IN THE SUPREME COURT OF NEW ZEALAND

SC 15/2006
[2007] NZSC 27

BETWEEN	TRUSTEES EXECUTORS LIMITED Appellant
AND	PETER JAMES MURRAY & ORS First Respondents
AND	MOREL & CO LIMITED Second Respondent
AND	JENNIFER ANN MOREL Third Respondent

SC 17/2006

AND BETWEEN	PETER JAMES MURRAY & ORS Appellants
AND	MOREL & CO LIMITED First Respondent
AND	JENNIFER ANN MOREL Second Respondent

Hearing: 21-22 November 2006

Court: Blanchard, Tipping, McGrath, Gault and Henry JJ

Counsel: L Taylor and J A Maslin for Trustees Executors Limited
B O'Callahan and D C E Smith for Peter James Murray & Ors
P R Jagose and J F Keane for Morel & Co Limited and Jennifer Ann Morel

Judgment: 1 May 2007

JUDGMENT OF THE COURT

A. **Trustees Executors' appeal (SC 15/2006) is allowed and causes of action 7, 8 and 9 are struck out.**

B. **The appeal by Peter James Murray & Ors (SC 17/2006) is dismissed.**

C. **The first respondents in SC 15/2006 are to pay to Trustees Executors costs of $15,000 together with disbursements, to be fixed if necessary by the Registrar.**

D. **The appellants in SC 17/2006 are to pay to the respondents in that appeal costs of $10,000 plus disbursements, to be fixed if necessary by the Registrar.**

E. **The costs orders made below are vacated. We order that, unless they can be agreed, costs below are to be fixed by the courts below in the light of the outcome in this case.**

REASONS

BLANCHARD J

[1] I agree with the orders proposed in Tipping J's reasons for judgment. On the issues of (a) the validity of the allotments under s 37(2) of the Securities Act 1978 and (b) whether s 28 of the Limitation Act 1950 postponed the commencement of the limitation period otherwise applicable to the plaintiffs' claims, I have nothing to add and entirely concur with Tipping J's reasons.

[2] On the issue of "reasonable discoverability", I have benefited from Tipping J's valuable description of the development of the New Zealand case law to its present state. I agree with him that recognition of a general doctrine of reasonable discoverability is properly a matter for Parliament.

[3] The difficult question is whether the decisions in *S v G*[1] and *GD Searle v Gunn*[2] cannot stand because they are inconsistent with this Court's rejection of any judge-made general doctrine of reasonable discoverability or whether they arise from special situations which justify a different approach. Tipping J has concluded that they should not be overruled. I agree with that conclusion but I am not comfortable with the attempt to distinguish or "ring-fence" those cases solely on logical grounds.

[4] Instead, I believe, it must be acknowledged that the New Zealand courts were confronted by the decision of the House of Lords in *Cartledge v E Jopling & Sons Ltd*[3] without the benefit in this country of the parliamentary reforms of limitation statutes which have responded to that unhappy decision in other jurisdictions. They understandably found the result in *Cartledge* so repugnant to justice that they could not countenance it. They felt able to interpret the Limitation Act in a manner which prevented time running against plaintiffs who had suffered personal injury but had no way of realising that they had been injured (*Searle*) and against victims of sexual abuse who reasonably had not appreciated that the abuse had been causative of their mental injury (*S v G*[4]). In cases of those kinds, these decisions of the Court of Appeal have been understood for over a decade to state the law of New Zealand. Undoubtedly, they have been relied upon. It is not without moment that Parliament has reformulated the accident compensation scheme in the Injury Prevention, Rehabilitation, and Compensation Act 2001, and relevantly amended it in 2005, so that it now provides cover for persons in the position of the plaintiffs in *S v G* (in s 21A[5]) and in *Searle* (in s 20(2), read with s 32), thereby limiting the practical application of those cases for the future. But there has been no legislative overruling of the Court of Appeal's interpretation of the Limitation Act.

[5] In these circumstances, and where successive Law Commission proposals for reform of an outdated Act have for many years appeared to languish in the bottom drawer of a departmental desk, I would not, for the now limited number of plaintiffs

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1 [1995] 3 NZLR 681 (CA).
2 [1996] 2 NZLR 129 (CA).
3 [1963] AC 758.
4 Affirmed by the Court of Appeal in *W v Attorney-General* [1999] 2 NZLR 709.
5 See *S v Attorney-General* [2003] 3 NZLR 450 at paras [21] – [29] (CA) for discussion of the position under earlier accident compensation legislation.

who may be relying upon *S v G* or *Searle*, have this Court produce an injustice by overturning those decisions.

[6] But, on the other hand, I would not extend the reasoning in those cases to other fields, especially not in a proceeding concerning a liability created by a statute, particularly under a provision enacted some years ago – in this case, s 56 of the Securities Act dating from 1982[6] − when Parliament may be assumed to have anticipated that any limitation questions would be determined in accordance with the then prevailing view of the operation of the Limitation Act.

[7] It is notorious that the New Zealand law concerning limitations is long overdue for reconsideration. It is to be hoped that Parliament will soon have the opportunity of giving it some attention.

TIPPING J

Table of Contents	**Para No**

Introduction

[8] These two appeals involve an allotment of securities said to have been invalid and of no effect. That contention rests on the proposition that the amount stated in

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6 Section 27 of the Securities Amendment Act 1982.

the registered prospectus as the minimum amount which needed to be raised had not been paid to and received by the issuer within four months after the date of the registered prospectus, as required by s 37(2) of the Securities Act 1978. Whether that is so depends on whether a cheque supplied to the issuer by the relevant subscribers qualified as a deemed payment and receipt in terms of s 37(2)(a) of the Act.

[9] The question arises because although the cheque was received within the four-month period, payment was made not by means of the cheque, but by a set-off arrangement which took place a few days outside that period. The High Court held that the cheque qualified and the allotment was therefore valid.[7] The Court of Appeal took the view that the allotment was invalid because the cheque was a "red herring"; it was intended never to be presented.[8] I have come to the conclusion that the cheque did qualify and that the allotment was therefore valid, as the High Court found.

[10] The circumstances which give rise to this issue, and two others, require only brief description to put the legal matters in their factual context. In 1994 the owners of a forest near Warkworth approached Morel & Co Ltd (Morels) wishing to raise money on their forest. A proposal was developed whereby the right to harvest the trees would be sold to members of the public who would buy shares in a forestry partnership. Morels agreed to prepare and register a prospectus and organise an invitation to the public to subscribe for shares in the partnership. Once established, the partnership would lease the forest from the owners and the lease would entitle the partnership to harvest the trees between 2001 and 2006. The partnership was to pay the owners $2.4 m for the lease, with $1.3 m (the minimum subscription amount) coming from investors, and the balance being funded by a bank loan. The units in the partnership were participatory securities within the meaning of the Securities Act, the provisions of which therefore had to be observed.

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7 *Murray v Morel & Co Ltd* (High Court, Auckland, CIV 2003-404-4897, 8 April 2004, Master Lang).

8 *Murray v Morel & Co Ltd* [2006] 2 NZLR 366 at para [32].

[11] The necessary prospectus was registered on 18 August 1994. It provided for a total of 25 units or shares in the partnership, each costing $52,000. Subscriptions closed on 31 October 1994. The statutory supervisor was Trustees Executors Ltd. The minimum subscription of $1.3 m had not been raised by 31 October and the closing date was extended to 30 November 1994. By that date only 7 of the 25 units had been subscribed for. The forest owners, Mr Hadlow and Ms Zuill, decided that they would purchase the remaining 18 units for the required price of $936,000. It was said in argument that they had no funds available to make payment before settlement of the sale and did not wish to arrange and pay interest on bridging finance in the meantime. They therefore proposed that their subscription monies be set off against the amount the partnership would be paying them for the lease. On that basis the sale price of the lease would effectively be reduced by $936,000 and the vendors would receive, on settlement, $1.464 m instead of $2.4 m. The same result could of course have been achieved by a simple exchange of cheques; on settlement the partnership could have handed the vendors a cheque for $2.4 m, with the vendors concurrently handing the partnership their cheque for $936,000 for their subscription monies.

[12] There were discussions between the vendors, Ms Jennifer Morel of Morels and Trustees Executors about the mechanics of what was being proposed. Ms Zsuzsanna Bognar, the Wellington Manager of Trustees Executors, made a file note of a conversation she had with Ms Morel on 1 December 1994. The material part reads:

> She [Ms Morel] advised that they will be short and the original vendor will take up the shortfall. We have agreed that he will provide us with an application and a cheque. This cheque will not be banked until settlement and in fact we proposed to a net settle in order to avoid any credit risk.
>
> He is to fax us his application form today and we will receive the original tomorrow.
>
> I have talked to Gordon Wong about this process and he has confirmed that this meets the legal requirements.

The Gordon Wong referred to was a solicitor in the firm from which Ms Bognar sought legal advice about what was proposed.

[13] Pursuant to these arrangements, the vendors sent a cheque to Trustees Executors for $936,000. In his covering letter dated 30 November 1994, Mr Hadlow wrote:

> As discussed, please hold this cheque and offset the same value against the amount payable to us on settlement of the purchase of the forest.
>
> Once settlement has taken place for the offset amount we request you destroy the cheque.
>
> Trusting this is in order.

[14] The partnership was duly formed, with the necessary allotments taking place in terms of the several applications. Settlement took place between the vendors and the partnership by set-off and the vendors' cheque was returned to their solicitors by Trustees Executors. The venture was not a commercial success and those members of the public who purchased units suffered losses. They sued Trustees Executors, Morels and Ms Jennifer Morel, its director, in an endeavour to recover their losses.

The course of the proceedings below

[15] The case reaches this Court in the following circumstances. The investors' claim was based on ten separate causes of action, the precise terms of some of which will need to be examined later. The High Court struck out all the causes of action; first on the basis that the allotments were valid, and second on the basis that the causes of action were barred by the relevant provisions of the Limitation Act 1950, the proceedings not having been commenced until 2003.

[16] The Court of Appeal reinstated all the causes of action, save for the first and tenth, which remained struck out. The appeal brought by Trustees Executors to this Court seeks the reinstatement of the High Court's order. There is a separate appeal by the investors, seeking to resurrect the two causes of action which remain struck out in terms of the Court of Appeal's order. I do not propose to say any more about the individual causes of action and how the points raised on appeal affect them at this stage. It is simpler to address the three legal points upon which leave to appeal was granted, independently of the causes of action, as can satisfactorily be done, and then apply the effect of the determination of those points to the causes of action.

The validity of the allotments

[17] At the relevant time s 37(2) of the Securities Act provided:

> **37 Void irregular allotments**
>
> (1) …
>
> (2) No allotment shall be made of an equity security or a participatory security offered to the public for subscription if the allotment is the first allotment of such security to the public unless the amount stated in the registered prospectus relating thereto as the minimum amount which, in the opinion of the directors of the issuer, must be raised by the issue of the securities in order to provide for the matters specified in regulations made under this Act, is subscribed, and that amount is paid to, and received by, the issuer within 4 months after the date of the registered prospectus; and, for the purposes of this subsection—
>
> > (a) A sum shall be deemed to have been paid to, and received by, the issuer if a cheque for that sum is received in good faith by the issuer and the directors of the issuer have no reason to suspect that the cheque will not be paid:
> >
> > (b) The amount so stated in the registered prospectus shall be reckoned exclusively of any amount payable otherwise than in cash.

[18] The prospectus was dated the same day as its registration, that is, 18 August 1994. Hence the four months referred to in s 37(2) expired on 18 December 1994. The vendors' cheque for their subscription money was received by Trustees Executors on behalf of the issuer,[9] Morels, on 2 December 1994. For the cheque to be a deemed payment of the sum required and a deemed receipt of that sum by the issuer, it had to be received in good faith (which is not otherwise in issue) and the directors of the issuer had to have no reason to suspect that the cheque would not be paid.

[19] The Court of Appeal, differing in this respect from the High Court, was of the view that the arrangements made between the parties meant that the cheque would never be paid; it had been delivered subject to a condition that it never be presented. I do not consider this is an appropriate construction of the arrangements into which the parties entered. The payment required of the vendors for their subscription money was certainly intended to be made by set-off against the purchase price of the

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[9] See the then current definition of issuer in s 2 of the Act.

lease; but the cheque served a real commercial purpose. It was a form of security against there being some change of mind or other impediment as regards the proposed set-off. The cheque was and remained an unconditional mandate to the vendors' bank to pay to Trustees Executors the amount for which it was drawn. If, in circumstances where the transaction was proceeding, set-off had not occurred, there could have been no legitimate objection to the cheque being presented for payment. I do not consider the Court of Appeal was correct in construing the parties' arrangement as amounting to delivery of the cheque subject to a condition that it should never be presented. That would have made the cheque a sham which, in context, it was not. The cheque was more than colourable compliance with the statutory regime. The Court of Appeal was therefore in error in putting the cheque aside as a red herring.

