

look that's all very well but now we know there were two plans of subdivision that had a problem and that's their case. Previously they didn't assert that there was one plan of subdivision in relation to Tylden Road that was the subject of a council resolution and a different one that got put forward to the registrar of titles that got registered. The complaint, no doubt you'll be told, is different because when Justice Kaye, for instance, dealt with whether or not the condition was a valid condition on the permit or rather the withdrawal of it was, he didn't realise it was a different plan to what it had originally been the subject of the first condition.

But we say it doesn't matter because what's said to have caused the loss is the registration of the very plan about which they still complain and the new facts are really antecedent to the critical facts and those that are critical to the cause of action.

We say that the really - and the same applies in the case of the Woodleigh Heights land, there's additional pieces of information that they don't constitute the disclosure of a new cause of action that's been concealed.

I think the other point we would add in in 62 is that time runs once the concealment has ceased and I think that's fairly obvious in the authorities we've been to.

If we go to p.20 of the outline we say in para 65, if one takes Mr Thompson's summary judgment affidavit, it's clear that irrespective of what

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happened before June of '91, he did receive the critical document on that day and there could not be any intentional concealment after that so that we say that really because the document was provided in 1989, in order to avail themselves of the postponement provision in s.27B, in reality the plaintiffs have to show that they could not with reasonable diligence have discovered the cause of action from that time when they were given the discovered document all the way through to 31 May 1999. So ten years. The material doesn't provide any explanation about anything that happened prior to 1991.

Let's assume for some reason there's some argument that says, don't worry, don't start until 1991. Again, there's no basis here on the evidence put forward which would entitle the plaintiffs to establish that they'd exercised reasonable diligence in the eight year period between 14 June '91 and 31 May '99. What we say is that the cases establish that the burden of proof as to reasonable diligence lies on the plaintiff. I've got a decision I'd like to hand forward which isn't in our folder. That proposition is accepted.

Secondly, the cases show that reasonable diligence, you don't have to do everything reasonably possible but the test is doing that which ordinary circumstances and with regard to the expense and difficulty could reasonably be required. That appears actually from the same case that I was going to hand forward so I'll hand it forward for that purpose.

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