IN THE SUPREME COURT OF NEW ZEALAND
I TE KŌTI MANA NUI O AOTEAROA

SC 59/2024

BETWEEN	**WHANGAREI DISTRICT COUNCIL**
	Appellant
A N D	**MALCOLM JAMES DAISLEY**
	Respondent

SUBMISSIONS BY RESPONDENT (DAISLEY) IN REPLY TO SUBMISSIONS BY APPELLANT (WHANGAREI DISTRICT COUNCIL)

Dated: 6 December 2024

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Summary

1. The Court of Appeal was correct to adhere to English authorities decided under the Limitation Act 1939 (UK) which applied the standard of recklessness as a species of equitable fraud and wilful concealment of a cause of action so as to activate section 28(b) of the Limitation Act 1950 (NZ).

2. The key factual finding was that the relevant Council officers, although not having express knowledge of the existence of a resource consent which authorised the operation of his quarry, were on notice by a number of facts (including historic use of the quarry) that raised the possibility of an existing consent being in the Council's records but deliberately chose not to conduct a search of those records.

3. This constituted reckless conduct that had the effect of concealing a right of action in negligence against the Council or, alternatively, wilful blindness that had the same effect.

Relevant Factual Findings

4. Both in the High Court and in the Court of Appeal, the key finding of fact was that the Council, from the time when first LIM application was made in November 2004 until September 2009, when it was "found", had possession of the 1988 LUC but failed to search for it diligently and to disclose its existence to Mr Daisley or to take it into account when making decisions relating to Mr Daisley's right to operate the quarry.

5. To the contrary, the Council wrongly took the view that it was for Mr Daisley to prove the existence of a consent or other entitlement to operate the quarry lawfully.

6. In the High Court, it was said that the cause of Mr Daisley's losses through his inability to conduct commercial quarrying was "the Council's persistent obstruction of his attempts to exploit the mineral resource, obstruction founded on the false premise that there was no existing consent." That premise, the Court said, "was available to the Council only because of its negligent failure to keep a record of the consent reasonably available and the negligent failure of the Council's officers, in any event, to conduct a diligent search when they had a statutory obligation to do so".[1] Other, related, findings by the High Court were:

   (1) It had not been established that any Council officer knew the consent existed until it was found in 2009.[2]

   (2) "The persistent view of the Council's officers [was] that it was for Mr Daisley to prove the existence of a resource consent".[3]

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[1] *Daisley v Whangarei District Council* [2022] NZHC 1372 [HC judgment] at [263].
[2] At [207].
[3] At [331].

(3) This meant that the Council's officers were wilfully blind to the prospect that a consent existed and did not undertake a diligent search of the Councils records before issuing the first or any subsequent abatement notice".[4]

(4) A "reasonably diligent inquiry into the existence of a consent by searching the Council's records, with the assistance of a member of the Council's records management ream, would have revealed the existence of the file notwithstanding that it had been archived".[5]

7. The Court of Appeal traversed the High Court Judge's factual findings thoroughly and did not disagree with them. Specifically, the Court listed the historical use of quarrying and found that Council officers had been provided with "credible information indicating that Council records might well contain evidence of a land use consent or existing use rights".[6] The Court ruled that the failure to search was unreasonable in circumstances known to the officers[7]and was "subjectively reckless".[8]

The Reasoning of the Court of Appeal

8. The two limitation issues identified by the Court of Appeal were:

(1) Whether the High Court Judge was correct that time did not begin to run until the LUC was disclosed on 22 September 2009 on the basis that the Council's duty of care was breached continuously throughout and Mr Daisley's losses were continuous;[9] and

(2) Whether the Council fraudulently concealed the existence of the 1988 LUC until 22 September 2009[10]

9. As to the first issue, Toogood J in the High Court held that the Council was continuously in breach of its duties regarding information about the consent from the time it issued the erroneous LIM in December 2004 (when the search of its records was "cursory") until the discovery of the LUC in September 2009. He also held that Mr Daisley suffered continuous damage or loss from September 2006 (when the Council required him to apply for a resource consent but then opposed his application on the grounds that he did not have an existing LUC despite failing itself to investigate whether that was so[11]) until September 2009 when the LUC was disclosed.[12] The Judge said that policy justifications for this approach were to be found in the fact that the Council controlled

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[4] At [331].
[5] At [332].
[6] *Whangarei District Council v Daisley* [2024] NZCA 161 [CA judgment] at [171].
[7] At [175].
[8] At [178] and [183].
[9] CA judgment, above n 6, at [178]. The Respondent was given leave to argue this point out of time.
[10] At [179].
[11] HC judgment, above n 1, at [375].
[12] At [378].

the records and that landowners were reliant on the Council to comply with its statutory obligation under the Resource Management Act to keep records of resource consents reasonably available.[13] For that reason, the proceeding was issued within the 6 year period and was not statute-barred.[14]