[20] The issue whether the cheque qualified in terms of s 37(2)(a) turns on the interpretation and application of the words "the directors of the issuer have no reason to suspect that the cheque will not be paid" in their statutory context. The purpose of s 37(2) is to ensure that all subscription monies are in hand within four months of the date of the prospectus. Unless that is so, allotment cannot proceed and subscription monies already received must be refunded. The section is designed to protect investors against under-capitalisation in terms of such minimum figure as is stipulated in the prospectus: see Francis Dawson's article, "Securities Regulation",[10] citing Edwards J in *Re The Shortland Flat Goldmining Co Ltd*:[11]

> [T]he whole aim of section 95 [the equivalent of s 37(2)] is to provide that applicants shall not be saddled with shares in a company unless such number of shares has been subscribed as will enable the company to prosecute the undertaking for which it is incorporated. If a minimum number of shares is fixed as provided by section 95, then the applicants, before applying for shares, can exercise their own judgment as to whether or not a sufficient capital is thereby ensured, and can act accordingly.

Here there was absolutely no risk of such under-capitalisation. The vendors' subscription money was undoubtedly going to be paid, either by set-off or by the cheque.

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10 [2002] NZ Law Rev 277, p 288.

11 (1910) 29 NZLR 931 at p 955 (CA). See also *Deloitte Touche Tomatsu Trustee Co Ltd v Christchurch Pavilion Partnership No 1* (2000) 8 NZCLC 262,361 (CA), upheld on appeal to the Privy Council: [2002] 3 NZLR 289.

[21] Section 37(2)(a) must be applied in a commercially realistic way to the present facts. The cheque was provided as security or back-up for another seemingly assured method of payment. It would be entirely artificial to hold that the agreement for set-off constituted a ground for suspicion that the cheque would not be paid. The existence of an arrangement for an alternative means of payment does not make the cheque any less a deemed payment and receipt under s 37(2)(a). There was no assertion that any other reason existed for suspicion that the cheque would not have been paid had it become necessary to rely on it.

[22] The investors' real complaint seems to be that they did not anticipate there would be such a proportionately small "independent" participation in the partnership: that the majority subscription would be from the vendors. But, if that were otherwise permissible (an issue which does not arise on the questions we are considering), there was no reason why it could not be effected by the means employed. The investors' argument on s 37(2)(a) is a very technical one, seeking to take advantage of a delay in the effecting of the set-off, not foreseen when the arrangement concerning the cheque was made. The issuer would have been entitled, had it wished, to proceed by way of cheque swap rather than set-off. There is nothing in the evidence to suggest that when the vendors' cheque was received the issuer had any reason to suspect that, in the case of a cheque swap, the vendors' cheque would not be met.

[23] The circumstance that, in the event, settlement took place, unexpectedly and through no fault of the vendors, just outside the period of four months is of no moment to the present issue. If s 37(2)(a) is satisfied, the deemed payment and receipt thereby effected takes place at the time the cheque is received by or on behalf of the issuer. In this case that was on 2 December 1994 within the requisite four-month period. The issue addressed by the Privy Council in the *Deloitte* case[12] concerning the meaning of the word "subscribed" does not therefore arise. Subscription took place within the four months allowed, by dint of deemed payment in terms of s 37(2)(a). It is the deemed payment by means of the cheque which is important, not the actual payment by means of the set-off. The fact that this actual

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12 At p 299.

payment occurred three days after the expiry of the four months does not somehow disqualify the cheque as a deemed payment if it otherwise qualifies as such.

[24] There was not and could not be any suggestion that the cheque arrangement was entered into as a device to secure for the subscribers some inappropriate advantage, whether in terms of time or otherwise. Nor was the purpose of s 37(2) being frustrated in any way. For all these reasons I consider the cheque qualified in terms of s 37(2)(a) and the allotments were not invalid for breach of s 37(2).

[25] On this analysis none of the other allied issues discussed by the Court of Appeal, some of which were touched on in argument in this Court, require examination. The fate of this litigation must therefore be determined on the basis that there was no breach of s 37(2).

The role of s 28 of the Limitation Act 1950

[26] The next issue concerns s 28 of the Limitation Act 1950. The practical compass of this issue is substantially reduced by my conclusion that the allotments were valid. That conclusion removes from contention a substantial number of the causes of action involved in the proceedings. To the extent that the causes of action which survive the allotment conclusion are otherwise statute-barred, the plaintiffs seek to rely on s 28 so as to overcome that bar. The question is whether they are entitled to do so. The procedural history of the point is of some relevance. The plaintiffs have not pleaded s 28 by way of reply to the limitation defences raised against them. Reliance on the section first occurred during submissions on the strike-out application in the High Court. That is an unpromising start. In this Court, as below, we received submissions describing the factual basis on which the plaintiffs seek to rely on s 28. I think it appropriate to deal with whether the plaintiffs can invoke that section on this somewhat informal basis in order to put the issue to rest.

[27] Section 28 postpones the commencement of the limitation period applicable to a cause of action on the following basis:

28 Postponement of limitation period in case of fraud or mistake

Where, in the case of any action for which a period of limitation is prescribed by this Act, either—

(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:

Provided … [not applicable]

[28] No cause of action in the proceedings which the plaintiffs are bringing is based, on the present pleadings, on the fraud of the defendants. Nor would it be responsible for the plaintiffs to frame a cause of action in fraud against the defendants. The high water mark of counsel's suggestion that fraud could be argued lay in the proposition that Ms Bognar had doubts about the legal propriety of the cheque arrangement; hence she sought legal advice; the advice she received should not have dispelled her doubts; and therefore no honest person in her position should have proceeded on the basis that the cheque arrangement was legally acceptable. It seems to be suggested that Ms Bognar's doubts, and the line of reasoning arising from them, must be regarded as affecting Morels as well as Trustees Executors. Even if we had held that the allotment was invalid, I do not consider for one moment that the line of argument proposed, or indeed any of the other lines of argument advanced by counsel, gives rise to a fairly arguable cause of action in fraud, whatever the precise connotations of the concept of fraud may be for the purposes of s 28(a). As regards s 28(b), there is no tenable basis for an allegation that any defendant fraudulently concealed a right of action vested in the plaintiffs.

[29] How, then, did the Court of Appeal consider that the plaintiffs' invocation of s 28 saved a cause of action which was otherwise statute-barred from being struck out? The Court examined two cases: the decision of the English Court of Appeal in

Ronex Properties Ltd v John Laing Construction Ltd[13] and my decision in the High Court in *Matai Industries Ltd v Jensen*.[14] The Court of Appeal stated that these two cases established that:[15]

> the onus is clearly on the defendants to show that the plaintiff's claim, or at least some part of it, is statute-barred.

This formulation came from *Matai*.[16] The Court of Appeal also noted that evidence can be tendered either way by affidavit.

[30] Their Honours recorded that Mr O'Callahan, for the plaintiff investors, had pointed out that there was no evidence at all from Morels and that Ms Bognar's affidavit was limited to exhibiting "documents to support the chronology". The Court was of the view that Ms Bognar's affidavit provided no evidence about the subjective state of mind of any of the defendants.[17] This proposition, at least with regard to Ms Bognar's file note, is one of some difficulty.

[31] After suggesting that the evidentiary position was different from that in *Matai*, and making other allied observations, their Honours continued:[18]

> In the present case, Morels and Ms Morel have not demonstrated that they did not know they were bound not to make the allotment … and that they were obliged to repay the subscriptions they had received.

On that basis their Honours considered that the four causes of action based on breach of trust should be allowed to continue.

[32] Their Honours did not cite all the relevant passages from *Matai*. For example, in a passage immediately following that cited, I said:[19]

> If the plaintiff in opposition to the defendant's proposition can show that it has a fair argument that the claim is not statute-barred or that the limitation period does not apply, or is extended for any reason, then of course the matter must go to trial.

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13 [1983] QB 398.
14 [1989] 1 NZLR 525.
15 At para [60].
16 At p 532.
17 At paras [61] – [62].
18 At para [63].
19 At p 532.

Read as a whole my judgment in *Matai* can be seen as holding that the onus is on the defendant to show that a claim, or at least part of it, is statute-barred, unless the plaintiff is able to rely on some extension of the ordinary limitation period or some postponement of the commencement of that period. The question which arises in this case concerns what the plaintiff must do to resist the striking out of a claim which, subject to matters of postponement and extension, is clearly statute-barred.

[33] I consider the proper approach, based essentially on *Matai*, is that in order to succeed in striking out a cause of action as statute-barred, the defendant must satisfy the court that the plaintiff's cause of action is so clearly statute-barred that the plaintiff's claim can properly be regarded as frivolous, vexatious or an abuse of process. If the defendant demonstrates that the plaintiff's proceeding was commenced after the period allowed for the particular cause of action by the Limitation Act, the defendant will be entitled to an order striking out that cause of action unless the plaintiff shows that there is an arguable case for an extension or postponement which would bring the claim back within time.

[34] In the end the judge must assess whether, in such a case, the plaintiff has presented enough by way of pleadings and particulars (and evidence, if the plaintiff elects to produce evidence), to persuade the court that what might have looked like a claim which was clearly subject to a statute bar is not, after all, to be viewed in that way, because of a fairly arguable claim for extension or postponement. If the plaintiff demonstrates that to be so, the court cannot say that the plaintiff's claim is frivolous, vexatious or an abuse of process. The plaintiff must, however, produce something by way of pleadings, particulars and, if so advised, evidence, in order to give an air of reality to the contention that the plaintiff is entitled to an extension or postponement which will bring the claim back within time. A plaintiff cannot, as in this case, simply make an unsupported assertion in submissions that s 28 applies. A pleading of fraud should, of course, be made only if it is responsible to do so.

[35] The plaintiffs here have been given the indulgence of our considering informal particulars supplied by their counsel of what they would wish to assert in support of their reliance on s 28. Those particulars, even if the facts they assert are capable of being established, as must generally be assumed, fall well short of

amounting to an arguable case under s 28, sufficient to justify the contention that causes of action which would otherwise be statute-barred should not be struck out. The strike-out application must be determined on that basis.

Reasonable discoverability

[36] The plaintiffs contend that such of their causes of action as might otherwise be statute-barred are saved by the proposition that, properly construed, the references in the Limitation Act to accrual of a cause of action are references not to the time of the occurrence of the events constituting the cause of action, or the last of them, but rather to the time when the plaintiff acquires or ought reasonably to have acquired knowledge that those events have occurred. Hence, in Mr O'Callahan's submission, a cause of action accrues under the Limitation Act only when the plaintiff knows of the existence of all the material facts constituting the cause of action, or could, with reasonable diligence, have discovered their existence.

[37] The plaintiffs were unable to persuade the Court of Appeal to adopt their argument. The Court summarised its decision in the present case when it adopted the same approach in its more recent decision in *Securities Commission v Midavia Rail Investments BVBA*:[20]

> In that decision [*Murray v Morel*], this court confirmed earlier decisions that there is no general doctrine of "reasonable discoverability". This court held that, if a "reasonable discoverability" gloss were to be placed generally by judicial fiat on the Limitation Act, it would have to be the Supreme Court which did it: at [45]. Alternatively, it was a matter for Parliament.

[38] Mr O'Callahan sought to build his argument for such a general doctrine on the proposition that the approach of the courts in New Zealand to cases involving latent damage to buildings, sexual abuse, and bodily injury should lead logically to reasonable discoverability being applied across the board in the limitation field. I am satisfied for the reasons I will give that there should be no general adoption of reasonable discoverability for limitation purposes. In the course of my discussion I

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[20] (Court of Appeal, CA252/05; CA19/06, 29 November 2006) at para [45], Chambers J for the Court.

will consider the most important of the existing authorities as well as matters of general principle.

