IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA **SC 59/2024**

BETWEEN	**Whangarei District Council** Appellant / Cross-Respondent
AND	**Malcolm James Daisley** Respondent / Cross-Appellant

SUBMISSIONS FOR THE APPELLANT

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May it please the Court—

Part A: Introduction, overview and issues

1 Summary of WDC's submissions on appeal

1.1 In 2004 Mr Daisley bought a property to operate as a quarry. In 1988 the County Council had issued a land use consent ("**LUC**") permitting quarrying. The LUC was archived by the new Whangārei District Council ("**WDC**") after amalgamation. Mr Daisley quarried the land believing it was permitted. WDC disagreed and took enforcement steps. In September 2009 WDC discovered the LUC in its archives and gave it to Mr Daisley's lawyer. In August 2015 he issued proceedings for negligence.[1]

1.2 The Court of Appeal rejected WDC's limitation defence because it held that WDC fraudulently concealed Mr Daisley's right of action, despite concurrent findings that it did not know of the LUC. It held WDC was reckless as it appreciated a risk the LUC may exist and unreasonably ran that risk.[2]

1.3 WDC submits that wilful concealment, not recklessness, is the correct test. To fraudulently conceal a right of action, the defendant must know the facts, know they have committed a wrong, and choose not to disclose their wrong. Recklessness is not the correct test because:

(a) Recklessness conflicts with the leading New Zealand case law, which adopted a wilful concealment test (**Part B**).

(b) The exception responds to unconscionable conduct. "Recklessness" does not have that quality, and conflicts with limitation policy (**Part C**).

(c) The exception originated in the Courts of Equity which applied a wilful concealment test (**Part D**). Decisions in the UK under the 1939 and 1980 limitation statutes continue to apply that test. Recklessness was rejected by the UK Supreme Court in *Canada Square* (**Part E**). Both Canada and Australia also apply a wilful concealment test (**Part F**).

1.4 Applying the correct wilful concealment test, WDC did not fraudulently conceal the right of action because it did not know the LUC existed until 2009. Even if recklessness were sufficient, the Court misapplied its own test. It held that actual knowledge of the material facts is a pre-requisite for reckless concealment but made a contradictory fresh finding that WDC was reckless as to only the possible existence of the LUC and had therefore fraudulently concealed it.

Part B: Departure from "wilful concealment" test

2 Limitation Act 1950 — Fraudulent concealment

2.1 Under the Limitation Act 1950 ("the **LA1950**"), actions founded on tort must be brought within 6 years from the date of accrual.[3] Section 28 provides an exception in cases of fraudulent concealment:

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1 *Daisley v Whangarei District Council* [2022] NZHC 1372, (2022) 23 ELRNZ 839 [HC judgment].
2 *Whangarei District Council v Daisley* [2024] NZCA 161 [CA judgment] at [166]–[178].
3 Limitation Act 1950, s 4(1)(a) [LA1950].

> **28 Postponement of limitation period in case of fraud or mistake**
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> 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 …
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud … or could with reasonable diligence have discovered it.

2.2 The LA1950 was designed to mirror the Limitation Act 1939 (UK) ("the **1939 UK Act**").[4] Both Acts contain an identical fraud exception. In the Limitation Act 2010, Parliament continued the fraudulent concealment exception.[5]

2.3 "Fraudulent concealment" for the purposes of s 28(b) is not limited solely to common law fraud. Rather, s 28(b) also reflects the special *equitable* fraud exception fashioned by the Chancery Courts beginning in 1714 to foreclose unconscionable reliance by a defendant on the Statute of Limitations 1623.[6] Accordingly, s 28(b) embraces common law fraud (requiring proof of dishonesty or moral turpitude) and equitable fraud.

2.4 Mr Daisley alleges that s 28(b) applies as WDC 'fraudulently concealed' his negligence action by not disclosing the existence of the LUC until 2009. He relies on equitable fraud. The case turns on the scope of that exception.

3 Equitable fraud requires "wilful concealment" in New Zealand

Wilful concealment — The controlling New Zealand test

3.1 Equitable fraud exists for the purposes of s 28(b) when a defendant wilfully conceals the plaintiff's right of action. Before *Daisley*, the leading authority on s 28(b) was *Wrightson v Blackmount* in which the Court of Appeal upheld the equitable fraud test articulated by the High Court decisions in *Matai* and *Inca*.[7] Distilled into its key principles, the test requires the following:

(a) The defendant must know the key facts comprising the right of action;

(b) The defendant must subjectively appreciate that (in light of the known facts) they have committed a wrongful act such that they are aware of the right of action and could disclose it to the plaintiff;

(c) The defendant owed a duty to the plaintiff (whether a fiduciary duty or some other special relationship) to disclose the material facts; and

(d) Having knowledge of all the matters in [3.1(a)]–[3.1(c)], the defendant failed to disclose the right of action with the result that it is concealed by means that attract the epithet "wilful" or "deliberate".

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4 See below at [7.1].
5 Limitation Act 2010, ss 4, 14(3) and 48; and CA judgment, above n 2, at [149].
6 *Booth v Earl of Warrington* (1714) 4 Bro PC 163, 2 ER 111 (HL). See below at [7.12]–[7.25].
7 *Wrightson Ltd v Blackmount Forests Ltd* [2010] NZCA 631; *Inca Ltd v Autoscript (New Zealand) Ltd* [1979] 2 NZLR 700 (SC); and *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 (HC).

Knowledge of the material facts and of wrongdoing

3.2 Fundamental to the concept of equitable fraud in s 28(b) is that a defendant cannot "conceal" a right of action of which they are not aware.[8] Consistent with that principle, the Court of Appeal in *Wrightson* held that the defendant must subjectively know "all the facts which together constitute the cause of action".[9] That proposition may seem self-evident, but WDC will submit that the Court of Appeal in *Daisley* interpreted s 28(b) in a manner that nullifies the knowledge requirement.

3.3 It therefore becomes necessary at this early point to emphasise the essentiality of knowledge. As the Court observed in *Wrightson*, the entire focus of s 28(b) is on knowledge of the relevant facts.[10] Absent knowledge, the defendant logically cannot have appreciated their own wrongdoing or, accordingly, that there existed a right of action to disclose. *Inca* and *Matai* underscore this point. Each noted that the defendant must know the "essential facts" constituting the action.[11]

3.4 Mere knowledge of the material facts is, however, not sufficient on its own. Before a defendant can be found to have "concealed" the action, it must also have appreciated that (in light of the known facts) it committed a wrong. Only then will the defendant be aware of the existence of a right of action capable of being disclosed. That additional knowledge requirement is the corollary of the proposition that it is not possible for a defendant to deliberately conceal a claim unless it knows one exists.

3.5 Knowledge of wrongdoing is a requirement of *Wrightson*, *Inca* and *Matai*:

(a) In *Wrightson*, the plaintiff (Blackmount Forest) sued Wrightson in negligence and contract for, essentially, misleading statements, conduct and omissions in relation to a commercial forest. For s 28(b) to apply, the Court held that someone within Wrightson needed to know it had "breached its contract" and that the information provided to Blackmount was "misleading and deceptive".[12] Equipped with that knowledge, Wrightson would have faced a decision-making point as to whether to disclose the right of action. Failure to do so could only be characterised as "wilful" or "deliberate" concealment.

(b) To similar effect, Mahon J in *Inca*, largely endorsed English case law under s 26(b) of the 1939 UK Act distinguishing between a defendant who knowingly commits a wrong (justifying an equitable fraud finding) and one who is "unaware" of their wrongdoing (which will not).[13] So, in both *Inca* and *Matai*, the High Court determined that the defendant in a negligence case needed to know that there was a cause of action

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8 For example, see *Inca*, above n 7, at 711.
9 *Wrightson*, above n 7, at [55].
10 *Wrightson*, above n 7, at [47].
11 *Matai*, above n 7, at 536.
12 *Wrightson*, above n 7, at [47] and [49]–[50].
13 *Inca*, above n 7, at 705–706.

in negligence.[14] Wilful concealment is dependent on showing that the defendant knows a right of action exists and stays silent.

Duty of disclosure or special relationship

3.6 Since *Inca*, it has been the position in New Zealand that non-disclosure of the material facts only qualifies as "equitable fraud" when that failure is in breach of fiduciary duty or a special duty of disclosure:[15]

(a) Unconscionability is the touchstone of equitable fraud in s 28(b) of the LA1950. But English decisions under the 1939 UK Act had placed too much weight on general unconscionability (i.e. conduct that renders it "inequitable"[16] or "against conscience"[17] for the defendant to rely on a time bar) and failed to recognise the special type of unconscionability the Chancery Courts required for fraudulent concealment.[18] Mahon J said this was conduct involving a breach of fiduciary duty or a special relationship requiring disclosure of the material facts.

(b) Translated to a limitation context, the Court in *Inca* found that s 28(b) requires a defendant's non-disclosure to be in breach of duty. The Court in *Wrightson* clarified that the defendant must know that it was under a duty of disclosure.[19] Unless there was a duty or special relationship, a defendant is not required to disclose wrongdoing.[20]

Exhaustive test for equitable fraud under s 28(b) of LA1950

3.7 Wilful concealment is treated by *Wrightson*, *Inca* and *Matai* as exhaustively defining the concept of equitable fraud in s 28(b) of the LA1950. Fraudulent concealment occurs only when a defendant deliberately conceals the cause of action. Put another way, the prohibited *mens rea* state is intention — the defendant must have actual subjective knowledge of the matters in [3.1(a)]–[3.1(c)] and fail to disclose (and thus "wilfully conceal") the cause of action.[21] Nothing short of wilful concealment suffices under s 28(b). To that end, the Court of Appeal in *Wrightson* endorsed Mahon J's exhaustive definition set out in *Inca*.[22] Mahon J held that s 28(b) of the LA1950 codified the equitable rules extending time limits in cases of fraud. On that basis, s 28(b) applies where there is dishonest concealment or non-disclosure which amounts to equitable fraud. In either case, the concealment "*must be wilful*".[23]

4 "Recklessness" incompatible with wilful concealment test

4.1 Reckless concealment, as recognised by the Court of Appeal in *Daisley*, is incompatible with the earlier New Zealand authorities. Despite purporting to be consistent with *Wrightson*, the effect of the Court's analysis was to

14 *Matai*, above n 7, at 539–540; and *Inca*, above n 7, at 711.
15 *Inca*, above n 7, at 709; *Matai*, above n 7, at 536; and *Wrightson*, above n 7, at [39]–[42].
16 For example, see *Applegate v Moss* [1971] 1 QB 406 (CA) at 413.
17 *King v Victor Parsons & Co (A Firm)* [1973] 1 WLR 29 (CA) at 33–34.
18 See the reasoning in *Inca*, above n 7, at 707–711.
19 *Wrightson*, above n 7, at [56]. See also at [47].
20 At [39].
21 At [47].
22 See *Inca*, above n 7, at 711 (emphasis added) endorsed in *Wrightson*, above n 7, at [55]. It also endorsed Tipping J's finding in *Matai* that under s 28(b), the defendant's failure to disclose "*must be wilful*": see at [57]–[58] citing *Matai*, above n 7, at 536.
23 *Inca*, above n 7, at 711.

find WDC guilty of fraudulently concealing a right of action it did not know existed. Equitable fraud instead rested on a finding that WDC was reckless as to whether the material facts (and, by extension, the right of action) existed, and it was objectively unreasonable to run that risk.

Non-wilful concealment of unknown action declared fraudulent

WDC had no knowledge of the LUC or the negligence action

4.2 For present purposes, the key facts are simple. From 2005, WDC sought to limit Mr Daisley to quarrying no more than 500 BCM (bank cubic metres) annually from his land on the basis that he had no authority to do so. WDC issued abatement / infringement notices and, in 2009, initiated enforcement action in the Environment Court. Throughout, WDC maintained, having earlier searched its records, that no LUC existed authorising commercial quarrying to the level that Mr Daisley required. In 2009, the LUC was discovered in WDC's files, thereby revealing its negligence.

4.3 Turning to the reasoning, in assessing s 28(b), the Court of Appeal held that the material fact concealed from Mr Daisley was the existence of the LUC:[24]

> The concealed fact that was essential to Mr Daisley's cause of action in negligence was the existence of the 1988 land use consent. The consent not only supplied a complete or near-complete defence to the abatement notices and application for an enforcement order but also authorised quarrying on the scale necessary to sustain the damages sought.

4.4 Crucially, the Court found that WDC did not know of the existence of the LUC until its discovery in 2009.[25] WDC therefore had no knowledge of the "concealed" fact essential to Mr Daisley's negligence action. The Court agreed with Toogood J's conclusion that no Council officer "actually knew" that the LUC was in WDC's files.[26] Nor were the officers wilfully blind in the sense that they knew the LUC likely existed but consciously put it out of their minds to deliberately avoid having their suspicions confirmed.[27] That being so, the Court of Appeal decided that WDC had not "deliberately withheld" the LUC or "wilfully failed to disclose it".[28] Fraudulent concealment requires that the defendant "subjectively know of the matter concealed".

WDC nevertheless "recklessly" concealed the LUC and negligence action

4.5 Despite those findings, the Court determined that WDC was "reckless" as to the existence of the LUC and fraudulently concealed it by failing to carry out proper searches before taking enforcement action against Mr Daisley.

4.6 In reaching these conclusions, the Court firstly found that the WDC officers had been provided with credible information indicating that WDC's records "might well contain evidence of a land use consent".[29] They were "on notice at the outset that there might well be an historic consent". Underpinning that was the Court's analysis that "it must have been obvious" to WDC that

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[24] CA judgment, above n 7, at [151].
[25] At [164].
[26] At [154] and [164].
[27] At [116] and [165].
[28] At [154] and [164].
[29] At [171].

the land had been quarried on a longstanding basis.[30] Given that knowledge, it was reckless of WDC "not to check" its files. As well, the WDC's sincere belief that it was Mr Daisley who had the burden of proving the existence of the LUC showed that the Council had attempted to justify their failure to check the Council records at the time.[31]

4.7 Secondly, faced with that information the Court concluded it was objectively unreasonable for the officers not to search WDC's records (relying instead on a search undertaken for a LIM) before taking enforcement action.[32] WDC knew the LIM made no mention of a LUC. But the circumstances required WDC officers to comprehensively search the files to be satisfied there were reasonable grounds to believe the quarrying was unauthorised.