10. The Court of Appeal cited a decision of the UK Supreme Court – *Jalla v. Shell International Trading and Shipping Co. Ltd*[15] for the proposition that a continuing cause of action is one which arises from the repetition of acts or omissions of the same kind. The Court accepted that there were periods in which the case could be analysed in terms of continuing breach arising from the Council's duty to keep and produce records and to review them before taking enforcement action. There were, the Court said, "numerous breaches of duty over a period of years and each had the same unifying element: the failure to check historic records". The prosecution of enforcement proceedings, the Court continued, "can naturally be seen as giving rise to a continuing obligation of disclosure so long as the proceeding continues" (which it did until almost 2 years after the LUC was disclosed).[16]

11. Notwithstanding that acknowledgement, the Court ruled that the Council's failure to withdraw the proceedings after disclosure of the LUC was not an allegation of continuing breach of the duty to keep and disclose records".[17] The only loss that was within the limitation period as a new and distinct loss was the loss on sale of the property.[18]

12. The pleading contained in the 4th amended statement of claim however contains an allegation that, after the disclosure of the LUC, the Council sought to dispute its continued validity and application to the quarrying operations conducted by Mr Daisley and for that purpose continued the enforcement proceedings that it had issued in the Environment Court shortly before the LUC had been disclosed.[19] It is submitted that this comes within the pleaded duty of the Council under sections 35 and 122 of the Resource Management Act as to how it carried out its regulatory and enforcement actions, namely an obligation to act reasonably in taking enforcement action.[20] The Council's denial of the continued validity and relevant application of the LUC to the quarry, it is submitted, is of the same nature and effect as the Council's initial denial of the existence of an LUC.

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[13] At [379].
[14] At [380].
[15] *Jalla v Shell International Trading and Shipping Co Ltd* [2023] 2 WLR 1085 at [26].
[16] CA judgment at [85].
[17] At [86].
[18] At [87]-[88].
[19] Fourth Amended Statement of Claim [CB 101.0019] at 123-126.
[20] CB 101.0019 at 13-24.

13. Both the High Court and the Court of Appeal ruled that the proceeding was not time-barred (if it was otherwise) by virtue of section 28(b) of the Limitation Act 1950, namely that Mr Daisley's cause of action had been concealed by the fraud of the Council.

14. The High Court Judge, in finding that section 28(b) had been satisfied, confined his ruling to equitable fraud on the basis of his factual finding that no individual Council officer knew that the LUC existed, though he was also of the view that a diligent enquiry by Council officers "with inquiring minds, if necessary with the assistance of someone knowledgeable in the intricacies of the database" would have identified the existence of the archived hard copy.[21]

15. The Judge held[22] that equitable fraud could be invoked to postpone the limitation period only if the Council had a duty to disclose the relevant facts to Mr Daisley and if the failure to disclose was wilful (citing *Matai Industries Ltd. v. Jensen*[23] and *Inca Ltd. v. Autoscript (New Zealand) Ltd*[24]. The requirement of "wilful" non-disclosure was however satisfied, the Judge said, referring to *Wrightson Ltd. v. Blackmount Forests Ltd*[25], if the defendant with a duty of disclosure with knowledge of facts constituting the cause of action does not disclose them to the plaintiff.[26] Key to this ruling was the fact that the Council controlled the records and the information that gave rise to the cause of action. "Knowledge of the existence of the consent must be imputed to the Council (as the entity being sued) even if individual Council officers did not have actual knowledge of it", the Judge said.[27]

16. Toogood J, following English authority, also found that the Council acted recklessly by not taking the least trouble to verify the facts that they assumed – namely that there was no consent and it was up to Mr Daisley to establish one – an assumption that "was false and on a simple examination of the records would have been shown to be false".[28] A challenge to the concept of recklessness is in the forefront of the Council's appeal; it relies on a recent UK Supreme Court Judgment (*Canada Square*) rejecting that concept (but under a different legislative provision).

17. After outlining the policy reasons for having a fixed limitation period [CA judgment, at 99-102], the Court of Appeal discussed the policy reasons for extending the period in cases where the plaintiff is under a disability, including those where the right of action is concealed by the fraud of the defendant. As the Court said: "… a defendant who has fraudulently concealed the cause of action has no right to repose, for they have only

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[21] At [385].
[22] HC judgment, above n 1, at [387].
[23] *Matai Industries v Jensen* [1989] 1 NZLR 525 (HC).
[24] *Inca Ltd v Autoscript (New Zealand) Ltd* [1979] 2 NZLR 700 (SC).
[25] *Wrightson Ltd v Blackmount Forests Ltd* [2010] NZCA 631, citing Chambers J. at [47].
[26] HC judgment, above n 1, at [389]-[390].
[27] At [393].
[28] At [396].