***Hamlin*'s case**

[39] The best starting point lies with the decisions of the Court of Appeal and the Privy Council in the *Hamlin* litigation which concerned latent damage to buildings.[21] In his judgment in the Court of Appeal in that case, McKay J said:[22]

> The ordinary time limit for an action in contract or in tort is thus calculated from the date on which the cause of action accrued. The phrase "cause of action" has been defined as meaning every fact which it will be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court: *Cooke v Gill* (1873) LR 8 CP 107 at p 116 and *Read v Brown* (1888) 22 QBD 128 (CA). In contract the cause of action accrues as soon as there has been a breach of contract. In an action in tort based on a wrongful act which is actionable per se without proof of actual damage, the cause of action will accrue at the time the act was committed. Where the claim is based on negligence, however, damage is an essential part of the cause of action, and until the damage has occurred the cause of action is not complete.
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> This is described as "familiar law" in the judgment of this Court delivered by Cooke P in *Askin v Knox* at p 254. He goes on to point out that it is equally familiar that the six-year rule could operate unfairly to the owner of a building if "damage" resulting from defective construction were regarded as arising before he knew, or ought reasonably to have known of it. On the other hand, there could be unfairness to defendants if allegations of negligence could be raised many years after the work has been carried out. The judgment notes the unsatisfactory disharmony that has developed between New Zealand law and English law in dealing with these difficulties.
>
> The Limitation Act 1950 is based on the Limitation Act 1939 (UK), and the sections set out above adopt substantially the same wording. The decisions of the English Courts are accordingly relevant and of persuasive authority, and they have been referred to in the New Zealand cases. The issue has been discussed in two cases in this Court, but in neither was it determinative. In *Mount Albert Borough v Johnson*, Mahon J had adopted the reasonable discoverability test, but in this Court it was held that no question of limitation could arise: see per Cooke and Somers JJ at p 238, and per

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[21] *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA); [1996] 1 NZLR 513 (PC). The enactment of the Building Act 1991 provided a partial legislative solution to the limitation problems apt to arise in this field: see for example *Johnson v Watson* [2003] 1 NZLR 626 (CA).

[22] At pp 536 – 537. McKay J dissented on the reasonable discoverability point but his summary, as set out, is a clear and cogent statement of the position as it was generally regarded prior to *Hamlin*.

> Richardson J at p 242. The breach of the duty of care occurred in 1967, more than six years before the action was commenced in 1973. The plaintiff, however, did not acquire the property until 1970, and she based her claim on damage which occurred after that date. The issue was again discussed in *Askin v Knox*, in which Cooke P delivered the judgment of a Court of five Judges, but it was unnecessary to decide the issue of limitation as it was held that the appellants had failed to prove negligence. The matter now falls to be determined by this Court, and it is appropriate to examine both the English and the New Zealand cases in which the question has arisen.

[40] The Privy Council's analysis in *Hamlin* was such that the case was brought within conventional limitation jurisprudence.[23] Their Lordships' reasoning was that no loss occurred until the latent cracking was discovered or discoverable. Lord Lloyd of Berwick for the Board said:[24]

> Once it is appreciated that the loss in respect of which the plaintiff in the present case is suing is loss to his pocket, and not for physical damage to the house or foundations, then most, if not all the difficulties surrounding the limitation question fall away. The plaintiff's loss occurs when the market value of the house is depreciated by reason of the defective foundations, and not before. If he resells the house at full value before the defect is discovered, he has suffered no loss. Thus in the common case the occurrence of the loss and the discovery of the loss will coincide.
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> But the plaintiff cannot postpone the start of the limitation period by shutting his eyes to the obvious. In *Dennis v Charnwood Borough Council*, a case decided in the Court of Appeal before *Pirelli* reached the House of Lords, Templeman LJ said at p 420 that time would begin to run in favour of a local authority:
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> > "... if the building suffers damage or an event occurs which reveals the breach of duty by the local authority or which would cause a prudent owner-occupier to make investigations which, if properly carried out, would reveal the breach of duty by that local authority."
>
> In other words, the cause of action accrues when the cracks become so bad, or the defects so obvious, that any reasonable homeowner would call in an expert. Since the defects would then be obvious to a potential buyer, or his expert, that marks the moment when the market value of the building is depreciated, and therefore the moment when the economic loss occurs. Their Lordships do not think it is possible to define the moment more accurately. The measure of the loss will then be the cost of repairs, if it is reasonable to repair, or the depreciation in the market value if it is not: see *Ruxley Electronics and Constructions Ltd v Forsyth* [1995] 3 WLR 118.

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[23] This analysis built on passages in the judgments of Casey J and particularly Gault J in the Court of Appeal. The validity of the analysis can be put to one side for present purposes.

[24] At p 526. The Board comprised Lord Keith of Kinkel, Lord Browne-Wilkinson, Lord Mustill, Lord Lloyd of Berwick and Sir Michael Hardie Boys.

> This approach avoids almost all the practical and theoretical difficulties to which the academic commentators have drawn attention, and which led to the rejection of *Pirelli* by the Supreme Court of Canada in *Kamloops*. … Whether or not it is right to describe an undiscoverable crack as damage, it clearly cannot affect the value of the building on the market. The existence of such a crack is thus irrelevant to the cause of action. It follows that the Judge applied the right test in law.

[41] Immediately following this passage their Lordships affirmed that their advice on the limitation point was confined to the problem created by latent defects in buildings. They abstained, as had Cooke P in the court below, from considering whether the "reasonable discoverability" test should be of more general application "in the law of tort".[25]

[42] The reasoning of the Privy Council means that cases of the *Hamlin* kind do not involve any departure from the conventional approach to when a cause of action accrues. The element of knowledge or discoverability affects when the loss occurs. Only through that issue does it affect when the cause of action accrues. The focus remains upon occurrence of loss rather than on discoverability of a loss which has already occurred. Their Lordships expressly reinforced the general limitation position when they observed:[26]

> [Our] approach is consistent with the underlying principle that a cause of action accrues when, but not before, all the elements necessary to support the plaintiff's claim are in existence. For in the case of a latent defect in a building the element of loss or damage which is necessary to support a claim for economic loss in tort does not exist so long as the market value of the house is unaffected.

The case of *S v G*

[43] The next case of significance in New Zealand is *S v G*.[27] The plaintiff claimed exemplary damages for personal injury resulting from sexual abuse which had allegedly occurred between 1978 and 1980. She claimed to have become aware only in 1990 that her psychological problems resulted from this abuse. On that basis she asserted that her claim was brought within six years of accrual of the cause of

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25 At pp 526 – 527.
26 At p 526 (in the passage omitted from the citation in para [40] above).
27 [1995] 3 NZLR 681 (CA).

action, albeit leave was required because more than two years had elapsed.[28] Leave was opposed on grounds which included the proposition that the cause of action had accrued more than six years before the proceeding was commenced. It was to rebut this proposition that the plaintiff relied on reasonable discoverability. She contended that the cause of action did not accrue until she had discovered or ought reasonably to have discovered the link between the abuse and the psychological difficulties from which she had been suffering. Gault J, for the Court, said that it had long been accepted that a cause of action accrued when "all of its elements are subsisting". His Honour went on to say that the accrual was postponed:[29]

> in certain cases while the plaintiff is under a disability (s 24 of the Limitation Act), when there has been fraudulent concealment of the cause of action (s 28) or where the plaintiff reasonably has not discovered all of the elements (*Invercargill City Council v Hamlin* [1994] 3 NZLR 513).

[44] That interpretation of *Hamlin* was appropriate while the majority decision of the Court of Appeal stated the law. It was no longer appropriate following the decision of the Privy Council which had not, of course, been given at the time *S v G* was decided in the Court of Appeal. In the light of the Privy Council's reasoning, *Hamlin* cannot properly be regarded as authority for any general proposition that accrual of a cause of action is postponed while the plaintiff "reasonably has not discovered all the elements". In *S v G* the Court of Appeal said that the plaintiff's causes of action appeared on their face to have arisen at the time of the alleged conduct, that is, the abuse. But the Court, after referring to pleading issues, went on to say:[30]

> We therefore proceed to consider whether, as a matter of law, for the purpose of the Limitation Act, it can be said that where a victim of sexual abuse suffers psychological and emotional harm resulting from that abuse, the cause of action against the abuser accrues only when the victim discovers the link between the abuse and the harm. The Supreme Court of Canada held that to be the case under the Ontario Limitations Statute in *K M v H M* (1992) 96 DLR (4th) 289.

[45] After citing from *KM v HM*, the Court said:[31]

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28 See s 4(7) of the Limitation Act.
29 At p 686.
30 At p 686.
31 At p 687.

> We accept that where damage is an element of the cause of action, as in negligence, the reasonable discoverability of the link between psychological and emotional harm and past sexual abuse may be employed to determine the accrual of the cause of action. We have more difficulty with that approach to causes of action of which damage is not an element and all other elements are known, unless ss 24 or 28 of the Limitation Act can be invoked. Even in cases of negligence, where some recognised damage flows immediately from the alleged conduct, the limitation period commences to run, subject only to postponement under the Act by reason of disability (s 24) or fraudulent concealment (s 28). In the present case the alleged physical abuse such as the infecting of the respondent with anal and vaginal venereal warts and the physical assaults can hardly be regarded as wholly latent such that no cause of action should arise until later therapy linked the consequential psychological damage to the abuse.

[46] The Court then discussed the topic of separate and distinct damage arising from one and the same cause of action, following which their Honours said:[32]

> Of course the Limitation Act itself does not define when a cause of action accrues. It is not a matter of statutory construction. It is a question of when as a matter of law the cause of action accrues for the purpose of the Limitation Act. In the *Hamlin* case the majority view was that the cause of action in negligence in causing defective foundations accrued when the house owner discovered the defect or acting reasonably would have done so. That he had earlier seen cracks around the house was not sufficient since those observations did not lead to discovery of the defective foundations nor would they have led a reasonable house owner to that discovery. By analogy it can be said that the sexual abuse victim who reasonably has not linked serious psychological and emotional damage to the abuse does not have the limitation period run merely because of awareness of the symptoms of that damage. It is only when the psychological damage is or reasonably should have been identified and linked to the abuse that it can be said that the elements of the negligence cause of action are known and thus the cause of action has accrued. That approach was followed by Gallen J in *G v G D Searle and Co* [1955] 1 NZLR 341.

[47] Their Honours concluded their discussion by expressly adopting the reasonable discoverability test in relation to the causative link between the sexual abuse alleged and the psychological harm relied on. The general approach of the Court of Appeal in *S v G* was obviously influenced by the approach of the same Court in *Hamlin*. But, as earlier noted, the support afforded by *Hamlin* to the *S v G* reasoning requires reassessment in the light of the Privy Council's reasoning in *Hamlin*, which must be treated as supplanting that of the Court of Appeal.

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[32] At p 687.

[48] There is also a material point of distinction between the reasoning of the Court of Appeal in *Hamlin* and that of the same Court in *S v G*. In *Hamlin* the reasonable discoverability concept was applied by the majority to the damage element of the cause of action. The Court saw the relevant damage as being the physical damage. It had to be known or reasonably discoverable before the cause of action could accrue. In *S v G* the psychological damage was known but what was said not to be known or reasonably discoverable was the cause of that damage and specifically that its cause lay in the conduct of the defendant. *S v G* can therefore be said to stand for the proposition that a cause of action does not accrue unless and until the plaintiff realises or ought reasonably to realise that the harm from which she is suffering was caused by the defendant's conduct.

[49] Analogous reasoning has been applied to sexual abuse cases based on the intentional tort of battery where the cause of action is treated as not accruing until the plaintiff realises that her apparent consent was not true consent.[33] In cases of sexual abuse the courts have therefore placed something of a gloss on the concept of accrual of a cause of action so that there is no accrual until the plaintiff either knows or ought reasonably to discover or appreciate the true position in relation to causation and consent. The approach has not been to assimilate appreciation of causation of harm into the cause of action itself as the Privy Council felt able to do in the *Hamlin* case. As most cases of sexual abuse which cause limitation difficulties involve conduct which can also be regarded as a breach of fiduciary duty, the gloss can be justified in such cases because of the influence which the equitable connotation of a fiduciary breach properly plays in determining the limitation response. I will return to this proposition later.

***Searle*'s case**

[50] That brings me to the case of *G D Searle & Co v Gunn*.[34] The plaintiff had an intrauterine device inserted at a family planning clinic on 15 September 1981. As a result of pain which she had experienced the device was removed on 1 October

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[33] Said to be an element of the cause of action in *S v G* at p 687; but see *S v Attorney-General* [2003] 3 NZLR 450 at paras [117] – [119] (CA).

[34] [1996] 2 NZLR 129 (CA).

