

- (a) no concealment. The evidence establishes the “critical document” was discovered in the earlier proceeding in 1989, inspected and a copy provided;
- (b) no evidence of “fraud” – how could there be when the document relied on was discovered.

81. Further:

- (a) the Plaintiffs have failed to show that they acted with reasonable diligence;
- (b) the evidence establishes there is no arguable case for postponement to 31 May 1999. The documents in question have been in the physical possession of the Plaintiffs since 1991. At best for the Plaintiffs, time ran from 14 June 1991, the date of the settlement at Court and expired on 14 June 1997.

**No concealment of the cause of action: book of pleadings**

82. The plaintiffs key contention in the current proceeding (which is said to underpin the misfeasance in public office allegations) is that the initial sealing of the plans of subdivision was unlawful or illegal and that the plans were sealed in such a way so as to avoid the operation of section 9 of the Sale of Land Act 1962 (Vic).
83. The plaintiffs contend that they only worked out that the initial sealing of the plans of subdivision was unlawful or illegal when Mr Thompson opened the “black folder” in August 2000 and reviewed the copy of the complete plans for the industrial allotments.
84. However, what is clear from a book of pleadings annotated by Mr Thompson for use in the prior Tylden Road proceeding is that Mr Thompson had formed the view prior to the settlement of the prior Tylden Road proceeding in 1991 that the initial sealing of the plans of subdivision was unlawful. The “new”

matters that the Plaintiffs are now seeking to rely upon to support their misfeasance in public office cause of action have been known to them since prior to 1991 (that is some 14 years to the issue of the current proceeding).

85. The following extracts are quotations from Mr Thompson's handwriting in the book of pleadings<sup>103</sup>:

(a) this is the critical "new" fact that the Plaintiffs contend that they were unaware of until August 2000;

"Notwithstanding that it was illegal Buchanan had sold at least two of the allotments (notices of disposition opposite). In order to avoid the provisions of section 9 of the Sale of Land Act which at that time prevented the sale of allotments on subdivisions of more than two allotments (etc) Buchanan then lodged seven separate plans which were contrived to create several subdivisions of two lots each"<sup>104</sup>

(b) "Buchanan lodged 30<sup>th</sup> Schedule notices in relation to these new contrived plans. The new Notices are dated 4/3/80 which is also the date which the notices of disposition give as the date of possession passing to the new Purchasers"<sup>105</sup>;

"The Council served a separate 'Notice of Requirement' in relation to each of the Contrived Plans which were numbered 79305E/79305K"<sup>106</sup>

(c) in Thompson (1), Mr Thompson asserts that it was only after reviewing the complete version of the plans for the industrial allotments that he became aware that a copy of a plan that he had previously seen and which was marked 7905G was in fact part of a sequence of plans<sup>107</sup>. The

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<sup>103</sup> See tab 43 of the exhibit folder "MED 1"

<sup>104</sup> At p 5

<sup>105</sup> At p 6

<sup>106</sup> At p 7

<sup>107</sup> See paras 53 (d) and (e)

notation made by Mr Thompson and quoted below reveals that this is simply not the case;

- (d) further, "Not one of the plans submitted comply"<sup>108</sup> - that is with section 569A of the Local Government Act:

"Although Buchanan thought he had exploited a loophole in the law he had in fact broken the law because as it was his clear intention to subdivide the land into 18 allotments he was bound to give one 30<sup>th</sup> schedule Notice and one plan showing all allotments".

- (e) "Buchanan therefore approached the Council" in order to have the Notice of Requirement (in respect to the construction of a road on the subdivision) issued under section 569E of the Local Government Act lifted<sup>109</sup> so as to enable Buchanan to realise the proceeds from the sale by him of the 2 lot plans of subdivision<sup>110</sup>;

"Discovery however indicates that council's evidence at Bendigo was false"<sup>111</sup>

- (f) in Thompson (1), it is said that Mr Thompson only became aware of this "false evidence" after he read the complete version of the plans in the black folder<sup>112</sup>. His notations record:

"Discovery reveals that the 'relevant' 30<sup>th</sup> schedule Notices were dated 4<sup>th</sup> March 1980"<sup>113</sup>