Effect of *Daisley* is to nullify the wilful concealment test

4.8 Expressed simply, the effect of the Court's reasoning is that s 28(b) applies to a defendant who fails to disclose a right of action that it did not know existed and, thus, did not knowingly conceal. To explain:

(a) Applying the *Daisley* test, it is not necessary for a defendant to know the material facts comprising the plaintiff's right of action. Rather, it is enough that a defendant appreciates a risk (but does not subjectively know) that the relevant facts might exist. The defendant need only be put on notice of that possibility. Equitable fraud will be established if the defendant unreasonably runs the risk that the material facts exist.

(b) By adopting recklessness, the decision necessarily nullified the wilful concealment test. Without actual subjective knowledge that the material facts exist, the defendant cannot know (or even turn its mind to the possibility) that it has committed a wrong. Nor is it logically possible for the defendant to subjectively know that its duty or special relationship requires disclosure of the facts or the right of action to the plaintiff. Without knowledge of the matters in [3.1(a)]–[3.1(c)], the defendant cannot know an action exists or decide not to disclose it.

Part C: Policy grounds justify the "wilful concealment" test

5 Without wilful concealment there is no unconscionability

5.1 For those reasons, *Daisley* involves a significant expansion of s 28(b) beyond the traditional, exhaustive understanding of equitable fraud. The Court's decision must therefore rest on a different principle, namely that a defendant acts "unconscionably" by taking a risk that a right of action may exist even if they have no actual knowledge of the facts or their wrongdoing.

5.2 In adopting that principle, the Court fell into error. "Recklessness" does not involve unconscionability. Section 28(b) is only engaged if a defendant has wilfully caused time to run in their favour, thus creating a limitation defence. Equity bars defendants from benefiting from their unconscionable conduct.

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30 At [170].
31 At [168].
32 At [172]–[177].

Touchstone of s 28(b) is unconscionable concealment

Equitable fraud limited by context of fraudulent concealment

5.3 Fraudulent concealment in s 28(b) can be substantiated by way of equitable fraud. Generally speaking, the touchstone of "equitable fraud" is the idea of unconscionability. By contrast to common law fraud, the Court of Chancery did not require an intention to cheat. Equity ran more broadly and attached its sanction to conduct of a kind "sufficient to invoke the intervention of a court of conscience".[33]

5.4 Typically, intervention was justified in circumstances where conscience demanded that a party be fastened with personal liability for violating an obligation or special duty recognised in equity.[34] Yet equity responded to, and denounced as fraudulent, other conduct considered so unconscionable it should not be allowed to stand.[35] Many doctrines are founded on this theory of unconscionability and rely on its essential ingredients as established by courts over time, e.g. constructive trusts, misrepresentation, breach of fiduciary duty. Each gives expression to the concept of "equitable fraud" in a particular context and is regulated by its own rules for identifying conduct that is *relevantly* unconscionable.

5.5 The doctrine embodied in s 28(b) is no exception. Based on equitable fraud, s 28(b) responds to unconscionability.[36] As with the doctrines noted above however s 28(b) is engaged by a particular type of unconscionable conduct. Mere unconscionable or inequitable reliance on the LA1950 time bar is not enough. Otherwise, the general law of equitable fraud (e.g. constructive fraud) would overwhelm s 28(b).[37]

5.6 Properly understood, s 28(b) debars a defendant from invoking the LA1950 if it has caused, by unconscionable means, time to run in its favour. Equity then prohibits the taking advantage of wrongdoing. To be clear, in this context, the relevant wrongdoing considered unconscionable is keeping the plaintiff oblivious of a right of action through concealment. So, in *Gibbs v Guild* Lord Coleridge CJ held that the equitable doctrine of concealed fraud was justified because a defendant who conceals wrongdoing has "by fraud made the statute run in your own favour" and cannot be permitted to "take advantage of it".[38] Lindley LJ in *Thorne v Heard* determined that the fraud exception prohibited the "moral injustice of allowing a man to take advantage of his own fraud and concealment".[39] When a defendant creates

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33 J D Heydon, M J Leeming and P G Turner *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies* (5th ed, LexisNexis, Chatswood (NSW), 2015) at 435–443.

34 *Nocton v Lord Ashburton* [1914] AC 932 (HL) at 954 per Viscount Haldane LC.

35 Heydon, Leeming and Turner, above n 33, at 435–443.

36 For example, see *Kitchen v Royal Air Force Assoc* [1958] 1 WLR 563 (CA) at 572–573; *Applegate*, above n 16, at 413; *King*, above n 17, at 33–34; *M (K) v M (H)* [1992] 3 SCR 6 at 57; *Pioneer Corp v Godfrey* 2019 SCC 42, [2019] 3 SCR 295 at [54]; and *Inca*, above n 7, at 709–711.

37 That was the point Mahon J made in *Inca*. Likewise, in *Seymour v Seymour* (1996) 40 NSWLR 358 (CA), the Court held that the exception does not embrace all "equitable fraud": see at 382.

38 *Gibbs v Guild* (1882) 9 QBD 59 (CA) at 63.

39 *Thorne v Heard* [1894] 1 Ch 599 (CA) at 605 per Lindley LJ; *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] AC 102 (HL) at 144–145 and 154; and see also G E Dal Pont *Law of Limitation* (2nd ed, LexisNexis, Chatswood (NSW), 2021) [Dal Pont on Limitation] at 323.

the lapse of time, equity refuses to permit them to "reap the benefit" of deception[40] or use the statute to "accomplish a fraud".[41]

Illustrations and parameters of s 28(b) unconscionability

5.7 Applying the principles given in [5.3]–[5.6], the parameters of s 28(b) can be illustrated and justified by contrasting wilful and negligent concealment.

5.8 There are two well-recognised types of wilful concealment:

(a) The paradigm case is where the defendant only belatedly appreciates their own wrongdoing and takes action to conceal it, either actively or by passive non-disclosure ("**Subsequent Concealment**").

(b) Wilful breach of duty / commission of a wrong in circumstances where the defendant knows the plaintiff will not discover the breach for some time ("**Contemporaneous Concealment**").[42]

5.9 Starting with Subsequent Concealment, supposed a builder has unwittingly erected a house on faulty foundations. During construction the builder had a choice between two types of brick. Brick B was selected instead of Brick A, not realising that it was inferior. Years later the builder discovers that this was negligent, i.e. Brick B is low quality *and* could not safely support the house on its foundations.

5.10 Turning to the logic of *Wrightson*, the builder was, on discover of the negligence, able to say something to the prospective plaintiff to disclose the right of action because the material facts comprising the plaintiff's right of action were known, and the builder subjectively appreciated the wrong (i.e. the foundations were defective because of the negligent choice of brick). Equipped with that knowledge, a defendant is faced with a clear decision, whether or not to tell the plaintiff. They *choose*, however, to say nothing. Significantly, it is that choice which equity treats as unconscionable. By saying nothing, the defendant deliberately conceals the right of action and thereby causes time to run in their favour. The defendant's choice created the legal advantage of being able to rely on the time bar. Equity will prevent a defendant taking the benefit of that advantage given it was created by unconscionable conduct.

5.11 Secondly, Contemporaneous Concealment is indistinguishable in principle from Subsequent Concealment. Suppose, to vary the example, the builder knew when building the house that Brick B was inferior and would produce defective foundations.[43] The builder also knew that the defect would not be discovered for some time because it related to underground foundations. Here, the builder *knowingly* breached a duty to the plaintiff and committed a wrong. While they have not actively concealed the action, they ""committed the breach secretly" and furtively, safe in the knowledge that the intentional breach will not be discovered.[44] Identically to the earlier example, the

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40 *Trevelyan v Charter* (1835) 4 LJ (NS) (Ch) 209 at 214.

41 *Inca*, above n 7, at 709 citing *McCormick v Grogan* (1869) LR 4 HL 82 at 97, *Bond v Hopkins* (1802) 1 Sch & Lef 413 and *Story's Equity Jurisprudence* (13th ed, 1886) vol 2 at [1521].

42 *Bulli Coal Mining Co v Osborne* [1899] AC 351 (PC). See also *King*, above n 17, at 33–34.

43 By analogy to *Clark v Woor* [1965] 1 WLR 650 (QBD).

44 *King*, above n 17, at 33–34; and *Bulli Coal*, above n 42, at 362–364.

builder knew the relevant facts and subjectively knew of their wrongdoing. The builder says nothing to the plaintiff and relies instead on not being discovered. Correctly analysed, the builder has made a *choice* to commit a wrong (contract, tortious, etc) in a manner that wilfully conceals the action. Equity intervenes to denounce that choice and remove the legal advantage the defendant would otherwise unconscionably obtain

5.12 To contrast these hypotheticals with the following variations in negligence:

(a) The builder deliberately used Brick B believing (negligently) it to be of the same quality as Brick A and then covered over the foundations.

(b) Several years after the house was finished, the owner asked the builder if they used Brick A or B, to which the builder responded (both negligently and mistakenly) that they used Brick B.

5.13 For each hypothetical in [5.12], the result is identical to wilful concealment. By their conduct, the builder caused the plaintiff to remain ignorant of the right of action. The crucial difference in relation s 28(b) of the LA1950 lies in the identity and character of the builder's conduct that causes the plaintiff's non-discovery of the action and whether equity treats that conduct as unconscionable. Here, it is the builder's negligent failure to ascertain the existence of the facts or to appreciate wrongdoing in light of the facts which causes the right of action to go undiscovered. Equity does not (and never did)[45] denounce that negligence as either unconscionable or fraudulent.

5.14 Unlike in a case of wilful concealment, the builder has not knowingly created their own legal advantage by causing time to run in their favour with a result that the time bar crystallises. The builder did not make a *choice* that caused the right of action to be hidden, and instead the opposite is the case. The builder's negligence meant that they were entirely ignorant of their wrong and thus never had the opportunity to make a decision regarding disclosure which would bind their conscience and invite equity's judgement.

5.15 Underscoring WDC's submissions, negligent concealment was rejected by the House of Lords in *Cave v Robinson Jarvis & Rolf* as a sufficient basis for extending time under the Limitation Act 1980 (UK):[46]

(a) The House of Lords referred to authorities under the 1939 UK Act for the proposition that negligence does not engage the concealed fraud exception.[47] Relying on those decisions, Lord Millett said that s 26(b) "did not extend to the case where the defendant *ought to have known but did not in fact know the relevant facts* which constituted the cause of action against him" for the basic reason that a person cannot either "conceal" or "fail to disclose something of which he is ignorant".[48]

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45 See the discussion below in Part D.

46 See *Cave v Robinson Jarvis & Rolf (A Firm)* [2002] UKHL 18, [2003] 1 AC 384. The House of Lords overturned *Brocklesby v Armitage & Guest* [2002] 1 WLR 598 (CA) which had held that a defendant who intentionally performed the relevant act or omission and was found to have been negligent was guilty of fraud even if they did not appreciate their wrongdoing.

47 *Cave*, above n 46, at [20]–[21] per Lord Millett and [41] per Lord Scott.

48 At [21] (emphasis added). See also Lord Scott at [61].

(b) Deliberate concealment, therefore, turns on knowledge and intention. In the absence of "*intentional wrongdoing*", the House said that it was "neither just nor consistent with the policy of the Limitation Acts to expose" a defendant to civil proceedings after expiry of the time bar.[49] For so long as the defendant "remains ignorant of the error and of his own inadvertent breach of duty, there is nothing for him to disclose".[50] The deliberate concealment exception instead requires either that the defendant take active steps to conceal their breach after they become aware of it or the defendant fails to disclose the deliberate wrong.

Recklessness does not involve unconscionable concealment

5.16 Having explained the rationale and parameters of s 28(b), the reasoning as to why recklessness is not fraudulent concealment is easier to explain. WDC submits that recklessness does not engage the mischief to which s 28(b) responds. A reckless defendant has not acted unconscionably.

5.17 WDC accepts that wilful blindness is 'fraudulent concealment' under s 28(b) simply because it is, like the forms of concealment discussed already, wilful. Applied to the limitation context, the UK Supreme Court in *Canada Square* said that wilful blindness involves deliberate concealment on the basis that the defendant is treated as having actual knowledge of the fact(s) to which they deliberately turned a blind eye or failed to conduct further inquiries into, in order to prevent obtaining actual knowledge of their own wrong.[51] Based on the principles above, that choice is unconscionable and fraudulent.

5.18 By contrast, a reckless defendant lacks knowledge of the facts/wrongdoing:

(a) Recklessness as defined by the Court of Appeal in *Daisley* is when a defendant subjectively appreciates a risk that the material fact(s) may exist and that it was unreasonable in the circumstances known to the defendant to run the risk.[52] It distinguished this from wilful blindness.[53]

(b) Logically, the reckless defendant cannot know the material facts(s) as otherwise they would meet the "actual knowledge" test. Nor can they be guilty of suspicion that the facts / wrongdoing may exist and of intentionally not inquiring further, as that would be "wilful blindness".

(c) Rather, by "recklessness" the Court of Appeal must have meant that the defendant recklessly reached the genuinely held subjective belief that the relevant fact did not exist. Put another way, the defendant has considered and rejected the risk that the fact exists or that they have committed a wrong. The objective limb of the *Daisley* "recklessness" formulation then asks whether or not that was reasonable. Translated to the facts of *Daisley*, the Court decided that WDC did not know that the LUC existed, and nor was it wilfully blind. Rather, the Court found

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49 At [15] per Lord Millett.
50 At [26] per Lord Millett.
51 See *Potter v Canada Square Operations Ltd* [2023] UKSC 41, [2024] AC 679 at [48] and [129]. See generally *Westpac New Zealand Ltd v MAP & Associates Ltd* [2011] NZSC 89, [2011] 3 NZLR 751 at [27] and *Sandman v McKay* [2019] NZSC 41, [2019] 1 NZLR 519 at [78].
52 CA judgment, above n 2, at [115] but see also at [141].
53 At [115]–[116] and [164]–[178].

that WDC's officers must have appreciated a risk of the LUC existing but ultimately disregarded that possibility in circumstances that were objectively unreasonable. This is however the language of negligence and not unconscionable fraud.