themselves to blame for not being sued in time", citing *Cave v. Robinson Jarvis & Rolf (a firm).*[29] The Court traced the development of the equitable doctrine of fraud which ultimately was codified in the United Kingdom by the Limitation Act 1939 which was adopted in New Zealand by the Limitation Act 1950. The Judgment then referred to English and Canadian cases in which it was held that "fraud" in section 26(b) of the 1939 Limitation Act is not limited to common law fraud or deceit but is to be given a broad meaning.[30] It is not necessary to show that the defendant was subjectively dishonest; it is enough if the conduct was unconscionable.[31]

18. The Court of Appeal then applied one of its earlier decisions – *Wrightson Ltd. v. Blackmount Forests Ltd*[32] – in which it was held that a decision not to disclose material facts known to the defendant will almost always be wilful.[33] The Court then turned to the concept of wilful blindness, saying: "A person is wilfully blind where they know of a risk that the relevant fact or circumstance exists, as opposed to not giving any thought to it, but they have consciously put it out of their mind". It continued: "Equity may treat the failure to disclose as deliberate, but the person is at least subjectively reckless".[34]

19. The Court then considered further the question of whether subjective recklessness as to whether a defendant, knowing of a real possibility of harm and taking the risk of that happening by not disclosing material facts known to it to the plaintiff, could come within section 28(b) of the Limitation Act. In considering this issue, the Court pointed out that New Zealand Courts in responding to limitation defences under the 1950 Limitation Act have followed English authorities under the 1939 UK Act absent good reason to depart from them. It then applied and followed English cases that established that recklessness may amount to fraudulent concealment. At the forefront of these was *Beaman v. ARTS Ltd.*[35] The case concerned a bailee of goods who for their own commercial reasons and taking the view that this was beneficial to the plaintiff gave the goods away and then failed to tell the plaintiff that they had done this. Lord Greene said that that belief was "entertained with a recklessness which I can only attribute to self-deception". He also ascribed recklessness to other assumptions by the defendants that led them to breach their obligations to the plaintiff.

20. The Court of Appeal referred to other authorities that had been decided under the 1939 Limitation Act in which reckless conduct in not disclosing material facts amounting to a cause of action was held to be fraudulent concealment – *Kitchen v. Royal Air Force Assoc.*[36] and *King v. Victor*

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[29] *Cave v Robinson Jarvis & Rolf (A Firm)* [2003] 1 AC 384 at [8] per Lord Millett.
[30] At [109]-[110].
[31] At [111].
[32] *Wrightson*, above n 25.
[33] At [112].
[34] At [116].
[35] *Beaman v ARTS Ltd* [1949] 1 KB 550 (CA) and CA judgment, above n 6, at [118]-[125].
[36] *Kitchen v Royal Air Force Assoc* [1958] 1 WLR 563 (CA).

Parsons & Co. (A Firm).[37] The Court cited a lengthy passage from the Judgment of Lord Denning MR in the latter case, an extract from which is as follows:

> "In order to show that [a defendant] 'concealed' the right of action 'by fraud', it is not necessary to show that the took active steps to conceal his wrong-doing or 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. By saying nothing he keeps it secret. He conceals the right of action. He conceals it by 'fraud' as those words have been interpreted in the case. To this word 'knowingly' there must be added 'recklessly: see *Beauman v. ARTS Ltd.* Like the man who turns a blind eye. He is aware that what he is doing may well be 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 …." [38].

21. The Council, in challenging subjective recklessness as being a legally sufficient basis for determining that a defendant has fraudulently concealed a right of action under section 28(b) of the Limitation Act 1950, refers to and relies on the recent decision of the UK Supreme Court in *Potter v Canada Square Operations Ltd,*[39] overruling a finding in the Court of Appeal in that case that recklessness was a basis for extending time. As pointed out by our Court of Appeal, however, that case was decided under the 1980 UK Limitation Act which replaced the basis for an extension of time from fraudulent concealment of a cause of action to "deliberate" concealment. For New Zealand therefore the 1939 UK Act and the case law under it which recognized the recklessness principle remains applicable.[40] The Court said: "We think it plain that subjective recklessness may amount to unreasonable conduct, through the combination of actual knowledge of a fact or circumstance and the exercise of choice about its concealment".[41]

22. The Court in *Canada Square* addressed the delineation between pre- and post-1980 case law when commenting on the case *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd*.[42] The Court stated:

> [Sheldon] is an important starting point [when discussing the language of the Limitation Act 1980] because of the emphasis of giving the language its plain meaning, rather than reading it as a continuation of the pre-1980 law.
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[37] *King v Victor Parsons & Co (A Firm)* [1973] 1 WLR 29 (CA).
[38] *King,* above n 37, at [35] and CA judgment, above n 6, at [128].
[39] *Potter v Canada Square Operations Ltd* [2023] UKSC 41, [2024] AC 679.
[40] CA judgment, above n 6, at [131].
[41] At [141].
[42] *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] 1 AC 102.

