

The First Defendants Summary Judgement Affidavit sets out a tabular comparison between paragraphs in the 1988 pleadings and paragraphs in the current pleadings insofar as they are relevant to the Tylden Rd land. At paragraph 47, the same type of comparison is undertaken between paragraphs in the 1995 pleadings and paragraphs in the current pleadings insofar as they affect the Woodleigh Heights land. The affidavit asserts that certain allegations are common to both the present and past proceedings.

Firstly, it is significant that a number of paragraphs in the current pleadings are omitted from this analysis.<sup>18</sup> Those omitted paragraphs are in effect, the “nub” of the Plaintiffs’ present claim. The allegations contained in the omitted paragraphs have never been made in any prior proceedings, because, as Mr Thompson deposes in his First Affidavit, the facts underpinning the allegations had been concealed from the Plaintiffs by the Defendants and were not discovered by the Plaintiffs until August 2000.

To the extent that allegations are repeated, they address the following issue of

exemplary damages and establishing an ongoing (as opposed to aberrant) course of conduct, which had the effect, inter alia of concealing the true facts from the Plaintiffs.

Nothing turns on the fact that those paragraphs have been pleaded in a similar way in prior proceedings.

Further, item (iii) of the table at paragraph 22 and item (vii) at paragraph 47<sup>19</sup> are simply inaccurate. The Plaintiffs submit that the comparison undertaken in relation to those items is flawed:

In the current proceedings the assertions are that:

- (i) The council *unlawfully* sealed the Tylden Rd plans of subdivision without services leaving any prospective purchaser without services on the subdivision and without recourse to any legal means of compelling the developer or any other person to provide those services;
- (ii) The Registrar of Titles registered the cluster subdivision *only because* of the false representations inherent in the council’s unlawful sealing of the plans.

By contrast, the paragraphs in the prior proceedings are bland statements of fact asserting merely that the Tylden Rd plans of subdivision were sealed (in the case of the 1988 proceedings) and the plans of Cluster subdivision were registered. (in the case of the 1995 proceedings). There are no allegations of misfeasance, or for that matter wrongful conduct of any description in relation to the actual sealing of the plans or their registration.

The items discussed above are a good illustration of the Plaintiffs’ ignorance of the true facts when they instituted those proceedings.

### 3. LIMITATION ISSUE

The Defendants contend that the proceedings are Statute barred by the operation of *S 5(1)(a)* of the *Limitation of Actions Act 1958*. (“*the Act*”) The Plaintiffs rely on *S 27* of the Act, the relevant portion of which provides relevantly as follows:

<sup>18</sup> The omitted paragraphs are set out in paragraph 42(a) and (b) of the First Thompson Affidavit.

<sup>19</sup> The inaccurate paragraphs are truncated versions of that set out in the pleadings.