IN THE SUPREME COURT OF NEW ZEALAND

I TE KŌTI MANA NUI O AOTEAROA

SC 59/2024
[2026] NZSC 72

BETWEEN		WHANGAREI DISTRICT COUNCIL Appellant
AND		MALCOLM JAMES DAISLEY Respondent

Hearing:	18–19 March 2025
Further submissions:	4 April 2025
Court:	Winkelmann CJ, Glazebrook, Ellen France, Kós and O'Regan JJ
Counsel:	D H McLellan KC, P A Robertson and S O H Coad for Appellant J A Farmer KC and D J MacRae for Respondent
Judgment:	4 June 2026

JUDGMENT OF THE COURT

A **The appeal is allowed in part. The finding that the appellant fraudulently concealed the respondent's right of action is set aside.**

B **The appeal in respect of the award of damages of $90,000 for loss of the value of the Knight Road property, and interest on that sum in the terms set out by the High Court, is dismissed.**

C **The damages awarded to the respondent are otherwise set aside.**

D **The cross-appeal is dismissed.**

E **The respondent must pay the appellant costs of $45,000 plus usual disbursements. We allow for second counsel.**

REASONS

SUMMARY OF REASONS
(Given by the Court)

[1] This is a brief summary of the reasons of the Court regarding the matters of legal principle arising in this case. It does not provide full coverage of this Court's reasoning and must be read in conjunction with the full reasons.

Background

[2] This case concerns claims against the Whangarei District Council for negligence and misfeasance in a public office in relation to enforcement action taken by the Council to restrict quarrying on the respondent's property between early 2005 and mid-2011. The Council issued abatement notices and pursued enforcement proceedings, asserting the respondent lacked resource consent. A 1988 land use consent (LUC) authorising quarrying was found in the Council's archives in 2009. By then, Mr Daisley was compelled to sell the property, at a significant loss. He sued the Council in 2015, seeking damages.

[3] The High Court awarded just over $4.25 million for negligence and misfeasance, but the Court of Appeal overturned the misfeasance finding and reduced the quantum of damages. The appeal and cross-appeal in this Court focused, respectively, on whether the limitation period had been extended due to fraudulent concealment by the Council of the respondent's right of action under s 28(b) of the Limitation Act 1950 (1950 Act) or by operation of the continuing breach doctrine; and on whether the Council's conduct amounted to tortious misfeasance.

[4] This Court, by a majority comprising Glazebrook, Ellen France, Kós and O'Regan JJ, has allowed the appeal in part, setting aside the finding that the appellant

fraudulently concealed the respondent's right of action. With the exception of the award of damages of $90,000 for loss of the value of the Knight Road property, and interest on that sum in the terms set out by the High Court, the damages awarded to the respondent are set aside.

[5] Winkelmann CJ dissented. While agreeing with the majority that the cross-appeal should be dismissed, she would have upheld the Court of Appeal's finding that the appellant fraudulently concealed the respondent's right of action. She therefore would have upheld the quantum of damages awarded by the Court of Appeal.

Fraudulent concealment under s 28(b) of the 1950 Act

[6] The majority held that fraudulent concealment for the purposes of s 28(b) of the 1950 Act requires that the defendant either possessed actual knowledge of the essential facts giving rise to the cause of action or was wilfully blind to them at the time of the alleged concealment.[1] Mere recklessness or negligence as to the existence of those facts is insufficient.[2]

[7] Additionally, the defendant must have actually known, or been wilfully blind to the fact, that those essential facts amounted to a wrongful act, and decided nevertheless to conceal them. Again, mere recklessness or negligence (here, as to wrongfulness) will not suffice.[3]

[8] Although attracted to the conclusion of the United Kingdom Supreme Court in *Potter v Canada Square Operations Ltd* that fraudulent concealment does not require the further element of a duty to inform or disclose the facts to the defendant,[4] the majority found it was ultimately unnecessary to determine that issue in this case. It therefore expressed no concluded view as to whether there is a "duty to disclose" requirement in New Zealand law.[5]

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1 See below at [96]–[98].
2 See below at [99].
3 See below at [121]–[125].
4 *Potter v Canada Square Operations Ltd* [2023] UKSC 41, [2024] AC 679.
5 See below at [86] and [130].

[9] In the present case the Court of Appeal found that the Council had not acted with actual knowledge or wilful blindness either of the essential facts or that its actions amounted to a wrongful act. The majority agreed that the evidence led to that conclusion. The Council's actions, while certainly (perhaps even grossly) negligent, did not meet the standard for equitable fraud and extension of the limitation period under s 28(b).[6]

[10] Winkelmann CJ agreed with the majority that the word "fraud" in s 28(b) is used in the sense of equitable fraud.[7] However, in agreement with the Court of Appeal, she found that unconscionable, rather than dishonest, conduct is the standard for equitable fraud for the purposes of s 28(b).[8]

[11] Winkelmann CJ held that when assessing relevant conduct, the existence of a special relationship between the parties may be part of the circumstances giving rise to a finding of unconscionability, but unconscionability may also arise from conduct in circumstances where there is no special relationship.[9] In a case of negligence, such as the present, the essential issue is whether, in all the circumstances of the case, blameworthiness on the part of the defendant, above and beyond the blameworthiness inherent in the negligence, means that it would be unconscionable for the defendant to avail themselves of the statutory limitation defence.[10] In all the circumstances of this case, the Council's recklessness as to the existence of the essential facts giving rise to a cause of action was enough for the purposes of s 28(b).[11]

Continuing breach

[12] The majority recognised three illustrative categories of breach that shape how limitation periods apply in negligence claims. First, a *singular* breach occurs when a one-off act or omission causes more than trivial damage, at which point the cause of action accrues and the limitation clock begins. All subsequent damage of the same kind and arising from the same breach is captured within that original cause of action

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6 See below at [141]–[143].
7 See below at [189].
8 See below at [191].
9 See below at [192].
10 See below at [245].
11 See below at [193].

but does not restart time. Damage of a distinct kind will, however, give rise to a fresh cause of action and restart time.[12] Secondly, a series of *episodic* breaches, by contrast, involves repeated negligent acts or omissions, each giving rise to a separate cause of action when fresh damage manifests. Time runs independently for each episode, allowing recovery for losses within the limitation period even if losses of the same kind from earlier breaches are time-barred.[13] Finally, a *continuing* breach arises where a consistent course of negligent conduct, which cannot be logically divided into discrete events, continues to cause loss of the same kind.[14] In such cases, the cause of action continually refreshes so long as the breach persists and damage continues to accrue.[15] However, continuing *breach* should not be conflated with continuing *damage* from a singular breach, which does not restart time.[16]

[13] Regardless of categorisation, however, a plaintiff will generally not be entitled to recover for damage incurred outside the limitation period—i.e., between the initial manifestation of the breach and the date six years prior to the commencement of the claim. That is of course subject to specific statutory exceptions, such as (under the 1950 Act) fraudulent concealment.[17]

[14] In this appeal, the majority considered the continuing breach principle, on which Mr Daisley sought to rely, could not assist him, for the reasons given at [161]–[162]. However, also in agreement with the Court of Appeal, the majority found the claim for the losses arising from forced sale was within time.[18]

Misfeasance in a public office

[15] It proved unnecessary for this Court to consider in any depth the substantive legal principles of the tort of misfeasance in a public office.[19] In agreement with the

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12 See below at [149].
13 See below at [150]–[151].
14 See below at [152]–[153].
15 See below at [154].
16 See below at [152].
17 See below at [80]–[81] and [155].
18 See below at [170].
19 See below at [176]–[177].

Court of Appeal, the majority considered those principles did not apply on the facts of this appeal.[20] The majority therefore dismissed the cross-appeal.[21]

GLAZEBROOK, ELLEN FRANCE, KÓS AND O'REGAN JJ
(Given by Kós J)

Table of Contents

[20] See below at [178].
[21] See below at [179].

Introduction

[16] Negligence struck Mr Daisley twice. First, the Whangarei District Council restricted the operation of a quarry he had bought, while overlooking that it had long ago granted a land use consent permitting quarrying. The Council now accepts it was wrong, and negligent. Secondly, a solicitor told Mr Daisley he had no claim against the Council. By the time Mr Daisley obtained better advice and issued these proceedings, the Council was able to raise a limitation defence. We now explain briefly, and then more fully,[22] how this all happened.

[17] In late 2004, Mr Daisley purchased a 48-hectare rural property on Knight Road, Ruatangata, near Whangārei. It included a quarry from which Mr Daisley intended to extract material to use in his contracting business, and for sale. Soon after settlement, however, the Council commenced efforts to prevent him from quarrying. It issued an abatement notice, saying he had neither existing use rights nor a resource consent permitting quarrying.

[18] The Council's enforcement efforts escalated in the years that followed, culminating in enforcement proceedings in the Environment Court. But in the course of those proceedings, a 1988 land use consent (LUC) permitting quarrying on the property was discovered in the Council's archives. The Council eventually withdrew its proceedings, but by then Mr Daisley had been forced by his bank to sell the property. Eventually, and belatedly, he sued the Council. He claimed damages in negligence and misfeasance in a public office.

[19] The High Court rejected the Council's limitation defence. The Judge found for Mr Daisley in both negligence and misfeasance. He awarded damages of just over

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22 Below at [21]–[54].

$4.25 million. That award was reduced slightly on appeal, the Court of Appeal rejecting the misfeasance claim.[23]

[20] The Council accepts it was negligent, but challenges the judgment on limitation grounds. Mr Daisley cross-appeals rejection of his misfeasance claim. Central to the appeal is the question whether the Council fraudulently concealed the existence of the LUC within the meaning of s 28(b) of the Limitation Act 1950 (1950 Act). The 1950 Act applies because the relevant acts or omissions by the Council pre-dated 1 January 2011, when the Limitation Act 2010 entered into force.[24] The cross-appeal focuses on whether the Council's failure to promptly withdraw enforcement proceedings, once the LUC was discovered, amounted to misfeasance in a public office for which it should be held liable.

Background

[21] The previous owners of the Knight Road property were a Mr and Mrs Drake. They bought it from Mr Drake's father in 1978. Mr Drake Sr had bought the property in the early 1960s. He opened a quarry on the property in about 1964 or 1965.

The 1988 LUC

[22] After Mr and Mrs Drake took over the property, the quarry was accessed and operated by a range of contractors. They included Charles and Henry Adams, trading as Adams Bros. In 1988, Adams Bros obtained the LUC from the Whangarei County Council, one of the Council's predecessor entities.[25] The County Council had itself obtained rock from the quarry in the 1980s. The LUC authorised the establishment of a commercial quarry to extract red brown rock, with no fixed maximum output. The LUC was for a different quarry location within the property, but no-one suggests the distinction is material.

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23 *Daisley v Whangarei District Council* [2022] NZHC 1372, (2022) 23 ELRNZ 839 (Toogood J) [HC judgment]; and *Whangarei District Council v Daisley* [2024] NZCA 161, [2024] 2 NZLR 660 (Miller, Gilbert and Mallon JJ) [CA judgment].