1981. Later in October she was admitted to hospital and was diagnosed as suffering from pelvic inflammatory disease. She claimed that as a result of this disease she had a number of ectopic pregnancies and had required extensive medical treatment over several years. She had also become infertile. The plaintiff claimed she had first become aware on 14 June 1991 that her problems were or may have been caused by her use of the IUD. She claimed to have made this link only as a result of reading an article in a magazine which had been published in March 1991. Her proceedings were commenced in 1992. They were struck out by the Master, then reinstated by Gallen J whose decision was affirmed by the Court of Appeal. That Court framed the ultimate issue as being whether the plaintiff's sole cause of action, which was in negligence for personal injury, accrued at the moment when damage resulted from the negligent act or omission, irrespective of whether the damage was discovered or discoverable, and irrespective of whether causation between the damage and the negligent act or omission was discovered or discoverable.[35] The Court thereby encompassed both the *Hamlin* circumstance of latent damage and the *S v G* situation of unappreciated causation.

[51] The Court commenced its discussion of the legal issues by recording that the purposes of a limitation statute are said to be threefold:[36]

> to give a potential defendant security against being held to account for an ancient obligation, to prevent litigation being determined on stale evidence, and to require due diligence of a plaintiff in pursuing a cause of action. In the present context it is relevant to keep in mind that to deprive a plaintiff of the right to bring an action is not one of the legislative purposes.

The last sentence is, with respect, rather difficult because the fulfilment of the first general objective will necessarily result in the plaintiff being deprived of the right to bring an action.

[52] The Court proceeded next to observe that *Hamlin* and *S v G* provided a platform for determining the issue in *Searle*. Speaking of *Hamlin*, the *Searle* Court said:[37]

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35 At p 131, Henry J for the Court.
36 At p 131.
37 At pp 131 – 132.

> In that case the majority held that the cause of action arose when the defect was discovered or could have been discovered by reasonable diligence. The decision was upheld by the Privy Council [see [1996] 1 NZLR 513] as being good law for New Zealand despite it being in conflict with that of the House of Lords in *Pirelli General Cable Works Ltd v Oscar Faber & Partners (A Firm)* [1983] 2 AC 1. In *Hamlin* Their Lordships noted that their advice in this regard was confined to the problem created by latent defects in buildings, and that they abstained from considering whether the reasonable discoverability test should be of more general application to the law of tort. Although emphasis was placed on the argument that the damage in such a case could be classed as economic and therefore not occurring until discovery of the defect, there was recognition in this Court of the injustice to which the *Pirelli* approach gives rise, and inferentially at least also of the logical desirability in applying the *Hamlin* test on a wider basis. *Pirelli* was firmly based on the earlier personal injury case of *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, which is necessarily subject to the same criticisms levelled at *Pirelli*.

[53] With respect to the *Searle* Court, I do not consider enough was made of the fact that the Privy Council's reasoning in *Hamlin* was such that no discoverability issue arose for accrual purposes. *Hamlin* is not, on the Privy Council's reasoning, an authority on discoverability in that context. The discoverability issue related to an element of the cause of action. No cause of action accrued until loss occurred and loss did not occur until it was discovered or was reasonably discoverable.

[54] The *Searle* Court next referred to *S v G* and, after citing the passage which I have set out at para [46] above, their Honours said:[38]

> This Court has therefore already taken what could be described as the *Hamlin* principle one step further and applied it to a personal injury claim of a specific kind. Although it was submitted that *S v G* is distinguishable on the basis that it could be said that the wrongful conduct itself was the reason for the link between the abuse and the psychological and emotional damage not being recognised, there can be no logical justification for confining the principle to such a situation. It is still a question of what is meant in s 4 [of the Limitation Act] by "the date on which the cause of action accrued". The phrase must be given a consistent meaning which is applicable to differing factual situations.

For the reasons already given, it is not correct to say that in *S v G* the Court took the *Hamlin* principle a step further. The *Hamlin* principle was applied in *S v G* in a materially different way. Discoverability was treated as an accrual point rather than as a necessary ingredient of the cause of action.

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[38] At p 132.

[55] The need for consistency in deciding when a cause of action accrues for the purposes of the Limitation Act is, of course, a primary plank in the argument made by Mr O'Callahan that the reasoning in *Hamlin*, *S v G* and *Searle* must lead logically to the proposition for which he contends, namely that accrual of a cause of action for all Limitation Act purposes does not depend on the occurrence of the material ingredients but on when the plaintiff knew or should have known of their occurrence. Unless *S v G* and *Searle* can properly be analysed as true exceptions or are to be regarded as anomalous or wrong, there is force in Mr O'Callahan's argument that the next logical and consistent step is to apply their reasoning across the board. *Hamlin* cannot, however, for reasons already identified, be regarded as a case which logically supports a general extension of the reasonable discoverability test. The reasoning of the Privy Council keeps *Hamlin*-type cases within the mainstream. *S v G* and *Searle* are more difficult.

[56] I return to *Searle* in order to complete my survey of its reasoning. Immediately following the passage set out above, the *Searle* Court said:[39]

> In our view the time has now come to state definitively that *Cartledge* does not represent New Zealand law. It has now been superseded in the United Kingdom by legislation, and its authority as well as that of *Pirelli* has also been cast into some doubt by *Hamlin*. As was pointed out in the course of some of the judgments in this Court in *Hamlin*, the rationale of *Cartledge*, which depended on the effect of the equivalent of s 28 of our Act, is not convincing and we see no need for statutory intervention to achieve a result which is consonant with justice and which gives effect to the overall legislative intention. The problem of latent defects in buildings did not really surface in this country until such cases as *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 and *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234. The law in that regard is now settled. The corresponding problem of what may be described as latent injury or latent disease in actions for bodily injury has only comparatively recently been called into question in this Court, and was referred to but left open in an asbestos-related cancer case, *McKenzie v Attorney-General* [1992] 2 NZLR 14. It should now be resolved in a similar way. To hold that a plaintiff who has not discovered that a bodily injury is attributable to the wrongful action of another, and who could not reasonably have discovered that fact, is barred from suit if the injury in fact occurred outside the statutory period is effectively to deny a person the right of action. We do not see that consequence as being required by the legislation. We would therefore hold that for the purposes of s 4(7) of the Limitation Act 1950, a cause of action accrues when bodily injury of the kind complained of was discovered or was reasonably discoverable as having been caused by the acts or omissions of the defendant.

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[39] At pp 132 – 133.

[57] The ratio of *Searle* lies in the last sentence of this passage. The Court endorsed a test of reasonable discoverability not only in relation to damage or loss for accrual purposes, but also in relation to the element of causation. Their Honours held that a personal injury claimant's cause of action does not accrue until the personal injury is discovered or is reasonably discoverable and the causative link between the defendant's conduct and the damage suffered by the plaintiff is or should have been discovered. *S v G* was also a case involving a lack of appreciation of the causative link and it was on that basis that the Court of Appeal considered it appropriate to apply a similar approach in *Searle*. There can be no doubt, however, that both *S v G* and *Searle*, as reasoned, represent a substantial departure from the conventional approach to accrual of a cause of action for limitation purposes.

French article and the *BP* case

[58] Before concluding this survey of how the law of reasonable discoverability stands in New Zealand, it is appropriate to mention two other discussions of the topic. The first is by Christine French in an article entitled "Time and the Blamelessly Ignorant Plaintiff: A Review of the Reasonable Discoverability Doctrine and Section 4 of the Limitation Act 1950".[40] The second is by Rodney Hansen J in his decision in *BP Oil NZ Ltd v Ports of Auckland Ltd*.[41]

[59] In discussing the policy aspects of the subject Ms French said that it must give some pause for thought that the High Court of Australia in *Hawkins v Clayton*[42] expressly declined to adopt a universal reasonable discoverability test in spite of that being the Canadian approach.[43] I am not aware of any change in the position taken by the High Court since then. Under the heading "The Need for Legislative Intervention" Ms French wrote:[44]

> There is a strong body of opinion that the solution lies in retaining the reasonable discoverability test but tempering its disadvantages by enacting an overriding long stop period. This was the view of our own Court of Appeal in *Askin v Knox* [Footnote here: [1989] 1 NZLR 249] (a building

40 (1998) 9 OLR 255.
41 [2004] 2 NZLR 208 at para [90] and following.
42 (1988) 164 CLR 539.
43 French, p 269.
44 At p 273.

> case) and the New Zealand Law Commission in its 1988 report. [Footnote here: Law Commission Report No 6 *Limitation Defences in Civil Proceedings*, October 1988. It was also the view of the House of Lords in *Pirelli*, and the Law Reform Committee 24th Report *Latent Damage* November 1984 Cmnd 9390 (UK). The Law Commission's survey of legislation in other jurisdictions shows that where a version of reasonable discoverability is enacted, it is invariably accompanied by an over-riding long stop. The Law Commission's own recommendations included a new standard three year limitation period (to replace the current six year period) dating from the time of the act or omission on which the claim is based but with an extension of the period up to a possible maximum of 15 years in the event of delayed discovery.] While favouring the introduction of a long stop provision, the Court of Appeal stressed that it was beyond their power to do so. It could only be done by legislation. The inability of the court to introduce a long stop was again reaffirmed in *S v G*. [Footnote here: [1995] 3 NZLR 681.] The arguments for a long stop provision seem compelling – even, it is submitted, in the sensitive area of abuse cases, provided of course that the period of the long stop is not too short. Section 28 would still be available as a useful mechanism to accommodate the special aspects of these abuse cases. [Footnote here: As suggested in *S v G*.]

[60] Ms French also observed:[45]

> The unfairness to defendants of not having a long stop is further heightened by the fact that it is defendants who bear the onus of proof. It is for the defendant to prove the claim is out of time, not for the plaintiff to prove it is within time. While there is English authority to the contrary, [Footnote here: *Maugham v Walker* (1790) 2 Peake 220; *Cartledge* at 784; *London Congregational Union Inc v Harriss* [1988] 1 All ER 15.] it is respectfully submitted that Tipping J was correct when he held in *Humphrey v Fairweather* [Footnote here: [1993] 3 NZLR 91. See also *Pullen v Gutteridge Haskins & Davey Pty Ltd* [1993] 1 VR 27.] that the persuasive onus does rest on the defendant. Under a reasonable discoverability regime – especially one with some subjective components – this does however create obvious problems for defendants. Significantly, in *Humphrey v Fairweather*, Tipping J was influenced in his thinking on onus by the existence of section 91 of the Building Act 1991 which he saw as ameliorating the position for defendants to a significant extent. In *non*-building cases, the continued absence of any long stop means the concerns for defendants must therefore remain.

[61] Despite these reservations and others which she identified, Ms French expressed support for a general doctrine of reasonable discoverability as a sensible development for the courts to undertake.

[62] In his judgment in the *BP* case, Rodney Hansen J carried out a comprehensive survey of the authorities, including a number of High Court decisions

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[45] At p 274.

decided since *S v G* and *Searle*.[46] While the Judge recognised that, if anything, the weight of recent High Court authority was against any general expansion of the doctrine of reasonable discoverability, he decided to apply it to the circumstances of his case on the basis that the facts were closely analogous to what he called the latent defect "exception".[47] The Judge also expressed support for the views of Ms French in favour of a general expansion of the doctrine.[48] In doing so he helpfully referred to the decision of the Supreme Court of Canada in *Peixeiro v Haberman*,[49] a case which was cited by counsel in the present case. Rodney Hansen J suggested that the Supreme Court of Canada had viewed the "rule" as nothing more than one of construction, the Supreme Court having adopted the following statement of Twaddle JA in an earlier case:[50]

> Whenever a statute requires an action to be commenced within a specified time from the happening of a specific event, the statutory language must be construed. When time runs from 'the accrual of the cause of action' or from some other event which can be construed as occurring only when the injured party has knowledge of the injury sustained, the judge–made discoverability rule applies. But, when time runs from an event which clearly occurs without regard to the injured party's knowledge, the judge–made discoverability rule may not extend the period the legislature has prescribed.

[63] The Judge suggested that this broad formulation was in line with those of the New Zealand Court of Appeal which he had been discussing.[51] I must say, however, that I consider the last sentence from the passage cited is the key to its understanding. Unless the element of knowledge or discoverability can properly be regarded as forming a part of the cause of action itself, as the Privy Council did in *Hamlin*, it is difficult to view reasonable discoverability as affording a general extension of the period of time which the legislature has prescribed from accrual. The concept of accrual for limitation purposes can hardly be "construed" as involving knowledge in some circumstances but not in others. Against that background I will briefly revisit the traditional view of when accrual occurs.