> Lord Browne-Wilkinson … roundly rejected the argument that section 32 should be construed on the basis that it was the statutory successor of s 26(b) of the 1939 Act, and therefore of the equitable principle of concealed fraud.

23. In reviewing the English 1939 Act cases, the Court of Appeal said that they were all cases where the act of concealment occurred after the wrong had been done and after loss had been suffered; in each case the defendant knew of an obligation to the plaintiff and a connection between the facts concealed and the plaintiff's realised or likely loss. Those authorities, the Court held, "establish that concealment may be unconscionable where it meets the test of subjective recklessness".[43] The present case, the Court said, was relevantly similar:

> "The duty of care corresponded to the Council's statutory duty to keep and disclose records. It was breached by failing to search those records for evidence of existing use when taking enforcement action. Council officers knew of the duty, they knew that Mr Daisley's business activities depended on the consent, and they must have known, but failed to tell him, that they had not searched for the consent before taking action to stop him."[44].

24. The Court of Appeal identified the existence of the 1988 LUC as being the concealed fact that was essential to Mr Daisley's cause of action in negligence.[45] It pointed to evidence of prior use of the quarry which it said was "credible information", available to Council officers, "indicating that Council records might well contain evidence of a land use consent or existing use rights". [46] The failure to search, the Court said, was unreasonable[47] and was subjectively reckless and unconscionable amounting to fraudulent concealment, thus preventing time from running until the consent was disclosed in September 2009.[48]

The Council's written submissions

25. The Council relies heavily on the factual finding of the trial Judge that it had not been established that any relevant Council officer knew of the resource consent before it was discovered in September 2009. It submits that recklessness lacks the quality of unconscionability to constitute wilful concealment and therefore does not fall within the fraudulent concealment exception to the standard limitation period contained in section 28(b) of the Limitation Act 1950. It says in any event that even if recklessness was a valid test, the Court of Appeal misapplied that test by finding that the Council was reckless as to only the possible existence of the consent.[49] In short, the Council's argument is that actual

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[43] At [149].
[44] At [148].
[45] At [151].
[46] At [171].
[47] At [175].
[48] At [178].
[49] Council's submissions dated 15 November 2024 [Council's submissions], at 1.1-1.4.

knowledge of the existence of the resource consent by Council officers was a *sine qua non* for the application of section 28(b), without which the Council lacked knowledge of the cause of action and therefore could not be said to have concealed it.

26. The Council's submissions trace the exception of fraudulent concealment from its origins in the Chancery Courts who refused to allow a defendant to rely on the limitation period specified by the Statute of Limitations 1623 where it would be unjust or unconscionable to allow a suitor to take the benefit of a legal advantage.[50] Among other authorities, the Council cites the decision of the Privy Council in *Bulli Coal Mining Company v. Osborne.*[51] The Judgment, delivered by Lord James, is illustrative of the expansive approach taken by the Courts as to the meaning and scope of the principle of fraudulent concealment:

> "The contention on behalf of the appellants that the statute is a bar unless the wrongdoer is proved to have taken active measures in order to prevent detection is opposed to common sense as well as to the principles of equity. Two men, acting independently, steal a neighbour's coal. One is so clumsy in his operations, or so incautious, that he has to do something in order to conceal his fraud. The other chooses his opportunity so wisely, and acts so warily, that he can safely calculate on not being found out for many a long day. Why is the one to go scot-free at the end of a limited period rather than the other? It would be something of a mockery for courts of equity to denounce fraud as 'a secret thing', and to profess to punish it it sooner or later, and then to hold out a reward for the cunning that makes detection difficult or remote."[52]

27. Lord Denning MR in *King v. Victor Parsons & Co.(a Firm)*[53], in a passage cited by the High Court[54] and referred to by the Court of Appeal[55] in the present case, referred to *Bulli* as establishing that in order to show that a defendant has concealed a right of action by fraud "it is not necessary to show that he took active steps to conceal his wrongdoing". It was, he said, sufficient that he knowingly committed it and said nothing. That amounted to concealment by fraud. Then, in reference to *Beaman v. ARTS Ltd,*[56] he said: "To this word 'knowingly' there must be added 'recklessly'". *Beaman* was analysed at length by the Court of Appeal in the Judgment under appeal and accepted as authority for regarding recklessness as constituting concealment by fraud.[57] The Council disputes that recklessness can amount to fraudulent concealment, relying on the recent decision of the UK Supreme Court in *Canada*

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[50] Citing *Gibbs v Gild* (1882) 9 QBD 59 (CA) at 63.
[51] *Bulli Coal Mining Co v Osborne* [1899] AC 351 (PC).
[52] *Bulli,* above n 51, at 363-364.
[53] *King,* above n 37.
[54] HC judgment, above n 1, at [394].
[55] CA judgment, above n 6, at [71] and [118].
[56] *Beaman*, above n 35.
[57] CA judgment, above n 6, at [118]-[125].