5.19 Properly defined, "recklessness" is not unconscionable and therefore does not constitute equitable fraud. A reckless defendant has not concealed the plaintiff's right of action. Borrowing the language of *Gibbs* and *Thorne*, the reckless defendant has not by unconscionable means caused time to run in their favour such that they are responsible for creating the legal advantage on which they seek to rely. Nor has a reckless defendant made a choice not to disclose the action. Like the negligent builder, a reckless defendant does not know the material facts or, if they do know the facts, they have failed to appreciate their own wrongdoing. Without knowledge of these matters, as Lord Millett observed in *Cave*, there is nothing for the defendant to disclose.

6 Limitation policy undermined by "recklessness" test

6.1 Besides not being unconscionable, a recklessness test should be rejected because it expands s 28(b) in a manner inconsistent with limitation policy and with the balance Parliament struck between irreconcilable interests.[54]

Limitation policy — The balance struck by the LA1950

6.2 Three sets of irreconcilable interests underlie the balance Parliament struck in enacting the LA1950. Each has a bearing on s 28(b)'s interpretation.

6.3 Firstly, the statute is primarily designed to promote fairness to defendants, as this Court found in *Credit Suisse*.[55] Limitation periods safeguard against endless litigation and prevent defendants from facing ancient obligations.[56] Exposing defendants to historical claims risks unfairness due to the issue of evidential decay. Witnesses' memories fade, documents are disposed of or lost, key witnesses move on etc.[57] In consequence, with the lapse of time, neither the defendant nor the court has the evidence necessary to ascertain the truth on contested factual questions.[58] Statutes of limitation also enable defendants (after a time) to alter their position relying on the fact that a claim can no longer be brought against them.[59] Long dormant claims are unjust.[60]

6.4 Secondly, the LA1950 secures the wider public interest in justice. Access to justice for prospective plaintiffs is an important right. But the Act gives effect to a higher principle, the *fair* administration of justice. Historic claims and the associated risk of evidentiary decay mean that defendants cannot fairly defend themselves.[61] Public confidence in the existence of fair trial rights

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54 See also Te Aka Matua o te Ture | Law Commission *Limitation Defences in Civil Proceedings* (NZLC R6, 1988) [NZLC Report] at [1]–[3] and [101]–[110]; and Dal Pont on Limitation, above n 39, at [1.15].
55 *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [156].
56 At [155]–[156] citing *GD Searle & Co v Gunn* [1996] 2 NZLR 129 (CA) at 131. See NZLC Report, above n 54, at [101]–[103].
57 NZLC Report, above n 54, at [101]–[105]; Law Commission of England & Wales *Limitation of Actions Consultation* (CP151, 1998) [EWLC Report] at 11–13; Dal Pont on Limitation, above n 39, at 12–14.
58 NZLC Report, above n 54, at [101]–[105]; EWLC Report, above n 57, at 12.
59 EWLC Report, above n 57, at 12; Dal Pont on Limitation, above n 39, at 14–16.
60 Dal Pont on Limitation, above n 39, at 14 citing *A'Court v Cross* (1825) 3 Bing 329, 130 ER 540.
61 At 12–14; EWLC Report, above n 57, at 13–14; NZLC Report, above n 54, at [105].

risks being eroded by such actions.[62] So too if long-established rights (including those held by third parties) are unsettled by dormant claims, with the result that the public cannot safely assume that the "slate has been wiped clean of ancient obligations".[63] Belief in the fair administration of justice depends on principles of legal certainty, finality and repose. The LA1950 recognises that access to justice cannot be permitted to imperil public confidence in the system's ability to fairly dispense justice.

6.5 Finally, plaintiffs have an interest in vindicating their legal rights. The 6 year limitation period (with narrow exceptions) in the 1950 and 2010 Acts follows centuries of English reforms, later modified by Parliament to meet this country's conditions.[64] In adopting the 6-year period, a careful balance was struck. The courts' role is to interpret and apply the Act and its exceptions predictably and consistently with Parliament's compromise.[65]

Wilful concealment test is consistent with limitation policy

6.6 Interpreting s 28(b) to require wilful concealment — like in *Wrightson*, *Matai* and *Inca* — is consistent with Parliament's policy balance:

(a) Following the expiry of the 6-year period, the LA1950 bars a plaintiff's right of action. It does so on the assumption that the interests of both the defendant and society require statutory intervention to realise the policy objectives in [6.3]–[6.5]. Specifically, the LA1950 operates on a default assumption that the defendant is not at fault for being exposed to a historic action and the associated consequences.

(b) When a defendant has wilfully concealed the action, however, that assumption breaks down. They only have themselves to "blame" for not being sued on time.[66] Not only have they unconscionably created their own defence, but the concerns regarding evidential decay, legal uncertainty, unravelling long-established rights etc are entirely of their own making. Those issues are caused by wilful concealment and not by effluxion of time. The LA1950 only responds in the latter situation. Public confidence in the administration of justice would be eroded if a defendant could escape judgment by wilfully hiding their wrongdoing.

Recklessness test conflicts with limitation policy

6.7 By contrast, the "recklessness" test applied by the Court of Appeal conflicts with limitation policy and is inconsistent with the LA1950's policy balance.

6.8 Firstly, for the reasons submitted above, the recklessness test significantly expands the scope of s 28(b) to reach conduct that is not unconscionable. The defendant has, instead, merely failed to ascertain the constitutive facts or appreciate that they have committed a wrong. By that failure, they have not wilfully caused time to run in their favour with the result that equity must step in (out of conscience) to foreclose the defendant relying on the time

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62 NZLC Report, above n 54, at [2] and [105]; and EWLC Report, above n 57, at 13–14.
63 Dal Pont on Limitation, above n 39, at 15–16.
64 NZLC Report, above n 54, at [19]–[38].
65 *Haward v Fawcett* [2006] UKHL 9, [2006] 1 WLR 682 at [32]. Occasional apparent unfairness is the cost of the law of limitation: see *Hawkins v Clayton* (1988) 164 CLR 539 at 589.
66 *Cave*, above n 46, at [8] per Lord Millett.

bar. Therefore, the LA1950's default assumption holds true, namely the defendant is not legally responsible for the effluxion of time and so ought to be shielded from the harms inherent in defending against historic actions. Exposing a defendant to stale claims based on "recklessness" conflicts with limitation policy by unjustifiably bringing about the consequences which the time bar is designed to forestall. Additionally, it disturbs the balance Parliament struck by elevating the plaintiff's rights over the rights of the defendant and wider society.

6.9 Secondly, the Court in *Daisley* acknowledged that "recklessness" would be an improper test if it "affect[ed] an entire class of cases" so that a more restrictive interpretation of s 28(b) is justified.[67] Yet it concluded that the recklessness test did not fall foul of that error. Rather, the Court held that its test did not have any category-based consequences. It simply requires a case-by-case *mens rea* inquiry, not inconsistent with limitation policy.[68]

6.10 WDC submits that the Court of Appeal erred. It failed to appreciate that the recklessness test indeed does affect an entire class. For example, professionals such as surgeons, lawyers etc, but also builders and others whose work involves consciously taking risks will be captured on *Daisley*'s expanded theory of equitable fraud. In *Canada Square*, the UK Supreme Court rejected recklessness partly on that basis, observing that:[69]

> Professional people and others often know that they are exposed to claims, because their work necessarily involves the taking of risks. For example, surgeons operating on their patients are aware of the risk that the surgery may have an adverse outcome. Lawyers advising on difficult points of law are aware of the risk that their advice may prove to be mistaken. They, like the surgeons, know only too well that they are exposed to claims. That is the reason why surgeons, lawyers and other professionals take out professional indemnity insurance. However, if the test proposed by the claimant were to be applied, people such as these would have no protection against claims for the indefinite future.

6.11 Taking a risk, as part of the ordinary course of one's occupation, would be enough under *Daisley* to constitute subjective appreciation of a risk that a right of action may well exist. Years after the events, if a professional (for example) is alleged to have been negligent, s 28(b) would preclude reliance on the defence where the conduct involved the kind of risk-taking referred to by the UK Supreme Court. *Canada Square* and *Cave* said that reckless / negligent concealment would "subvert the whole purpose" of limitation because however stale the claim, the defendant "must defend the action on the merits",[70] i.e. show that the risk-taking was non-negligent.

Part D: History of fraudulent concealment exception

7 Fraud exception turned on wilful concealment (1714–1938)

7.1 Legislative history indicates that s 28(b) should be construed consistently with the old position in equity. Parliament enacted the LA1950 to "follow

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67 CA judgment, above n 2, at [147].
68 At [145]–[148].
69 *Canada Square*, above n 51, at [152].
70 *Canada Square* above n 51, at [151]–[152] endorsing *Cave*, above n 46, at [15].

substantially" the 1939 UK Act.[71] The UK Parliament passed an identical exception to codify the equitable doctrine of concealed fraud.[72]

7.2 History reinforces WDC's submission that s 28(b) requires proof of wilful concealment. Since the House of Lords' decision in *Booth v Warrington* in 1714, Courts of Equity recognised an exception to the 1623 Act time bar in cases of fraudulent concealment.[73] Later decisions then applied *Booth* in a manner consistent with *Wrightson*. Before looking at these, it is necessary to address the relationship between statute and equity which supplied the conceptual basis for equity's refusal to apply the 1623 Act in situations of fraudulent concealment.

Relationship between Courts of Equity and Statute of Limitations 1623

Equity adopted the Statute of Limitations to govern equitable jurisdiction

7.3 Under the Statute of Limitations 1623, most claims in tort and contract had a six-year period. There was no exception for fraudulent concealment. Nor did the Act expressly govern suits in equity. It was limited to actions at law.[74]

7.4 Despite that, the Courts of Equity adopted the 1623 Act as establishing the applicable limitation period in the equitable jurisdiction. That was, in large part, due to the close alignment of the work performed by, the two court systems. Equity was: (a) exclusive, (b) concurrent and (c) auxiliary.[75] Many common law actions could also be brought by Bill in equity's concurrent jurisdiction, albeit equity administered peculiar and (often more effectual) remedies. The fraud exception emerged from that jurisdiction.

7.5 Accordingly, the Courts of Equity applied the 1623 Act even though it was not binding. Various justifications have been offered for the theoretical basis for that approach.[76] In 1872, Lord Westbury in *Knox v Gye* offered a leading explanation: analogy.[77] Where a "suit in Equity corresponds with an action at Law which is included in the words of the statute", the Court of Equity acts by analogy and imposes the same temporal restriction. Earlier, in 1806, Lord Redesdale had offered a different but not inconsistent justification of obedience.[78] The Courts of Equity were within the "spirit and meaning" of the 1623 Act and were "bound to yield obedience" in the same manner as a Court of Law.[79]

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71 Limitation Bill 1950 (59-1) (explanatory note) at 1; and (16 November 1950) 293 NZPD 4240.

72 Law Revision Committee *Fifth Interim Report – Statutes of Limitation* (23 December 1936) at 29–31.

73 *Booth*, above n 6; and John Brunyate *Limitation of Actions in Equity* (Stevens & Sons, London, 1932) at 24 [Brunyate Text].

74 Even if the equitable bill fulfilled the same purpose as a suit: John Brunyate "Fraud and the Statute of Limitations" (1931) 4 CLJ 174 at 175 [Brunyate Article]; *Hollingshead's Case* (1721) 1 P Wms 745, 24 ER 595 at 595; *Hovenden v Lord Annesley* (1806) 2 Sch & Lef 607 at 629–630 per Lord Redesdale (the Irish Lord Chancellor); and *Bond*, above n 41, at 428.

75 F W Maitland *Equity: A Course of Lectures* (2nd ed, Cambridge University Press, Cambridge, 1936) at 20–21; Story *Commentaries on Equity Jurisprudence* (Hilliard, Gray & Co, Boston, 1876) at 33-34.

76 For example, see *Gerace v Auzhair Supplies Pty Ltd* [2014] NSWCA 181, (2014) 87 NSWLR 435.

77 *Knox v Gye* (1872) LR 5 HL 656 at 674; and *Jones v Turberville* (1816) 1 Ves Jr 214, 34 ER 757.

78 *Hovenden*, above n 74, at 629–630. See also *Lockey v Lockey* (1719) Prec Ch 518, 24 ER 232; *Hollingshead's Case*, above n 74; *Smith v Clay* (1767) Amb 646, 27 ER 419; *Cholmondeley v Clinton* (1821) 4 Bli 1, 4 ER 721; *Barber v Houston* (1884) 14 LR IR 273; *Whalley v Whalley* (1821) 3 Bligh 1, 4 ER 506; *Ecclesiastical Commissioners v North Eastern Railway Co* (1877) 4 ChD 845 (Ch); *Sherwood v Sutton* (1828) 5 Mason's US Reports (1st Cir) 143 per Story J; and L A Sheridan *Fraud in Equity* (Pitman & Sons, London, 1957) at 160–161.

79 *Hovenden*, above n 74, at 630.

