

27. Where, in the case of any action for which a period of limitation is prescribed by this Act-

- (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake-

the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:

With regard to fraudulent concealment, it must be shown that facts relevant to the right of action were concealed, and that the concealment was fraudulent. Fraud here is being used in the sense of showing some form of moral turpitude even if short of dishonesty or common law fraud – see for example *Hamilton v Kaljo* (1989) 17 NSWLR 381, *Seymour v Seymour* (1996) 40 NSWLR 358, 372. Merely to establish ignorance of the right of action is insufficient. However there is no need to show that active measures were taken to prevent detection, if the way in which the defendant has acted is itself sufficient concealment (*Bulli Coal Mining Co v Osborne* [1899] AC 351 (PC) and *Beaman v ARTS Ltd* [1949] 1 KB 550 [[1949] 1 All ER 465] (CA)).

In these cases, the limitation period does not begin to run until the fraud is discovered, or could with reasonable diligence have been discovered. Reasonable diligence means what an ordinary prudent person would do having regard to all the circumstances (see *Peco Arts Inc. v Hazlitt Gallery Ltd* (1983) 1 W.L.R. 1315). It seems that discovery by the plaintiff's agent or failure by the agent to exercise reasonable diligence will not be imputed to the plaintiff.

The "fraud" upon which the plaintiffs rely to invoke S.27 is the Defendants' conduct in concealing from them the true nature of their cause of action. The plaintiffs did not discover the "fraud" until August 2000 and could not, with reasonable diligence have discovered it before that date.²⁰ Time therefore commences to run from the time of discovery of the "fraud" and accordingly, the Plaintiffs are not Statute Barred.

3.1 Concealment caused by conduct pleaded in the Statement of Claim

It is apparent on the face of the pleadings that in many instances, the very nature of the tortious conduct alleged against the Defendants has had the effect of concealing from the Plaintiffs their true cause of action. In *Hawkins v Clayton* (1988) 164CLR 539, Deane J dealt with a limitation defence as follows:

*"the reference in s 14(1) of the Limitation Act [NSW] to the cause of action first accruing should be construed as excluding any period in which the wrongful act itself effectively precluded the institution of proceeding"*²¹

²⁰ The Plaintiffs ignorance of the true facts is described in paragraphs 48 – 52 inclusive of the 1st Thompson Affidavit and the circumstances of the Plaintiffs' discovery of the "fraud" are set out at paragraphs 53 and 54 of that Affidavit.

²¹ (1988) 164CLR 539 at 589 –90

Some examples of the Defendants' conduct pleaded in the Statement of Claim which has also had the effect of concealing from the Plaintiffs the true cause of action are set out below.

a) Conduct of the First Defendant

(i) Unlawful sealing of the plans of subdivision

Section 97(2)(a) of the *Transfer of Land Act 1958* provides that the Registrar of Titles will not approve a plan of sub-division unless it accords with the plan sealed by Council.

The Council has a statutory obligation under *S569B (7)* to refuse to seal plans of sub-division unless it was satisfied inter alia that the plan complies in all respects with the Local Government Act.

On the 20 February 1980 two plans earlier lodged by Buchanan one creating 18 residential lots, the other creating 6 industrial lots came before Council for consideration.

The plans considered by Council on that day were not proceeded with.²²

Subsequently by way of series of Notices to the Effect of the 30th Schedule one of which is exhibited at GAT-14, Buchanan lodged a series of plans creating both residential and industrial lots in respect of the same land as was considered by Council on 20 February. These plans did not comply with *Ss 569A(1)(a), (b) and (c)*. The plans when sealed by the Council gave rise to an illegal series of two lot subdivisions which were contrived to facilitate the sale of allotments in breach of *S9* of the *Sale of Land Act 1958*.

