

conceal from the Plaintiffs facts and circumstances, which are now known to amount to acts of misfeasance.

Mr Thompson canvasses the Defendants' conduct in this regard at some length in his first Affidavit.

**c) Ms Dixon's Further Affidavit sworn 28 October 2005:**

Material in this Affidavit seeks to rebut the assertions of concealment referred to by Mr Thompson in his first Affidavit. It also seeks to allege that Mr Thompson was on notice of his true cause of action as a result of documents allegedly discovered in the 1988 proceedings.

Far from challenging Mr Thompson's assertions, Ms Dixon's further Affidavit merely highlights the nature and extent of the First Defendant's continuing course of conduct which concealed the true facts from the Plaintiffs.

In relation to paragraph 9 of Ms Dixon's Further Affidavit wherein she deposes that a complete set of plans was discovered by the First Defendant, the following submissions are made:

- a) As Mr Thompson deposes, item 4 on the relevant Affidavit of discovery is not a complete set of plans but merely a copy of correspondence referring to certain correspondence.
- b) In any event the documents purported to have been discovered as referred to in MED-12 of Ms Dixon's further Affidavit in the 1988 proceedings, are complete copies of industrial plans only. The 1988 proceedings related solely to the Tylden Road *residential* land and the industrial plans shown in Exhibit MED-12 would have been entirely irrelevant to those proceedings.
- c) It is noteworthy that in her further Affidavit Ms Dixon only goes so far in paragraph 5 as asserting "a belief" that a complete set of residential plans were discovered by Council. Nowhere in her Affidavit does Ms Dixon depose to the fact that such plans *were in fact* discovered. The Plaintiffs also note that the plans Ms Dixon "believes" were discovered are not exhibited to her Further Affidavit or indeed in any Affidavit filed on behalf of the First Defendant.

### **3.4 Anshun**

The Defendants seek to rely on *Port of Melbourne Authority v Anshun Pty Ltd (1981) 147 CLR589*. The principle espoused in that case precludes the raising in later litigation, matters that should have been put in issue in earlier proceedings between the same parties.<sup>30</sup>

Firstly, the Plaintiffs submit that should the Court extend the limitation period as a result of the concealment discussed in 3.1 - 3.3 above the *Anshun* issue does not need to be decided.

In order to invoke the principle the Defendant must satisfy the following prerequisite:

*"in a later proceeding some claim must be made, or some state of fact or law must be alleged or denied, that could have been adjudicated upon in an earlier proceeding at the instance of the party against whom the invocation is sought or his privies." Moreland Finance Corporation v Levine (1990) VR205 per Tadgell J at 209.*

<sup>30</sup> (1981) 147 CLR 589 at 597-598