24 Limitation Act 1950, s 2A.

25 The Whangarei County Council was amalgamated with the Whangarei City Council, the Hikurangi Town Council and the Otamatea County Council (along with several reserve boards) in 1989 to form the newly established Whangarei District Council: "Local Government (Northland Region) Reorganisation Order 1989" (13 June 1989) 99 *New Zealand Gazette* 2391; and see Local Government Act First Schedule Order (No 2) 1989.

[23] The Council digitised its property records in the 1990s, but did not scan the paper file relating to the 1988 LUC. However, the existence of that file was noted in the electronic database record for the property in December 1999 and would have been apparent to any officer searching the digital record. Council officers had easy access to the physical archives if a certain file was required. The digital record was migrated to a new electronic database in September 2008, but the paper file itself was not uploaded in scanned electronic form until 2018.

[24] Since granting the LUC in 1988, the Council had rated the quarry commercially, in addition to general rates payable on the property. It did so on the basis of the quarry being in commercial use, despite the objections of the Drakes. However, at some point before 2004 the Council mistakenly began to levy the rates based on a different quarry on Drake Road—confusingly known as "Drakes quarry"—which was owned by the Council itself.

Mr Daisley acquires the quarry

[25] Mr Daisley had been searching for about two years for a "small-to-medium sized quarry" to meet the demands of his contracting business and those of other contractors buying material from him. Such a quarry was not easy to come by. Fortunately for him, in 2004 the Drakes were looking to sell, and the Knight Road property was marketed as including "a metal pit for contractors". When he visited in July or August of that year, Mr Daisley was surprised by the suitability of the quarry. He was excited about the opportunity to integrate it into his business.

[26] At the time of Mr Daisley's approach, the Drakes appear to have been unaware of the 1988 LUC obtained by Adams Bros. Mr Drake told Mr Daisley that a quarry had been operated on the land for decades without issue, and the Council clearly knew about it because it had charged commercial mineral rates for years (and continued to do so). As noted, its predecessor, the County Council, had itself used the quarry in the past. Similar assurances were given by the real estate agent and by local contractors familiar with the quarry's history.

[27] Following some negotiation as to sale price and usage of the existing stockpiled metal, Mr Daisley and the Drakes executed a sale and purchase agreement for the

property on 18 October 2004, with settlement occurring on 24 December 2004. The agreement allowed the Drakes to retain ownership of the stockpiled material present on the site at the time of settlement.

The 2004 LIM

[28] In November 2004, after execution but before settlement, Mr Daisley's solicitors obtained a land information memorandum (LIM) from the Council. It did not refer to the 1988 LUC. It stated:

> **5: ANY PERMIT, CONSENT, CERTIFICATE, NOTICE, ORDER OR REQUISITION AFFECTING THE LAND OR ANY BUILDING ON THE LAND PREVIOUSLY ISSUED BY THE WHANGAREI DISTRICT COUNCIL:**
>
> *No information applicable to this property was found.*
>
> …
>
> **7: 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.*
>
> …
>
> The information supplied is based on Councils existing records relating to the property.
>
> Any of these files may be inspected at the Whangarei District Council by prior arrangement.

[29] The absence of an LUC did not come as a surprise to Mr Daisley, given the information he had obtained from Mr Drake. He said he:

> … relied on the Council's obvious knowledge and acceptance of the operation of the quarry as reflected by the mineral rates assessment. It had obviously been operated as a commercial quarry for quite some time without any issue.

In essence, Mr Daisley proceeded on the basis he would have existing use rights to operate the quarry, based on his discussions with Mr Drake and the commercial rates assessment the real estate agent had given him. He could not, of course, be sure that was the case: the mere fact of a commercial rates assessment did not mean he held existing use rights. That depended on the use being lawfully established by 1978, and

not having been discontinued for more than 12 months.[26] So Mr Daisley was taking what Toogood J described as "a calculated risk".[27]

Trouble after purchase

[30] Believing that commercial quarrying activity was protected by existing use rights, Mr Daisley planned to quarry well in excess of the 500 bank cubic metres (BCM) permitted activity under r 28.6 of the 1998 Whangarei Proposed District Plan.[28] While he eventually sought permission from the Council and the Northland Regional Council to extract 40,000 BCM of aggregate per annum (plus 10,000 BCM of overburden fill), Mr Daisley indicated in cross-examination that he had initially intended to quarry an even larger quantity.[29]

[31] Following settlement, the Drakes began removing the stockpiled material. A neighbour complained to the Council on 1 February 2005, citing impacts on visual amenity. This prompted a Council monitoring and enforcement officer, Mr Barnsley, to inspect the site two days later. On 4 February, Mr Barnsley wrote to Mr Daisley alleging unauthorised extraction of material in excess of the 500 BCM annual limit and requiring that quarrying activity cease in the absence of a resource consent. The letter incorrectly attributed the stockpile to Mr Daisley's contracting business, Daisley Contracting Ltd, referring to the fact that "some of [the company's] plant was still on site".

[32] Mr Barnsley returned to the property on 16 February and observed workmen "disturbing/excavating" at the quarry site. He recorded a "good deal of further

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26 Resource Management Act 1991 [RMA], s 10(1) and (2). The 1978 date is set by the operative date of the plan. In this respect we note the fourth amended statement of claim asserted that property had been "operating as a commercial quarry for extracting minerals since c1982".

27 HC judgment, above n 23, at [260].

28 Aggregate in its original state in the ground is measured in terms of "bank cubic metres" (BCM), which describes cubic metres of material in situ prior to blasting and excavation: HC judgment, above n 23, at [3], n 2. "Aggregate" refers to rock or inorganic material suitable for industrial use: Aggregate & Quarry Association of New Zealand *Glossary of terms used in the quarrying sector* (Wellington, May 2020) at 1.

29 The lower output sought appears to have been the product of Mr Daisley's negotiations with the Northland Regional Council, from whom he also had to (and did) obtain resource consent. "Overburden" is overlying material such as clay which must be removed ("stripped") before a mineral can be extracted; "overburden fill" refers to overburden used as "cleanfill"—i.e., uncontaminated and non-hazardous material used to fill a pit after extraction: Aggregate & Quarry Association of New Zealand, above n 28, at 2–3.

activity" at the quarry since his earlier visit. An abatement notice followed on 21 February, issued under s 322 of the Resource Management Act 1991 (RMA). The issuing of that notice is central to the claim eventually made against the Council. The notice asserted that quarrying in excess of the 500 BCM annual limit was occurring without either resource consent or existing use rights, breaching r 28.6 of the Proposed District Plan and s 9 of the RMA. Mr Daisley was advised that failure to comply with the notice might result in prosecution under s 338 of the RMA.

[33] Mr Daisley responded on 28 February, denying having removed material from the property and explaining his arrangement with the Drakes regarding ownership and removal of the stockpiled material.[30] He sought cancellation of the notice on that basis.[31] Mr Daisley also advised that he had "already applied for resource consents from both Whangarei District Council and Northland Regional Council", but added:[32]

> While I am happy to apply for a resource consent, I find it hard to believe that the council has not issued a consent to the previous owners as the quarry has been in use for 35 years that I know of, and I believe it unlikely that council would condone long-standing non-permitted quarrying for more than three decades. WDC have been collecting rates on it as a quarry all through that time.

He referred to an attached rates notice charging commercial mineral rates on the quarry, although it seems that attachment was not received by the Council.[33]

[34] Mr Daisley reiterated this position in a further letter of 3 March, also asserting existing use rights under s 10 of the RMA. In it, he sought to lodge an application for a resource consent to operate the quarry.

[35] The Council responded on 4 March, rejecting the application as incomplete and requesting evidence of lawful establishment and continuous operation, among other information. Mr Daisley then provided a letter from Mr Drake confirming

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30 See above at [27].

31 Under s 325A(4) of the RMA.

32 It appears Mr Daisley had in fact only applied to the Northland Regional Council at this stage; a separate application form for a resource consent from the Whangarei District Council was completed by Mr Daisley's agent, Mr Turner, on 21 February 2005, but no application was lodged with the Council until 3 March (at the earliest)—at least three days after the letter disputing the abatement notice was sent: see below at [34].

33 See above at [24].

long-standing use and detailing previous operators and output reaching as much as 20,000 BCM per annum.

[36] In two further letters dated 17 and 18 March, respectively, the Council advised Mr Daisley that his application to cancel the abatement notice had been unsuccessful. The Council maintained its position that his activities were unlawful and said it was yet to accept an application for resource consent from Mr Daisley. It noted previous owners did not seem to have been issued abatement notices, but:

> Council usually becomes involved in these issues when we receive complaints. As far as I am aware no complaints were received about previous owners' activities.

The Council advised Mr Daisley of his right to appeal the abatement notice and apply for a stay—and indeed recommended he do so and told him how to do it—but stated that in the meantime it had no discretion in the matter and was "duty bound" to enforce compliance with the District Plan. The second letter enclosed a copy of the relevant Proposed District Plan rules.

[37] The Council wrote again on 28 April, noting that it had received neither a valid resource consent application nor any notice that Mr Daisley had sought an appeal or a stay of the notice. It warned that any breach of the abatement notice would be met with enforcement action including the issuing of an infringement notice. It appears Mr Daisley then received legal advice that the abatement notice was ineffective, and that no formal challenge was required.

[38] On 12 May, the Council met with Mr Daisley at his property and carried out a site inspection. He was provided forms to lodge an appeal and apply for a stay of the abatement notice and advised to apply for waiver of the 15-working-day period to file an appeal.

[39] On 30 May, Mr Daisley filed a notice of appeal to the Environment Court seeking a stay or cancellation of the abatement notice. On 20 June he sought waiver of the filing period. Mr Daisley was granted both waiver and stay on 4 July, the stay expiring on 30 September 2005. The stay was later extended to 15 November by Judge Newhook on the basis that Mr Daisley's counsel had advised his amended

resource consent application would be ready by about that date, there having been delays due to the unavailability of various consultants. By the expiry of the stay Mr Daisley had still not lodged an application. But, in the meantime, the Council had become aware of a defect in the abatement notice requiring its withdrawal.[34] That proceeding came to an end.

[40] At a meeting on-site on 3 October, Mr Daisley again raised the commercial rating issue he had raised on 28 February.

[41] The Council issued fresh abatement notices to Mr Daisley and Daisley Contracting Ltd on 16 November 2005. In a letter to the Council dated 20 December, Mr Daisley seemed to acquiesce to the Council's position that there was no resource consent, referring a number of times to his waiting for such a consent to be granted. But he maintained his position on existing use rights, saying:

> In the meantime, I believe that because the continuous use of the quarry by private owners (and WDC from time to time) predates the Resource Management Act there is an existing use under Section 10 of the Resource Management Amendment Act 1993.
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> … In levying rates on the property as a quarry, the Whangarei District Council has acknowledged the existence and the use of this quarry for at least 35 years

The letter did not claim, nor provide any evidence, that any formal permission had been granted to undertake quarrying activity. For the bulk of the period of the quarry's operation—from about 1964 until 1988—it seems there was no permission. The Council's position was that the claim of existing use rights was unsupported by evidence, and it was for Mr Daisley to establish them. It did however investigate the rating information, which proved inconclusive.[35]

[42] The November abatement notices were followed by a series of infringement notices issued by the Council on 22 December 2005, 26 January 2006 and 14 February 2006. Mr Daisley queried these actions, maintaining his position that he was lawfully entitled to operate the quarry. He advised that he had experienced delays in the preparation of his resource consent application but that it would be lodged in due

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34 The notice had been directed to the property neighbouring Mr Daisley's by mistake.
35 See below at [44].

course. On 8 March 2006, Council officers executed a search warrant on Mr Daisley's property accompanied by two police constables.