The traditional approach to accrual

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46 At paras [93] – [105].
47 See paras [95], [98] and [103].
48 At para [100].
49 [1997] 3 SCR 549.
50 At para [37], citing *Fehr v Jacob* (1993) 14 CLLT (2d) 200 at p 206 (Man CA).
51 At para [104].

[64] It is clear, as McKay J said in *Hamlin*,[52] that the long-established meaning of accrual relates to the occurrence of all material facts rather than knowledge of them. Had that not been so, the English cases of *Cartledge* and *Pirelli* would have been decided differently. New Zealand's current Limitation Act is in the same terms as the Limitation Act 1939 (UK) upon the basis of which *Cartledge* and *Pirelli* were decided. I can do no better than cite from Lord Reid's speech in *Cartledge* for the conventional view that was taken to when a cause of action accrues:[53]

> It is now too late for the courts to question or modify the rules that a cause of action accrues as soon as a wrongful act has caused personal injury beyond what can be regarded as negligible, even when that injury is unknown to and cannot be discovered by the sufferer, and that further injury arising from the same act at a later date does not give rise to a further cause of action. It appears to me to be unreasonable and unjustifiable in principle that a cause of action should be held to accrue before it is possible to discover any injury and, therefore, before it is possible to raise any action. If this were a matter governed by the common law I would hold that a cause of action ought not to be held to accrue until either the injured person has discovered the injury or it would be possible for him to discover it if he took such steps as were reasonable in the circumstances. The common law ought never to produce a wholly unreasonable result, nor ought existing authorities to be read so literally as to produce such a result in circumstances never contemplated when they were decided.
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> But the present question depends on statute, the Limitation Act, 1939, and section 26 of that Act [the precise equivalent of New Zealand's s 28] appears to me to make it impossible to reach the result which I have indicated. That section makes special provisions where fraud or mistake is involved: it provides that time shall not begin to run until the fraud has been or could with reasonable diligence have been discovered. Fraud here has been given a wide interpretation, but obviously it could not be extended to cover this case. The necessary implication from that section is that, where fraud or mistake is not involved, time begins to run whether or not the damage could be discovered. So the mischief in the present case can only be prevented by further legislation.

[65] As one might expect, the conventional view is entirely consistent with our Limitation Act and how it is constructed, expressed and arranged. Time limits are imposed from accrual. Circumstances of postponement of accrual or extension of time for suing are then engrafted. Section 3 sets the pattern when it says that Part I is to be subject to Part II. The general rules in Part I are subject to "extension" of the periods of limitation in the circumstances set out in Part II. They include disability, fraud and mistake. Section 28, already discussed for other purposes, is a good

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52 See para [39] above.
53 At pp 771 – 772.

example. The ordinary limitation period does not begin to run in a case of fraud or mistake until the plaintiff has discovered the fraud or mistake or could, with reasonable diligence, have done so. The same applies if the right of action, whatever it may be, is concealed by fraud in terms of s 28(b). Clearly a right of action must already exist for it to be concealed. Mr O'Callahan argued that the legislative history of the English equivalent of our s 28 was such that it could not, or need not, be viewed as providing exclusively for all circumstances in which the concept of reasonable discoverability should apply under our Limitation Act.

[66] I find that a difficult proposition,[54] particularly when the fact that s 28 does not stand alone is brought to account. In itself s 28 is a powerful pointer that Parliament's purpose was that there were to be extensions of time or postponement of accrual on account of reasonable discoverability only in the statutorily prescribed circumstances. I do not propose to set out in these reasons a detailed review of the various sections in Part I. There is nothing to be found throughout that Part which derogates from the proposition that in general terms discoverability has nothing to do with when a cause of action accrues. In short, I am satisfied that McKay J was entirely correct in his analysis of the existing law in *Hamlin*.

[67] It will be recalled that in *Searle* the Court of Appeal said:[55]

> As was pointed out in the course of some of the judgments in this Court in *Hamlin*, the rationale of *Cartledge*, which depended on the effect of the equivalent of s 28 of our Act, is not convincing and we see no need for statutory intervention to achieve a result which is consonant with justice and which gives effect to the overall legislative intention.

[68] It is not, however, easy to discern the passages in *Hamlin* to which the Court was referring. Nor is it easy to accept that the *Cartledge* reasoning, based on the United Kingdom equivalent of our s 28, was unconvincing in the legislative environment in which *Cartledge* was decided and which, for present purposes, remains exactly the same in New Zealand. While it is self-evident that *Cartledge* and *Pirelli* produced unsatisfactory outcomes, that does not mean that the House of Lords in *Cartledge* was wrong in its approach to accrual in the legislation under

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[54] Lord Reid obviously did not think that was the case in *Cartledge*; nor did Lord Pearce with whom all members of the House agreed: see p 784.

[55] At p 132.

consideration. The United Kingdom Parliament moved swiftly after both *Cartledge* and *Pirelli*; something which cannot be said of the New Zealand Parliament. As a result some considerable straining of a core concept in the Limitation Act has occurred to cope with what the courts have regarded as particularly necessitous individual circumstances. But that does not mean that the straining can properly be continued in a way which would take it well past breaking point.

Conclusions on reasonable discoverability

[69] In my view the numerous references in the Limitation Act to accrual of a cause of action can only be construed as references to the point of time at which everything has happened entitling the plaintiff to the judgment of the court on the cause of action asserted. Save when the Limitation Act itself makes knowledge or reasonable discoverability relevant, the plaintiff's state of knowledge has no bearing on limitation issues. Accrual is an occurrence-based, not a knowledge-based, concept. The Limitation Act as a whole is structured around that fundamental starting point. The periods of time selected for various purposes must have been chosen on that understanding. The circumstances of postponement and extension have themselves been similarly framed.

[70] Indeed, in England, the concept of accrual of a cause of action is still clearly focussed on the occurrence of the events constituting the cause of action. The parliamentary amendments which have been made in England still drive off that fundamental starting point. Passages in the speeches in the House of Lords in the recent case of *Law Society v Stephton & Co*[56] exemplify the point.

[71] Lord Hoffman said:[57]

> The normal period of limitation prescribed by section 2 of the Limitation Act 1980 for an action founded on tort is six years from the date on which the cause of action accrued. Since a cause of action may accrue without the knowledge of the injured party (*Cartledge v E Jopling & Sons* [1963] AC 758) the six year period may expire before he is able to bring proceedings. In actions for negligence in which the cause of action accrues before the potential claimant knows the relevant facts, section 14A therefore prescribes

[56] [2006] 2 AC 543.
[57] At para [7].

> an additional period of three years from the date on which he acquires such knowledge.

[72] Lord Walker said:[58]

> My Lords, a claimant wishing to sue for negligence must be able to identify the time at which he suffers damage. Until he has suffered damage he cannot sue for damages (although he may possibly be able to apply for an injunction to prevent damage occurring). If on the other hand he waits too long after he has suffered damage, he may find that his claim is statute-barred. Sometimes a claimant suffers damage without being aware of it, because the damage takes the form of a latent disease, or a latent defect in a building or structure, or defective professional services whose adverse consequences take some time to become apparent. Where damage has undoubtedly occurred but the claimant is unaware of some or all of the material facts, his difficulties are alleviated (although not always entirely removed) by sections 11, 14 and 14A of the Limitation Act 1980 …

[73] And Lord Mance said:[59]

> A cause of action in tort may accrue for the purposes of section 2 of the Limitation Act 1980 (formerly section 2 of the 1939 Act) before its beneficiary knew or had reason to know of it: cf *Cartledge v. E. Jopling & Sons Ltd.* [1963] AC 758 (personal injury), *Pirelli General Cable Works Ltd. v. Oscar Faber and Partners* [1983] 2 AC 1 (latent damage to buildings) and *Forster v. Outred & Co.* [1982] 1 WLR 86 (professional negligence). *The legislative response was not to alter the time when the cause of action is to be taken as accruing, but to introduce alternative three-year time limits running from the date of knowledge.*

[74] Against this background and the factors I have discussed, the introduction, by decision of this Court, of such a fundamental change as that proposed in this case would be to alter in a substantial way the balance which Parliament has struck between the interests of plaintiffs and defendants. That change would be substantially to the advantage of plaintiffs and substantially to the disadvantage of defendants. It was common ground that this Court could not introduce any long stop provision which would operate to bar a claim despite its not being reasonably discoverable at that time. Such a provision, or at least very careful consideration of whether and when such a provision would be appropriate, seems to me to be an essential concomitant of the introduction of any general discoverability doctrine. The one should not be introduced without the other.

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58 At para [37].
59 At para [56] (emphasis added).

[75] I am reminded of the words of Lord Scarman, when faced with a similar situation in *Pirelli*. His Lordship said:[60]

> It is tempting to suggest that in accordance with the *Practice Statement (Judicial Precedent)* [1966] 1 WLR 1234, the House might consider it right to depart from the decision in *Cartledge*. But the reform needed is not the substitution of a new principle or rule of law for an existing one but a detailed set of provisions to replace existing statute law. The true way forward is not by departure from precedent but by amending legislation. Fortunately reform may be expected, since the Lord Chancellor has already referred the problem of latent damage and date of accrual of cause of action to his law reform committee.

[76] What is required in New Zealand, and has been required for some considerable time, is a complete legislative overhaul of the Limitation Act. All the competing interests can then be fully considered and reconciled. Piecemeal attempts by the courts to cure the difficulties with the present outdated legislation have already created their own difficulties and have produced a distinct lack of harmony in the area being addressed. The surgery now required is beyond the proper province of the courts. On this aspect of the matter I agree with the submissions made by Mr Taylor for Trustees Executors.

The status of *S v G* and *Searle*

[77] What then of the status of *S v G* and *Searle*? I deal first with *S v G*. It is important to appreciate that the first intended cause of action in that case was for breach of fiduciary duty. The person who was said to have sexually abused the plaintiff was a medical practitioner. The second cause of action was framed in negligence and relied on breach of the duty of care which the defendant owed to the plaintiff as her medical practitioner. The common law concept of want of care, that is, carelessness, when related to what was essentially deliberate conduct, is a difficult proposition. The third cause of action was for assault and battery. The Court noted that in none of the three causes of action was there pleaded "any injury or damage".[61]

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60 At p 19.
61 At p 685.

It must have been inherent in the context that no other form of loss was pleaded either. In each case the pleading simply described the defendant's alleged conduct in terms thought sufficient to justify exemplary damages. As personal injury was involved no compensatory damages were sought. The Court recorded, however, that some qualifying damage or loss had to be established in order to establish the cause of action.[62] This observation was clearly made on the premise that what was in issue was negligence at common law. On that premise, unless there was loss or damage, there would be no cause of action upon which exemplary damages could be awarded.

[78] After discussing the limitation position in respect of the negligence and assault and battery causes of action, the Court addressed the breach of fiduciary duty claim in these terms:[63]

> We turn to the claim for breach of fiduciary duty. This is advanced as a separate equitable claim said by Ms Fisher to be "fundamentally different to the claims for negligence and assault and battery". Of course the obligations imposed on a fiduciary depend upon the particular relationship involved and may be very different from obligations in contract and in tort. But in the circumstances of this case it is not easy to discern the differences between the pleaded fiduciary duty and the pleaded duty of care in negligence. Both rest in part on the fact that the intended defendant was a medical practitioner and on the relationship between the parties in the community over the material time. As already mentioned the pleaded breaches are of substantially the same conduct.

[79] The Court then made reference to particular passages from the speeches of Lord Browne-Wilkinson in *Henderson v Merrett Syndicates Ltd*[64] and *White v Jones*,[65] and continued:[66]

> However where the pleaded claims are really alternatives in respect of essentially the same conduct there is much to be said for the long-established analogy whereby equity follows the law which was preserved in s 4(9). This was the view expressed by Tipping J in *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525, 542-545 and was assumed in the argument in this Court in *Official Assignee of Collier v Creighton* [1993] 2 NZLR 534, 538.

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62 At p 686.
63 At p 688.
64 [1995] 2 AC 145 at p 205.
65 [1995] 2 AC 207 at p 275.
66 At p 689.