Statute of Limitations treated as obligatory — Equity followed the law

7.6 Whatever the explanation, it is settled that Courts of Equity treated the 1623 Act as imposing substantive constraints (whether by analogy, binding effect or both) which equity was obliged to follow, so far as conscience allowed.[80]

7.7 The leading authority is the English Court of Appeal's decision in *Gibbs v Guild*. Lord Coleridge CJ stated (referring to Lord Redesdale's justification) that the 1623 Act did "bind Courts of Equity as much as it binds the Courts of Law". Equity owed obedience to the Act.[81] Brett LJ found that within its concurrent jurisdiction, the Courts of Equity did "recognise the binding authority" of the 1623 Act, whether by analogy or because they "considered themselves bound" by it (Brett LJ preferred the latter view).[82] Holker J also spoke in the language of obligation. The Courts of Equity were "bound by the strict language of the statute", for acts of parliament are "omnipotent".[83]

7.8 Although equity was bound to apply the 1623 Act, that obligation would not apply if conscience demanded otherwise. Fraudulent concealment was the paradigm case where equity refused to apply Parliament's legislation. Lord Coleridge CJ in *Gibbs* reasoned that the duty to apply the Act was governed by the ancient doctrine that equity prohibited suitors from taking the benefit of a legal advantage where it would be unjust.[84] Equity parted ways with the 1623 Act in cases of fraudulent concealment. By similar reasoning, Brett LJ found that Courts of Equity would be free of the 1623 Act in cases of fraud: it created an equity independent of the Act that precluded its application.[85]

Wilful concealment repelled the 1623 Act in equity

7.9 Invested with an obligatory quality, the 1623 Act would be applied in a Court of Equity *unless* the defendant's conduct was unconscionable to the degree that it "repelled the application of the statute".[86] Powerless as they were to disapply a Parliamentary enactment, the Common Law courts were unable to give a remedy in cases of concealment.[87] But equity could.[88] Ultimately, Parliament followed equity, as is seen below.

7.10 Having reviewed the case law between 1714–1938, L A Sheridan said that the 1623 Act would be repelled in Courts of Equity in two instances:

(a) Where a person, "knowing that another has a cause of action against him", conceals the existence of the cause of action so that the plaintiff could not discover it.[89] For concealment to be fraudulent, a defendant

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80 George Spence *The Equitable Jurisdiction of the Court of Chancery* (Lea & Blanchard, Philadelphia, 1846) vol 1 at 502 and vol 2 at 61.

81 *Gibbs*, above n 38, at 64–65. See also *Bulli Coal*, above n 42, at 363; *Inca*, above n 7, at 709.

82 *Gibbs*, above n 38, at 68.

83 At 74–75.

84 At 65. See also *Hovenden*, above n 74, at 634.

85 At 68–69. For similar reasoning, see *R v McNeil* (1922) 31 CLR 76 at 100.

86 For example, see *Hovenden*, above n 74, at 634; *Trotter v MacLean* (1879) 13 ChD 574 (Ch) at 584; *Bulli Coal*, above n 42, at 363–365; *Bond*, above n 41, at 429; *Inca*, above n 7, at 709 (referring to *McCormick*, above n 41); *McNeil*, above n 85, at 100; and *Gerace*, above n 76, at [46]–[49].

87 See *Hunter v Gibbons* (1856) 1 H&N 460, 156 ER 1281 and *Imperial Gas Light v London* (1854) 10 Exch 38, 156 ER 346, unless the fraud was actionable in its own right as a common law action.

88 In some cases, the courts spoke of engrafting an exception onto the 1623 Act (*Hunter* and *Sherwood*).

89 Sheridan, above n 78, at 172. See also Brunyate Text, above n 73, at 36–37 to similar effect. See also *Canada Square*, above n 51, at [36] (fraud depended on knowledge of all the facts concealed).

"must have been aware" they were concealing an action.[90] If so, they are a "cheat" who has "suppressed" the plaintiff's right of action.[91]

(b) Alternatively, it is fraudulent for a defendant, "knowing that he is doing something actionable", to commit the wrong secretly.[92]

7.11 Sheridan's formulation of the law between 1714–1938 is consistent with *Wrightson*'s wilful concealment test. Unless the defendant knew the action existed, its conduct was not unconscionable to the level required for a Court of Equity to depart from its self-conscious obligation to comply with the 1623 Act or recognise an equity precluding reliance on the time bar. Sheridan's account mirrors the key elements from [3.1], namely knowledge of the facts and of wrongdoing. It also reflects the forms of both Contemporaneous and Subsequent Concealment.

Leading authorities are consistent with wilful concealment test[93]

7.12 The origin of the exception is the 1714 decision in *Booth* which typifies wilful concealment. The Earl of Warrington aspired to marry Mary Oldbury. George Booth, the Earl's uncle, arranged the marriage. He claimed that he had met a third-party who would procure the marriage for a fee. The uncle told the Earl he had put up security for the fee and requested he be repaid. When the marriage went ahead the Earl paid his uncle. Nine years later, the scheme was unravelled as a fraud. There was no third party, fee, etc. The uncle arranged the marriage directly and kept the Earl's money.[94]

7.13 The Earl brought a bill in the Court of Chancery and the uncle, in turn, relied on the 1623 Act. The House of Lords refused the defence on the basis that, due to the fraud, relief in equity was not barred by lapse of time. The decision is not fully reported, but later decisions have explained the House's reasoning. Fraud is a "secret transaction" or a "secret thing".[95] The uncle concealed his wrongdoing and "pending the concealment of the fraud", time should not run because his conscience was too affected.[96] This appears to have been Contemporaneous Concealment.

7.14 Next came *Llevellyn v Mackworth* in 1740,[97] which held that to remove a limitation defence the alleged concealment "*must be a voluntary and fraudulent one*".[98] Accidental concealment of facts which the defendant has no knowledge of is not fraudulent. Otherwise, the exception would have "dangerous consequences" and defeat the 1623 Act's purpose, which was for "quieting Possessions".[99] The plaintiff alleged that the defendant had suppressed a 1655 will. Lord Chancellor Hardwicke held that the defendant

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90 Sheridan, above n 78, at 165.
91 At 169–170, 178 and 180.
92 At 162. Fraud exists where the wrong was perpetrated "darkly", "astutely" and "invisibl[y]": at 165.
93 See also Brunyate Text, above n 73, at 35–36.
94 It was described as a "mere fiction and fraud": see *Booth*, above n 6, at 113.
95 *South Sea Co v Wymondsell* (1732) 3 P Wms 143, 24 ER 1004; *Hovenden*, above n 74, at 633–634.
96 *Hovenden*, above n 74, at 633–634.
97 *Llevellyn v Mackworth* (1740) 1 Barn Ch 445, 27 ER 714.
98 At 715.
99 *Limitation Abridgment* (1744) 2 Eq Cas Abr 577, 22 ER 486 at 488 (reporting *Llevellyn*).

was in possession of the 1655 will for many years but he had no knowledge of this, so it was accidental and there was no fraud.

7.15 Two later decisions warrant only brief mention:

(a) *Bree v Holbech* (1781) — Lord Mansfield's decision is consistent with the requirement of knowledge. An administrator found in the testator's papers a mortgage deed and assigned it. More than 6 years later, the assignee sued on discovering the deed to be a forgery. The fraud exception did not apply because the administrator was not aware of the forgery, but had he known of that and sold a "true security", the exception might have applied.[100]

(b) *Short v M'Carthy* (1820) — a submission was rejected that the fraud exception applied to mere negligence. The plaintiff bought a £340 share of a £700 annuity relying on his lawyer's representation that the annuity existed in the Bank of England's records. Years later it emerged that no annuity existed: the lawyer had not searched the Bank. The plaintiff relied, in part, on fraud whereas the defendant argued there was only negligence. The defendant succeeded albeit the judgment was primarily based on the date of accrual.[101]

7.16 Intentional concealment was endorsed in *Dean v Thwaite* (1856). When mining an underground colliery the defendants transgressed their boundary and mined their neighbour's coal for 11 years without consent. Upon discovering this, the plaintiff filed a bill in equity seeking an account and relied on fraudulent concealment. The Master of the Rolls determined that "the only fraud that … would justify the Court in coming to the conclusion that the coal gotten before that period ought to be accounted for is, that the Defendants had *intentionally* taken the Plaintiff's coal, and had concealed the fact" and had "*taken steps to prevent*" discovery.[102] No evidence of intentional fraud existed, so the 1623 Act applied.

7.17 Finally, in *Bulli Coal* (1899), the Privy Council confirmed that equitable fraud existed both in cases of Contemporaneous and Subsequent Concealment. Either way, the judgment emphasises the requirement of knowledge — it is consistent with *Wrightson*.[103] Between 1878-1880, Bulli extracted coal from the respondent's neighbouring property without consent. It did so "secretly" and "wilfully" by an underground trespass.[104] When this was discovered in 1893, the respondent sued. Bulli unsuccessfully pleaded the 1623 Act on the grounds that it had not "actively concealed" its trespass and that intentional trespass does not amount to equitable fraud.[105]

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[100] *Bree v Holbech* (1781) 2 Doug KB 654, 99 ER 415. The decision acknowledges that fraud may exist if a defendant represents the truth of a statement when they have no belief in the truth (i.e., deceit).

[101] *Short v M'Carthy* (1820) 3 B&A 626, 106 ER 789 at 791; *Armstrong v Milburn* (1886) 54 LT 723 (CA).

[102] *Dean v Thwaite* (1856) 21 Beav 621, 52 ER 1000 at 1001. See also *Granger v George* (1826) 5 B&C 149, 108 ER 56 ("fraud practised by the defendant *in order to prevent*" plaintiff obtaining knowledge); and *Charter v Trevelyan* (1844) 11 C&F 714, 8 ER 1273 at 1283–1284.

[103] *Bulli Coal*, above n 42.

[104] At 360.

[105] At 356–357, 361. The trial court found Bulli Coal had taken the coal wilfully not inadvertently: at 352.

7.18 The Privy Council rejected this and endorsed a wilful concealment test:

(a) Deliberately concealing one's wrongdoing after the fact will amount to equitable fraud. The Privy Council endorsed *Dean v Thwaite*.[106]

(b) Fraud also exists in cases of Contemporaneous Concealment. That is because the defendant has committed the act "so wisely and acted so warily, that he can safely calculate on not being found out for many a long day".[107] In principle, there is no distinction between concealing wrongdoing subsequently or carrying out a wilful "furtive" wrong.[108]

(c) In either case, whether fraud exists turns on knowledge and intention. The Privy Council found that underground trespass can be carried out "without any sinister intention"; the courts have to distinguish between cases of "ignorant or wilful, innocent or fraudulent" wrongdoing.[109]

7.19 Authorities in the early 1900s leading up to the 1939 UK Act proceeded on these settled principles.[110]

Recklessness no different to inadvertent wrongdoing – Trotter v MacLean *(1879)*

7.20 Recklessness was treated as mere inadvertence in *Trotter*,[111] meaning that the defendant was not guilty of wilful concealment. MacLean owned a colliery which abutted property owned by the estate of Trotter. In 1871 the colliery started negotiations with the estate for a licence to mine its coal but a final agreement was not reached and, despite that, the colliery began mining the same year. Nine months later, one of the trustees told the colliery that an agreement was not possible. The estate sued in April 1878. Part of its claim was time-barred.

7.21 The plaintiff argued that the fraudulent concealment exception applied. Unlike *Dean v Thwaite* the boundary transgression was said not to be mere inadvertence but, rather, the colliery acted unconscionably by a "*reckless dealing*" with the estate's property. It had "nothing but an expectation that everything would be made right and [it] deliberately took the risk of beginning before it was made right". That amounted to fraud and justified setting aside the 1623 Act. By contrast, the defendant argued that the unlawful mining was inadvertent. The colliery had a "bona fide belief" that a lease would be granted by the trustees.[112]

7.22 Fry J declined to apply the fraud exception and upheld the defendant's submissions. He held that while there was no agreement in 1871, there was a mutual "expectation" that an agreement would be concluded.[113] The plaintiff's case was therefore rejected on recklessness. There was, in any case, no concealment as the estate knew of the mining.

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[106] At 365, but this was subject to the qualification that Contemporaneous Concealment also sufficed.
[107] At 364.
[108] At 364–365. The Privy Council endorsed *Trotter*, above n 86.
[109] At 364. It overruled *North Eastern Railway*, above n 78. Intentional trespass was required.
[110] For example, *Oelkers v Ellis* [1914] 2 KB 139 (KB); *Legh v Legh* [1930] All ER Rep 565 (KB). The other 1900's cases concern the exception at common law: see *Lynn v Bamber* [1930] 2 KB 72 (KB).
[111] *Trotter*, above n 86.
[112] See the summary of argument at 577–583.
[113] At 584–585.

Partial codification – Real Property Limitation Act 1833

7.23 The UK Parliament partially codified the fraud exception in s 26 of the Real Property Limitation Act 1833 ("the **RPA1833**") for suits to recover land / rent in equity. Time would not run if concealed fraud deprived a plaintiff of title.

7.24 The RPA1833 exception was drawn from the general concealment doctrine recognised in *Booth* and developed by the Courts of Equity.[114] Speaking to the Bill in the House of Lords, the Lord Chancellor said a limitation period of 20 years had been adopted (subject to a fraud exception) as those were the rules upon which Courts of Equity acted in relation to land held on trust.[115] Later decisions have said that "concealed fraud" in the RPA1833 bears the same essential meaning as the antecedent equitable doctrine.[116] It appears that the RPA1833 test is marginally stricter, only because it was not settled whether mere non-disclosure sufficed. What matters is that the RPA1833 (as in equity) required actual knowledge of the right of action.

7.25 Decisions applying the RPA1833 exception stressed the requirement that the defendant be guilty of *wilful* concealment. These decisions reinforce the view that the wider equitable exception (which is the predecessor doctrine) turns on wilful concealment, too. In *Petre*, the Court said that concealed fraud means "designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right".[117] Similarly, in *Willis v Earl Howe*, Kay LJ held that "concealed" indicates that there "were facts known to the person who enters and designedly concealed by him from the real owner, which facts if known, would enable the real owner to recover".[118] Concealed fraud is not established if the defendant is ignorant of the facts, negligent or mistaken.[119]

Part E: Deliberate concealment required in United Kingdom

8 Wilful concealment – Governing test under 1939 UK Act

8.1 Before the 1939 UK Act, the Courts of Equity had, over the course of two centuries, coherently and reliably insisted on wilful concealment as the type of unconscionability justifying a departure from the 1623 Act. Formulated in that way, the exception observed the balance of interests Parliament struck in the 1623 Act while also suppressing the injustice of allowing a defendant to rely on a lapse of time created by their own intentional misconduct.

