

Malcolm James Daisley
Respondent / Cross-Appellant

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Appellant's outline of oral argument

1 Text and policy of the LA1950

- 1.1 The 6-year limitation period is postponed if the "right of action" is "concealed by the fraud" of the defendant (at [2.1]). Origin of s 28(b) is the 1939 UK Act which was based on the equitable fraud doctrine ([2.2]–[2.3], [7.1]–[7.2]).
- 1.2 The s 28(b) exception must be interpreted against the backdrop of limitation policy and the balance Parliament struck between irreconcilable interests:
 - (a) LA1950 intended to promote fairness to defendants by shielding them from historic claims ([6.3], 1988 NZLC Report; *Credit Suisse*).
 - (b) The LA1950 secures public faith in fair administration of justice ([6.3], 1988 NZLC Report, Dal Pont).
 - (c) The 6-year period balances those interests against the general public interest (and the plaintiff's interest) in vindicating legal rights in court.

2 Wilful concealment – The controlling test

- 2.1 Equitable fraud in LA1950 requires *wilful* concealment (at [3.1]–[3.6]):
 - (a) Focus of s 28(b) is "knowledge of relevant facts and on knowledge of a duty to disclose them" (*Wrightson* [47]). Defendant must know "all the facts" which "constitute the action" (*Wrightson* [55] and [58]).
 - (b) Knowledge of wrongdoing in light of the known facts is also required. E.g., *Wrightson* at [47]–[50], *Matai* 540 and *Inca* 711.
 - (c) Having all that knowledge, a defendant who "decides not to disclose" the facts is guilty of equitable fraud (*Wrightson* [47]–[48]).
 - (d) Defendant cannot "as a matter of logic, wilfully conceal facts of which one is unaware" (*Wrightson* [58]); a defendant cannot have "wilfully concealed a right of action which he did not know existed" (*Inca* 711).
 - (e) Breach of duty can provide evidence of wilful concealment but may not be a legal requirement (*Canada Square*).
- 2.2 The *Daisley* recklessness test nullifies *Wrightson* by reasoning that WDC fraudulently concealed the LUC through its negligent failure to search diligently for the LUC ([4.2]–[4.8]):
 - (a) WDC was found to have fraudulently concealed the LUC because its officers had credible information showing that Council records "might well contain evidence" of an LUC or existing rights (CA [171]). WDC's officers were "*on notice*" that there "*might well be*" a historic consent.
 - (b) Faced with that information, it was "*unreasonable*" for WDC's officers "not to search the records" (CA [175]–[176]). WDC "assume" that the LIM excluded an LUC (at [173]). That is the language of negligence.

3 Wilful concealment is the correct test

- 3.1 Equity intervenes to disentitle a defendant from invoking the LA1950 if they have by unconscionable means caused time to run in their own favour. The

touchstone for s 28(b) is unconscionability and preventing a defendant from taking advantage of their own wrong ([5.3]–[5.11]; *Gibbs*; *Thorne*; *Inca*).

3.2 “Wilful concealment” applied by Courts of Equity under the 1623 Act:

- (a) Equity paid obedience to Act unless compelled to repel its application due to unconscionability ([7.3]–[7.9] and *Gerace*; *Knox*; *Gibbs*).
- (b) Defendant must have (i) known about the action and concealed it or (ii) known they were committing a secret wrong (*Sheridan*).
- (c) Voluntary concealment required (*Lleveylln*); active concealment of an intentional wrong qualifies (*Dean*); but a defendant is also fraudulent if they knowingly commit a wrong and stay silent (*Bulli Coal*). Courts distinguish between “ignorant or wilful, innocent or fraudulent” wrongs (*Bulli Coal*). “Designed fraud” where a party, “knowing to whom a right belongs, conceals the circumstances giving that right, and by means of such concealment” obtains an advantage (*McCallum*, *Willis*).

3.3 Recklessness does not qualify as equitable fraud. E.g., in *Trotter*, where a “reckless dealing” with the plaintiff’s property and “deliberately” taking a risk was not accepted by the Court as constituting equitable fraud.

3.4 The UK Act adopted the equitable fraud exception applied in the case law preceding the Act (e.g., *Willis*, *Gibbs*, *Bulli Coal*, 1939 LRC Report). The exception was retained in substance in the 1980 UK Act ([7.1], [9.1]–[9.2]).