[80] The circumstances of *S v G* support the view, which I have already mentioned briefly, that the substantial fiduciary overlay, and the linking of the negligence and fiduciary claims for limitation purposes, seem to have influenced the Court in its decision to introduce a discoverability element into the conventional accrual doctrine. If *S v G* is viewed in this way, I do not consider the reasoning which has persuaded me to reject Mr O'Callahan's argument for an all-embracing reasonable discoverability doctrine means that *S v G* was wrongly decided. A claim for bodily injury, when the claim is based on a breach of a duty of care in equity, that is, where the bodily injury is caused by a person whose conduct represents a breach of duty by a fiduciary,[67] can properly be regarded as not accruing until the link between the wrongdoer's conduct and the plaintiff's damage is known to or ought to be known to the plaintiff. Indeed, on this basis s 4 would not apply as it is directed at common law claims in tort. The analogous bar which sometimes defeats an equitable claim can properly be administered on a basis which recognises the need for a reasonable discoverability approach. On that basis, and to that extent, I consider *S v G* can be regarded as good law.

[81] Whether *Searle* was correctly decided and, if so, on what analytical basis, are difficult questions. It might be possible to argue, by analogy with *Hamlin*, that in cases like *Searle*, the discoverability element can properly be regarded as a necessary ingredient of the cause of action. On that basis the cause of action would not exist unless and until the plaintiff knows or ought to know that there is a causal link between the defendant's conduct and the harm suffered by the plaintiff. If mental harm is the foundation of the claim, that could be said to justify making a distinction from the ordinary position that applies to physical harm. In certain circumstances common law claims for compensatory damages for mental harm can be brought despite the accident compensation regime. The position is further complicated by the plaintiff's ability to seek exemplary damages, whether the harm be physical or mental.

[82] If discoverability issues can, as in *Hamlin*, be regarded as an ingredient of the cause of action itself, rather than being a facet of when time starts to run, they can

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[67] The fiduciary has a duty to take care of the dependent party. It is not a duty to be careful; it is a duty to take care of the plaintiff.

properly be brought to account without doing violence to the structure, language and purpose of the Limitation Act. In this case it is not necessary to reach any final conclusion whether the circumstances of *Searle* and like cases can properly be analysed along those lines. Nor would it be appropriate in this case to come to any final conclusion whether *Searle* was wrongly decided. All that can be said is that the reasoning employed in it is difficult to reconcile with the general views I have expressed about the place of reasonable discoverability in the limitation field. That is not to say, however, that the actual result in *Searle* might not be capable of justification on a different process of reasoning.

[83] Although Mr O'Callahan argued that the courts should recognise an across-the-board doctrine of reasonable discoverability, and he mounted his argument on that broad basis, rather than on a basis particular to the facts of the present case, we need decide only whether, in relation to the relevant causes of action in this case, the concept of reasonable discoverability can avail the plaintiffs. In light of the rejection of any general doctrine of reasonable discoverability and the conclusions on the allotment and s 28 issues, it is necessary to see if any of the plaintiffs' ten causes of action survive the strike-out applications.

The fate of the causes of action

[84] All the causes of action against Trustees Executors (7, 8 and 9) depend on the allotment being void. Most of those against Morels and Ms Morel (the Morels) (1, 2, 3, 4 and 5) also depend on that being the case. As the allotment was not void these eight causes of action cannot be sustained. However, two causes of action against the Morels (6 and 10) do not depend on the allotment being void. It is therefore only those two which require examination to see what their fate should be, consequent upon our conclusions on the s 28 and reasonable discoverability issues.

[85] The sixth cause of action represents a contention by the plaintiff investors that the Morels, as promoters and/or issuers, had "a continuing fiduciary duty" to make full disclosure to the plaintiffs, as subscribers for the participatory securities. The plaintiffs allege that in breach of that fiduciary duty of disclosure the Morels failed to disclose certain particularised matters. The plaintiffs then say that if proper

disclosure had been made of those matters, they would not have subscribed for the participatory securities as they did. Their claim is to recover their subscription monies which amounted in total to $416,000 together with cash calls of nearly $38,000, plus interest on both amounts.

[86] It is apparent from this pleading that the continuing duty of disclosure, as alleged, is a duty which continued to the point when the plaintiffs paid their subscription monies. The duty as pleaded cannot logically extend beyond that time. It was only up to then that the failure to disclose which is alleged could have had any causative bearing on the plaintiffs' payment of their subscription monies, of which they seek return.

[87] So the breach of fiduciary duty, as pleaded, must have been complete as at December 1994. The proceeding was commenced in 2003. There is, however, no statutory time bar as regards claims for breach of fiduciary duty. The only possible equivalents of such a bar are either a bar in equity, by analogy with the statutory bar that would apply to a corresponding common law claim, or the equitable doctrine of laches. Matters pertaining to reasonable discoverability are certainly capable of being relevant to laches; and this cause of action, as framed, cannot be the subject of strike-out on the basis that the case for an analogous equitable bar is so compelling as to leave no room for any rational opposition to that course. Indeed I did not understand the Morels to be making any such suggestion. Furthermore, they have not appealed against the Court of Appeal's reinstatement of the sixth cause of action. In not doing so, the Morels seem to have correctly appreciated that the sixth cause of action represents a claim in equity, to which no statutory time limit attaches, and that the circumstances are not such that it can be struck out as frivolous, vexatious or an abuse of process or on any other basis.

[88] The tenth cause of action alleges against the Morels, as issuers and promoters, that the plaintiffs subscribed for their securities on the basis of the registered prospectus and that it contained untrue statements, of which particulars are given. The plaintiffs say that the untruthfulness of the impugned statements was not reasonably discoverable by them until 1999, when a named firm indicated that they might need to review the forestry industry. The plaintiffs contend they have suffered

losses as particularised. The losses claimed are losses said to flow from the untruthfulness of the statements impugned.

[89] This pleading, although not stating as much, was said to be based on s 56 of the Securities Act which allows the court to order payment of compensation to subscribers who rely on untrue statements in a prospectus. It was struck out by the High Court as statute-barred and not reinstated by the Court of Appeal. The plaintiffs seek to have it reinstated by this Court. There is no extended discussion in the Court of Appeal's judgment concerning this cause of action, probably because their Honours saw the cause of action as depending on reasonable discoverability which they had already rejected as a general proposition. In short, the cause of action seeks to make the Morels responsible for losses said to have occurred by dint of statements in the prospectus being untrue.

[90] This cause of action is designed to recover a sum recoverable by virtue of an enactment and is therefore subject to the general six-year period of limitation prescribed by s 4 of the Limitation Act.[68] The cause of action accrued outside the six-year period and is statute-barred unless, as the pleading recognises, it can be rescued by a general doctrine of reasonable discoverability. For the reasons already given it cannot. The tenth cause of action must therefore remain struck out.

Conclusions

[91] The end result is that all the causes of action against Trustees Executors must be struck out. All those against the Morels must be struck out except the sixth. The appeal by Trustees Executors therefore succeeds. The appeal by the plaintiff investors to restore the first and tenth causes of action must fail. There is, as I have earlier observed, no appeal by the Morels against the reinstatement by the Court of Appeal of the second, third, fourth, fifth and sixth causes of action. As earlier indicated, the second, third, fourth and fifth causes of action must logically fall on account of the allotment being valid. There is, however, no basis upon which we can so order, as there is no appeal from the Court of Appeal's order reinstating them.

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[68] In terms of s 4(1)(d).

They should now be discontinued. The lack of any appeal in relation to the sixth cause of action (that being the only cause of action which is not dependent on the allotment being void and which is not statute-barred) reflects the substance of our conclusion.

Formal orders

[92] The formal orders should therefore be:

1. To allow Trustees Executors' appeal and order the striking out of causes of action 7, 8 and 9.

2. To dismiss the plaintiff investors' appeal.

3. To award to Trustees Executors against the plaintiff investors costs of $15,000, together with disbursements, to be fixed if necessary by the Registrar.

4. To award to the Morels against the plaintiff investors costs of $10,000 together with disbursements, to be fixed if necessary by the Registrar.

5. To vacate the costs orders made below and order that, unless agreed, costs below are to be fixed by the respective courts in light of the outcome in this Court.

McGRATH J

[93] I agree with Tipping J, for the reasons he gives, that the manner of subscription, payment and receipt of the minimum subscription amount stipulated in the registered prospectus complied with the requirements of s 37(2) of the Securities Act 1978. It follows that the allotments were accordingly valid under that section. I also agree with Tipping J that, to the extent that statutory provisions of limitation

apply to the plaintiff investors' claims, no basis for postponement of any limitation period under s 28 of the Limitation Act 1950 has been shown.

[94] This disposes of all causes of action against Trustees Executors Ltd. Two causes of action, however, remain in the proceeding against Morel & Co Ltd and Ms Morel. The first, being the sixth cause of action, is a claim for breach of fiduciary duty. It is not premised on voidness of the allotment. Nor is it covered by any statutory provision of limitation. In those circumstances no issue was raised concerning the sixth cause of action in this Court and it is unnecessary to refer further to it.

[95] That leaves the tenth cause of action in which the plaintiff investors claim that they subscribed for the securities in 1994 in reliance on untrue statements contained in the prospectus. They seek to recover those subscriptions plus interest as compensation under s 56 of the Securities Act. They plead that the untruthfulness of the statements concerned was not known to them, nor reasonably discoverable, until 1999 when a need for reassessment of the forest inventory was signalled by consultants and a reassessment report obtained. Mr O'Callahan argued on their behalf that only then did the six-year limitation period commence in relation to the tenth cause of action.[69] The proceedings were issued in 2003. The Court of Appeal rejected the submission and struck out this cause of action. The plaintiff investors' appeal to this Court is against that finding.

[96] In *Invercargill City Council v Hamlin*[70] Cooke P recognised that when a cause of action arises is not stipulated by the Limitation Act but is a question left to be decided under common law principles. In the case of a house built with defective foundations, a cause of action in negligence arose when the defects were, or ought to have been, discovered by the plaintiff.[71] Cooke P declined to give the principle of reasonable discoverability any wider application, preferring as he put it, "to proceed step by step".[72] The defendant local authority appealed unsuccessfully to the Privy

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69 Under s 4 of the Limitation Act.
70 [1994] 3 NZLR 513 at p 523 (CA).
71 At p 522.
72 At p 522.

Council against this judgment.[73] The Privy Council, however, did decide the appeal in *Hamlin* on a different basis to the Court of Appeal, a matter which I shall consider shortly.

[97] In sequence, the next judgment of the Court of Appeal following *Hamlin* was that in *S v G*.[74] The Court there decided that a limitation period had not commenced to run in the case of an adult plaintiff claiming in respect of sexual abuse when she was a child. Although aware of the abuse, the plaintiff had not linked it with the serious psychological and emotional condition she was suffering from. Reasoning by analogy with its decision in *Hamlin*, the Court of Appeal decided that the cause of action accrued, and time began to run under the Limitation Act, only when the damage should have been linked by the plaintiff to the abuse she had suffered.[75]

[98] Finally, and after the Privy Council decided *Hamlin*, the Court of Appeal applied the approach it had taken in *Hamlin*, in *G D Searle & Co v Gunn*,[76] to a claim for personal injury, on account of the effects of pelvic inflammatory disease arising from allegedly negligent manufacture of an intrauterine device used by the plaintiff in 1981. The plaintiff in that case did not attribute the effects in question to the device until many years later. In refusing to strike out the claim, the Court of Appeal held that a cause of action for bodily injury of the kind complained of arose only when it was discovered, or reasonably discoverable, that the bodily injury was caused by acts or omissions of the defendant.[77]

[99] As Tipping J has pointed out, the Privy Council's reasoning in *Hamlin* differed from that of the Court of Appeal, insofar as that Court had adopted a reasonable discoverability test. The Privy Council reasoned that the plaintiff's loss only occurred when the value of the house depreciated, which was when the physical damage became apparent. Tipping J has difficulty in reconciling the reasoning of the decisions in *S v G* (decided before the *Hamlin* decision in the Privy Council) and *Searle* (decided afterwards), with the Privy Council judgment in *Hamlin*.

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73 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513.

74 [1995] 3 NZLR 681. *S v G* was decided by the Court of Appeal before the Privy Council's decision in *Hamlin.*

75 At p 687.

76 [1996] 2 NZLR 129.