The 2006 resource consent application

[43] The Council received Mr Daisley's updated resource consent application, seeking permission to quarry up to 40,000 BCM per annum, on 24 March 2006.[36] The application was required to be publicly notified, and was set down for hearing by the Council's Judicial Committee on 28 November 2006. The Council's reporting planner opposed the application in his written report and at the hearing. As we note later, Toogood J concluded that loss first arose on 15 September 2006.[37]

[44] Throughout this period the Council had also investigated the rating information presented by Mr Daisley. At this point the error referred to earlier was uncovered: the rating information Mr Daisley had been relying on related to a different quarry on Drake Road, rather than his Knight Road quarry—a mistake apparently made by QV.[38] On 1 November 2006 a Council officer, Mr Lucas, met with Mr Daisley's planners. His file note recorded that they:

> … agreed, reluctantly, that Drakes Quarry was not Daisley's Knight Rd quarry, and they queried whether or not council had Daisley's property's quarry records available. I advised them that they would need to determine this, as neither council nor QV appeared to have such records. [Mr Murfitt, a Council planner,] mentioned that they may seek an adjournment for the hearing due to the revelation that the Daisley & Drakes quarries were not the same, but I advised them that the consent should be heard on its merits and not over the question of existing use.

[45] The Council reminded Mr Daisley that any existing use rights would depend instead on proof that the quarry had been lawfully established before 1978 and had not thereafter stopped operating for any period exceeding 12 months.[39] Mr Daisley's

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36 The original application was for 50,000 BCM, but this was reduced to 40,000 BCM including aggregate at the hearing.

37 See below at [64]. As the Court of Appeal noted, that conclusion was not disputed: CA judgment, above n 23, at [27].

38 See above at [24].

39 See above at [29].

application for resource consent was then refused on 2 February 2007.[40] In the reasons for its decision, the Committee said:

> No resource consent currently exists for quarrying activities on the site and no written confirmation of any existing use rights under section 139A of the Act has been issued by the Council.

[46] Following that decision, on 12 February 2007, the Council sent Mr Daisley a letter directing that he "cease operation of the quarry forthwith" or otherwise face enforcement proceedings in the Environment Court. Between October 2007 and November 2008, the Council issued a further three abatement notices.

[47] During this time, official information requests made on behalf of Daisley Contracting Ltd for information relating to the property did not uncover the original LUC.[41] It would appear the Council did not search its historic paper records before responding to these requests, though it invoiced Daisley Contracting Ltd for four hours of staff time. Requests for cancellation of the abatement notices were also refused; instead, a further infringement notice was issued on 5 March 2009.

Environment Court proceedings and discovery of the LUC

[48] On 31 July 2009, the Council filed proceedings in the Environment Court seeking an enforcement order against Mr Daisley and his company. Around the same time, Mr Daisley was facing pressure from his bank to sell the property due to cashflow and debt servicing issues.

[49] In the course of those proceedings, Mr Daisley's solicitors sought, and then searched, the Council's physical records relating to the property. On 22 September 2009, the hardcopy file containing the 1988 LUC was finally uncovered by Mr Daisley's solicitors.

[50] The Council did not immediately withdraw the proceeding, but agreed to vacate the hearing and seek an adjournment with an undertaking to report to the Court

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40 A separate consent was granted by the Northland Regional Council and issued on 5 March 2007.

41 Mr Daisley gave evidence that various professional advisors engaged by him had already requested such information on multiple occasions from 2004–2007, but no documentation to that effect appears to have been discovered.

by 30 October 2009. On 15 October 2009, the abatement and infringement notices were withdrawn, and outstanding debts for infringement fees arising from those notices were cancelled.

[51] The Council proposed to conclude the enforcement proceedings by way of an enforcement order made on agreed terms. Mr Daisley's position was that no order would be agreed to, there being no proper basis for enforcement action. He was prepared to negotiate terms on which quarrying could proceed, but those negotiations stalled. In particular, the Council insisted the LUC only allowed quarrying of red, not blue, rock. On 22 January 2010, the Council wrote to Mr Daisley's lawyer threatening to continue the enforcement proceedings (or, alternatively, seek a declaration as to Mr Daisley's rights) in the absence of agreement.[42]

Forced sale and withdrawal of proceedings

[52] The property was ultimately sold in a forced sale to Ark Contractors Ltd (Ark) at a nearly 25 per cent discount from the estimated market price.[43] The agreement for sale and purchase was signed on 2 December 2009—just one day before the bank's scheduled mortgagee sale—with Ark taking title in or around February 2010. On 30 May 2011, the Council granted Ark a variation to the LUC (on a non-notified basis) that authorised the annual removal of 50,000 BCM of material from the property.[44]

[53] The Council withdrew the enforcement proceedings against Mr Daisley and his company a short time later, in early July 2011.

Mr Daisley sues the Council

[54] Mr Daisley commenced proceedings against the Council on 14 August 2015, just within six years of the 22 September 2009 disclosure. We note two points. First, the delay is attributed to earlier legal advice that he had no cause of action against

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42 Declaration procedures are provided for in s 311 of the RMA.

43 See HC judgment, above n 23, at [555].

44 The 1988 LUC only allowed removal of red brown rock from the area defined in the consent documentation. The variation granted to Ark removed these limits, allowing removal of rock "inclusive of blue, red or brown rock" at "any location on the site" provided it was at least 20 metres from the boundary.

the Council. That advice led to a claim against the solicitor concerned, which was settled before trial. Secondly, to state the obvious, the proceedings were issued well outside the six-year period from the time the Council's negligence caused loss to accrue. That dated back to September 2006—so a battle over limitation became inevitable.[45]

[55] The present appeal and cross-appeal are confined to questions of limitation and misfeasance. It is common ground that the Council's failure to search its records was negligent and that had it disclosed the 1988 LUC earlier, much of the loss suffered by Mr Daisley would have been avoided.

Legislative framework

[56] Before summarising the decisions of the Courts below, it will be helpful to set out the key provision of the 1950 Act in issue. That Act applies because of the timing of the Council's negligent acts or omissions.[46] It has since been replaced by the Limitation Act 2010 (2010 Act), but the new legislation does not apply to this case.

[57] The provision in question is s 28(b) of the 1950 Act, but we will set out the whole of s 28 here:

> **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
>
> (c) the action is for relief from the consequences of a mistake,—
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:
>
> Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which—

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45 As to the date of accrual of loss, see below at [64].
46 See above at [20].

(d) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or

(e) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

High Court

[58] As noted earlier, Mr Daisley issued proceedings in the High Court on 14 August 2015, just within six years of the date on which the LUC came to light. Three causes of action were pleaded: breach of statutory duty, negligence, and misfeasance in a public office.[47]

[59] Mr Daisley claimed loss of earnings, the loss of a valuable business operation (including goodwill and royalties), a reduction in the sale price of the property and costs incurred in resisting enforcement action.[48] The claimed losses totalled $20,945,891 plus interest, costs and exemplary damages.[49]

[60] The Council denied the claims almost entirely. It accepted it was negligent in some respects but disputed the duties alleged, denied it had misled Mr Daisley, and asserted a limitation defence under the 1950 Act.[50] It pleaded that the losses claimed were speculative or exaggerated and that any damage was the result of the appellant's own contributory negligence,[51] or of third-party conduct, including that of his solicitor.[52]

Negligence

[61] Toogood J held that the Council owed duties of care, additional to its statutory obligations under the RMA, to keep resource consent records reasonably available for

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47 The breach of statutory duty claim was however rejected by Toogood J on the basis that careless performance of a statutory duty is not recognised as an independent tort: HC judgment, above n 23, at [140]–[141]. It was not pursued on appeal, and we need not discuss it further.

48 At [15].

49 At [16].

50 At [17] and [351]. See above at [20].

51 See at [252]–[265].

52 At [20], [346(f)] and [567].

inspection and provide information about them with reasonable care and skill, and to undertake reasonably diligent inquiries into the existence of such records when that was in issue.[53] The Judge found these duties had been breached continuously from November 2004, when an erroneous LIM was issued, until the discovery of the LUC in September 2009.[54] Specific breaches included failures to conduct adequate searches before issuing the February 2005 abatement notice, in processing the 2005 and 2006 resource consent applications, when opposing the 2006 application, and in issuing subsequent notices and enforcement proceedings.[55] The Judge found these breaches to be the real and effective cause of loss, comprising lost profits from the inability to establish a commercial quarry, loss of property value, and direct costs in resisting enforcement.[56] The lost profits were calculated on the basis of the revenue the quarry would have generated had Mr Daisley been able to commercially exploit the available mineral resource from 2006–2017.[57]

[62] The Council's claim of contributory negligence was rejected,[58] though Toogood J held that Mr Daisley was not entitled to recover twice where sums recovered from his former solicitor included compensation for losses covered by the award of damages against the Council.[59]

Misfeasance

[63] The Court of Appeal decision in *Garrett v Attorney-General* held that the tort of misfeasance in a public office is made out where a public officer, in the purported exercise of public powers but deliberately or recklessly acting beyond the limits of those powers, causes harm to the plaintiff intentionally, knowingly or with reckless indifference.[60] Toogood J found that Council officers had been wilfully blind to the LUC's potential existence, and had acted recklessly in assuming the consent did not exist, despite evidence to the contrary, and in failing to make proper inquiries at

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53 At [22] and [185].
54 At [23], [214], [230]–[231] and [241].
55 At [23] and [230(b)].
56 At [24], [275] and [566]. Claims for loss of goodwill and of the value of the business itself were disallowed: at [25] and [553]–[554].
57 See at [542]. The ultimate figure accounted for operating costs, annual overheads, debt servicing costs and a broad reduction for contingency and risk: at [543]–[550].
58 At [26] and [275].
59 At [567].
60 *Garrett v Attorney-General* [1997] 2 NZLR 332 (CA) at 344.

relevant times.[61] The continuation of the Council's "stubbornly obstructive attitude" toward Mr Daisley even after the discovery of the LUC tipped the scales in favour of an award of exemplary damages, despite a lack of actual malice on the part of Council officers.[62]