Square.[58] As referred to above, the Court of Appeal distinguished *Canada Square* on the ground that it was decided under the UK Limitation Act of 1980 which had replaced the Limitation Act of 1939 (upon which the New Zealand Act is based) and which had substituted the test of fraudulent concealment with one of deliberate concealment, thereby rendering the earlier case law obsolete in the United Kingdom.

28. It should be noted in any event that our Court of Appeal applied section 28(b) of the Limitation Act on the basis of both English and New Zealand authority that did not rely on or invoke, or did not rely on or invoke exclusively, the concept of recklessness. Thus, it referred to *Beaman* as authority for extending the limitation period where "the conscience of the defendant was so affected as to justify loss of the limitation defence". That included cases where there was no dishonesty or moral turpitude".[59] Reference was also made to the decision of the Supreme Court of Canada in *Pioneer Corp. v. Godfrey*[60] where it was held that there need not be a special relationship or a duty to disclose: the court inquires "not into the relationship within which the conduct occurred, but into the unconscionability of the conduct itself".[61]

29. The Court of Appeal moved from that point to refer to one of its earlier decisions – *Wrightson Ltd. v. Blackmount Forests Ltd.* [62] A passage from the Judgment in that case was cited which included the following:

> "The focus of s.28(b) is not on whether or not the non-disclosure is wilful. The focus is on knowledge of relevant facts and on knowledge of a duty to disclose them. If, despite such knowledge, the defendant decides not to disclose the fact, then almost always that decision will be worthy of the epithet 'wilful'."[63]

30. The Court then applied the concept of wilful blindness to a situation where a person knows "of a risk that the relevant fact or circumstance exists, as opposed to not giving any thought to it, they have consciously put it out of their mind". In that case, the Court said: "Equity may treat the failure to disclose as deliberate, but the person is at least subjectively reckless."[64] In that respect, it said: "It may suffice that the defendant knows of an undisclosed connection between something they have done and a loss suffered by the plaintiff."[65] That was the position in each of the leading English cases decided under the 1939 Act: *Beaman, Kitchen* and *King.*[66]

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[58] *Canada Square*, above n 39.
[59] At [108].
[60] *Pioneer Corp v Godfrey* [2019] 3 SCR 295.
[61] Godfrey, above n 60, at [54] and CA judgment, above n 6, at [110].
[62] *Wrightson*, above n 25 and CA judgment, above n 6, at [112].
[63] *Wrightson,* above n 25, at [47] and CA judgment, above n 6, at [113].
[64] At [116].
[65] At [147].
[66] At [148].

31. The Court then applied that legal analysis to the facts as found by the trial Judge. The present case, the Court said, was "relevantly similar" to the English cases:

> "The duty of care corresponded to the Council's statutory duty to keep and disclose records. It was breached by failing to search those records for evidence of existing use when taking enforcement action. Council officers knew of the duty, they knew that Mr Daisley's business activities depended on the consent, and they must have known, but failed to tell him, that they had not searched for the consent before taking action to stop him."[67]

32. In *Kitchen*, the Court considered the nature and extent of the duty of care owed by the defendant to the plaintiff is relevant in considering the conduct of the defendant. The court found the fiduciary duty as between solicitor-client was relevant and was "more powerful in favor of the plaintiff than the relationship of bailor and bailee" (referring to *Beaman*). *Kitchen* is authority for the principle that the higher the fiduciary relationship, the greater the level of scrutiny in relation to the conduct in question and the less egregious that conduct needs to be for the exclusion to engage.

33. The Court in the present case identified the concealed fact that was essential to Mr Daisley's cause of action in negligence as being the existence of the 1988 land use consent.[68] In this respect, the Court analysed the Judge's factual findings at length.[69] They included the finding, relied on heavily in the Council's submissions, that there was not sufficient evidence that any of the relevant Council officers (Barnsely, Lucas and Hislop – none of whom gave evidence) knew of the land use consent and deliberately withheld knowledge of it.[70] That was tempered by a further finding that, based on their "persistent view … that it was for Mr Daisley to prove the existence of a resource consent" they were "wilfully blind to the prospect that a consent existed and did not undertake a diligent search of the Council's records before issuing the first or any subsequent abatement notice".[71] The Judge also thought that the response to Mr Daisley's LIM application in November 2004, which failed to mention the resource consent, was the outcome of a cursory search, an outcome which thereafter became the Council's default position "and no one bothered to carry out a further more diligent search."[72] Importantly, the Court of Appeal recited the trial Judge's finding that, relying on *Beaman*, supported his view that Mr Daisley relied on Council officers to search its records by making reasonable inquiry, namely that:

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[67] At [148].
[68] At [151].
[69] At [153]-[166].
[70] At [154].
[71] At [155].
[72] At [156].