77 At p 133.

[100] I do not consider the Privy Council judgment in *Hamlin* undermines the reasoning in *Searle*. On the approach it took, the Privy Council, as I read its judgment, expressly declined to examine whether reasonable discoverability had any general application. In those circumstances I consider the Court of Appeal remained free in *Searle* when the question arose to apply the enlightened approach it had taken in *Hamlin* and *S v G* to the difficult problems created by the House of Lords in *Cartledge v E Jopling & Sons Ltd*.[78]

[101] I do not, however, regard this triumvirate of Court of Appeal decisions as laying down reasonable discoverability as a generally applicable principle in New Zealand tort law when deciding whether a cause of action has accrued. Nor do I accept Mr O'Callahan's submission that consistency with these three decisions requires that the principle be applied in relation to the tenth cause of action in this case. In the continuing absence in New Zealand of legislative reforms enacted by other jurisdictions, the application of reasonable discoverability, to determine whether a cause of action has accrued in tort, remains a matter of judgement to be made in particular situations having regard to decided cases and analogies that can be fairly drawn from them. In that regard it must be borne in mind that the unfairness to plaintiffs, if damage is treated as arising before they knew or ought to have known of it, in some situations will be matched and outweighed if allegations of wrongful conduct can be raised many years after what is complained of happened. I understand this to be the concern of Cooke P in *Hamlin* when he said that his preference was to proceed step by step. Provided the *Hamlin* principle is applied on this basis, I regard it as sound in principle and a valuable development in New Zealand law. I would affirm it.

[102] The question then is whether the principle of reasonable discoverability should be applied in determining when a cause of action accrues in a claim for civil liability for misstatements in a registered prospectus under s 56. To allow such claims to be brought many years after the issue of the prospectus, without limitation, to my mind, has the potential to create great unfairness to the issuers of securities, in particular where there is volatility over time in the value of the investments. Because of that factor I see little analogy between the circumstances of the present

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78 [1963] AC 758.

case and those in the cases where the Court of Appeal has applied the approach it first took in *Hamlin*. Accordingly, I would not apply the principle of reasonable discoverability to the statutory tort created by s 56 of the Securities Act. For these reasons I would hold the tenth cause of action to be outside of the limitation period under s 4(7) of the Limitation Act.

GAULT J

[103] I agree that the allotments are not invalid and that the plaintiffs have laid no basis to support reliance upon s 28 of the Limitation Act 1950. On these two aspects of the case I agree with the reasons in the judgment prepared by Tipping J which I have read in draft.

[104] I take a different view, however, on the limitation issue.

[105] The two claims not dependent upon the invalidity of the allotment are those pleaded as the sixth and tenth causes of action.

[106] The sixth cause of action alleges breach of fiduciary duty said to be owed by the issuer to the subscribers (a doubtful proposition but we heard no argument on it). It alleges failure to disclose the falsity of matters relied on in deciding to subscribe. This equitable cause of action is not affected by s 4 of the Limitation Act (save by analogy) and, in any event, alleges a continuing breach which would seem to be actionable so long as the subscribers enjoy statutory rights to recover their subscriptions. I do not see any issue of reasonable discoverability arising on this cause of action.

[107] That leaves the tenth cause of action which appears to have its basis in s 56 of the Securities Act 1978. That provides the statutory right to recover subscriptions paid in reliance upon false statements in a prospectus. No question of avoidance of allotments is involved. The issue for present purposes is whether, under s 4 of the Limitation Act, the cause of action arises upon the payment of the subscription or when the alleged falsity of the statements relied upon became known or reasonably ought to have been discovered.

[108] The difficult issue of limitation bars to causes of action of which plaintiffs are ignorant has troubled the courts for some time.

[109] In my view the Court of Appeal in this country made some real progress in ameliorating the plain and acknowledged injustices dictated by the approach taken by the House of Lords in *Cartledge v E Jopling & Sons Ltd*.[79] The majority in the Court of Appeal in *Invercargill City Council v Hamlin*[80] determined that the cause of action for negligent design or construction of a building did not arise within the terms of s 4 of the Limitation Act until the damage was discovered or should with reasonable diligence have been discovered. That approach was taken further in *S v G*[81] and other cases where sexual abuse was much later recognised as causative of mental or emotional harm, and in *G D Searle & Co v Gunn*[82] involving claims for damages in respect of effects much later recognised as attributable to the insertion or removal of intrauterine devices.

[110] The judgment in the *Searle* case was clear:[83]

> In our view the time has now come to state definitively that *Cartledge* does not represent New Zealand law. It has now been superseded in the United Kingdom by legislation, and its authority as well as that of *Pirelli* has also been cast into some doubt by *Hamlin.* As was pointed out in the course of some of the judgments in this Court in *Hamlin,* the rationale of *Cartledge,* which depended on the effect of the equivalent of s 28 of our Act, is not convincing and we see no need for statutory intervention to achieve a result which is consonant with justice and which gives effect to the overall legislative intention.

[111] That judgment was delivered after the decision of the Privy Council in the *Hamlin* case in which the Privy Council had not overruled the Court of Appeal on the limitation point, but sought to construe the claim as for economic loss.[84] On that reasoning the cause of action arose only when the building defects were discovered thereby reducing the value of the property.

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79 [1963] AC 758.
80 [1994] 3 NZLR 513.
81 [1995] 3 NZLR 681 (CA).
82 [1996] 2 NZLR 129 (CA).
83 At p 132, Henry J for the Court.
84 *Invercargill City Council v Hamlin* [1996] 1 NZLR 513.

[112] I am quite unable to reconcile that reasoning of the Privy Council with the earlier decision of the House of Lords in *Pirelli General Cable Works Ltd v Oscar Faber & Partners*.[85] In that case it was held that a claim in respect of building defects discovered more than six years after they occurred was time-barred. In my view the Privy Council reasoning in the *Hamlin* case, upholding the Court of Appeal while at the same time seeking not to erode the English line of authorities, is unconvincing.

[113] By characterising the damage in *Hamlin* as economic loss so it did not occur until discovered, the Privy Council, in effect, was upholding a reasonable discoverability approach. That approach put claimants for economic loss in a better position than those suffering other forms of damage or injury.

[114] I am not persuaded that this Court should turn back from the development through the New Zealand cases culminating in *Searle.* That case has stood now for ten years and those before it for longer. Proceedings have been brought, particularly those alleging sexual abuse long in the past, in reliance on them. The legislature has not intervened. It would be a retrograde step to go back to the unfortunate situation created by the decision in the *Cartledge* case.

[115] In my view it is preferable to adopt some flexibility in interpreting when the cause of action accrues under s 4 of the Limitation Act according to particular causes of action where that serves the ends of justice. That is essentially what the Privy Council did in its decision in *Hamlin*. Of course, the matter must be approached in a principled way but I find no difficulty in the proposition for New Zealand that a cause of action has not arisen when the prospective plaintiff does not know and cannot reasonably ascertain that a claim exists. I am well aware that the position of potential defendants must be considered but in my view the balance is in favour of the ignorant plaintiff.

[116] The absence of any long stop indicates the need for legislative action but the reasonable diligence required of potential plaintiffs will generally be of similar effect and gives flexibility that a fixed statutory cut-off point would not.

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[85] [1983] 2 AC 1.

[117] Given the present state of the New Zealand case law, I would leave to the legislature the only available alternative of overruling *Searle* and the cases to similar effect.

[118] In the present case, I would allow the tenth cause of action to proceed so that the plaintiffs can pursue the claim to recover their subscriptions if they can establish that they would not with reasonable diligence have discovered the alleged falsities in the prospectus on which they say they relied until within six years of the commencement of the proceeding.

HENRY J

[119] These appeals raise two broad issues. The first is whether an allotment of shares in a partnership venture made to a number of investors (the first respondents in SC 15/2006 and the appellants in SC 17/2006) was invalid as having infringed s 37(2) of the Securities Act 1978, thereby entitling the investors to repayment of their subscriptions. The second is whether the various causes of action are barred by the provisions of the Limitation Act 1950. It is common ground that the second issue is relevant only to the sixth and tenth causes of action if the allotments were not in breach of s 37(2), as all the other causes of action can only succeed if there was a breach and consequential invalidity.

Section 37(2) of the Securities Act 1978

[120] At the relevant time s 37(2) provided:

> **37 Void irregular allotments**
>
> (1) …
>
> (2) No allotment shall be made of an equity security or a participatory security offered to the public for subscription if the allotment is the first allotment of such security to the public unless the amount stated in the registered prospectus relating thereto as the minimum amount which, in the opinion of the directors of the issuer, must be raised by the issue of the securities in order to provide for the matters specified in regulations made under this Act, is subscribed, and that amount is paid to, and received by, the issuer within 4 months after the date of the registered prospectus; and, for the purposes of this subsection—

> (a) A sum shall be deemed to have been paid to, and received by, the issuer if a cheque for that sum is received in good faith by the issuer and the directors of the issuer have no reason to suspect that the cheque will not be paid:
>
> (b) The amount so stated in the registered prospectus shall be reckoned exclusively of any amount payable otherwise than in cash.

[121] The background giving rise to the argument has been set out by Tipping J but it is convenient to restate the pertinent facts. These are taken from the affidavit of Ms Bognar, Wellington manager at the relevant time of Corporate Trustee Services of Trustees Executors (the appellant in SC 15/2006). Her affidavit was the only evidence adduced on the strike-out application.

[122] In 1994, Mr Hadlow and Ms Zuill, the owners of a forest near Warkworth, approached Morel & Co Ltd (Morels) in order to raise money on their forest. A proposal was developed whereby the right to harvest the trees would be sold to members of the public, who would buy shares in a forestry partnership. Morels agreed to prepare and register a prospectus and organise an invitation to the public to subscribe for shares in the partnership. Once established, the partnership would lease the forest from the owners and the lease would entitle the partners to harvest the trees between 2001 and 2006. The partnership was to pay the owners $2.4 m for the lease, with $1.3 m, being the minimum subscription amount allowed under the statute, coming from investors, the balance being funded by a bank loan. The units in the partnership were participatory securities within the meaning of the Securities Act, and Morels became the issuer for those same purposes.

[123] The prospectus was registered on 18 August 1994. It provided for a total of 25 units in the partnership, each costing $52,000. Subscriptions closed on 31 October 1994. The statutory supervisor was Trustees Executors. By 31 October the minimum subscription of $1.3 m had not been raised and the closing date was extended to 30 November 1994. Prior to 30 November only 7 of the necessary 25 units or shares had been subscribed. The forest owners had earlier agreed to take up any shortfall in subscriptions to make up the minimum requirement. On 30 November Morels received applications for 4 units from each of the forest owners, Mr Hadlow and Ms Zuill, and a further 10 units from those two persons jointly. On or about the same day Trustees Executors received a cheque for

$936,000 being the amount of the subscription due for the 18 units. The cheque was payable to Trustees Executors and drawn on the ANZ Bank at Warkworth. The letter enclosing the cheque signed by Mr Hadlow reads:

> Please find enclosed our cheque for $936,000.00 for 18 units in the Mount Auckland Forest Partnership.
>
> As discussed, please hold this cheque and offset the same value against the amount payable to us on settlement of the purchase of the forest.
>
> Once settlement has taken place for the offset amount we request you destroy the cheque.
>
> Trusting this is in order.

[124] A file note of Ms Bognar dated 1 December reads:

> I spoke this afternoon with Jenny Morel regarding subscriptions for the Mt Auckland issue. She advised that they will be short and the original vendor will take up the shortfall. We have agreed that he will provide us with an application and a cheque. This cheque will not be banked until settlement and in fact we proposed to a net settle in order to avoid any credit risk.

[125] On 19 December, Trustees Executors wrote to Webster Malcolm & Kilpatrick, solicitors for the forest owners, in the following terms:

> The Statutory Supervisor undertakes that the cheque from C P Hadlow and Y P Zuill for the sum of $936,000, being payment for 18 units in the Mt Auckland Forest Partnership, will be returned to your firm at or following settlement of the transactions being entered into by the Partnership.
>
> This cheque will be returned as settlement is to take place on a net basis, (ie rather than banking the Hadlow's cheque and paying across the full $1.3 million, TEA is to contribute the net proceeds). We have agreed to settle in this manner to protect the partnership against any settlement risk associated with the clearance of the Hadlow's cheque.

[126] On 21 December the transactions were settled, the set-off arrangement was implemented and the cheque for $936,000 was returned by Trustees Executors to Webster Malcolm & Kilpatrick. The set-off was therefore implemented after the statutory four-month period dictated by s 37(2) which expired on 18 December.

[127] In a succinct judgment the Court of Appeal held that the Hadlow/Zuill subscriptions had not been paid and received within the statutory four-month period.

Payment had been effected only by way of set-off. The cheque was described as a "red herring" because it was never intended to be presented to the bank and Morels therefore had every reason to suppose it would not be paid.

[128] The critical question is whether the challenged subscriptions were paid to and received by Trustees Executors on behalf of the issuer by 18 December. The only payment which could fall into that category was the cheque dated 30 November.