Limitation

[64] The Council argued that the causes of action accrued more than six years before proceedings were filed and were barred by s 4 of the 1950 Act.[63] Toogood J accepted that accrual of a cause of action depends (in part) on the date of damage, and is an occurrence-based, not a knowledge-based, concept.[64] He found that damage occurred in September 2006 when the Council required Mr Daisley's 2006 consent application to be publicly notified and then opposed it on the incorrect ground that no consent existed.[65] However, the Judge found that the breaches of duty and resulting losses were continuous from 15 September 2006 until July 2011, when enforcement proceedings were finally withdrawn.[66] The claim was therefore within time under conventional accrual principles.[67]

[65] In the alternative, Toogood J held that s 28(b) of the 1950 Act applied.[68] He accepted that the provision postponed the running of time where the defendant's conduct amounted to "fraudulent concealment" in equity—emphasising that "fraud" in this context did not require deceit in the common law sense but encompassed conduct unconscionable in equity, including reckless disregard of another's rights.[69]

[66] The Judge found that the Council's conduct met this standard: it had "recklessly and without taking the least trouble to verify the facts assumed … that

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61 HC judgment, above n 23, at [331] and [342].
62 At [342].
63 At [351].
64 At [353]–[354].
65 At [237] and [355].
66 At [378].
67 At [376]–[380] citing *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA) at 424 per Cooke J, *Mount Albert Borough Council v Johnson* [1979] 2 NZLR 234 (CA) at 239 per Cooke and Somers JJ, and *Williams v Attorney-General* [1990] 1 NZLR 646 (CA) at 678–679 per Richardson J dissenting (but not on this point).
68 At [393]–[400].
69 At [394]–[397] citing *King v Victor Parsons & Co (a firm)* [1973] 1 WLR 29 (CA) at 33–34 per Lord Denning MR; and *Beaman v ARTS Ltd* [1949] 1 KB 550 (CA) at 565–566 per Lord Greene MR.

there was no resource consent".[70] It did not matter that the Council had no "dishonest motive"; it should have made a reasonable search of its records to establish whether a consent existed.[71] The Judge added, in concluding, that:[72]

> It would be wrong to allow the Council to benefit from the expiry of the limitation period when it had been responsible for the state of affairs that led to Mr Daisley's ignorance of the true position.

[67] It followed that even if the causes of action had otherwise accrued more than six years before filing, the limitation period did not begin to run until 22 September 2009, when the LUC was discovered. As the proceeding was commenced (just) within six years of that date, Toogood J held that the claims were not statute-barred.[73]

Result

[68] The Judge found for Mr Daisley, awarding $4,089,622 for loss of profits,[74] $90,000 for the Council's contribution to the reduced property value,[75] $50,000 for the direct costs of addressing the consequences of the Council's negligence,[76] interest to judgment[77] and $50,000 in exemplary damages for misfeasance.[78]

Court of Appeal

[69] On appeal, the Council accepted liability in negligence in principle but challenged the High Court Judge's conclusions on limitation (including concealment by fraud) and misfeasance.[79] The only live issues in respect of negligence were limitation and the extent of recoverable loss.

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70 At [396] quoting, in part, *Beaman v ARTS Ltd*, above n 69, at 565 per Lord Greene MR.
71 At [396] referring to the expression used by Lord Denning MR in *King v Victor Parsons & Co*, above n 69, at 34.
72 At [399].
73 At [400].
74 At [550].
75 At [559] and see at [555].
76 At [563].
77 At [565]. The rate of interest was set at five per cent.
78 At [345].
79 CA judgment, above n 23, at [9].

Limitation: continuing breach

[70] The Court of Appeal held that the High Court Judge had misconstrued the principle of continuing breach.[80] It reaffirmed that, where a tort is actionable on proof of damage, a continuing cause of action arises only from repeated acts or omissions of the same kind producing new loss within the limitation period. Time does not restart merely because losses from an earlier breach continue to accrue.[81] Successive actions may lie for each accrual of fresh damage, but damages cannot be recovered for breaches occurring outside the limitation period.[82]

[71] Applying that framework, the Court found no pleaded or proved breach of duty after 14 August 2009.[83] The statement of claim alleged only failures occurring before that date, with later matters framed as continuing injury and evidence of bad faith, not as fresh breaches of the relevant duty.[84] Losses from lost profits and enforcement costs were of the same kind as those suffered earlier, and therefore out of time; the only distinct loss within the six-year limitation period was the $90,000 diminution in value on the December 2009 forced sale.[85]

Limitation: concealment by fraud

[72] Turning to the issue of concealment by fraud of a right of action, the Court of Appeal agreed with the High Court that "fraud" in s 28(b) of the 1950 Act encompasses equitable fraud, including wilful concealment and recklessness,[86] but emphasised that both require a subjective element. For wilful concealment, the defendant (or their agent) must, at minimum, have known the essential facts comprising the cause of action and decided not to disclose it.[87] For recklessness, he or she must have appreciated there was a real risk the material information existed and decided not to

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80 At [82].
81 At [83] citing *Jalla v Shell International Trading and Shipping Co Ltd* [2023] UKSC 16, [2024] AC 595 at [26] and [37].
82 At [84] citing Stephen Todd "Discharge of Liability" in Stephen Todd and others (eds) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) 1537 at 1562–1563, and *Jalla v Shell*, above n 81, at [32].
83 At [86].
84 At [86].
85 At [87]–[88].
86 At [111], [141] and [149].
87 At [111]–[113].

investigate further.[88] Corporate or constructive knowledge, or mere carelessness, is insufficient.[89]

[73] On the facts, the Court identified the principal "material fact" here as the existence of the LUC.[90] The Court accepted that Council officers knew that they had statutory and common law obligations to search and disclose records when enforcement action was contemplated, and that the existence or otherwise of a consent was central to the question of the lawfulness of Mr Daisley's activities.[91] Given the accumulation of information pointing to the possibility of an historic consent—including correspondence, rating history and the long-standing presence of the quarry—the Court concluded the officers were subjectively reckless: they recognised the real possibility that a consent existed yet chose not to search the historic files, instead relying on the absence of any consent notation in the LIM.[92] This was unconscionable conduct for the purposes of equitable fraud. Time did not therefore start to run on the claim until the disclosure of the LUC in September 2009.[93]

[74] The Court of Appeal's reasoning here differed from the High Court decision in two respects: it insisted on a subjective awareness of risk, and it treated that requirement as satisfied on the evidence. In the Court of Appeal's view, the High Court Judge erred in treating corporate knowledge as sufficient for the purposes of establishing fraud, and in inferring recklessness from certain evidence which could not sustain such a finding.[94] The result was, however, the same: the Council's limitation defence failed.

Misfeasance

[75] The Court of Appeal held that the recklessness found for s 28(b) purposes—as to the existence of the 1988 LUC—could not simply be "repurposed for the

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88 At [115]–[116]. See also at [164]–[178].
89 At [115], [138] and [164].
90 At [151]. The Court also acknowledged that knowledge of historic use tending to indicate the existence of existing use rights might be relevant: at [169]. But this was not the focus as Mr Daisley did not plead this point: at [152].
91 At [148] and [150]–[151].
92 At [168]–[178].
93 At [178].
94 At [164]–[167]. Compare HC judgment, above n 23, at [396]–[399].

misfeasance claim".[95] Misfeasance required reckless indifference by an officer to the limits of their lawful authority and to the consequences of their actions for the plaintiff.[96] The Court considered the failure to keep the LUC reasonably available when it was archived was "too remote to amount to subjective recklessness with respect to Mr Daisley", and there was in any case no evidence of the subjective knowledge of Council officers responsible for archiving at that time.[97] Further, while it accepted that officers had been reckless in respect of the existence of the LUC, that did not extend to recklessness regarding their lawful authority to take enforcement action.[98] On that basis, the High Court's finding as to misfeasance was set aside, along with the exemplary damages award.[99]

[76] The Court added two points for completeness. First, even if misfeasance had been established, it did not consider an award of exemplary damages was necessary to sanction the Council, given the already substantial award of compensatory damages.[100] Secondly, although the Council should have immediately withdrawn the enforcement proceeding and apologised to Mr Daisley once the LUC came to light, the Court considered the High Court Judge attached too much significance to its failure to do so.[101] By that stage, matters were in the hands of solicitors rather than Council officers, and the decision to put the proceeding on hold was a pragmatic one, made to prevent quarrying in the interim and on the basis that Mr Daisley "had no ongoing exposure".[102] The Court of Appeal therefore did not consider this factor should have tipped the scales in favour of awarding exemplary damages.

Issues on appeal

[77] The issues on appeal are four:

(a) Limitation: was the s 28(b) concealment by fraud exception to limitation engaged here?

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95 CA judgment, above n 23, at [181].
96 At [181] citing *Garrett v Attorney-General*, above n 60, at 349–350.
97 At [183].
98 At [183].
99 At [184] and [187].
100 At [185].
101 At [186].
102 At [186].

(b) Limitation: was the continuing breach doctrine engaged?

(c) Limitation: was the loss of value distinct damage?

(d) Misfeasance: was the Court of Appeal wrong to reverse the High Court's conclusion on misfeasance?

The dominant issue in argument was the first one. The second issue arose as a further argument by Mr Daisley supporting the judgment under appeal.

Limitation: was the s 28(b) exception to limitation engaged here?

[78] Section 4 of the 1950 Act provided that an action in tort must be brought within six years of the date of accrual. Limitations statutes of this kind have existed since the early 17th century. The Court of Appeal discussed the rationale for such statutes in its judgment, and we need not add to that discussion here.[103] It is sufficient to record that they involve selection of a simple rule to encourage the bringing of claims with expedition, to discourage the dredging up of ancient claims and use of stale evidence, and to defray risk in markets for services that entail risk.[104] As the Court of Appeal concluded:[105]

> Seen in this light, fixed limitation periods serve a public interest in timely and effective adjudication. They also ensure that cases are decided according to the legal mores of the era in which the wrong was done.

[79] Most simple rules attract less simple exceptions. Section 28(b) of the 1950 Act is one such exception. We set s 28 out above at [57], but for ease of reference, we now repeat s 28(b) here, with relevant contextual language:

> Where, in the case of any action for which a period of limitation is prescribed by this Act, …
>
> (b) the right of action is concealed by the fraud of [the defendant or his agent or of any person through whom he claims or his agent]; …

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103 At [99]–[103]. We adopt the historical account given at [99]–[107] of the CA judgment, above n 23.

104 *Cave v Robinson Jarvis & Rolf (a firm)* [2002] UKHL 18, [2003] 1 AC 384 at [6] per Lord Millett. The Court of Appeal instanced insurance and professional services: CA judgment, above n 23, at [102] citing *Potter v Canada Square Operations Ltd* [2023] UKSC 41, [2024] AC 679 at [152].

105 CA judgment, above n 23, at [102].

> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it: …

The rationale for the s 28(b) exception

[80] The bar in s 4 was a blunt instrument, as the Court of Appeal observed.[106] That choice was deliberate: the drafting process for the Limitation Act 1939 (UK) (1939 UK Act)[107]—largely uplifted and adopted here as the 1950 Act[108]—rejected more nuanced, laches-like options, favouring certainty over case-by-case consideration of merit and excuse.[109]

[81] To that blunt time limit, s 28 offered the exception set out above in instances where the claim itself is based on fraud or mistake, or where the right of action is concealed by the fraud of the defendant or their agent. The critical points, as the words of the provision make clear, are two: (1) that what has been concealed is the *right of action*, and (2) that the concealment is *fraudulent*. As we will see, the act of fraudulent concealment may be contemporaneous with the cause of action, *or* it may postdate it.[110] Either will fall within s 28(b).

