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

RESPONDENT'S ORAL ARGUMENT ON APPELLANT'S APPEAL

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RESPONDENT'S ORAL ARGUMENT ON COUNCIL'S APPEAL

Key facts (as found by trial Judge and Court of Appeal)

1. Trial Judge [RWS 2-7, 37, 42, 55]:

   (1) Although individual officers did not know of the consent, (irrespective of whether the Council is to be imputed to have knowledge of the resource consent by virtue of its possession and control of the consent: J.393, 310-311 cf. CAAJ 164), they and the Council were aware of facts which suggested at least the possibility of a resource consent or of existing use rights:

   (a) Evidence of historic commercial use of the quarry;

   (b) Commercial rating of the property;

   (c) Notation of "minerals" on the title;

   (d) The requirement of "reasonable grounds" under s.322(4) RMA for issuing an abatement notice;

   (e) Any record of a land use consent to the knowledge of Council officers would be found in the Council's files which by law the Council was required to maintain so as to provide ready access to it.

   (f) The Council officers failed to undertake a diligent search of the Council files;

   (g) The Council persistently maintained the view that it was for Mr Daisley to establish that he had lawful authority to operate the quarry and took the view that there was accordingly no need for them to undertake a diligent search of the Council files.

2. The Court of Appeal Judgment was to the same effect (with the exception of imputing corporate knowledge of the consent to the Council). In particular, it said:

   (1) The Council officers failed to tell Mr Daisley that, in breach of their statutory duty to keep and disclose records, they had not searched the records before taking action to stop his quarrying [CAJ. 148].

   (2) 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" [CAJ 168-171; RWS 55-56]

(3) Council officers knew of the statutory duty to keep and disclose records ("which corresponded to the duty of care"), they knew that Mr Daisley's business activities depended on the consent and they knew, but failed to tell Mr Daisley, that they had not searched for the consent before taking action to stop him [CAJ 148].

Was the cause of action concealed by fraud (s.28(b) Limitation Act 1950?

3. Wilful blindness, deliberate non-disclosure, recklessness are all forms of wilful or fraudulent concealment – [CAJ [116] (cf. AWS 5.18(a)), 165; RWS 37; *Wrightson* (Cases 179 at [47]-[48] – In this case, the Council failed to conduct a careful search of the records but took the position instead that Mr Daisley bore the onus of establishing a lawful authority to operate the quarry. The CA held that was unconscionable amounting to fraudulent concealment for purposes of s. 28(b) (CAJ [178]) RWS 42.

4. The English cases decided under the 1939 Limitation Act "establish that concealment may be unconscionable where it meets the test of subjective recklessness" [CAJ 139-141, 147-149; RWS 36-40; cf. AWS 8.5-8.13]. *Beaman* (Cases 202 at pp. 561, 562, 565, 566): *Kitchen* (Cases 340 at pp.573, 574, 576, 578): *King* (Cases 326 at pp. 33-34, 35). Cf. *Canada Square* (Cases 409 at paras. 95, 99, 106-108, 111-113, 133, 138, 153.) - The rejection of recklessness by the UK Supreme Court in *Canada Square* is explicable by virtue of the fact that it was decided under the 1980 Limitation Act which substituted "deliberately concealed" for the equitable test of concealed by fraud in the 1939 Act. The Court held that 'deliberately' does not include 'recklessly'.

5. Council, relying on *Wrightson*, *Inca* and *Matai*, says that the defendant must have knowledge of the relevant facts that constitute the cause of action [AWS 3.2-3.5].

6. However, the relevant facts, of which the Council was aware, are those listed in 1 and 2 above. Those facts constitute a cause of action in negligence of which the Council was aware but failed to disclose to Mr Daisley, a failure that was, alternately, either deliberate, wilfully blind or reckless [CAJ 116, 148; RWS 46-47]. It is not necessary to show that the Council took active steps to conceal its wrong: *Bulli Coal Mining Co. v. Osborne* (Cases 233, cited in *Beaman* at p. 570 per Somervell LJ).

7. Toogood J thought that a key factor was that, pursuant to its statutory obligation to do so and make them readily available, the Council controlled the records and the information (including the consent that it had granted), information and records that gave rise to the cause of action [J. 393]. The Court of Appeal was of the same view: [CAJ 148].

Continuous Breach

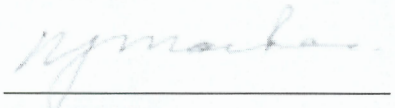
8. There are 3 components that can be said to be "continuing" – (1) continuing duty; (2) continuing breach of duty; (3) continuing loss. The focal point of all 3 is the continued negligence of the Council, evidenced by its failure to conduct more than a cursory search of its records while over a long period of time taking several active steps designed to put Mr Daisley out of the quarrying business and ultimately having that effect.

9. CA adopted the test of continuing cause of action articulated in *Jalla* (Cases 1052) – one which arises from the repetition of acts or omissions of the same kind (as opposed to a one-off act which causes continuous loss – *Jalla* at 13(iii), 16, 26-27, 30 [CAJ 83] and said there were periods when the case could be analysed in terms of continuing breach – numerous breaches in relation to the prosecution of enforcement proceedings that had "the same unifying element of the failure to check historic records". That should naturally have led to a finding in the present case of continuous breach.

10. Toogood J held that the Council was in breach of duty on a continuous basis from the time it issued the LIM in November 2004 until the discovery of the LUC in September 2009 and suffered continuing damage or loss from September 2006 when the Council dealt with his resource consent application until July 2011 when it withdrew the Environment Court proceedings. Accordingly, the cause of action accrued from September 2006 (when loss was first suffered) until the discovery of the LUC [J.378].

11. But CA said there was no new pleaded breach of duty to keep and disclose records after 14 August 2009 [CAJ 85-86]. Cf RWS 12 – the 4ASC alleges that after the discovery of the LUC the Council sought to dispute its continued validity and applicability to the quarrying operations – an allegation of the same nature and effect as the initial denial of the existence of the LUC.

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



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Dated 17 March 2025