

(g) The Tylden Road industrial land: Anshun estoppel

35. The plaintiffs have not previously sought relief in respect of or sued the Council concerning the Tylden Road industrial land. However, the subject matter of the present Tylden Road industrial land claim is so closely connected with the subject matter of the prior Tylden Road proceeding that, if they wished to sue, the Plaintiffs should have done so in that action. That is, in 1988. They are estopped from doing so now³³. With the exercise of reasonable diligence, they could have brought such a claim in 1989 or, at the latest, 1991³⁴. As much is plain from Mr Thompson's own affidavit evidence filed in relation to this application.

36. As discussed below in respect of the Tylden Road land, the "critical document" from the black folder which led Mr Thompson to reach the conclusions which are said by him to underpin the "fresh allegations" he now wishes to advance (which relate to both the Residential land and the Industrial land) was the copy of the complete version of the plans. On his own evidence, he has had a copy of the complete version of such plans since 1991. Further, as the objective documentary material exhibited to the first Dixon summary judgment affidavit and the 3 November Edward affidavit establish, in fact:

- (a) a copy of the complete version of such plans was provided to the plaintiffs solicitors in the prior Tylden Road proceeding in May 1989;
- (b) when Mr Edward undertook inspection of the plaintiffs' discovered documents in March 1999 in respect of the prior Woodleigh Heights proceedings one of the documents in Mr Thompson's possession was a copy of the complete version of the plans for the industrial allotments.

Although Mr Thompson has responded to the affidavits to which reference is made, he has not sought to contradict those statements of fact.

³³ Anshun at 602 per Gibbs CJ, Mason and Aickin JJ
³⁴ See Gibbs v Kinna [1999] 2 VR 19; [1988] VSCA 52