[82] It is common ground that "fraud" here is not just the more egregious common-law species of that doctrine. It encompasses equitable fraud also.[111] This was so before the 1939 UK Act, and it remained so after its enactment, and that of the 1950 Act.[112] One species of equitable fraud was the concealment of wrongdoing. Equity had no statutory limitations framework, relying instead on the more nebulous doctrine of laches, although eventually coming to apply the statutes by analogy.[113] It would not do so, however, in cases where the claim was based on fraud,

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106 At [100].

107 Limitation Act 1939 (UK) 2 & 3 Geo VI c 21 [1939 UK Act].

108 See Limitation Bill 1950 (59-1) (explanatory note) at [2].

109 See Law Revision Committee *Fifth Interim Report (Statutes of Limitation)* (Cmd 5334, December 1936) at [7].

110 See *Beaman v ARTS Ltd*, above n 69, at 559 per Lord Greene MR. Relevant concealment is unlikely to *pre-date* the right of action.

111 As to equitable fraud, see JD Heydon, MJ Leeming and PG Turner *Meagher, Gummow and Lehane's Equity: Doctrines and Remedies* (5th ed, LexisNexis Butterworths, Sydney, 2015) at [12-005] and following; and John Brunyate *Limitation of Actions in Equity* (Stevens and Sons, London, 1932) at ch 2 and, in particular, 38–40.

112 See Michael Franks *Limitation of Actions* (Sweet & Maxwell, London, 1959) at 201–203.

113 *Bulli Coal Mining Co v Osborne* [1899] AC 351 (PC) at 363; and GE Dal Pont *Law of Limitation* (2nd ed, LexisNexis, Chatswood (NSW), 2021) at [15.2]–[15.8].

or where the claim had been concealed by fraud.[114] It was accepted before us that the 1939/1950 Acts were essentially intended to encapsulate the pre-legislation case law excepting the limitation bar in the case of fraudulent deception, both confirming the transposition of the equitable doctrine across to cases in common law and clarifying its reach.[115]

Submissions

[83] We have set out the Court of Appeal's reasoning at [72]–[74] above. Its essence was that subjective appreciation by Council officers of the real possibility of an LUC existing, combined with a deliberate decision not to look for it, was subjectively reckless and unconscionable. It amounted to fraudulent concealment for the purposes of s 28(b).

[84] For the Council, Mr McLellan KC submits that equitable fraud exists for the purposes of s 28(b) only when a defendant wilfully conceals a plaintiff's right of action. The leading New Zealand authority, prior to the decision appealed, is that of the Court of Appeal in *Wrightson Ltd v Blackmount Forests Ltd*.[116] We apprehend Mr McLellan's submission as being that the test articulated in that decision (and two prior High Court decisions) is as follows:[117]

(a) the defendant must have known the essential facts comprising the right of action;

(b) the defendant must also have appreciated (in light of the known facts) that he or she had committed a wrongful act such that they were aware of the right of action and could have disclosed it;

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114 *Booth v Earl of Warrington* (1714) 4 Bro PC 163, 2 ER 111 (HL).

115 Law Revision Committee, above n 109, at [22]; *Potter v Canada Square Operations Ltd*, above n 104, at [39]; and Dal Pont, above n 113, at [15.8]. The application of the equitable rule to common-law cases was confirmed by McCardie J in *Lynn v Bamber* [1930] 2 KB 72 (KB).

116 *Wrightson Ltd v Blackmount Forests Ltd* [2010] NZCA 631.

117 *Inca Ltd v Autoscript (New Zealand) Ltd* [1979] 2 NZLR 700 (SC); and *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 (HC).

(c) the defendant must have 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 foregoing, the defendant must have failed to disclose his or her wrongful act with the result that it was concealed "by means that would attract the epithet 'wilful' or deliberate'".

[85] For Mr Daisley, Mr Farmer KC submits that the approach taken by the Court of Appeal below was correct. English authority under the 1939 UK Act was directly relevant. He submits three English authorities in particular support the proposition that recklessness may amount to fraudulent concealment: *Beaman v ARTS Ltd*, *Kitchen v Royal Air Force Assoc* and *King v Victor Parsons & Co (a firm)*.[118]

The proper reach of s 28(b) in New Zealand law

[86] In considering the proper reach of s 28(b), we now address the four elements identified by Mr McLellan at [84] above. They are the need for knowledge of the essential facts, the need for an appreciation of wrongfulness (and the place of recklessness in that appreciation), whether the deception must also involve breach of a duty to disclose and whether a deliberate decision to conceal must be shown. Here, the first two elements prove decisive.

A The need for knowledge of the essential facts

[87] What s 28(b) requires is *concealment* of a *right of action*. Inherent in this is *knowledge* of the facts constituting that right of action. In *King v Victor Parsons & Co*—an English building case we discuss in more detail later in this judgment—the view of the Court of Appeal was that the English equivalent of s 28(b) was inapplicable where a defendant ought to have known of the facts constituting the right of action, but did not in fact know them.[119] That conclusion is a logical one, at least. Extension of the standard limitation period is only justified by the unconscionable

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[118] *Beaman v ARTS Ltd*, above n 69; *Kitchen v Royal Air Force Assoc* [1958] 1 WLR 563 (CA); and *King v Victor Parsons & Co*, above n 69.

[119] *King v Victor Parsons & Co*, above n 69, at 33–34 per Lord Denning MR and 36 per Megaw LJ.

non-disclosure (or active concealment) of facts constituting the right of action. Logically, that depends on the defendant knowing those facts. Where, otherwise, is the unconscionable act?

[88] The requirement for knowledge of the essential facts in New Zealand was expressed firmly by Mahon J in *Inca Ltd v Autoscript (New Zealand) Ltd*.[120] He observed that s 28(b) covered causes of action other than fraud, and a limitation defence would be excluded (for the appropriate period) either where there was dishonest concealment of the cause of action, equivalent to common law fraud, or non-disclosure occurring in such circumstances as to amount to equitable fraud. In either case, he said, the concealment must be wilful and "[t]he defendant must know all the facts which together constitute the cause of action."[121]

[89] The same approach was taken by Tipping J in *Matai Industries Ltd v Jensen*:[122]

> … the failure to disclose must be wilful. One cannot conceal something of which one is unaware. … For the concealment to be wilful the [defendant] must be shown to have known the essential facts constituting the cause of action. It is after all the right of action which must be concealed by the fraud of the defendant.

In that case, Tipping J found no evidentiary basis on which to conclude the defendant receiver knew he had committed a wrong in dealing with the assets—in the sense he apprehended both negligence and loss arising—such that failure to disclose could be called an equitable fraud.[123] In any event, the receiver had "faithfully observed" his statutory duties and filed his reports: "From these it either was or ought to have been patent to the directors and shareholders what the financial course of the receivership was."[124]

[90] The reasoning in *Inca* and *Matai Industries* received explicit approval from the Court of Appeal in *Wrightson Ltd v Blackmount Forest Ltd*.[125] The case concerned a failed forestry venture in which the promoters' agent, Wrightson Ltd, had certified the

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120 *Inca Ltd v Autoscript (New Zealand) Ltd*, above n 117.
121 At 711.
122 *Matai Industries Ltd v Jensen*, above n 117, at 536.
123 At 540.
124 At 540.
125 *Wrightson Ltd v Blackmount Forests Ltd*, above n 116, at [54]–[55] and [58].

suitability of a block and advised as to something called its "site index", which was indicative of its growth and revenue potential. The claim alleged that these were relied upon in entering the investment, that Wrightson became aware neither was true, and concealed that fact. Limitation was pleaded, and the plaintiffs sought to rely on s 28(b). It was in that context that Chambers J observed, for the Court of Appeal, that "a duty to disclose can arise only if a relevant person knows those facts".[126] The focus of s 28(b) is on "knowledge of relevant facts and on knowledge of a duty to disclose them".[127] If those facts are established, "the concealment will indeed be wilful".[128]

[91] This approach is consistent also with English authority on the 1939 UK Act—on which the 1950 Act was, of course, based. We have referred already to *King v Victor Parsons & Co*, and will return shortly to it in the next section. There the point was made clearly by Lord Denning MR:[129]

> 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), or a breach of contract (by putting in an insufficient foundation) then he could avail himself of the Statute of Limitations.

[92] It was applied also by the House of Lords in *Cave v Robinson Jarvis & Rolf (a firm)* in 2002.[130] By then the 1939 UK Act had been reformed: the Limitation Act 1980 (UK) (1980 UK Act) modified the former equivalent of s 28 so that limitation was postponed where "any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant".[131] As Lord Millett said, the reference to concealment "by … fraud" in the 1939 UK Act "was an inapt and inelegant expression which caused much difficulty. It put the emphasis on the fraud rather than the concealment."[132] The amended wording in the 1980 UK Act clarifies that concealment is the point of focus, and that it must be deliberate—although that was surely also the case under the earlier legislation, properly construed.[133]

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126 At [41].
127 At [47].
128 At [47].
129 *King v Victor Parsons & Co*, above n 69, at 34.
130 *Cave v Robinson Jarvis & Rolf*, above n 104.
131 Section 32(1)(b). Compare 1939 UK Act, s 26(b); and see Limitation Amendment Act 1980, s 7.
132 *Cave v Robinson Jarvis & Rolf*, above n 104, at [19].
133 See above at [87] and [91]. As to the mischief addressed by the reform, see *Cave v Robinson Jarvis & Rolf*, above n 104, at [19] per Lord Millett.

[93] In *Cave* the House had to consider an earlier decision of the Court of Appeal which had held, in an ordinary case of solicitors' negligence (not involving intentional wrongdoing), that it was sufficient for time to be extended that the defendant had deliberately committed an act amounting to negligence, without it also being necessary that the solicitor appreciate that his (or her) act gave rise to a breach of duty.[134] The effect of that decision, Lord Millett said, was:[135]

> … to deprive a professional man, charged with having given negligent advice and who denies that his advice was wrong let alone negligent, of any effective limitation defence. However stale the claim, he must defend the action on the merits, for he will not have the benefit of a limitation defence unless he can show that his advice was not negligent. This subverts the whole purpose of the Limitation Acts.