8.2 Following enactment of the 1939 UK Act, the UK courts faithfully followed that settled body of principle by adopting the same wilful concealment test.

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[114] For example see *Hovenden*, above n 74, at 629–635 which refers to the fraud exception in the context of cases dealing with title to property; and see *Whalley*, above n 78.

[115] Speech of Lord Lyndhurst (1833) 18 UKHL 790 (14 June 1833).

[116] For example, see *Gibbs v Guild* (1891) 8 QBD 296 (QB) at 304–305; *Re McCallum* [1901] 1 Ch 143 (CA) at 150–151 and 159; *Beaman v ARTS Ltd* [1949] 1 KB 550 (CA) at 567; *Gerace*, above n 76, at [75]; and *Canada Square*, above n 51, at [36]. Sheridan, above n 78, at 163–164 and Brunyate Text, above n 73, at 37–40 note that the RPA1833 may be slightly stricter: it was not settled if non-disclosure or contemporaneous concealment sufficed. The cases went in both directions.

[117] *Petre v Petre* (1853) 1 Drew 371, 61 ER 493, endorsed in *Re McCallum*, above n 116.

[118] *Willis v Earl Howe* [1893] 2 Ch 545 (CA) at 552.

[119] Brunyate Text, above n 73, at 39 citing *Dawkins v Lord Penrhyn* (1877) 6 Ch D 318, *Re Coole* [1920] 2 Ch 536 and *Rains v Buxton* (1880) 14 Ch D 537. See also Sheridan, above n 78, at 163–164.

Knowledge of right of action a pre-condition for concealment

8.3 Applying the 1939 UK Act, the leading authorities have all required that defendants have actual subjective knowledge of the material facts and their wrongdoing to be guilty of s 26(b) "fraudulent" concealment. Without actual subjective knowledge of those matters, the defendant logically will not know of the right of action and, therefore, has not concealed it unconscionably. In *King v Victor Parsons*, Lord Denning summarised the test as follows:[120]

> The cases show that, if a man *knowingly* commits a wrong (such as digging underground another man's coal); or a breach of contract (such as putting in bad foundations to a house), in such circumstances that it is unlikely to be found out for many a long day, he cannot rely on the Statute of Limitations as a bar to the claim: see *Bulli Coal Mining Co v Osborne* and *Archer v Moss*.[121] In order to show that he 'concealed' the right of action 'by fraud', it is not necessary to show that he took active steps to conceal his wrongdoing or his breach of contract. It is sufficient that he *knowingly* committed it and did not tell the owner anything about it. He did the wrong or committed the breach secretly. … To this word 'knowingly' must be added 'recklessly': see *Beaman v ARTS Ltd*. Like the man who turns a blind eye. He is aware that what he is doing may well be a wrong, or a breach of contract, but he takes the risk of it being so. He refrains from further inquiry lest it should prove to be correct; and says nothing about it. The court will not allow him to get away with conduct of that kind. It may be that he has no dishonest motive; but that does not matter. He has kept the plaintiff out of the knowledge of his right of action; and that is enough: see *Kitchen v Royal Air Forces Association*. If the defendant was, however, quite unaware that he was committing a wrong or a breach of contract, it would be different. So if, by an honest blunder, he unwittingly commits a wrong (by digging another man's coal).

8.4 Having traversed the history, it is apparent that Lord Denning's test for s 26(b) of the 1939 UK Act is consistent with, and draws on, the wilful concealment test developed by the Courts of Equity. Fraud can be proven by Contemporaneous or Subsequent Concealment (e.g. *Bulli Coal*, *Dean*). The defendant must know the material facts and be aware of their wrong (e.g. *Booth*, *Llewelyn* and *Bree*). Mistaken, negligent or inadvertent wrongs are not enough (e.g. *Trotter*, *Short*). Fraud lies in the wilful decision to stay silent and not disclose a known wrong. All of this mirrors *Wrightson*.

Recklessness not endorsed by *Beaman*, *Kitchen* or *King* decisions

8.5 Despite that focus on wilful concealment, *Daisley* interpreted the authorities on s 26(b) of the 1939 UK Act as endorsing a lesser recklessness standard. That interpretation rests on a handful of references to "recklessness" by Lord Greene MR in *Beaman*, cited by Lord Evershed in *Kitchen* and Lord Denning MR in *King*. These decisions do not provide the support suggested by the Court of Appeal, and each turned on wilful concealment.

Beaman v ARTS Ltd (1949) and *Kitchen v Royal Air Force Association* (1959)

8.6 *Beaman* concerned the defendant's conversion of the plaintiff's property, of which it was bailee. In 1935, she had deposited five packages with the

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[120] *King*, above n 17, at 33–34. Lord Denning's reasons are often relied on as stating the test.

[121] *Bulli Coal*, above n 42; *Applegate*, above n 16, applying wilful concealment (also reported as *Archer*). In that case, a builder put in "rubbish foundations and then covered them up" and knew the foundation departed from the agreed specifications. To similar effect, in *Clark*, above n 43, the builder contracted to construct a house with Dorking bricks and deliberately used Ockley bricks instead knowing that some of them were defective. He knew the facts and "deliberately withheld knowledge of them".

defendant for safekeeping in England. After Italy entered World War II, the defendant (an Italian company) wound up the business. Its English staff disposed of or personally appropriated the plaintiff's goods. No steps were taken to obtain Beaman's consent; she was not informed of the disposal. After she discovered the facts, she sued in conversion. Denning J held that the claim was time-barred and that fraud required proof of "moral turpitude" such as a "deliberate untruth, or dishonesty". This was not established, and so he held for the defendant. While it had intentionally converted the property, it believed that was the right thing to do given the war, length of time, Beaman's uncertain location etc. As the conversion was innocent, s 26(b) required active concealment. No such conduct existed.[122]

8.7 The Court of Appeal reversed Denning J and corrected two errors in relation to his interpretation of s 26(b). Those errors are context to understanding why *Beaman* did not endorse recklessness. First, the Court held that s 26(b) embraces equitable fraud. Moral turpitude and dishonesty are not required. Second, s 26(b) includes Contemporaneous Concealment not just Subsequent Concealment. To that end, the Court approved *Bulli Coal*'s wilful concealment test and its holding that intentional wrongdoing is fraudulent if concealment is implicit in the technique adopted.[123] The Court endorsed its earlier insistence in *Re McCallum* on knowing and "designed" concealment.[124]

8.8 Viewed against *Bulli Coal*, the Court unanimously found that the bailees wilfully concealed the tort. The bailees' sole motivation was to "get rid of the plaintiff's goods" to obtain the "commercial advantage of being able to close down their business".[125] They knew the bailor reposed confidence in them and had no reason to invigilate the faithful performance of their obligations. They took advantage of that reliance to dispose of the property in a "furtive and surreptitious" way, "calculated to keep her in ignorance".[126] The bailees were guilty of "conscious wrongdoing". There was a "wilful disposition" with intention to "conceal" the tort.[127] Nothing turned on recklessness given the Court's unanimous application of the wilful concealment test in *Bulli Coal*.

8.9 It was in the context of finding the bailees guilty of wilful concealment that Lord Greene MR referred to recklessness. They "recklessly" assumed that: (a) it was impossible to contact the bailor, (b) that she would have agreed to disposal as in her best interests and (c) that the goods were valueless, even though this provided no justification for violating their duty.[128] As was confirmed later in *Canada Square*, Lord Greene MR was not to be taken as suggesting recklessness is an independent form of fraudulent concealment. Rather, he was "going through the evidence" in response to Denning J's

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122 *Beaman v ARTS Ltd* [1948] 2 All ER 89 (KBD) at 93–95.
123 *Beaman*, above n 116, at 559–560, 567, 570. Somervell LJ also expressly endorsed *Re McCallum*, above n 116, which applied the wilful concealment test from *Petre*, above n 117.
124 At 567 per Somervell LJ.
125 At 564–565, 569 and 571.
126 At 566.
127 At 572.
128 At 565–566.

suggestion that the defendants acted honestly.[129] By contrast, Lord Greene indicated that the bailees had been dishonest. Self-deceiving assumptions cannot absolve a wilful breach of duty.[130] Read in context, "recklessness" meant no more than conscious wrongdoing or wilful blindness.[131] It was not referred to or relied upon by Somervell LJ or Singleton LJ and was not pressed by counsel in argument.[132]

8.10 In *Kitchen v Royal Air Force Association* Lord Evershed MR referred to the defendant's conduct as "reckless" in the "sense in which Lord Greene MR used the word" in *Beaman*, i.e. conscious wrongdoing or wilful blindness.[133] His reasoning was expressly based on concealment of subjectively known facts with an intention that the plaintiff never learn of the right of action. The defendant knowingly and intentionally committed a wrong.

King v Victor Parsons & Co (1973)

8.11 Victor Parsons & Co acquired a plot of land for development. Before doing so they surveyed the site and discovered that it lay on an old chalk pit. They sought advice about its suitability for construction. They were told that the site required a particular system of reinforcing in order to support the developed. Victor Parsons prepared a building plan which deviated from the advice it had received. The builder objected, telling Victor Parsons that the land had been used as a rubbish dump. Victor Parsons approved makeshift reinforcements to the foundations, but it knew that they continued to deviate from the original advice it had received. The foundations were covered up by a house which was sold to the Kings. Over 6 years later, the house failed. The Kings sued in contract for a breach of an implied term that the foundations were proper. Victor Parsons pleaded the 1939 Act.[134]

8.12 The Court of Appeal's decision in *King* is a leading authority on the wilful concealment test. It held that Victor Parsons had actual knowledge of the facts. Victor Parsons knew the site was unsuitable for construction and that the "foundations which they had been advised must be used if the building was to be reasonably safe from settlement and damage" were not built.[135] When the contract was signed, Victor Parsons thus knew that the warranty of fitness was untrue as it knew the foundations were faulty and there was a risk of subsidence.[136] By staying silent and covering the foundations, it concealed the right of action.

8.13 Similarly to *Beaman* and *Kitchen*, Lord Denning's reference to recklessness must be read in context. He applied a wilful concealment test:

(a) When articulating the general s 26(b) test, Lord Denning MR stressed the requirement that the defendant know the material facts and know

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[129] *Canada Square*, above n 51, at [44]–[45].
[130] *Beaman*, above n 116, at 561.
[131] *Canada Square*, above n 51, at [45].
[132] At [43].
[133] *Kitchen*, above n 36, at 573–574.
[134] *King*, above n 17, at 31–33.
[135] At 38. See also 40–41. One of the issues on appeal was whether or not it was necessary for the defendant to have subjective knowledge of the material facts or if constructive knowledge is enough. The trial Judge relied on the latter. The Court reversed and substituted findings of actual knowledge.
[136] At 34–38 and 41–42.

of its wrong. He relied on *Bulli Coal* and other decisions that endorsed and applied a wilful concealment test.[137] He concluded that fraud is established where a defendant "recklessly" commits a wrong. He defined recklessness as turning a "blind eye". To meet the standard, the defendant must be "aware that what he is doing may well be a wrong … but he takes the risk of it being so" and "refrains from further inquiry lest it should prove to be correct".[138]

(b) Lord Denning MR was simply adopting the concept of wilful blindness. As the Supreme Court observed in *Canada Square*, a defendant who turns a blind eye and refrains from inquiry is, on that doctrine, treated as being in the "same position as a person who acted knowingly".[139] So, *King* gives effect to the wider principle whereby equity "attributes constructive notice" to those who are wilfully blind.

(c) *Daisley* erred in characterising Lord Denning's decision as turning on a finding that Victor Parsons were "reckless" in the sense ultimately adopted in *Daisley*.[140] The Kings' action was for breach of warranty. The facts necessary to prove that Victor Parsons' warranty of fitness was untrue were the existence of the chalk pit and that concrete foundations had not been installed. Together, these facts would have proved that the warranty was untrue as the foundations were defective, with the result that there was a risk of subsidence. Lord Denning reasoned that Victor Parsons had actual knowledge of all facts showing that the foundations were not properly constructed and that adequate precautions had not been taken. Contrary to *Daisley*'s interpretation, Victor Parsons was not reckless as to the facts, it had actual knowledge and committed a conscious breach of contract.[141]

9 Continuity of principle – Deliberate concealment in 1980 UK Act

9.1 The modern legislative framework in the UK is the Limitation Act 1980 ("the **1980 UK Act**"). It reenacted the pre-existing concealment exception in s 32 but substituted "fraud" with a simpler test, deliberate concealment. The UK Supreme Court in *Canada Square* nevertheless adopted an interpretation of the new text aligning with the three centuries' old wilful concealment test, and with *Wrightson*. Importantly, it rejected the relevance of "recklessness".

The 1980 UK Act retained a wilful or "deliberate" concealment test

9.2 Section 32(1) postpones time where the claim is based on the fraud of the defendant or where "any fact relevant to the plaintiff's right of action has been *deliberately concealed*". Section 32(2) provides that a "deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time" amounts to deliberate concealment of the facts.

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[137] See above at n 121 referring to *Bulli Coal*, *Applegate* and *Clark*.
[138] *King*, above n 17, at 33–34.
[139] *Canada Square*, above n 51, at [48].
[140] CA judgment, above n 2, at [129].
[141] *Canada Square*, above n 51, at [48].