[129] Section 37 prohibits the making of an allotment unless the appropriate minimum amount has been subscribed, paid to and received by the issuer in cash within the four-month period. In this case as at the cut-off date the amount of the Hadlow/Zuill subscriptions, which was necessary to make up the minimum amount, had not been paid. Payment in fact only occurred at the time the set-off arrangement was later implemented. Validity of the allotments therefore necessarily depended upon subs (2)(a) of s 37.

[130] Mr Taylor's submission for Trustees Executors, that the cheque was accepted as the equivalent of a payment in cash at the time of its receipt, is quite unsupported by evidence or authority and cannot succeed. Neither can it be, as was held in the High Court,[86] that subs (2)(a) is satisfied if the issuer has no reason to suspect that the full value of the cheque will not later be received from some other source. If reliance is made on a source of payment other than the cheque itself, then that payment must be made within the statutory period, otherwise s 37(2) is breached. The question therefore is whether the Hadlow/Zuill cheque was received by Morels through Trustees Executors in good faith with no reason to suspect it would not be paid. The fact that payment comes from another source, however secure on its own, is not enough if that payment is outside the period. As at the cut-off date it is still only the cheque which could be relied upon to meet the terms of the statute.

[131] In my view s 37(2) was satisfied in the circumstances, although I have reached this view for different reasons than Tipping J. The anticipation of the parties was that the cheque would be paid, and in fact it was paid by the drawer.

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[86] *Murray v Morel & Co Ltd* (High Court, Auckland, CIV 2003-404-4897, 8 April 2004, Master Lang) at para [50].

[132] Morels as issuer had every reason to expect that the cheque would be paid. Payment would be made on settlement of the transaction and would be effected by the drawer. As was intended under the arrangement, the cheque was exchanged for payment of the very sum for which it had been drawn. That was the effect of the set-off. At that point the cheque was paid. There is nothing novel in the concept of a bill of exchange being paid by the drawer and the fact that that was to be the preferred method of payment did not alter its status as a bill of exchange (here a cheque) and all the rights and obligations which attached to it.

[133] Notwithstanding the set-off arrangement, which meant the drawer was intended to be the primary port of call, there is no doubt s 55(1)(a) of the Bills of Exchange Act 1908 applied. It provides:

> **55 Liability of drawer or indorser**
>
> (1) The drawer of a bill, by drawing it,—
>
> > (a) Engages that on due presentation it shall be accepted and paid according to its tenor, and that if it is dishonoured he will compensate the holder or any indorser who is compelled to pay it, provided that the requisite proceedings on dishonour are duly taken:

[134] Mr Hadlow and Ms Zuill did not purport to and could not negate that liability, which remained even if for some reason the arrangement was not implemented and Trustees Executors either presented the cheque to the Bank itself for payment or indorsed it to a holder in due course.

[135] The Bills of Exchange Act itself expressly recognises that a bill may be paid by the drawer or indorser. Section 59(3)(a) provides:

> (3) Subject to the provisions hereinafter contained, when a bill is paid by the drawer or an indorser it is not discharged: but
>
> > (a) Where a bill payable to or to the order of a third party is paid by the drawer, the drawer may enforce payment thereof against the acceptor, but may not reissue the bill;

[136] The reason why the bill is not discharged in those circumstances is to preserve the drawer's or indorser's right of recourse. They are treated as co-guarantors and for example can succeed to securities held by the drawee. There is no

question of presentment being excused in these particular circumstances nor is there anything to suggest that the cheque was held merely as some form of security. It was undoubtedly accepted as payment for the subscriptions in question as required by the prospectus and by the legislation. Payment was assured because Trustees Executors had the ability to control it under the set-off arrangement – it knew the cheque could be exchanged for cash. The cheque was surrendered because and only because it was paid, and Trustees Executors' rights as holder ceased. Surrender was important for the drawer and on payment could be demanded under s 54(b) to ensure the cheque could not be negotiated. This is precisely what happened.

[137] No question of dishonour arose in these circumstances. Payment by the drawer is quite distinct from liability on dishonour. Section 57 defines the measure of damages, which includes interest and expenses, and requires appropriate steps to be taken before damages become available. Those steps are set out in ss 48 and 49.

[138] There is no justification for adding the words "by the drawee" to s 37(2)(a) or construing the word "paid" as referring to payment in due course, a phrase which has a defined meaning. The provision means what it says. The drawee is not the only person who can pay a bill of exchange and belief in payment of it one way or another logically is all that the provision is concerned with. The error of the Court of Appeal lies in treating the set-off as nothing more than payment of the antecedent debt incurred when applying for the units, whereas in reality and in law it was payment of the cheque which had been tendered with the applications. Accordingly s 37(2) was not breached because there was every reason to believe the cheque would be paid, Trustees Executors having the means to ensure it was paid. Therefore it was deemed to have been paid at the time of receipt.

[139] It is therefore unnecessary to rely on a contention that if, despite the set-off arrangement, a need had arisen to present the cheque to the bank, it would have been honoured. With respect to the views to the contrary, I consider there are difficulties with that proposition. The evidence in my view falls far short of establishing an absence of suspicion on the part of Morels that the cheque would not be paid on presentment to the bank, whether as a result of a cheque swap or otherwise. No evidence was adduced by Morels and the whole thrust of Ms Bognar's affidavit was

that the set-off arrangement was entered into to avoid a foreseen risk that the cheque would not be met in that way.

[140] Accordingly I would allow the appeal by Trustees Executors and strike out the seventh, eighth and ninth causes of action.

Limitation Act 1950

[141] Although there has been no formal pleading, it is clear that in the courts below the parties were agreed that all causes of action were governed by the provisions of the Limitation Act 1950 and that subject to possible postponement under s 28 the statutory limitation was a period of six years from the date on which the particular cause of action accrued. The only exception was the cause of action based on breach of the provisions of a deed. This is expressly recorded in paras [84] and [85] of the High Court judgment. The Court of Appeal notes at para [43] of its judgment[87] that the defence claim is that all causes of action (other than that based on the deed) are time-barred, and further that the investors' contention is that the reasonable discoverability doctrine applies, which means that time did not commence running for the purposes of the Limitation Act until 1999 or in some cases in 2001.

[142] The only causes of action which are not dependent upon the invalidity of the allotment are the sixth and the tenth. The sixth is against Morels and pleads breaches of fiduciary duty in failing to make disclosure in five separate particulars. One of those relates to the s 37 issue and therefore cannot be sustained. The tenth is also against Morels and alleges the prospectus contained untrue statements. It appears to be based on s 56 of the Securities Act. For reasons which I can state quite shortly in light of those expressed by Blanchard J and Tipping J, I am unable to accept the submission that this Court should declare that as a general proposition a cause of action does not arise for s 4 purposes until such time as all the essential facts constituting the cause of action were discovered or were reasonably discoverable by the particular plaintiff. Tipping J has provided a careful and helpful review of the

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87 *Murray v Morel & Co Ltd* [2006] 2 NZLR 366.

authorities, which in my respectful view provides a strong basis for this conclusion. Blanchard J's pragmatic approach also assists.

[143] The ramifications of such a broad principle of interpretation were not fully explored by counsel. It would, for example, impact on other provisions of the Limitation Act itself as well as on other statutory limitation provisions. In my view there is no justification for applying the judge-made doctrine of reasonable discoverability in such broad terms. This must remain a matter for the legislature.

[144] Applying the doctrine to the present case, the practical consequences which would follow demonstrate the difficulty in holding that the doctrine would give effect to the legislative intent. Eight of the ten pleaded causes of action have as their essential base an allegation that s 37 of the Securities Act was breached. The facts relied upon relate to the set-off arrangement and its implementation after the four month statutory period. There are nine plaintiff investors so potentially these causes of action have nine different accrual times. Section 37 has a wide and general application, and could well catch participatory securities in an issue which involved hundreds of investors, with there then being an indefinite cut-off period for challenging an allotment even when there was no suggestion of fraud. Breach yields a statutory consequence that necessarily affects all investors, not just the individual plaintiff.

[145] The sixth cause of action has four separate allegations of non-disclosure not related to s 37. A limitation inquiry, which would be necessary if such a claim was at common law rather than in equity as pleaded, would require individual examination of the knowledge and means of knowledge of each on the part of each investor. The tenth cause of action alleges nine separate untrue statements in the prospectus. Investigation of the knowledge and means of knowledge of each investor in respect of each allegation would again be required, with possibly a whole raft of different commencing dates.

[146] Other jurisdictions do not appear to have endorsed the application of the concept of reasonable discoverability to limitation provisions in the broad way proposed. The authorities cited in argument in this Court are all specific and with

one exception do not refer to the existence of some general principle. The exception is the judgment of the Supreme Court of Canada given by Le Dain J in a professional negligence claim, *Central Trust Co v Rafuse*:[88]

> I am thus of the view that the judgment of the majority in *Kamloops* laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence, and that that rule should be followed and applied to the appellant's cause of action in tort against the respondents under the Nova Scotia *Statute of Limitations*. There is no principled reason, in my opinion, for distinguishing in this regard between an action for injury to property and an action for the recovery of purely financial loss caused by professional negligence …

[147] *City of Kamloops v Nielsen*[89] was a building defect case where after discussion the majority declined to follow *Pirelli General Cable Works Ltd v Oscar Faber & Partners*.[90] For myself, I have been unable to discern from the judgment in *Kamloops* an acceptance of an across-the-board construction of the relevant statute and I note that there is an absence of discussion as to the impact of its adoption, for example, on a statutory cause of action such as that given by the New Zealand Securities Act, nor any reference to the desirability of some long stop provision.

[148] The real thrust of Mr O'Callahan's argument is that the rationale of the judgments of the Court of Appeal in *S v G*[91] and *GD Searle & Co v Gunn*,[92] which should be affirmed by this Court, logically support the general proposition. I do not find it necessary to review those two authorities in detail. In both it is clear that the Court did not consider it was establishing a general principle. Both concerned personal injury. Both were concerned with what could be described as the problem of an essential fact being truly unknown in the sense of being latent, as in the building defect cases, rather than unknown only to a particular plaintiff. In contrast, these claims involve no such concept. Whether or not the rationale of those two judgments can be supported by an analysis such as that carried out by Tipping J or as being an adoption of Cooke P's reference in *Invercargill City Council v Hamlin*[93] to

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88 [1986] 2 SCR 147 at para [77].
89 [1984] 2 SCR 2.
90 [1983] 2 AC 1.
91 [1995] 3 NZLR 681.
92 [1996] 2 NZLR 129.
93 [1994] 3 NZLR 513 at p 522 (CA).

preferably proceeding step by step on this wider question, I am satisfied they do not form an adequate basis or springboard to warrant acceptance of a general principle. I agree that to reject such a general principle does not require overruling either authority. In the result, no argument specific to the pleaded causes of action having been addressed, I do not find it possible to hold that any of these particular causes of action did not accrue until such time as the investor in question knew, or should have known, of the facts giving rise to the individual claim under consideration.

[149] I therefore agree that the investors' appeal should be dismissed.

Section 28 of the Limitation Act 1950

[150] The Securities Act not having been breached, in terms of the outcome of the appeals s 28 becomes of significance only to the sixth cause of action. The section was not invoked in respect of the tenth cause of action. I agree that s 28 cannot in the circumstances of this case assist the investors and have nothing to add to the reasons given by Tipping J in reaching that conclusion. No acceptable formulation of an allegation coming within s 28 was articulated.

Sixth cause of action

[151] The sixth cause of action is against Morels and alleges breaches of a fiduciary duty of disclosure. In the High Court the investors conceded that it was subject to the Limitation Act and contended for reasonable discoverability or, alternatively, for postponement of commencement of time running under s 28. The same approach was adopted in the Court of Appeal, which reinstated this claim, but only on the basis that s 28 was arguably applicable. In this Court the investors did not submit that the Limitation Act did not apply because it was a claim in equity rather than a claim at common law, and that issue was not the subject of any argument or discussion. Had this issue arisen at an appropriate time, it would have been open to Morels to contend in response that even if s 4 did not apply expressly, then it should by analogy (equity follows the law). Such a contention must be available on a strike-out where the facts are relatively simple and clear. Additionally, it can be noted that

this point is not embraced by either order granting leave to appeal. In my judgment it would be unjust to allow the point now to be raised by the investors in the High Court, the only bases for challenging the strike-out order made in that Court being unsuccessful.

[152] I would therefore dispose of this cause of action in the same way as suggested by Tipping J in respect of the second, third, fourth and fifth causes of action, indicating that they must all necessarily fail and inviting discontinuance.

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