[94] The House held, ultimately, that the legislation does not deprive a defendant of a limitation defence against a claim of negligence "if, being unaware of his error or that he has failed to take proper care, there has been nothing for him to disclose".[136]

[95] *Cave* was applied recently by the United Kingdom Supreme Court in *Potter v Canada Square Operations Ltd*.[137] That concerned a retail lending agreement under which the plaintiff borrower also took out repayment insurance. It transpired that over 95 per cent of the premium was commission payable to the defendant lender, a fact that subsequently gave rise to a right to claim based on unfairness under credit legislation. The Supreme Court held the defendant had deliberately concealed a fact relevant to the plaintiff's right of action, making a conscious decision not to disclose the commission.[138] And while, in doing so, it held the defendant need not apprehend *how* the facts were relevant to the right of action, it nonetheless had to have deliberately ensured the facts were withheld from the plaintiff: "the defendant must have considered whether to inform the claimant of the relevant fact and decided not to".[139] To state the obvious, that presupposes the defendant was acquainted with the essential fact or facts not conveyed.

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134 *Brocklesby v Armitage & Guest (a firm)* [2002] 1 WLR 598 (CA) at 605 per Morritt LJ.
135 *Cave v Robinson Jarvis & Rolf*, above n 104, at [15].
136 At [25] per Lord Millett. See also at [58]–[60] per Lord Scott.
137 *Potter v Canada Square Operations Ltd*, above n 104.
138 At [154] and [156].
139 At [105] and [108].

[96] As we noted earlier, extension of the limitation period is only justified by the unconscionable non-disclosure of facts constituting the right of action. Logically, the unconscionable aspect must depend on the defendant knowing those facts. Absent such knowledge, there is no deliberate concealment, and no unconscionable omission to disclose. The authorities in New Zealand and the United Kingdom support that approach. We agree, therefore, with Mr McLellan's submission, recorded at [84] above, that the state of the law in New Zealand prior to the decision on appeal was that "concealment" for the purposes of s 28(b) entails that the defendant must know the essential facts comprising the right of action.

[97] But what form must such knowledge take? A spectrum of apprehension can be posited. First, there is actual knowledge, which arises from such clear apprehension of the facts as to need no imputation under any of the remaining categories.[140] Secondly, there is wilful blindness, the orthodox formulation in this country being "a sufficiently strong suspicion … coupled with a deliberate decision not to make inquiry lest the inquiry result in actual knowledge", treated in equity as tantamount to actual knowledge.[141] Thirdly, there is simple recklessness, which the Court of Appeal suggested involves proceeding with knowledge of a risk, though not such a likelihood as to amount to wilful blindness, that a certain state of affairs might exist.[142] Fourthly, and finally, there is simple negligence, involving a failure to ascertain information in breach of a duty to do so.

[98] We accept that wilful blindness as to an essential fact or facts would also be sufficient to fulfil this first element of equitable fraud under s 28(b). That approach is consistent with fraud in its equitable sense contemplated by s 28(b). For the Council, Mr McLellan accepted that must be the case. So if, for instance, a building contractor knows that *some* of the reinforcing steel on site is defective, and that some of that steel *may* be being applied to the plaintiff's foundations, but covers the work up without checking to be sure, knowledge of the defective materials later found should be

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140 See for example *Baden v Société Générale pour Favoriser le Développement du Commerce et de l'Industrie en France SA* [1993] 1 WLR 509 (Ch) at [250].

141 *Westpac New Zealand Ltd v MAP and Associates Ltd* [2011] NZSC 89, [2011] 3 NZLR 751 at [27].

142 CA judgment, above n 23, at [166]–[178]. In *Potter v Canada Square Operations Ltd*, above n 104, at [20], Lord Reed P divided recklessness for limitation purposes into two forms: (1) purely subjective recklessness (subjective knowledge of both the risk and the unreasonableness of taking it); and subjective/objective recklessness (applying to those two elements in that order).

imputed to him. He cannot say, "I did not know the plaintiff's foundations included defective reinforcing." We discuss wilful blindness in more detail later, in addressing the second element of appreciation of wrongfulness.[143]

[99] We see no room however on the authorities for recklessness in this first element if it omits subjective appreciation of an essential fact (or its likely existence). Subjective apprehension of a fact to a standard below likelihood, not engaging wilful blindness, is not sufficient to engage s 28(b). That would set the standard for a finding of equitable fraud in a limitation context too low. Failure to apprehend the essential facts may involve stupidity, and it may involve negligence—even gross negligence—but that does not engage the unconscionability (or equitable fraud) trigger on which s 28(b) is built. The essence of all unconscionability is behaviour that amounts to unconscientious exploitation of another.[144] Where both the plaintiff and the defendant are operating in a state of genuine ignorance as to the actual or likely essential facts, there is no unconscionable act demanding the clock be stopped.

B The need for an appreciation of wrongfulness

[100] It is insufficient to extend the limitation period under s 28(b) for the defendant simply to be in possession of the essential facts. What s 28(b) requires is actual knowledge of, or wilful blindness to, the fact that those essential facts amounted to a wrongful act and a decision nevertheless to conceal them.

[101] The Court of Appeal discussed recklessness in relation to *risk*:[145]

> … that the defendant took a risk in circumstances in which they knew there was a real possibility of harm and it was unreasonable, in the circumstances known to the defendant, to take that risk.

Here the Court was concerned not with recklessness in the commission of the actionable wrong itself, but in the appreciation (or non-appreciation) of the *wrongfulness* of what had (or had not) been done. And it adopted the expression

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143 Below at [118]–[120].

144 See for example *Gustav & Co Ltd v Macfield Ltd* [2008] NZSC 47, [2008] 2 NZLR 735 at [6]; and *Gustav & Co Ltd v Macfield Ltd* [2007] NZCA 205 at [30].

145 CA judgment, above n 23, at [115].

"subjective recklessness" to distinguish responsibility "from a careless failure to give any thought to a risk that the defendant did not foresee but ought to have done".[146]

[102] The Court's ultimate reasoning as to recklessness appears to turn on an evidential inference that the Council's officers had sufficient information to put them on notice that the 2004 LIM might have been incomplete (as to the existence of a consent) and unreasonably failed to check.[147] It was thereby reckless as to whether a right of action existed.

[103] The Court of Appeal concluded that until the recent decision of the United Kingdom Supreme Court in *Canada Square*, it appeared to be settled law in England that subjective recklessness as to the existence of the relevant facts sufficed for fraudulent concealment under the s 28(b) equivalent in the 1939 UK Act.[148] It also said that the issue appeared not to have arisen directly in New Zealand before, as *Inca, Matai Industries* and *Wrightson* were "all concerned [with] wilful non-disclosure, not recklessness".[149]

[104] We accept the latter observation, but turn now to examine the three English decisions said to support the former conclusion that subjective recklessness was a sufficient basis for fraudulent concealment. They are *Beaman v ARTS Ltd*, *Kitchen v Royal Air Force Assoc* and *King v Victor Parsons & Co*.[150]

[105] In *Beaman*, the defendant bailee (whose business was closing due to wartime regulations) disposed of its principal's goods without advising her of that fact—despite the fact they had been in communications until just six months prior. The defendant's employees had actual knowledge the goods belonged to the plaintiff, knew they were obliged to hold them for her subject to instructions (and that to dispose of them without

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146 At [115].

147 At [167]–[178]. We note that Mr Daisley did not plead concealment of existing use rights: see at [152].

148 At [118].

149 At [114].

150 *Beaman v ARTS Ltd*, above n 69; *Kitchen v Royal Air Force Assoc*, above n 118; and *King v Victor Parsons & Co*, above n 69.

instructions would be wrongful, therefore) and yet made a deliberate decision to hide that act from the plaintiff.[151]

[106] As Lord Reed P noted for the Court in *Canada Square,* no argument directed to recklessness under the equivalent of s 28(b) was advanced in *Beaman*.[152] We observe that while Lord Greene MR employed the expression "recklessness" repeatedly, he did so in describing the defendant's employees' conduct in committing the tort of conversion—in disposing of the goods without attempting to communicate with the plaintiff, in assuming that ridding themselves of the goods benefitted the plaintiff, and in assessing the goods as being of no value—in circumstances where their actions were motivated by their own commercial convenience.[153] In *Beaman* it was inarguable that a conversion of the plaintiff's goods had occurred. The defendants were in full possession of all the facts. The suggestion that they had in mind the plaintiff's interests was "disingenuous",[154] and as Lord Greene ultimately found, their conduct was "furtive and surreptitious" and "calculated to keep [their client] in ignorance of the wrong that they had committed".[155] In other words, they knew what they were doing was wrong.[156] That amounted to fraudulent concealment of the right of action.

[107] It would in any case be a mistake to take the leading reasons, where three sets are delivered, as exhaustive of the ratio of the judgment, unless they are endorsed by the other two judges without evident divergence. That was not the case here. Neither of the other members of the Court referred to recklessness at all. Somervell LJ would have found moral turpitude if he had to.[157] For him the key point was the choice made not to communicate when the parties had been so recently in written communication with each other.[158] Singleton LJ was uncompromising, finding that

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151 There was no suggestion the plaintiff, now resident in India, was in breach of her obligations in any way.

152 *Potter v Canada Square Operations Ltd*, above n 104, at [43]. Counsel for the plaintiff in *Beaman* did submit that "[i]t was at least a wrongful act done recklessly and that would be fraud", but that seems to have been addressed at the equivalent of s 28(a): *Beaman v ARTS Ltd*, above n 69, at 553.

153 *Beaman v ARTS Ltd*, above n 69, at 561–566.

154 At 557 per Lord Greene MR.

155 At 557 and 566.

156 This is the inference Lord Reed P also took in *Potter v Canada Square Operations Ltd*, above n 104, at [45].

157 *Beaman v ARTS Ltd*, above n 69, at 569.

158 At 569–570.

"disposition of the property was carried out furtively, or at least without the knowledge of the owner, and the fact that this had been done was deliberately concealed from her".[159] The reason the defendants did not tell the plaintiff what they had done was "that they did not wish her to know", and by concealing from her what they had done "they concealed from her the right of action which arose upon the conversion of the goods".[160] Ultimately, once the reasons of Lord Greene are properly understood, there is no material divergence between them and those of Somervell and Sellers LJJ.

[108] We therefore consider, as Lord Reed P did, that *Beaman* was a case of actual knowledge of wrongfulness, followed by wilful concealment.[161] It is not authority that subjective recklessness as to wrongfulness amounts to fraudulent concealment.

[109] The second case, *Kitchen v Royal Air Force Assoc*, concerned solicitors' negligence.[162] These solicitors had taken instructions to act for the plaintiff against an electricity supplier whose bungled installation of an electrical appliance was the likely cause of the death by electrocution of the plaintiff's husband. However, the solicitors had failed to take effective steps before the one-year time bar that applied in fatal accident cases. Thereafter the solicitors negotiated an *ex gratia* payment by the electricity supplier, to be paid by a non-attributable donation routed through the Association, in a way which deliberately concealed the fact of the solicitors' breach of duty.[163] When the true facts emerged, Mrs Kitchen sued the solicitors in negligence—only (and ironically) to be faced with a limitation plea by the solicitors.