9.3 The legislative history to s 32 is instructive. It shows that the architecture underlying the exception remains the same despite the change in language. That change occurred following the advice of the Law Reform Committee, which pointed to the fact that s 26 of the 1939 UK Act was not expressed in language which accurately reflected the case law.[142] "Fraud" does not mean fraud, and "concealment" does not require active concealment. It recommended that the new Act retain s 26, "reformulated so as to express its true legal purport",[143] the essential feature being "blameworthiness". The overall recommendation was to reproduce the s 26 jurisprudence in a more intelligible form. Hansard confirms that s 32 was "not intended" to be "more restrictive" than the 1939 UK Act, and that the 1980 UK Act drew on cases like *Beaman* and *Bulli Coal*.[144]

The *Canada Square* judgment — Recklessness is not wilful concealment

Orthodox wilful concealment test restated and affirmed

9.4 The Supreme Court recognised two forms of concealment, consistently with the position in the Courts of Equity and under the 1939 UK Act and LA1950:

(a) **Contemporaneous Concealment**: a defendant must know that it is committing a breach of duty and is thus aware of its own deliberate wrongdoing.[145] Where the circumstances are such that the breach of duty will not be discovered for some time, s 32(2) will apply. The provision has its historic roots in *Bulli Coal* and like decisions.[146]

(b) **Subsequent Concealment**: a defendant must know all the material facts with the result that it can start the limitation period running by disclosing them to the plaintiff.[147] For s 32 to apply, a defendant must have "considered whether to inform" the plaintiff and decided not to.[148] Whether by active concealment or non-disclosure, concealment must be the "intended result".[149] A defendant has two choices: stay silent or disclose. By deciding on the former, the defendant has "chosen[n] to keep the claimant in ignorance".[150]

9.5 In adopting that test, the Court clarified that wilful concealment does not depend on violating a duty of disclosure. The Court reasoned:

(a) What engages s 32's policy rationale is the *choice* not to disclose.[151] Breach of duty may be helpful evidence but is not a legal requirement. Logically, concealment can occur without breach of a duty to disclose.

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142 Law Reform Committee *Final Report on Limitations of Actions* (September 1977). The Parliament "gave effect to the spirit" of the draft, if not the exact wording: see *Canada Square* at [53].

143 At [2.21].

144 (1979) 401 UKPD cl 1144–78 per Lord Chancellor (Lord Hailsham of Saint Marylebone). Because the 1980 UK Act is consolidating legislation, the modern decisions adopt a special rule of construction precluding reference to the old law except to resolve ambiguities. That special rule does not alter the conceptual origins of the 1980 UK Act or its consistency with the 1939 Act.

145 *Canada Square*, above n 51, at [67].

146 At [67] endorsing *Cave*, above n 46, at [23]–[25].

147 *Canada Square*, above n 51, at [108].

148 At [77] and [108], endorsing *Williams v Fanshaw Porter & Hazelhurst (a firm)* [2004] EWCA Civ 157, [2004] 1 WLR 3185 at [14].

149 *Canada Square*, above n 51, at [65]–[70].

150 At [105] and [108].

151 At [100].

Intentionally withholding the facts or committing a legal wrong has the effect of concealment regardless of a special duty (e.g. *Bulli Coal*).[152]

(b) Some of the decisions identify the duty as arising from the relationship between the parties (e.g. tortious, contractual, fiduciary). That duty is irrelevant. Other decisions say that the duty arises from the Act itself, utility and morality.[153] That approach to duty is non-justiciable and indeterminate. Courts cannot adjudicate questions of morality.[154]

9.6 Canada Square deliberately concealed the right of action. It was a commercial lender and insurance intermediary. In 2006, it entered a loan agreement with Potter, including a payment protection insurance policy. Over 95 per cent of the sum paid for the policy was in fact Canada Square's commission for brokering the policy. It did not tell Potter about the level of commission. In 2006, the Consumer Credit Act 1974 was amended to grant debtors the ability to seek relief in respect of unfair credit relationships. Despite the new Act Canada Square continued not to tell the plaintiff about the commission. The Court held that s 32(2) of the 1980 UK Act did not apply because the new creditor protections were not in force at the time Canada Square entered the loan; it did not commit an intentional wrong. However, s 32(1)(b) applied as Canada Square knew the facts and decided not to disclose after the creditor protections were enacted.[155]

Recklessness rejected in 1939 UK Act and 1980 UK Act

9.7 The decision in *Canada Square* was the first in the UK to squarely raise and address whether recklessness tolls the limitation period under the 1939 or 1980 UK Acts. It rejected recklessness for three reasons.[156]

9.8 First, recklessness lacked support in the 1939 and 1980 UK Act authorities. None of the 1939 UK Act decisions — *Beaman*, *Kitchen*, *King* — which the lower courts in *Canada Square* treated as affirming "recklessness" supplied support for that concept. As to *Beaman*, the Supreme Court observed that Lord Greene MR did not define what he meant by "recklessness" or explain its relevance to his reasoning, and it was not mentioned by other members of the Court.[157] When referring to recklessness, Lord Greene was "going through the evidence" that led Denning J to accept that the bailees acted honestly, and explaining why he rejected that view. Recklessness was not an element in the reasoning that led to Lord Greene MR's conclusion that s 26(b) applied. To the extent that he meant anything by that term, it went beyond taking a risk and was suggestive of "wilful blindness".[158]

9.9 Subsequent decisions under both Acts are to similar effect, as the Supreme Court found in *Canada Square*. Lord Denning MR's summary of the law in *King* set out the orthodox wilful concealment test before adding (as noted in

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[152] At [98]. See the other examples at [98]–[99].
[153] *AIC Ltd v ITS Testing Services (UK) Ltd* [2006] EWCA 1601, [2007] 1 All ER at [344].
[154] *Canada Square*, above n 51, at [103].
[155] At [154]–[155].
[156] See also the Privy Council (Cayman Islands) decision issued on the same day by the same panel in *Primeo Fund v Bank of Bermuda (Cayman) Ltd* [2023] UKPC 40, [2023] 3 WLR 1007.
[157] *Canada Square*, above n 51, at [43].
[158] At [45].

the quoted passage earlier) that a defendant also wilfully conceals a right of action if they acted "recklessly … Like the man who turns a blind eye … He refrains from further inquiry lest it should prove to be correct". The Supreme Court noted that Lord Denning's definition of recklessness equated with the principle of wilful blindness, not recklessness.[159] In any case, Lord Denning resolved the case (as did the other members of the Court) on the basis that Victor Parsons had committed a conscious breach of contract. Finally, in the 1980 UK Act context, Mance LJ referred to recklessness in *Williams* in the wilful blindness sense and not as a true recklessness test.[160]

9.10 Second, the Supreme Court held that recklessness is incompatible with the test in [9.4]. Deliberate concealment in s 32(1)(b) requires that a defendant conceal the material facts by an act or omission where "concealment is the *intended* result". The defendant must have actual knowledge of the facts to be in a position to "start the limitation period running by disclosing the fact". Faced with that choice, s 32(1)(b) bites if a defendant intentionally decides to "keep the claimant in ignorance".[161] Within that framework, recklessness does not qualify because it lacks the quality of knowledge and intention. In relation to s 32(2) (the *Bulli Coal* limb), the Supreme Court reaffirmed that a defendant must intend to commit a breach of duty and be aware of their own deliberate wrongdoing. The "inescapable conclusion is that recklessness is insufficient" as it cannot be reconciled with the governing intention test.[162]

9.11 Finally, the Supreme Court rejected "recklessness" as illogical and contrary to limitation policy. Deliberate concealment "strikes a balance between the interests of the claimant and the defendant, as Parliament intended".[163] If a defendant intentionally hides the facts, it is "just" that they be deprived of the benefit of their wrongdoing; and they only have themselves to blame if they are not sued earlier.[164] By contrast, a "recklessness" test would disrupt that policy balance. In *Cave*, Lord Millett noted in the context of s 32(2) that, "in the absence of any *intentional wrongdoing* … it is neither just nor consistent with the policy of the Limitation Acts" to deprive a defendant of a defence.[165] The Supreme Court in *Canada Square* agreed. It reasoned that it would be equally unjust to deprive a defendant of a limitation defence simply because of an appreciated risk that its conduct may expose itself to a claim. That test (as noted at [6.10]) would mean that professionals whose work involves taking conscious risks could never have a limitation defence, except if they prevailed on the merits.[166] The 1980 UK Act would have "failed to serve its purpose of protecting defendants from having to litigate stale claims".

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159 At [48].
160 At [128]–[129], referring to *Williams*, above n 148, at [38].
161 These quotes are all drawn from [108] of *Canada Square*. See also at [124].
162 At [125] and see [130].
163 *Canada Square*, above n 51, at [108].
164 At [108], citing *Cave*, above n 46, at [8].
165 *Cave*, above n 46, at [15], endorsed in *Canada Square*, above n 51, at [151]–[152].
166 *Canada Square*, above n 51, at [152].

Part F: The position in cognate jurisdictions

10 Australia and Canada require conscious wrongdoing

10.1 WDC submits that the current appeal can be resolved by reference to policy considerations, New Zealand and UK authorities, and history. The purpose of looking briefly to cognate jurisdictions however is to give a fuller picture of the LA1950 in light of the Australian and Canadian case law.

Cross-jurisdictional requirement of wilful concealment

10.2 The Australian states and territories each have their own statutory limitation regimes modelled on the 1939 UK Act except for ACT, South Australia and Western Australia.[167] Australian courts have identified three interpretations. Despite differences which may be apparent than real[168], it is clear that each formulation requires wilful concealment at a minimum:

(a) **Actual fraud**: in *Hamilton v Kaljo*,[169] the Supreme Court of New South Wales construed the equivalent of the 1939 UK Act as requiring moral turpitude or dishonesty, i.e. actual fraud. The Court cited the leading 1939 UK Act cases (e.g. *Beaman*, *Kitchen*, *Clark*, *Archer*) but rejected broad equitable fraud as the test because it was too dependent on general unconscionability. What is required is wilful concealment.

(b) **Conscious wrongdoing**: in *Seymour*, the NSW Court of Appeal read the exception as extending beyond common law fraud but being narrower than equitable fraud. There must be "consciousness that what is being done is wrong" or that to take advantage of the time bar involves wrongdoing.[170] Wilful blindness is enough. On the facts, the Court held that a negligent lawyer could rely on the time bar because he was not aware of his negligence.

(c) **Equitable fraud / unconscionability**: in *Levy v Watt*,[171] the Victorian Court of Appeal adopted the test for fraudulent concealment stated in the 1939 UK Act case law. "Fraud" therefore includes equitable fraud; "conduct by the defendant" such that it would "be against conscience for him to avail himself of the lapse of time". The Court endorsed the old equity authorities (e.g. *Trevelyan*, *Bulli Coal*) as defining what the qualifying form of unconscionability is, i.e. wilful concealment.

10.3 Similarly in Canada the doctrine of fraudulent concealment (which applies as a common law doctrine) mirrors the 1939 UK Act case law and turns on wilful concealment.[172] The exception was imported into Canadian law by a

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[167] The following adhere to the 1939 UK Act model: Limitation Act 1958 (VIC), s 27; Limitation of Actions Act 1974 (Qld), s 38; Limitation Act 1969 (NSW), s 55; Limitation Act 1974 (Tas), s 32; and Limitation Act 1981 (NT), s 42. ACT replicates the 1980 UK Act: see Limitation Act 1985 (ACT), s 33. Both the Limitation Act 2005 (WA) and Limitation of Actions Act 1936 (SA) have a general extension discretion.

[168] Dal Pont on Limitation at 327–328; and *Finance Guarantee v Auswild* [2019] VSC 664 at [302]–[312].

[169] *Hamilton v Kaljo* [1989] 17 NSWLR 381 (SC) at 386–388. See Dal Pont on Limitation, above n 39, at 327; and *Commonwealth of Australia v Cornwell* [2007] HCA 16, (2007) 229 CLR 519 at [40]–[48].

[170] *Seymour*, above n 37, at 372. This appears to be the leading authority: see the summary of Australian law in *Fourniotis v Vallianatos* [2018] VSC 369, (2018) 56 VR 85; and Dal Pont on Limitation at 328.

[171] *Levy v Watt* [2014] VSCA 60, (2014) 308 ALR 748 at [54]–[90].

[172] See *Halsbury's Laws of Canada: Limitation of Actions* (2021 Reissue) at Part IV ch 5. See generally Bevan Brooksbank "'An unconscionable thing for the one to do towards the other:' The doctrine of fraudulent concealment" (2015) 93 Can Bar Rev 549.

series of Supreme Court decisions that applied *Kitchen* and its definition of fraud (which aligned with *Beaman* and *King*).[173] The focus of the Canadian law is on unconscionability. To meet that test, a defendant must be "aware that they have committed a wrong".[174] Absent deliberate concealment, the Canadian courts will find non-disclosure to be unconscionable "where the underlying wrong was wilful".[175] Mere negligence "will not suffice" — rather, the acts complained of must "constitute an intentional wrongdoing".[176] The Supreme Court in *Pioneer Corp v Godfrey* recently held that a special duty of disclosure is no longer legally required.[177] Following the doctrine's arrival in Canada, the states and territories codified the exception with many using the language of "wilful concealment" in their statutory exceptions.[178]

Limited recognition of recklessness

10.4 "Recklessness" has received little support in Australian case law. Dal Pont refers to only one decision (*Grahame Allen*) suggesting that recklessness might amount to equitable fraud,[179] and on close analysis it does not apply or endorse a general recklessness test. The Court referred to recklessness but endorsed *Seymour*'s requirement of conscious wrongdoing and applied a 1939 UK Act case (*Applegate*) which adopted a wilful concealment test.[180]

10.5 In Canada, it appears that "reckless concealment" will trigger the exception in circumstances of wilful blindness. Three of the frequently cited decisions are *Wilson*, *Union Square* and *Luscar*.[181] Each adopted Lord Denning MR's decision in *King* on recklessness which is simply a wilful blindness test.

Part G: Summary – WDC not guilty of fraudulent concealment

11 Wilful concealment is the test under LA1950 and LA2010

11.1 Wilful concealment is the test under both the LA1950 and the LA2010 for ascertaining whether a right of action has been fraudulently concealed. That test is supported by the leading New Zealand case law on s 28(b), is justified on policy grounds and respects the balance of irreconcilable interests Parliament struck in the 1950 and 2010 Acts. Recklessness is not

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173 *Massie & Renwick v Underwriters' Survey Bureau Ltd* [1940] SCR 218; *Guerin v The Queen* [1984] 2 SCR 335 at 356 and 389–390; *M(K) v M(H)* [1992] 3 SCR 6 at 51–58; and *Pioneer Corp v Godfrey* 2019 SCC 42, [2019] 3 SCR 295 (requiring intentional wrongdoing or concealment at [54]).

