave it a cursory glance but because I considered the matter to be at an end, I archived the folder and did not look again at its contents until August 2000”⁸⁶;

⁸² Not enough if there is a failure to reveal. *Hamilton v Kaljo*

⁸³ For example, as might convert an arguable case the Defendant caused the loss to a good case. *Sknjel v Mengeder*

⁸⁴ See para 26 of Thompson 1

⁸⁵ See Thompson 4

⁸⁶ See para 26 of Thompson 1

- (iv) in August 2000, for the purposes of preparing a defence and counterclaim against the Council in respect of a rates dispute, Mr Thompson re-examined the contents of the black folder⁸⁷;
- (c) in August 2000, upon examining the documents in the black folder:
 - (i) it became apparent to Mr Thompson that there were 2 versions of the plans for the industrial land component of the Tylden Road land:
 - (1) the "complete" version; and
 - (2) the "clipped version"⁸⁸;
 - (ii) Mr Thompson recognised the clipped version as being the same as those admitted into evidence by Wilson (of the Council) in the 1987 Magistrates' Court proceeding⁸⁹;
 - (iii) Mr Thompson noticed:
 - (1) that the clipped versions of the plans had been clipped in copying in such a manner as to remove or omit the identifying number which was present on the complete version⁹⁰;
 - (2) that the black folder also contained copies of "the residential series of the Tylden Road plans of subdivision", that those plans had also been clipped;
 - (iv) Mr Thompson recognised such clipped plans as being identical to those admitted into evidence in the 1987 Magistrates' Court proceeding and the related Supreme Court Appeal⁹¹;

⁸⁷ See para 53 (a) of Thompson 1

⁸⁸ See para 53 (b) of Thompson 1

⁸⁹ Being the proceeding referred to in para 23 of Thompson 1 whereby the Council sought to recover from the plaintiffs the overrun of road construction costs in respect of the Tylden Road land. See para 5 3(b) of Thompson 1

⁹⁰ See para 53 (b) of Thompson 1 and exhibit "GAT-7" to that affidavit, being a bundle of the "complete" version of the plans

⁹¹ See para 53 (c) of Thompson 1

(d) as a result of reviewing the documents in the black folder and reflecting upon the evidence given in previous proceedings Mr Thompson reached certain conclusions which now form the basis of the allegations pleaded in the "omitted paragraphs"⁹².

75. It is apparent from Thompson 1 that the "critical document" from the black folder which led Mr Thompson to reach the conclusions which now *underpin* the allegations in the "omitted paragraphs" was the copy of the "complete version" of the plans for the industrial allotments⁹³.

76. The complete version of the plans for the industrial allotments is considered by Mr Thompson to be the "critical piece of the puzzle" which he says enabled him to comprehend fully the events which he alleges took place twenty five years ago⁹⁴.

77. The picture Mr Thompson seeks to paint in Thompson (1) is that the first time the complete version of the industrial plans was made available to him was in June 1991 whilst at Court. On the uncontested evidence, that is not so. The complete plans had previously been discovered.

78. As the uncontested evidence before the Master discloses:

(a) the complete version of the industrial plans were formally discovered in the prior Tylden Road proceeding supplementary affidavit of documents sworn 23 May 1989⁹⁵ - albeit as the industrial subdivision plans such discovery was arguably unnecessary⁹⁶;

⁹² See para 53 (c)-(h) of Thompson 1

⁹³ No other documents from the black folder are mentioned by Mr Thompson in his affidavit as assisting him in reaching the conclusions he did

⁹⁴ See para 53 of Thompson 1

⁹⁵ See paragraph 9 of Dixon 2 and exhibits MED-8, MED-11 and MED-12 to that affidavit

⁹⁶ See Thompson (2), para 11

- (b) a copy of the complete version of the industrial plans was provided to Mr Thompson's solicitors in the prior Tylden Road proceeding, Nevile & Co, during the currency of that proceeding by the Council's solicitors (Maddock Lonie & Chisholm) under cover of a letter dated 15 May 1989⁹⁷;
- (c) the provision of a copy of the complete version of the industrial plans followed an inspection by Nevile & Co of the documents referred to in Council's supplementary affidavit of documents sworn 23 May 1989⁹⁸;
- (d) Nevile & Co attended at the offices of Maddock Lonie & Chisholm on 19 July 1989 for the purposes of inspecting documents discovered by the Council in the prior Tylden Road proceeding⁹⁹;
- (e) further and of some significance, on 20 July 1989, Mr Thompson *personally* inspected documents discovered by the Council in the prior Tylden Road proceeding¹⁰⁰, a fact not disputed by Mr Thompson;
- (f) in March 1999, Mr Edward of the second defendant's solicitors undertook inspection of documents discovered by the Plaintiffs in earlier proceedings and retained by the Plaintiffs. Those documents included a copy of the "complete" version of the plans for the industrial allotments¹⁰¹.

79. That a complete version of the industrial plans was discovered in 1989 is conceded in Thompson (2)¹⁰².

80. In the present case, there is:

⁹⁷ See paras 11, 12.4 and 12.5 of Dixon 2 and page 5 of the exhibit MED-14 to that affidavit

⁹⁸ See paras 12.4 and 12.5 of Dixon 2 and page 4 of exhibit MED-14 to that affidavit

⁹⁹ See para 12.6 and page 6 of exhibit MED-14 to that affidavit

¹⁰⁰ See paras 12.7 and 12.8 of Dixon 2 and pages 7 and 8 of exhibit MED-14 to that affidavit

¹⁰¹ See paras 6 and 7 of the affidavit of Steven Edward sworn 3 November 2005

¹⁰² See para 11

- (a) no concealment. The evidence establishes the "critical document" was discovered in the earlier proceeding in 1989, inspected and a copy provided;
- (b) no evidence of "fraud" – how could there be when the document relied on was discovered.

81. Further:

- (a) the Plaintiffs have failed to show that they acted with reasonable diligence;
- (b) the evidence establishes there is no arguable case for postponement to 31 May 1999. The documents in question have been in the physical possession of the Plaintiffs since 1991. At best for the Plaintiffs, time ran from 14 June 1991, the date of the settlement at Court and expired on 14 June 1997.

No concealment of the cause of action: book of pleadings

- 82. The plaintiffs key contention in the current proceeding (which is said to underpin the misfeasance in public office allegations) is that the initial sealing of the plans of subdivision was unlawful or illegal and that the plans were sealed in such a way so as to avoid the operation of section 9 of the Sale of Land Act 1962 (Vic).
- 83. The plaintiffs contend that they only worked out that the initial sealing of the plans of subdivision was unlawful or illegal when Mr Thompson opened the "black folder" in August 2000 and reviewed the copy of the complete plans for the industrial allotments.
- 84. However, what is clear from a book of pleadings annotated by Mr Thompson for use in the prior Tylden Road proceeding is that Mr Thompson had formed the view prior to the settlement of the prior Tylden Road proceeding in 1991 that the initial sealing of the plans of subdivision was unlawful. The "new"