3.5 Wilful concealment was confirmed—and recklessness rejected—in *Canada Square* by the UK Supreme Court ([9.4]–[9.11]):

- (a) Contemporaneous concealment exists if the defendant has knowingly committed a wrong and deliberately stayed silent ([67]). That species of concealment has its roots in *Bulli Coal* ([67]; *Cave* [23]–[25]).
- (b) Subsequent concealment occurs if the defendant knows the material facts, has “considered whether to inform” the plaintiff and has elected not to (at [77], [108]). By deciding to stay silent, they have “chose[n] to keep the claimant in ignorance” (at [65]–[70], [77], [105], [108]).
- (c) Recklessness rejected because it was incompatible with “deliberate concealment” test and policy (WDC [6.7]–[6.11], [9.9]–[9.11]).

3.6 Hypothetical examples that illustrate unconscionability ([5.7]–[5.11]):

- (a) A builder knowingly installs faulty foundations, covers over them, and says nothing – contemporaneous concealment (*King*, *Bulli Coal*).
- (b) A builder installs a faulty foundation, later discovers their mistake and chooses to say nothing to the plaintiff – subsequent concealment (see generally *Inca*, *Wrightson*).
- (c) Wilful blindness is still deliberate concealment because the defendant has actual knowledge of the wrong to which they consciously turned a blind eye to avoid confirming what they know to be true. They know of their wrong and conceal it by choosing to say nothing.

- 3.7 A defendant has not acted unconscionably if they negligently or recklessly fail to appreciate their own wrongdoing. The defendant lacks knowledge of the wrong and so cannot have chosen to conceal it ([5.12]–[5.19]):
- (a) A builder mistakenly installs a faulty foundation without realising their mistake – negligence but not concealment (*King*; and see *Cave*).
 - (b) When constructing the foundation, the builder appreciates a risk that the materials may be deficient but ultimately reaches a genuine belief to the contrary. The defendant arrived at their conclusion negligently. But they lack knowledge of their wrong and so cannot have made any choice to conceal it ([5.16]–[5.19]).

4 The Court of Appeal erred in applying recklessness

- 4.1 Lower court judgment turned on “recklessness” because the Court held that WDC did not wilfully conceal the LUC:
- (a) Concurrent findings that no officer “actually knew” about the LUC (CA [164]; HC [307]). The Court of Appeal made a finding that the WDC’s officers “*cannot wilfully have failed to disclose it*” (CA [164]).
 - (b) WDC not “wilfully blind” as the officers did not know that WDC’s files “likely contained a consent and consciously chose to not look” ([165]).
- 4.2 The Court concluded incorrectly that English authorities (*Beaman*, *King* and *Kitchen*) endorsed recklessness under the 1939 UK Act:
- (a) All three decisions applied a “wilful concealment” test ([8.5]–[8.13]). Equitable fraud requires a defendant to know of the wrongdoing; negligence and mistakes are not enough (*King*).
 - (b) References to “recklessness” in *King*, *Beaman* and *Kitchen* mean no more than wilful blindness (*Canada Square*).
- 4.3 Despite no officer knowing of the LUC, the Court found that they concealed the LUC’s existence because they (a) subjectively appreciated a risk that the LUC “might well” exist and (b) acted objectively unreasonably in failing to diligently search for the LUC. The Court erred:
- (a) Removing the requirement for “actual knowledge” of the fact nullifies the wilful concealment test and is inconsistent with the governing test the Court endorsed at [141] which requires wilful concealment.
 - (b) Effect of *Daisley* is that a defendant who ought to have known of the concealed facts but who lacked that knowledge through negligence is guilty of fraud. That test wrongly conflates fraud with negligence (see ([6.9]–[6.11], [12.16]; *Cave*; *Canada Square*).
 - (c) In any case, there is no factual basis for the Court of Appeal’s finding that WDC was reckless as to the LUC ([12.13]–[12.15]).
- 4.4 Even if recklessness is an available test, it cannot apply unless a defendant subjectively knows of the facts they are said to have concealed. Knowledge of a “risk” of a fact has never been sufficient ([12.10]–[12.11]). Recklessness could only ever apply to appreciation of wrongdoing or of a duty to disclose.