- (g) this is a further matter of which Mr Thompson asserts that he first became aware in August 2000;

"The note on the bottom of the previous doc is incorrect as the plans were in fact 7 in number. The error however is explained

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<sup>108</sup> At p 8

<sup>109</sup> At p 10

<sup>110</sup> At p 9

<sup>111</sup> At p C 3

<sup>112</sup> See para 53 (f)

<sup>113</sup> At p C 4

and continued in document discovered in defendants supplementary affidavit doc No 2"<sup>114</sup>

- (h) This reference can only be a reference to the complete version of the plans for the industrial allotments discovered in the prior Tylden Road proceeding. Mr Thompson refers on the same page of the book of pleadings to the sequence of plans numbered "79305 G, H, I, J & K". Evidence that Mr Thompson was aware prior to 1991 that plan numbered 7905G is part of a sequence of plans, a matter he now asserts that he was unaware of until August 2000<sup>115</sup>;
- (i) Mr Thompson sets out the minutes of Council dated 21 May 1980. The sequence of plans 79305E to 79305K is clearly referred in the minutes, as is the fact that plans have been submitted in 7 parts<sup>116</sup>;
- (j) critically Mr Thompson records:

**"Mr Buchanan had illegally sold 2 of the lots and had been able to do so as the Council was prepared to accept plans of subdivision contrived in such a manner as to appear to be 'two lot subdivisions'"<sup>117</sup>**

- (k) further, Mr Thompson notes:

**"Subsequently upon accepting my guarantee Council gave effect to its original intent by lying to the Registrar of Titles"<sup>118</sup>**

86. The handwritten annotation in the first Plaintiffs' own handwriting in the Plaintiffs' book of pleadings puts to rest the proposition that there was

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<sup>114</sup> At p C 5

<sup>115</sup> That Mr Thompson knew that plan 7905G was part of a sequence of plans is also clearly illustrated from the extract from the minutes of Council set out on page 12 of the book of pleadings

<sup>116</sup> At p C 9

<sup>117</sup> At p C 12, emphasis added

<sup>118</sup> At p C 13, emphasis added

concealment of the Plaintiffs' cause of action. The handwritten entries reveal that Mr Thompson was aware from at least 1991 of the "new" matters of which he now contends he first became aware in August 2000 as a result of reading the "black folder" documents. It was open to the Plaintiffs to make the claims they now seek to advance in 1991. The claims are manifestly statute barred.

### **No Woodleigh Heights concealment**

87. Mr Thompson credits the documents in the black folder for making him aware in August 2000 of the facts and circumstances set out in the further "omitted paragraphs" relating to Woodleigh Heights. Whilst that is his contention, there is no evidence that any particular or identified document in the "black folder" led Mr Thompson to reach the conclusion he did in respect of the Woodleigh Heights land. Instead, the argument for the Plaintiffs is that Mr Thompson's review of the contents of the black folder after a 9 year delay prompted him to reflect further on the evidence presented in the prior Woodleigh Heights proceeding. There is no element of concealment on the part of the Council involved in these propositions.
88. That this is the "fraudulent concealment" case sought to be advanced relating to Woodleigh Heights appears from the following:

**"Upon reaching the foregoing conclusions in relation to the Tylden Road land I began to consider the possibility that the Council may have acted unlawfully in relation to the Woodleigh Heights land. I reconsidered the failed 1995 proceedings and the reticulation plan which had been shown to me in the Practice Court. I then realised that the Council had in fact sealed the plans of Cluster Subdivision in contravention of its statutory duty to refuse to so seal them and in full knowledge that the subdivision had not been completed according to law and the reticulated water supply was not present in 1979 as required by law but was instead laid in 1982 as pointed out to me in the Practice Court. I was now able to reconcile the representations made to me in the Practice Court in 1999 with my prior state of knowledge. It was now apparent that the Conduct of the Council and Water Board in relation to the Woodleigh Heights Subdivision was essentially similar to their conduct in relation to the Tylden Road land.. Subsequently the Council and Water Board engaged in an ongoing course of conduct the effect of which was to conceal from me the true facts as now known. In the case of the**