[110] In rejecting the solicitors' appeal, Lord Evershed MR alone employed the expression "recklessness". He did so largely by reciting Lord Greene's reasoning discussed above, and then going on to say that "similar reasoning" applied in this case:[164]

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159 At 572.
160 At 571.
161 *Potter v Canada Square Operations Ltd*, above n 104, at [45].
162 *Kitchen v Royal Air Force Assoc*, above n 118.
163 The first-named Association, which had instructed the second defendant firm of solicitors on the plaintiff's behalf, had been excused liability at first instance. The appeal was pursued by the solicitors, who had been held liable for professional negligence.
164 At 573–574 (footnote omitted).

> … the conduct of the [solicitors] was, in the sense in which Lord Greene MR used the word, reckless, in at least to the same degree as it was in *Beaman's* case.

But as he then noted, the plaintiff was entitled to expect the solicitors to look after her interests and the arrangements they had made regarding the *ex gratia* payment were "in breach of that confidence" and "concealed from her facts which would undoubtedly, if disclosed, have brought to light what her true rights against the [solicitors] were".[165] In his judgment, that was what amounted to concealment by fraud. It is unclear whether recklessness formed part of that reasoning path—but even if it did, his reasons are consistent with the more limited, descriptive use of the term seen in *Beaman*. Parker LJ, "with considerable hesitation", agreed with Lord Evershed MR that the arrangement between the solicitors, the electricity supplier and the Association involved a fraudulent concealment of Mrs Kitchen's right of action against the solicitor.[166]

[111] Sellers LJ had no such doubts, however. He would not have found that the *original* failure by the solicitors to act promptly, giving rise to a right of action against them, was fraudulently concealed at the time it occurred. It was what occurred afterwards, in the tripartite arrangement, that engaged the exception in the equivalent of s 28(b). That depended on finding that the solicitors had, "in order to benefit … themselves", failed to disclose the position to their client.[167] The offered amount was "modest indeed in comparison with the needs of the plaintiff and her children":[168]

> If she had known of what was taking place and had demanded more and had insisted, as it seems she would have done, that action should be taken, the defendants would have been in a difficulty and their failure to inform her of the omission to have issued a writ would have been revealed.

In this case the failure of duty concealed from Mrs Kitchen facts which would have revealed the solicitors' earlier breach of duty. As Sellers LJ concluded, "[t]he concealment was intentional and did, in fact, benefit and save the interests of the [solicitors]".[169]

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165 At 574.
166 At 576.
167 At 578.
168 At 579.
169 At 579.

[112] As with *Beaman*, we do not think this case stands for the proposition that subjective recklessness about the defendant's obligations or the plaintiff's rights amounts to fraudulent concealment. Rather, *Kitchen* is a case in which the defendants were found to have employed a deliberate device to conceal the true facts from their client—namely, that they had negligently allowed her claim against the electricity supplier to become statute-barred. The stratagem was adopted intentionally to conceal those facts, for the solicitors' benefit. It was deliberate; recklessness did not come into it. *Kitchen* involved active concealment; *Beaman*, passive concealment—i.e., non-communication of the fact of conversion. The form the dishonesty took made no practical difference to the limitation exception.

[113] We turn now to the third case, *King*.[170] In that case, the plaintiff had purchased a land and building package from the defendants, a firm of estate agents and property developers. The defendants were aware that the land was formerly a part-excavated chalkpit. There was reliable evidence that they had been told that part of the fill consisted of rubbish, it having been used as a "dump". The defendants took architects' advice. That advice was that it would be necessary either to cover the fill with a reinforced concrete raft or to employ a series of piles connected to reinforced concrete ground beams. The defendants did not however act on that advice. Instead, to their knowledge, they engaged their builders to install what was described by the Court of Appeal as a "homespun grillage raft"—an expedient that was wholly inadequate.[171] Seven years later, large cracks developed in the structure of the house. These proved irreparable, necessitating total demolition. The High Court held the plaintiff's claim was not statute-barred: the defendants knew or ought to have known of the unfitness of the foundations and the risk of subsidence.[172]

[114] On appeal there was no dispute that the developer was in breach of an implied warranty that the foundations were reasonably fit for the dwelling in the circumstances applying to it. The real issue concerned limitation. Lord Denning MR saw fraudulent concealment as involving conduct by a defendant or its agent advancing a limitation defence "against conscience".[173] Active steps to conceal were not necessary; it would

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170 *King v Victor Parsons & Co*, above n 69.
171 At 41 per Brabin J.
172 *King v Victor Parsons & Co* [1972] 1 WLR 801 (QB).
173 *King v Victor Parsons & Co*, above n 69, at 33.

be sufficient if the defendant knowingly committed the wrongdoing or breach of contract and did not tell the owner about it. Confusingly—and unnecessarily—Lord Denning then referred to *Beaman* as adding "recklessly" to "knowingly" in this formulation. He put it this way:[174]

> 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.

"Recklessness" can be a protean expression. Here Lord Denning seems to have used it only in the limited sense of wilful blindness.

[115] Three further points might be made. First, as we have seen, *Beaman* did not endorse an extended recklessness standard at all. Secondly, as Lord Reed P observed in *Canada Square*, *King* involved a *deliberate* act of concealment.[175] It was not a case where the defendants "ought to have known" there was a risk of subsidence as the High Court Judge had held. The defendants *knew* for a fact there was such a risk—because the architects had told them so—and they had not followed their advice as to how to avert that risk. Moreover, they did not tell the plaintiff about it, and let him think that the foundations were properly constructed and fit for purpose. It might be thought that was enough to engage the fraudulent concealment exception, and that reference to recklessness as to the defendants' obligations or the plaintiff's rights added nothing useful to the analysis.

[116] Thirdly, review of the separate, concurring reasons is instructive. Megaw LJ appears to have found that a warranty as to fitness was implied, customary and well-known to the defendants. They knew the foundations were defective for the site and knew there was a substantial or real risk of subsidence. This was actual knowledge; Megaw LJ rejected a suggestion by the Judge below that constructive knowledge of the relevant facts would suffice.[176] But here, they *did* know. Brabin J reached a similar conclusion on the facts.[177] Ultimately, he described their conduct as

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174 At 34.
175 *Potter v Canada Square Operations Ltd*, above n 104, at [48].
176 *King v Victor Parsons & Co*, above n 69, at 36.
177 At 41–42.

"unconscionable and reckless".[178] The extra epithet adds nothing, given the prior, unavoidable finding of knowledge of breach and consequent risk of damage.

[117] It follows that we do not consider these three cases involved subjective recklessness. Rather, they involved deliberate deception, involving both subjective appreciation (actual knowledge) of essential facts (including, in the building cases, the fact of risk to the plaintiffs) and deliberate concealment of those facts because of an apprehended risk of liability.

[118] As in the case of the first element (knowledge of essential facts, or wilful blindness as to their existence), we accept that a defendant in actual or deemed possession of the essential facts constituting a right of action, but who is wilfully blind as to the wrongfulness of their actions, may not rely on actual ignorance to avoid extension of the limitation period under s 28(b). None of the New Zealand authorities involved wilful blindness, and *Inca* was a case of deliberate breach. Arguably *Beaman* did, although—as we have explained—the factual findings suggest that was a case of actual knowledge rather than wilful blindness. In *King*, the Master of the Rolls addressed wilful blindness explicitly. Lord Denning MR said, in a passage cited above at [114], that a defendant who is aware that what he is doing "may well be a wrong … but … takes the risk of it being so" would fall within the equivalent of s 28(b). In the context of that case, which involved deliberate, knowing deception by the defendant, that observation is obiter. But we think it is sound.

[119] It also received some approval from the United Kingdom Supreme Court in the *Canada Square* decision. Referring to Lord Denning's observation in *King*, Lord Reed P described it as "in accordance with the wider principle according to which equity sometimes attributes constructive notice … to persons who are wilfully blind".[179] He came back to the topic later indicating apparent approval.[180]

[120] In the present appeal, and as we noted earlier, the Council accepts that wilful blindness would also amount to fraudulent concealment under s 28(b). It submits that,

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178 At 42.
179 *Potter v Canada Square Operations Ltd*, above n 104, at [48].
180 At [129].

consistent with the approach in *Canada Square*, that would be so where the defendant has the required degree of knowledge of the essential facts and deliberately then turns a blind eye "in order to prevent obtaining actual knowledge of their own wrong". That is, wilful blindness may satisfy both the first (factual) and second (wrongfulness) aspects of s 28(b). We agree that this approach is justifiable on the authorities, and in principle. But it still depends on the primary element of actual knowledge of the essential facts, or the imputation of such knowledge by reason of wilful blindness, combined with a deliberate decision not to examine those facts further to ascertain whether a wrong has been committed.

[121] That wilful blindness—the second species of knowledge in [97] above—is absorbed in s 28(b) does not, however, mean that the third species, subjective recklessness, suffices. As we have shown, that proposition was not supported by the authorities under the 1939 UK Act, and it was expressly rejected by the United Kingdom Supreme Court in *Canada Square* under the 1980 UK Act (which requires deliberate concealment). No authority cited to us, or of which we are aware, would support such a proposition. The underlying requirement of equitable fraud which is embedded in s 28(b) cannot be met by simply assimilating within it a cause of action based on simple negligence—i.e., one without subjective knowledge of the essential facts and subjective (or objective, in the limited sense of wilful blindness) appreciation that the facts constitute a wrong that may be, or become, actionable. That was the very error corrected by the House of Lords in *Cave*.[181]

[122] Nor do we think further extension of principle to embrace subjective recklessness—the third species—is required. We say that for four main reasons.

[123] First, sound policy reasons exist for clarity in the definition and extent of an exception to a firm, time-based statutory rule of limitation. Those policy considerations are described at [78]–[82] above, and we need not repeat them here. They are reflected in the prior case law, which does not support the extension of principle for which Mr Daisley contends. Indeed, they are to contrary effect—as we have demonstrated. As we also noted, the statutory limitation mechanism diverged

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[181] See above at [92]–[94].

from the more nuanced approach of equity's doctrine of laches. Even with fraud being used in its equitable sense, conscious but unconscientious exploitation of the defendant is required.

[124] Secondly, and in that light, we think the exposition of principle in *Wrightson* strikes an appropriate balance.[182] For conduct to constitute fraudulent concealment, extending the limitation period, there must be actual knowledge (or, in cases of wilful blindness, imputed awareness) both of the essential facts constituting the cause of action. and that those facts together involve a wrongful act against the plaintiff.[183] That approach avoids unjustified condemnation of a defendant acting in complete ignorance of the essential facts (and therefore an unjustified extension of time running against him or her) while at the same time dispensing with the sorts of unreal self-justifications to which those who apprehend they may have done wrong, but stay silent about it, are prone to resort. *Beaman* offers an excellent example of that sort of behaviour.[184] It also averts the risk of simply assimilating the s 28(b) limitation exception to the cause of action whenever carelessness is involved. Carelessness alone is not and cannot be enough to oust a limitation period under s 28(b), as the House of Lords decision in *Cave* made clear.[185] But where there is both actual or imputed knowledge of the material facts constituting the cause of action and an actual or imputed appreciation that those facts involve a wrongful act against the plaintiff, concealment of the right of action can be characterised as unconscionable. Subject to there being a duty to disclose—which we are about to address—time should then stand still until discovery (or reasonable discoverability) of the right of action.[186]

[125] Thirdly, we are dealing here with repealed legislation. The 2010 Act has since modified the approach to extension of time in the case of "dishonest or fraudulent concealment". Fraudulent concealment now sits under the broader umbrella of "late knowledge", allowing extension of the standard limitation period where the claimant did not know, nor ought reasonably to have known, of any essential fact due to

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182 *Wrightson Ltd v Blackmount Forests Ltd*, above n 116. See above at [90].