> "The Council granted the consent and held the record of it among the information it was bound by statute to keep reasonably available. Knowledge of the existence of the consent must be imputed to the Council (as the entity being sued) even if individual Council officers did not have actual knowledge of it."[73]

34. Corroboration of that position was found from evidence "of historic use, including visible evidence of past quarrying and quarrying by the Council itself, [that] required more than a cursory search of the records." This included the fact that the Council had been levying mineral rates on the property and that the title referred specifically to the mineral interests.[74] The Court of Appeal said that there was no room for argument but that Council officers had been "provided with credible information indicating that Council records might well contain evidence of a land use consent or existing use rights".[75] The Court of Appeal thought it likely that the enforcement officers were aware that the November 2004 LIM was silent on whether there was a resource consent but that it was unreasonable for them, knowing of the evidence of historic use, to rely on that fact by not undertaking their own search before taking or continuing enforcement action.[76]

35. The Court's view, consistent with *Kitchen*, reinforces that the Council was by virtue of the high fiduciary standard imposed by its delegated authority, required to meet a certain minimum standard of care towards Mr Daisley.

36. This led the Court of Appeal to conclude that "the Council's failure to search its records for a land use consent or evidence of an existing use was subjectively reckless [and therefore] unconscionable, amounting to fraudulent concealment for purposes of s 28(b) of the Limitation Act 1950".[77]

37. The Council seeks to deal with the adoption of a recklessness test in a series of English cases decided under the 1939 Act by reinterpreting them as cases of wilful concealment. Beginning with *Beaman*, it is said that the Court of Appeal unanimously applied the wilful concealment test enunciated in *Bulli.* Lord Greene MR's reference to recklessness, it is claimed referring to the Judgment of Lord Reed in *Canada Square,*[78] "is suggestive of conscious wrongdoing, or at least wilful blindness". As referred to above, the Court of Appeal in the present case described the concept of wilful blindness as being one where a person knows "of a risk that the relevant fact or circumstance exists, as opposed to not giving any thought to it, but they have consciously put it out of their mind." "Equity", it continued, "may treat the failure to disclose as deliberate, but

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[73] At [157]-[158].
[74] At [159] and [161].
[75] At [171].
[76] At [171]-[177].
[77] At [178].
[78] At [45].

the person is at least subjectively reckless".[79] A key factual finding in the present case is the persistent attitude of the Council that the onus was on Mr Daisley to prove the existence of a resource consent or other legal authority to operate the quarry in circumstances where the Council had issued the consent and retained possession of it and where the relevant Council officers had chosen not to make a search for it. Those facts, it is submitted, would justify alternate findings of wilful blindness, deliberate non-disclosure or reckless conduct and, on any description, fraudulent concealment.

38. The Council's submissions make similar points about the other cases where recklessness was found to have existed – *Kitchen v. Royal Air Force Association* and *King v. Victor Parsons & Co.* As to *Kitchen*, the Council's submission is that Lord Evershed MR used the term "reckless" in the sense of conscious wrongdoing or wilful blindness on facts where the defendant knowingly concealed the plaintiff's right of action. In fact, Lord Evershed aligned himself precisely with the passage in the Judgment of Lord Greene MR in *Beaman* in which he described the conduct of the bailees as reckless and held that the negligent conduct of the plaintiff's solicitors who had entered into a covert arrangement with a potential defendant was "reckless, in the sense in which Lord Greene MR used the word, in at least to the same degree as it was in *Beaman v. ARTS Ltd.*".[80]

39. As our Court of Appeal did in the present case, the UK Supreme Court in *Canada Square* cited the same passage from the Judgment of Lord Denning MR in *King* in which he added "recklessly" to the word "knowingly" in relation to the concealment of a cause of action: "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 he says nothing about it." The UK Supreme Court said of this:

> "That would be in accordance with the wider principle according to which equity sometimes attributes constructive notice (eg of a defect in an agent's authority, or in the title of a transferor of property) to persons who are wilfully blind."[81]

40. To that, Lord Reed added a comment made by Sir Robert Megarry V-C in *Tito v. Waddell (No. 2)*[82] on the authorities under the 1939 Act "it can be said that in the ordinary use of language, not only does 'fraud' not mean 'fraud' but also 'concealed' does not mean 'concealed', since any unconscionable failure to reveal is enough."[83]

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[79] CA judgment, above n 6, at [116].
[80] *Kitchen*, above n 36, at 573-574.
[81] *Canada Square*, above n 39, at [48].
[82] *Tito v Waddell (No 2)* [1977] Ch 106 at 245.
[83] *Canada Square*, above n 39, at [49] citing *Tito*, above n 82.