The conduct perpetrated by the Council in sealing (and thereby approving) these plans is starkly illustrated by a comparison of the plans exhibited at GAT-9 with the plans at GAT-14. In GAT-9 each plan purports to create a lot and a residue and dedicate a proportion of road applicable only to the lot created. Subsequent plans excise from the subdivision any lots created by the previous plan. By viewing the GAT-9 plans consecutively and comparing them with the GAT-14 plans, it can be seen that the road and the 18 residential allotments depicted in complete form in the GAT-14 plan emerge step by step from the GAT-9 plan.

(ii) False information provided to Registrar of Titles

In 1979 – 80, *S569E* empowered the council to require a subdivider to construct roads and provide a water supply. This was done by a Notice of Requirement pursuant to *S569E (1)* and *(1A)*. After service of a Notice of Requirement upon a subdivider, a council was required to endorse the plans of subdivision to the effect that the Notice had been issued. *S569E(3)(a)* mandated that the endorsement be made before the council was permitted to seal the plans.

In this case, a Notice of Requirement was served or was purported to have been served upon the subdivider (Buchanan)²³. On 21 May 1980 the council placed the mandatory endorsement on the plans and sealed them. On 19 November 1980, the Council resolved to withdraw that Notice of Requirement²⁴.

S569E (3)(e) prohibited the Registrar from approving any plan until the Council had lodged a statement with the Titles Office to the effect that the Notice had either been complied with or withdrawn.

²² see paragraph 53(f)(ii) of first Thompson affidavit

²³ See GAT 13 to 1st Thompson Affidavit

²⁴ GAT-24 page 20-21 of third Thompson affidavit

It is not in dispute between the parties that as at November 1980, no roads or waterworks had been constructed upon the subdivision by anybody, least of all Buchanan.

Notwithstanding the fact that there were no roads or water works installed on the subdivision and that no arrangements had been made for their installation pursuant to *S569E (1) (b)*, the Council, less than a week after it had withdrawn the Notice of Requirement, lodged a statement with the Registrar to the effect that Buchanan *had* complied with the Notice (ie that he had in fact constructed the said roads and water works).

The Statement lodged by the Council in purported compliance with *S569E (3) (e)* is, on the evidence available to the Court on this application alone, patently false. It follows that the Council has misrepresented to the Registrar, the existence of an essential precondition to the registration of the plans of subdivision.

Moreover, the Notice of Requirement which the Council resolved to issue on 20 February 1980 (see GAT-13) and allegedly issued on that date:

- (i) Purports to relate to one of the illegal plans referred to in paragraph 3.1(a) (i) above (see also paragraph 53 (c) (ii) (d) and (e) of the first Thompson affidavit and GAT-9 plan containing allotment G)
- (ii) Predates the illegal plans which were not filed with the Council before 4 March 1980 (see GAT-14)
- (iii) Was later represented in pleadings by the Council to refer to the 18 residential lot plan of 20 February²⁵

In Torrens Title, registration is everything. *Sections 569A* and *569B* were clearly intended to act as consumer protection provisions. The Sections empowered the Council to place obligations on subdividers for the protection of prospective purchasers of land; in short, to ensure that allotments could only be registered if services had been constructed or there was a legally enforceable requirement on the subdivider to provide such services.

In this case the very body entrusted with the enforcement of those consumer protection provisions failed to act lawfully.

Further examples of concealment as an integral part of the tortious acts pleaded against the First Defendant in the current Statement of Claim are to be found, inter alia, at T8 to T12 inclusive, T15, T16 and T20.

b) Conduct of the Second Defendant

The *Cluster Titles Act* (1974) enabled the registration of the Woodleigh Heights cluster subdivision ("CS1134") by virtue of which a body corporate namely body corporate CS1134 was created. The body corporate was charged with, inter alia, the maintenance of common property.

The planning permit (PP 2191) for the Woodleigh Heights cluster subdivision²⁶ mandated:

- (i) that the body corporate be responsible for inter alia the water supply to the subdivision (condition 6 of PP 2191);

²⁵ See Paragraph 7 of Statement of Claim at tab 3 of MED1 and admission in paragraph 7 of Re-Amended Defence at tab 6 of MED1

²⁶ Gat-5 to first Thompson affidavit