174 *Halsbury's Laws of Canada: Limitation of Actions* (2021 Reissue) at Part IV ch 5.

175 Brooksbank, above n 172, at 555.

176 At 556.

177 *Pioneer*, above n 173, at [54] and see CA judgment, above n 2, at [110].

178 See Limitation of Actions Act SNS 2015 c 22, s 17, Limitation of Actions Act SNB 2009 c L-8.5, s 16, Limitation Act SO 2002 c 24, s 15(4), Limitations Act CCSM 2021 c L150, s 17, Limitations Act SS 2004 c L-16.1, s 17 Limitation Act SBC 2012 c 13, s 21.

179 Dal Pont on Limitation at 328, citing *Grahame Allen & Sons Pty Ltd v Water Resources Commission* [1998] QSC 181, [2000] 1 Qd R 523. Not mentioned by Dal Pont is *Nupponen v Hymix Quarries Pty Ltd* NSWSC, 24 October 1986 where the Court referred to the broad concept of equitable fraud in the UK and said there must be "deliberate or reckless concealment". There is no explanation of what was meant by "reckless concealment". To the extent the decision relied upon UK authorities, the analysis at [8.1]–[8.13] applies. *Anthony v Morton* [2018] NSWSC 1884 approved *Nupponen* but did not apply recklessness. *Burrows v A W Bale & Son* [2022] QDC 117 cited *Grahame* but did not apply it.

180 Approving *Seymour* and referring to *Applegate*, above n 16, which applied a wilful concealment test.

181 *Wilson v McDonnell Douglas Canada Ltd* (1985) 52 OR (2d) 74 (ONSC); *Union Square Apartments Ltd v Academy Contractors Inc* 2016 ABQB 575; *Luscar Ltd v Pembina Resources Ltd* (1991) 122 AR 83 (QB). See for example the citations in *VAH v Lynch* 2000 ABCA 97, (2000) 255 AR 359 (CA); *WP v Albert (No 1)* 2013 ABQB 295, (2013) 563 AR 32; *Atlanta Industrial Sales Ltd v Emerald Management & Realty Ltd* 2006 ABQB 255, (2006) 399 AR 1. Recklessness is not referred to in *Halsbury's Laws of Canada* as a sufficient mental state for fraudulent concealment.

compatible with a wilful concealment test. A reckless defendant has not intentionally concealed the claim but have merely acted like a negligent defendant in failing unreasonably to appreciate their wrongdoing.

11.2 When Parliament provided for a fraudulent concealment exception, it did so against the backdrop of centuries of legal history. Beginning with the 1714 decision in *Booth* and stretching to the 1939 UK Act jurisprudence, the courts settled on the type of unconscionable behaviour to which the fraud exception responds — wilful concealment. That arc of history culminated in *Canada Square* where the Supreme Court affirmed the wilful concealment test and rejected recklessness. The New Zealand position therefore aligns with United Kingdom law.

11.3 To trigger the exception in the LA1950 or LA2010, the following is required:

(a) The defendant must subjectively know the material fact(s) comprising the right of action and which are alleged to have been concealed.

(b) The defendant must subjectively know they have committed a wrong, in light of the subjectively known facts.

(c) Equipped with that knowledge a defendant has a choice: to stay silent or to disclose. A defendant who chooses the former fraudulently conceals the plaintiff's action by electing to keep them in ignorance. The time bar does not apply because the lapse of time was created by the defendant's intentional, unconscionable choice.

(d) The decisions in *Wrightson*, *Inca* and *Matai* also referred to breach of a duty to the plaintiff to disclose the facts. Breach of duty provides at least relevant evidence of a wilful decision not to disclose, although it may not be a legal requirement.[182]

12 WDC did not wilfully conceal Mr Daisley's right of action

Searches undertaken by WDC for the LUC

12.1 The 1988 LUC was issued by the Whangārei County Council to the then landowner. After formation of the new District Council in 1989, it was transferred to WDC's hardcopy files,[183] but no record was kept in its current files for the property.[184] Access to hardcopy files was restricted to WDC's information management team, but other Council officers could search the files if escorted by a member of the records team.[185] The LUC remained in hard copy form as WDC was still in the process of digitising.[186] The High Court considered that WDC was negligent in failing to keep a copy of the LUC "reasonably available by storing it in the current files", but also that a "diligent inquiry" would have found it.[187]

[182] See the discussion of *Canada Square* above at [9.5] and *Pioneer* above at [10.3].
[183] HC judgment, above n 1, at [188]–[190] and [206]–[210].
[184] At [206]–[210].
[185] At [192].
[186] At [189].
[187] At [208], [385]–[386].

12.2 From 2005, WDC took steps to limit Mr Daisley's quarrying activities because he lacked existing use rights or an LUC. A cease and desist letter was sent on 4 February 2005.[188] The High Court said it was reasonable to assume that before sending it, the officer "looked at what current information was available regarding the property to determine ownership, even if only to obtain a copy of the LIM".[189] However, the Court found that WDC had to do more than a cursory search before issuing abatement notices.[190] It was negligent in failing to diligently search before opposing the application by Mr Daisley for a consent, taking enforcement action, and each time it misadvised Mr Daisley about the non-existence of the LUC

No fraudulent concealment — WDC unaware of the LUC

12.3 Applying the wilful concealment test at [11.3], WDC cannot have concealed the LUC given the concurrent findings that it lacked knowledge that the LUC existed until its discovery in 2009. Nor was WDC wilfully blind. Contrary to the authorities, it did not subjectively know of the existence of the material fact which it was found to have fraudulently concealed and the pre-requisite of knowledge of the material facts was not triggered, as noted by the Court of Appeal in *Daisley* itself.[191] Because WDC did not know about the LUC, it also cannot logically have appreciated its own negligence. The absence of those two facts means the Council never made a *choice* to stay silent.

12.4 The concurrent findings justify quotation in full. The High Court held:[192]

> I am not persuaded that any Council officer knew the consent existed until it was found in 2009. A finding that any one or more of Mr Barnsley, Mr Lucas and Mr Hislop knew about the 1988 LUC and deliberately withheld knowledge of its existence from Mr Daisley would require substantial proof, rather than an inference based on an assumption that they were competent in the execution of their duty.

12.5 The High Court made a further finding that:[193]

> It seems to be likely that the Council officer or officers who responded to Mr Daisley's application for a LIM in November 2004 conducted a cursory search of the current Council files related to the … property and did not find any record of the consent. … The Council then having reported to Mr Daisley in the LIM that no consent existed, it is also likely … that that became the Council's default position. On subsequent occasions when the question of whether or not there was an existing consent was germane to any action by the Council, the default position was accepted and no one bothered to carry out a further, more diligent search.

12.6 The Court of Appeal agreed and held that, as a result, WDC could not have wilfully concealed the LUC under s 28(b) of the LA1950:[194]

> We agree with the Judge that the evidence does not show any Council officer who was dealing with Mr Daisley actually knew of the 1988 land use consent. That being so, they cannot wilfully have failed to disclose it. We think the Judge reached the same conclusion. To the extent that he found the Council's corporate knowledge of the consent sufficient for purposes of s 28(b), we respectfully consider that he was wrong.189

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188 At [4], [45] and [215]–[217].
189 At [215].
190 At [215]–[217].
191 CA judgment, above n 2, at [141] and [164]. See also above at [3.1]–[3.2] and [8.3]–[8.13].
192 HC judgment, above n 1, at [307].
193 At [385]–[386].
194 CA judgment, above n 2, at [164].

> Fraudulent concealment requires that the defendant or its agent subjectively know of the matter concealed.

12.7 Additionally, the Court of Appeal held that WDC had not been "wilfully blind" to the existence of the LUC. The High Court had referred to wilful blindness, which the Court of Appeal said would "ordinarily mean that [WDC officers] knew the Council files likely contained a consent and consciously chose not to look for it".[195] But the Court continued, "we do not think that is what the Judge meant".[196] He applied a recklessness test, not a wilful blindness test.

The Court of Appeal erred by applying a "recklessness" test

12.8 Despite finding that WDC did not know of the LUC and cannot have wilfully concealed it, the Court of Appeal held that s 28(b) of the LA1950 applied on the basis of recklessness. It concluded that WDC was reckless about the existence of the LUC because the Council officers (a) appreciated a risk that WDC's files might well contain evidence of the LUC and (b) it was objectively unreasonable not to run that risk.[197]

12.9 The Court erred in three respects. First, recklessness is not sufficient under s 28(b) of the LA1950 for a finding of fraudulent concealment.

12.10 Second, even if recklessness is sufficient under s 28(b), the Court erred in law and fact in formulating and applying a recklessness test. Fraudulent concealment has two elements, concealment and fraud.[198] The former requires the defendant to have subjective knowledge of the material facts said to have been concealed ("the **Knowledge Requirement**"). For the concealment to trigger the s 28(b) exception, it must be equitable fraud. As has been made clear, unconscionability requires that a defendant know they have committed a wrong in light of the subjectively known facts, and they choose silence over disclosure ("**Unconscionability Requirement**").

12.11 English authorities referring to recklessness did so only in the context of the Unconscionability Requirement. The Knowledge Requirement was not in issue because in *Beaman*, *Kitchen* and *King*, the defendants knew the facts. In *Beaman*, they knew they had disposed of the bailor's property; they knew in *King* that proper foundations had not been used; and in *Kitchen*, they knew of the electricity company's £100 payment to the RAF. "Recklessness" was discussed in the context of whether, in light of the facts, the defendants committed a deliberate and knowing breach of duty, with the result that they knew about the right of action and could disclose it (i.e. the Unconscionability Requirement). Lord Denning MR made this clear in *King* when he said that "fraud" exists if a defendant "knowingly commits a wrong" or "turns a blind eye" and "takes the risk of it being so".[199] *Beaman*, *Kitchen* and *King* did not alter the rule that a defendant must know the facts.

12.12 The Court of Appeal erred by applying a recklessness test to the Knowledge Requirement not the Unconscionability Requirement:

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[195] CA judgment, above n 2, at [165].
[196] At [165].
[197] At [166]–[178].
[198] For example, see *Clark*, above n 43, at 654.
[199] *King*, above n 17, at 209.

(a) The Court of Appeal accepted that s 28(b) required a "combination of *actual knowledge of a fact* or circumstance and the *exercise of choice* about its concealment".[200] It labelled this subjective recklessness.

(b) But the Court then misapplied its recklessness test. It held that WDC was reckless as to the existence of the LUC, being the material fact in respect of which WDC needed to have "*actual knowledge*" so it could then exercise a choice about its concealment. The Court erred by formulating and applying a test whereby the defendant need not have actual knowledge of the facts it is found to have concealed.

12.13 The third error was in concluding that WDC's officers were subjectively aware of a risk that the LUC may well exist. The Court noted that there was no first instance finding to that effect, but then made a fresh factual finding "about the officers' knowledge" relying on the documentary record and aspects of the High Court's analysis.[201] It based its finding of a subjectively appreciated risk on two limbs: (a) the WDC's belief that Mr Daisley had the burden of proving the existence of the LUC; and (b) the officers' knowledge of evidence pointing to historic use of the quarry.[202]

12.14 Neither provides evidential support for a finding that the officers subjectively appreciated a risk that the LUC might well exist. The Court treated WDC's mistaken belief that Mr Daisley had the burden of showing lawfulness as evidence that WDC's officers "attempted at the time to justify their *failure* to check the Council records *in the knowledge* that records might disclose a [LUC] or evidence of existing use rights".[203] That reasoning is flawed:

(a) The Court of Appeal's analysis rests on a faulty premise that WDC did not search its records before taking the position that the legal burden rested on Mr Daisley. The High Court held that WDC performed a cursory search (not a "diligent inquiry") before issuing the cease and desist letter. Later in its decision, the Court inferred that "such inquiry as was made when the LIM was prepared for Mr Daisley in November 2004, and when [WDC] embarked on the abatement procedure in February 2005, went no further than a cursory search of the Council's current files".[204] The Court of Appeal erred in characterising WDC as attempting to justify its failure to carry out any search for the LUC.

(b) The Court of Appeal made a logical leap (not supported by evidence) in finding that WDC's sincere belief as to the location of the burden of proof meant it acted "*in the knowledge*" that an LUC may exist. WDC took the view that Mr Daisley had the legal burden, and was only held to be incorrect after the High Court resolved the "conflicting decisions" of the Planning Tribunal and the Environment Court about "where the burden of proof lies".[205] That legal error does not support the Court's

[200] CA judgment, above n 2, at [141] (emphasis added).
[201] At [163]–[166].
[202] At [168]–[171].
[203] At [168]. See also at [173] noting that WDC did not search "any records".
[204] HC judgment, above n 1, at [332].
[205] HC judgment, above n 1, at [326]–[330].

conclusion that WDC knew an LUC may be discovered if it carried out a proper search. It merely repeats a finding of negligence.

12.15 Nor does the evidence of historic quarry use support a recklessness finding. The Court of Appeal said that the WDC officers were "provided with credible information indicating that the Council records might well contain evidence of a [LUC] or existing use rights". They were "on notice" of the possible existence of the LUC and it was objectively unreasonable to run that risk.[206]

12.16 Again, the Court's recklessness analysis did no more than restate the reasoning leading to the finding of negligence. Historic use is, at most, evidence that WDC *ought* to have been on notice of a risk and thus *should* have properly searched for the LUC, and therefore the Court conflated negligence and recklessness. That error becomes apparent by comparing the Court's recklessness analysis with the High Court's negligence findings:

(a) The Court of Appeal held that it "must have been obvious" to the WDC officers who attended the property that the historic quarrying activities were longstanding and reasonably extensive. Additionally, WDC was told that the land was previously rated as a commercial use, enjoyed existing use rights and had been commercially quarried for years.[207] Put together, those factors proved that WDC was reckless.