41. The Council says that the Court of Appeal in the present case erred in characterising Lord Denning's Judgment in *King* as turning on a finding Victor Parsons were reckless and that the basis of his finding was that it had actual knowledge and committed a conscious breach of contract.[84] A reading of the Judgment suggests otherwise, Lord Denning saying explicitly:

> "On those facts, I think the judge put it too low when he said that Victor Parsons ought to have known there was a risk of subsidence. The correct finding would have been that Victor Parsons knew there was a risk of subsidence (because the proper precautions had not been taken) and nevertheless they took their chance on it. They did not say a word to Mr King about it. They let him think that the foundations were properly constructed and sufficient for the purpose. I call that a reckless disregard of their obligations. It is unconscionable conduct such as to disentitle them from relying on the statute. They concealed the right of action by 'fraud' in the sense in which 'fraud' is used in the section."[85]

42. Applying that analysis to the present case, the Council knew there was a risk that Mr Daisley had either a consent or existing use rights (because they knew the quarry had been operated for a considerable period of time and had been rated accordingly) but, in taking enforcement action nevertheless took their chance on it. Rather than undertake a diligent search of their records, they incorrectly took the position that it was for Mr Daisley to establish that he had a consent. That was a reckless disregard of their obligations (both statutory and at common law) and a breach of the high standard of fiduciary duty the Council was required to maintain in relation to Mr Daisley. It was unconscionable conduct disentitling them from relying on the statute. They had concealed the cause of action by 'fraud'.

43. The Council relies on the UK Supreme Court Judgment in *Canada Square* for its rejection of recklessness. It acknowledged that the 1980 Limitation Act, which replaced the 1939 Act, substituted fraudulent concealment with the test of deliberate concealment but claimed that the Court adopted an interpretation of the new text which aligned with the old wilful concealment test, while also rejecting the relevance of recklessness.[86] It is clear however that the primary basis for holding that recklessness did not come within the new Act was because, as Lord Reed put it: "I … reject the contention that 'deliberately', in this context, can mean 'recklessly'".[87] In this respect, he referred to Lord Scott's dictum in *Cave v. Robinson, Jarvis & Rolf*[88] that deliberate concealment must be "an intended result".

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[84] Council's submissions, above n 49, at 8.13(c).
[85] *King*, above n 37, at 35.
[86] Council's submissions, above n 49, at 9.1.
[87] *Canada Square*, above n 39, at [108].
[88] *Cave*, above n 29, at [60].

44. The Court of Appeal in the present case, mindful of the difference in wording in the 1980 Act, nevertheless considered the discussion of the UK Supreme Court of the case law under the 1939 Act. That Court had pointed to language in the Judgment of Lord Greene MR in *Beaman* that suggested that he saw the case as one of dishonesty. Our Court did not disagree that there were indications that Lord Greene thought that the defendants had acted dishonestly but overall considered that the case "is correctly classified as a case of subjective recklessness".[89] The Court of Appeal also thought that the Judgments of Lord Evershed MR in *Kitchen* and Lord Denning MR in *King* were authorities for the proposition that subjective recklessness were sufficient to law to constitute fraudulent concealment.[90]

45. Turning to the reasoning of the UK Supreme Court for rejecting the recklessness standard, our Court of Appeal agreed that "an allegation of subjective reckless concealment may raise difficult questions about the extent to which the defendant must appreciate the significance of the fact or circumstance for the plaintiff's rights" and that, where "the fact or circumstance concerns a risk of something happening, questions will also arise about the degree of risk which is sufficient." [91] However, as the Court then pointed out, questions about the sufficiency of the defendant's knowledge of the wrong arise also in cases of wilful concealment. It may suffice, the Court said, "that the defendant knows of an undisclosed connection between something they have done and a loss suffered by the plaintiff."[92] That was so in each of *Beaman, Kitchen* and *King* and was the case here:

> "The duty of care corresponded to the Council's statutory duty to keep and disclose records. It was breached by failing to search those records for evidence of existing use when taking enforcement action. Council officers know of the duty, they knew that Mr Daisley's business activities depended on the consent, and they must have known, but failed to tell him, that they had not searched for the consent before taking action to stop him."[93]

46. For those reasons, the Court concluded, it was "not persuaded that a subjective recklessness standard is over-inclusive under the 1950 Act." Equitable fraud remained the touchstone and the English authorities "establish the concealment may be unconscionable where it meets the test of subjective recklessness".[94]

47. It is submitted that the Council has failed to establish that the Court of Appeal has fallen into error in following the English authorities decided under the 1939 Act and adopting the subjective recklessness standard.

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[89] At [139].
[90] At [140].
[91] At [145].
[92] At [146].
[93] At [148].
[94] At [149].

The Australian and Canadian cases referred to by the Council do not take the discussion further.

Did time begin to run for limitation purposes from discovery of the LUC in September 2009?

48. Toogood J found that immediate damage accrued in 2006, when Mr Daisley's application for a resource consent was denied, but that "it would be artificial to regard the Council's various denials of the existence of a consent from time to time as separate breaches of duty". So on that basis damage occurred continuously from when the Council opposed the 2006 resource consent application until the discovery of the LUC in September 2009.

49. Toogood J also found that it was not necessary to apply a reasonable discoverability test to determine when the damages for the cause of action accrued, due to the nature of the continuing breach being linked to the eventual discovery of the existing consent.

50. Toogood J further noted, in justifying the limitation on the grounds of policy, that the Council was operating under the restrictions of a statutory duty imposed by the RMA, which Mr Daisley as a landowner was entitled to rely on and which it breached. The Council's breaches therefore extended beyond a straightforward failure to disclose information that could be observed between private parties. The Court of Appeal did not address this point.

51. The Court of Appeal did not directly address Toogood J's analysis or application of the legal tests established in *Bowen v Paramount Builders (Hamilton) Ltd* and *Mt Albert Borough Council v Johnson*. Instead, it relied on the UKSC case *Jalla v Shell.* However, while Mr Daisley does not contest that damages for causes of action sitting outside the six-year limitation period may not be claimed as of right, given the grounds upon which the High Court determined the claim was within the six-year limitation period *Jalla v Shell* is not relevant to the facts of this case.

Did the Council fraudulently conceal Mr Daisley's right of action?

52. The fundamental plank of the Council's submissions rejecting subjective recklessness as a basis for applying section 28(b) of the Limitation Act is the factual finding that no relevant Council official knew of the existence of the consent and therefore the Council never made a choice to stay silent.[95] They attribute to the Court of Appeal the view that the High Court Judge "applied a recklessness test, not a wilful blindness test".[96] Those words are not found in the Court of Appeal Judgment. Contrary to the suggestion that there is no link between recklessness and wilful blindness, the Court of Appeal said:

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[95] Council's submissions, above n 49, at 12.3.
[96] Council's submissions, above n 49, at 12.7.

> "A person is wilfully blind where they know of a risk that the relevant fact or circumstance exists, as opposed to not giving any thought to it, but they have consciously put it out of their mind."[97]

53. To that, the Court added that: "Equity may treat the failure to disclose as deliberate, but the person is at least subjectively reckless."[98] The Court referred to the High Court Judge's view, based on the persistent view of the Council's officers that it was for Mr Daisley to prove the existence of a resource consent, that they "were wilfully blind to the prospect that a consent existed and did not undertake a diligent search of the Council's records before issuing the first or any subsequent abatement notice".[99]

54. Thus, it is the incorrect position taken by the Council consistently that it was for Mr Daisley to establish that he had a consent which led it to assume that it did not hold a consent and as a consequence take a decision that there was no need to look for one that constitutes wilful blindness and subjective recklessness. That supports a submission that the Council's conduct was unconscionable and it cannot therefore rely on the limitation period as a defence.

55. Critical to the rulings of recklessness of both Courts below were certain facts known to the Council that suggested at least the possibility of the existence of resource consent. These were:

(a) The need for proper inquiries – implicit in the reasonable grounds requirement in section 322(4) of the RMA – when the Council was seeking to curtail Mr Daisley's quarrying activities on the grounds that he was working the quarry unlawfully

(b) The officers' knowledge that any record of a land use consent would be found in Council's file and that Mr Daisley depended on them to verify whether a consent existed;

(c) The officers' mistaken belief that the onus was on Mr Daisley to prove the existence of the consent, "the necessary corollary being that they believed they need not look for it";

(d) The officers' knowledge of circumstances pointing to historic commercial use of the quarry – including commercial rating of the property and the notation of "minerals" on the title;

(e) The Council's negligence not only caused Mr Daisley's loss but also concealed his cause of action from him until September 2009.[100]

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[97] CA judgment at [116]. See also [165].
[98] At [116].
[99] HC judgment, above n 1, at [331] and CA judgment, above n 6, at [155].
[100] CA judgment, above n 6, at [166].

56. The Court of Appeal said that it must have been obvious to Mr Barnsley, when he first visited the site after Mr Daisley had bought it, that the use as a quarry was longstanding and reasonably extensive[101] and, having regard to the above factors, concluded as follows:

> "For these reasons, we find that between February 2005 and the 2006 resource consent hearing Council officers were provided with credible information indicating that Council records might well contain evidence of a land use consent or existing use rights. We do not think there is any room for argument about this. Mr Barnsley and Mr Lucas were involved throughout and were plainly aware of this information. They were on notice at the outset that there might well be an historic consent or existing use rights."[102]

57. From there, the Court of Appeal concluded that the failure to search was unreasonable[103] and was subjectively reckless and unconscionable "amounting to fraudulent concealment for purposes of the Limitation Act.[104] It is submitted that this conclusion is legally sound and consistent with English authorities decided under the equivalent statute to the New Zealand Limitation Act 1950. It accords with Equity's concern to prevent a defendant relying on the limitation period unconscionably.

Dated this 6 day of December 2024

J A Farmer KC / D J MacRae
Counsel for the Respondent

[101] At [170].
[102] At [171].
[103] At [175].
[104] At [178].

I certify that, to the best of my knowledge, this submission is suitable for publication.

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D J Macrae
Counsel for the Respondent

Dated 6 March 2025