(b) The High Court relied on the same evidence of historic use as part of its liability finding. The Court said that it "would have been apparent" to WDC that the quarry had been worked over a significant period.[208] WDC also must have (or should have) been aware that "mineral rates were being charged on the property".[209] In February 2005, WDC was told that the quarry was a longstanding operation. The Court said this "information alone should have alerted" WDC to a possible LUC.[210]

13 Outcome and relief

13.1 The appellant seeks the following orders:

(a) The appeal is allowed and the proceeding against WDC in negligence and misfeasance is dismissed with judgment entered for WDC (costs to be reassessed in the High Court); and

(b) Costs and disbursements with certification for second counsel.

Dated: 15 November 2024

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D H McLellan KC | F P Divich | S O H Coad

Counsel for the appellant

[206] CA judgment, above n 2, at [171]–[178].
[207] At [170].
[208] HC judgment, above n 1, at [221].
[209] At [221].
[210] At [227].

Appellant's Chronology

Date	Event	HC Judgment Ref
1988 – 2004		
Feb. 1988	Land use consent (LUC) issued to Adams (as lessees of quarry).	**[86]**
11/11/2004	WDC issued LIM stating: 1. Any permit, consent, certificate, notice, order or requisition affecting the land or any building on the land previously issued by WDC: *No information applicable to this property was found*. 2. Information relating to the use to which the land may be put, and any conditions attached to that use: *No information applicable to this property has been found.*	**[42]**
24/12/2004	D purchased property from Mr Drake for $520,000.	**[44]**
2005 – 2006		
04/02/2005	WDC issued letter requiring D to cease quarrying until he obtained resource consent.	**[45]**
21/02/2005	WDC issued abatement notice to cease extracting minerals contrary to District Plan, because D had no: (1) resource consent; (2) existing use.	**[47]**
05/03/2005	D applied for resource consent (1st) (rejected by WDC as incomplete).	**[51]**
March/April 2005	D lodged appeal against 21/02/2005 abatement notice & obtained stay to 30/09/2005.	**[54]**
15/11/2005 – 14/02/2006	WDC undertook further enforcement action against D, including issuing: (1) abatement notices; (2) infringement notices.	**[56-60]**
24/03/2006	D applied for resource consent (2nd).	**[61]**
15/09/2006	**WDC required resource consent application to be publicly notified.** **[HC concluded D commenced suffering loss, but limitation period did not commence because of continuing duties/breaches/losses and/or s.28(b).]**	**[237]**
2007 – 2009		
02/02/2007	WDC refused 2nd resource consent application including because: (1) no resource consent; (2) no existing use.	**[79]**
03/10/2007 – 05/03/2009	WDC undertook further enforcement action against D, including issuing: (1) abatement notices; (2) infringement notices.	**[104/105]**
31/07/2009	1. WDC applied to Environment Court for enforcement order. 2. D directed by bank to sell property.	**[107/108]**
14/08/2009	**6 years before D issued HC proceeding**	
22/09/2009	**D & WDC discovered 1988 LUC in WDC's records.** **[HC concluded limitation period commenced.]**	**[190]**
28/09/2009	D filed affidavit in opposition to WDC enforcement proceeding.	**[110]**
15/10/2009	WDC withdrew last abatement notice (dated 28/11/2008) and subsequent infringement notices.	**[112]**
02/12/2009	D sold property to Ark for $400,000 (mortgagee sale scheduled next day).	**[12]**
2010 – 2014		
17/01/2011	Ark applied for existing use certificate.	**[90]**
05/05/2011	Ark applied for variation of the 1988 LUC.	**[91]**
30/05/2011	WDC granted Ark variation of 1988 LUC authorising extract of minerals (what D had applied for but been refused).	**[96]**
04/07/2011	WDC withdrew enforcement proceedings in Environment Court.	**[11]**
2015		
14/08/2015	**D issued HC proceeding**	

Authorities

LEGISLATIVE MATERIALS	
New Zealand	
1	Limitation Act 1950
2	Limitation Bill 1950 (59-1) (explanatory note)
3	(16 November 1950) 293 NZPD 4240
4	Limitation Act 2010
United Kingdom	
5	Limitation Act 1623 (Eng) 21 Ja I c 16
6	Real Property Limitation Act 1833 (UK)
7	Lord Lyndhurst (1833) 18 UKHL 790 (14 June 1833)
8	Limitation Act 1939 (UK)
9	(1979) 401 UKPD cl 1144–78
10	Limitation Act 1980 (UK)
Australia	
11	Limitation Act 1958 (VIC)
12	Limitation of Actions Act 1974 (Qld)
13	Limitation Act 1969 (NSW)
14	Limitation Act 1974 (Tas)
15	Limitation Act 1981 (NT)
16	Limitation Act 1985 (ACT)
17	Limitation Act 2005 (WA)
18	Limitation of Actions Act 1936 (SA)
Canada	
19	Limitation of Actions Act SNS 2015 c 22
20	Limitation Act SO 2002 c 24
21	Limitations Act CCSM 2021 c L150
22	Limitation Act SBC 2012 c 13
23	Limitations Act SS 2004 c L-16.1
24	Limitation of Actions Act SNB 2009 c L-8.5
DECISIONS	
New Zealand	
25	*Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541
26	*GD Searle & Co v Gunn* [1996] 2 NZLR 129 (CA)
27	*Inca Ltd v Autoscript (New Zealand) Ltd* [1979] 2 NZLR 700 (SC)
28	*Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 (HC)
29	*Sandman v McKay* [2019] NZSC 41, [2019] 1 NZLR 519
30	*Westpac New Zealand Ltd v MAP & Associates Ltd* [2011] NZSC 89, [2011] 3 NZLR 751
31	*Wrightson Ltd v Blackmount Forests Ltd* [2010] NZCA 631
United Kingdom	
32	*A'Court v Cross* (1825) 3 Bing 329, 130 ER 540
33	*AIC Ltd v ITS Testing Services (UK) Ltd* [2006] EWCA 1601, [2007] 1 All ER
34	*Applegate v Moss* [1971] 1 QB 406 (CA)
35	*Armstrong v Milburn* (1886) 54 LT 723 (CA)
36	*Barber v Houston* (1884) 14 LR IR 273
37	*Beaman v ARTS Ltd* [1948] 2 All ER 89 (KBD)
38	*Beaman v ARTS Ltd* [1949] 1 KB 550 (CA)
39	*Bond v Hopkins* (1802) 1 Sch & Lef 413
40	*Booth v Earl of Warrington* (1714) 4 Bro PC 163, 2 ER 111 (HL)
41	*Bree v Holbech* (1781) 2 Doug KB 654, 99 ER 415
42	*Brocklesby v Armitage & Guest* [2002] 1 WLR 598 (CA)
43	*Bulli Coal Mining Co v Osborne* [1899] AC 351 (PC)
44	*Cave v Robinson Jarvis & Rolf (A Firm)* [2002] UKHL 18, [2003] 1 AC 384
45	*Charter v Trevelyan* (1844) 11 C&F 714, 8 ER 1273
46	*Cholmondeley v Clinton* (1821) 4 Bli 1, 4 ER 721
47	*Clark v Woor* [1965] 1 WLR 650 (QBD)
48	*Dawkins v Lord Penrhyn* (1877) 6 Ch D 318
49	*Dean v Thwaite* (1856) 21 Beav 621, 52 ER 1000

50	*Ecclesiastical Commissioners v North Eastern Railway Co* (1877) 4 ChD 845 (Ch)
51	*Gibbs v Guild* (1882) 9 QBD 59 (CA)
52	*Granger v George* (1826) 5 B&C 149, 108 ER 56
53	*Haward v Fawcett* [2006] UKHL 9, [2006] 1 WLR 682
54	*Hollingshead's Case* (1721) 1 P Wms 745, 24 ER 595
55	*Hovenden v Lord Annesley* (1806) 2 Sch & Lef 607
56	*Hunter v Gibbons* (1856) 1 H&N 460, 156 ER 1281
57	*Imperial Gas Light v London* (1854) 10 Exch 38, 156 ER 346
58	*Jones v Turberville* (1816) 1 Ves Jr 214, 34 ER 757
59	*King v Victor Parsons & Co (A Firm)* [1973] 1 WLR 29 (CA)
60	*Kitchen v Royal Air Force Assoc* [1958] 1 WLR 563 (CA)
61	*Knox v Gye* (1872) LR 5 HL 656
62	*Legh v Legh* [1930] All ER Rep 565 (KBD)
63	*Limitation Abridgment* (1744) 2 Eq Cas Abr 577, 22 ER 486
64	*Llevellyn v Mackworth* (1740) 1 Barn Ch 445, 27 ER 714
65	*Lockey v Lockey* (1719) Prec Ch 518, 24 ER 232
66	*Lynn v Bamber* [1930] 2 KB 72
67	*McCormick v Grogan* (1869) LR 4 HL 82
68	*Nocton v Lord Ashburton* [1914] AC 932 (HL)
69	*Oelkers v Ellis* [1914] 2 KB 139 (KBD)
70	*Petre v Petre* (1853) 1 Drew 371, 61 ER 493
71	*Potter v Canada Square Operations Ltd* [2023] UKSC 41, [2024] AC 679
72	*Rains v Buxton* (1880) 14 Ch D 537
73	*Re Coole* [1920] 2 Ch 536
74	*Re McCallum* [1901] 1 Ch 143 (CA)
75	*Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] AC 102 (HL)
76	*Short v M'Carthy* (1820) 3 B&A 626, 106 ER 789
77	*Smith v Clay* (1767) Amb 646, 27 ER 419
78	*South Sea Co v Wymondsell* (1732) 3 P Wms 143, 24 ER 1004
79	*Thorne v Heard* [1894] 1 Ch 599 (CA)
80	*Trevelyan v Charter* (1835) 4 LJ (NS) (Ch)
81	*Trotter v MacLean* (1879) 13 Ch D 574 (Ch)
82	*Whalley v Whalley* (1821) 3 Bligh 1, 4 ER 506
83	*Williams v Fanshaw Porter & Hazelhurst (a firm)* [2004] EWCA Civ 157, [2004] 1 WLR 3185
84	*Willis v Earl Howe* [1893] 2 Ch 545 (CA)
Australia	
85	*Anthony v Morton* [2018] NSWSC 1884
86	*Burrows v A W Bale & Son* [2022] QDC 117
87	*Commonwealth of Australia v Cornwell* [2007] HCA 16, (2007) 229 CLR 519
88	*Finance Guarantee v Auswild* [2019] VSC 664
89	*Fourniotis v Vallianatos* [2018] VSC 369, (2018) 56 VR 85
90	*Gerace v Auzhair Supplies Pty Ltd* [2014] NSWCA 181, (2014) 87 NSWLR 435
91	*Grahame Allen & Sons Pty Ltd v Water Resources Commission* [1998] QSC 181, [2000] 1 Qd R 523
92	*Hamilton v Kaljo* [1989] 17 NSWLR 381 (SC)
93	*Hawkins v Clayton* (1988) 164 CLR 539
94	*Levy v Watt* [2014] VSCA 60, (2014) 308 ALR 748
95	*Nupponen v Hymix Quarries Pty Ltd* NSWSC 16452, 24 October 1986
96	*R v McNeil* (1922) 31 CLR 76
97	*Seymour v Seymour* (1996) 40 NSWLR 358 (CA)
Canada	
98	*Atlanta Industrial Sales Ltd v Emerald Management & Realty Ltd* 2006 ABQB 255, (2006) 399 AR 1
99	*Guerin v The Queen* [1984] 2 SCR 335
100	*Luscar Ltd v Pembina Resources Ltd* (1991) 122 AR 83 (QB)
101	*M(K) v M(H)* [1992] 3 SCR 6
102	*Massie & Renwick v Underwriters' Survey Bureau Ltd* [1940] SCR 218
103	*Pioneer Corp v Godfrey* 2019 SCC 42, [2019] 3 SCR 295
104	*Union Square Apartments Ltd v Academy Contractors Inc* 2016 ABQB 575

105	*VAH v Lynch* 2000 ABCA 97, (2000) 255 AR 359 (CA)
106	*Wilson v McDonnell Douglas Canada Ltd* (1985) 52 OR (2d) 74 (ONSC)
107	*WP v Albert (No 1)* 2013 ABQB 295, (2013) 563 AR 32
Cayman Islands	
108	*Primeo Fund v Bank of Bermuda (Cayman) Ltd* [2023] UKPC 40, [2023] 3 WLR 1007
United States	
109	*Sherwood v Sutton* (1828) 5 Mason's US Reports (1st Cir) 143
SECONDARY TEXTS AND REPORTS	
Texts	
110	John Brunyate *Limitation of Actions in Equity* (Stevens & Sons, London, 1932)
111	G E Dal Pont *Law of Limitation* (2nd ed, LexisNexis, Chatswood (NSW), 2021)
112	*Halsbury's Laws of Canada: Limitation of Actions* (2021 Reissue) at Part IV ch 5
113	J D Heydon, M J Leeming and P G Turner *Meagher, Gummow and Lehane's Equity, Doctrines and Remedies* (5th ed, LexisNexis, Chatswood (NSW), 2015)
114	F W Maitland *Equity: A Course of Lectures* (2nd ed, Cambridge University Press, Cambridge, 1936)
115	L A Sheridan *Fraud in Equity* (Pitman & Sons, London, 1957)
116	George Spence *The Equitable Jurisdiction of the Court of Chancery* (Lea & Blanchard, Philadelphia, 1846)
117	Story *Commentaries on Equity Jurisprudence* (Hilliard, Gray & Co, Boston, 1876)
Articles	
118	Bevan Brooksbank "'An unconscionable thing for the one to do towards the other:' The doctrine of fraudulent concealment" (2015) 93 Can Bar Rev 549
119	John Brunyate "Fraud and the Statute of Limitations" (1931) 4 CLJ 174
Reports	
120	Law Commission of England & Wales *Limitation of Actions Consultation* (CP151, 1998)
121	Law Reform Committee *Final Report on Limitations of Actions* (September 1977)
122	Law Revision Committee *Fifth Interim Report – Statutes of Limitation* (23 December 1936)
123	Te Aka Matua o te Ture | Law Commission *Limitation Defences in Civil Proceedings* (NZLC R6, 1988)

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