183 We do not consider Chambers J, in *Wrightson*, was suggesting the defendant needed to appreciate the exact legal form the wrongful act took: at [47] and [49]–[50]. In that case the wrong alleged was obviously contractual in nature.

184 *Beaman v ARTS Ltd*, above n 69. See above at [105].

185 *Cave v Robinson Jarvis & Rolf*, above n 104. See above at [92].

186 Limitation Act 1950, s 28.

fraudulent concealment by the defendant.[187] "Fraud", which includes dishonest or fraudulent concealment,[188] creates a rare exception to the otherwise strict longstop provision,[189] which the Law Commission justified on the basis that a defendant should not be able to avoid a claim through further wrongdoing.[190] A further report published by the Commission to assist with drafting the 2010 Act referred interchangeably to "fraudulent" and "deliberate" concealment, reflecting a view—based on the case law—that fraudulent concealment required more than carelessness or recklessness.[191] Both observations support the view that the drafters of the 2010 Act saw no need for a loosening of the meaning of fraud in this context. The 2010 reform, along with the reality that the principles applying under the 1950 Act were effectively settled in *Wrightson*, means it is not appropriate now to tinker with those settled principles when people may have ordered their affairs in reliance on them.

[126] Fourthly, as we note later, in the present case this approach worked no injustice. Mr Daisley had ample time to file proceedings against the Council, but did not do so because of defective legal advice. That fact merely suggests an alternative claim, against an alternative defendant. It offers no premise for the distortion of well-established, justifiable principle.

C Is a duty to inform also needed?

[127] In *Wrightson*, Chambers J referred to "knowledge of a duty to disclose" facts comprising a right of action as one of the elements of fraudulent concealment under s 28(b).[192] Adopting that approach, Mr McLellan submitted here that, in addition to the elements expressed at [124] above, the defendant must also "owe a duty to the plaintiff (whether a fiduciary duty or some other special relationship) to disclose the material facts".[193] Some further explanation is needed.

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187 Limitation Act 2010, ss 11(2)–(3) and 14(3).
188 Section 4 definition of "fraud", para (a).
189 Section 48.
190 Law Commission | Te Aka Matua o te Ture *Tidying the Limitation Act* (NZLC R61, 2000) at [23].
191 Law Commission | Te Aka Matua o te Ture *Limitation Defences in Civil Cases: Update Report for the Law Commission – Miscellaneous Paper prepared by Chris Corry, Barrister* (NZLC MP16, 2007) at [135].
192 See above at [90].
193 See above at [84(c)].

[128] As Mahon J observed in *Inca*, in cases of deliberate deceit—such as the clandestine theft of coal by repeatedly trespassing beneath the plaintiff's boundary in *Bulli Coal Mining Co v Osborne*—the cause of action will itself involve fraud, and s 28(a) might then apply.[194] The same might be true in a case involving the deliberate substitution of cheaper, non-compliant foundations.[195] As Mahon J saw it, however, where s 28(b) was engaged, the duty to disclose had to be founded either on:[196]

> … a fiduciary duty or a special duty of disclosure inherent in the contract made by the parties or in some other legal relationship to which they had become committed.

Duty to disclose was also very much part of Tipping J's formulation in *Matai Industries*.[197]

[129] The notion of a special relationship giving rise to a duty to disclose does not feature prominently in the English authorities under the 1939 UK Act.[198] It was enough that essential facts as to the existence of a right of action were known and wilfully concealed, either contemporaneously with the cause of action or thereafter. In either case, time would not begin to run until the right of action was discovered or became reasonably discoverable. After the 1980 UK Act was passed, some cases flirted with the notion of a duty to disclose.[199] But in *Canada Square*, the suggestion that there was a third and additional element of the exception based on breach of such a duty was firmly rejected by the United Kingdom Supreme Court as lying beyond the words and intent of Parliament.[200]

[130] While we are attracted to the reasoning in *Canada Square*, ultimately it is unnecessary for us to decide in this case whether the "duty to disclose" element

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194 *Inca Ltd v Autoscript (New Zealand) Ltd*, above n 117, at 710; and see *Bulli Coal Mining Co v Osborne*, above n 113.

195 As occurred, for example, in *Applegate v Moss* [1971] 1 QB 406 (CA).

196 *Inca Ltd v Autoscript (New Zealand) Ltd*, above n 117, at 709.

197 *Matai Industries Ltd v Jensen*, above n 117, at 536–538 citing *Inca Ltd v Autoscript (New Zealand) Ltd*, above n 117.

198 The only case of that era which suggests such a duty is relevant, *Hawkesley v May* [1956] 1 QB 304 (QB), does not appear to have been cited elsewhere in support of that proposition.

199 See for example *Topplan Estates Ltd v Townley* [2004] EWCA Civ 1369, [2005] 1 EGLR 89 at [85]; *Beaulane Properties Ltd v Palmer* [2005] EWHC 817 (Ch), [2006] Ch 79 at [58]; and *AIC Ltd v ITS Testing Services (UK) Ltd* [2006] EWCA Civ 1601, [2007] 1 All ER (Comm) 667 [*The Kriti Palm*] at [321] per Rix LJ dissenting.

200 *Potter v Canada Square Operations Ltd*, above n 104, at [98]–[104].

hitherto adopted in the New Zealand cases is correct or not. That is because we consider it inarguable in the particular context of this case that, if the Council (1) was in fact aware of the 1988 LUC, and (2) then apprehended its negligence both in not recording it and in precluding operation of the quarry in its absence, then (3) it would plainly have been bound to disclose its existence. As a local authority, the Council was obliged to act openly and transparently and consider the interests of any person affected by a particular decision—including a decision *not* to do something.[201] Those general duties are reinforced here by the principle of availability of information under the Local Government Official Information and Meetings Act 1987,[202] and the right of access to personal information under that Act.[203]

D Deliberate decision to conceal?

[131] The fourth element requires little extra attention here. The appeal does not turn on it. As Chambers J noted in *Wrightson*:[204]

> 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 facts, then almost always that decision will be worthy of the epithet "wilful". But that is a *consequence* of those other factors, not the driver. The cases to which we shall shortly come say that "the concealment must be wilful" but that is no more than a shorthand way of expressing the factual elements we have been discussing. If they are established, then the concealment will indeed be wilful.

[132] In *Canada Square*, the Supreme Court appeared to suggest a more restrictive view that the exception still depends on someone having made a conscious decision not to disclose the wrongful act—i.e., to have deliberately ensured the facts were withheld from the plaintiff:[205] "the defendant must have considered whether to inform the claimant of the relevant fact and decided not to".[206]

[133] It is unnecessary in this appeal to choose between these positions, and in all the circumstances we do not do so. It may be that there is not a single principle here;

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201 Local Government Act 2002, ss 14(1)(a)(i), 76(4) and 78(1).
202 Local Government Official Information and Meetings Act 1987, s 5.
203 Section 23. See also s 44A(6) and (2)(d).
204 *Wrightson Ltd v Blackmount Forests Ltd*, above n 116, at [47].
205 *Potter v Canada Square Operations Ltd*, above n 104, at [105].
206 At [108].

the ultimate question, if the first two elements are made out, will be whether non-disclosure of the essential facts and wrongful act or omission involves an unconscientious exploitation of the defendant. Where actual knowledge of the first two elements is demonstrated—as was the case in *Beaman*, *Kitchen*, *King* and assumed in *Wrightson*—it may well be no further enquiry is needed, as Chambers J suggested. That will be particularly so where, as here, the third element (duty to inform) applies. Where knowledge is imputed, however, the fourth element may assume independent importance.[207]

Application of principles here

[134] We conclude that the evidence at trial established neither actual knowledge nor wilful blindness as to the likely existence of an LUC in the Council files, regardless of what the LIM said. Nor does it establish knowledge of either kind in relation to wrongfulness.

[135] A paradox of the pleading in this case is that the claim of negligence was firmly based on something *neither party* knew about at the time. That is, it was based on the negligent failure of the Council to *ascertain the existence* of the LUC at the same time as it was taking enforcement action against Mr Daisley and not—or at least not directly—on the Council's earlier error in compiling the LIM.[208] Neither Mr Daisley nor any Council officer actually knew anything about an LUC at that time, as both Courts below found.[209]

[136] Significantly, the Court of Appeal did not agree with the High Court that Council officers were wilfully blind about the LUC's existence—in the sense of knowing the Council files likely contained an LUC and then consciously choosing not to look for it.[210] We consider that conclusion must be correct. As the narrative earlier in this judgment demonstrates, nothing beyond the fact of past mineral extraction and the commercial rating charges levied suggested any prior rights to quarry.[211] But those

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[207] For the avoidance of doubt, we leave open whether the fourth element may also assume independent importance in the absence of the third.

[208] See HC judgment, above n 23, at [212]. The Council acknowledged a duty of care in preparation of a LIM, under s 44A(2) of the Local Government Official Information and Meetings Act.

[209] HC judgment, above n 23, at [307]; and CA judgment, above n 23, at [164].

[210] CA judgment, above n 23, at [164]–[165].

[211] See above at [21]–[47].

suggested, at best, existing use rights, rather than an LUC—a distinction the Court of Appeal does not appear to have drawn. As we have seen, by December 2005 Mr Daisley seemed to have acquiesced to the Council's position that there was no resource consent, and was getting on with making a fresh resource consent application.[212]

[137] A further paradox of the pleading, then, is that the claim was not based (again, directly) on the thing Mr Daisley had been most forcefully asserting—i.e., *existing use rights*. This is important: as noted, Mr Daisley's dealings with the Council had not emphasised the likelihood of an LUC existing, for—once the rating evidence had been exploded—he had no solid grounds to believe one had ever been issued. But existing use rights he did assert—while at the same time seeking a resource consent of his own. Yet, as the High Court held, as a general proposition it was always for the *landowner* to establish existing use rights.[213] It is material also that existing use rights do not endure in the way an LUC may: to avoid extinguishment, they must generally be exercised with effects of consistent character, intensity and scale over time, and must not be discontinued for more than 12 months in circumstances where the use would be unlawful but for the existing rights.[214] In this case proving existing use rights would require more than just evidence of prior quarrying activity: that activity must also have met the regulatory requirements of the earlier legislation and have been maintained consistently in the manner just described.[215] And as the Court of Appeal also observed, Mr Daisley:[216]

> … did not plead that the Council concealed the existence of those rights from him, or that a diligent search would have disclosed something about existing use rights that he did not already know from Mr Drake.

[138] Whether there *were* any existing use rights was never established at trial. Toogood J made no such finding. However, the obtaining of the LUC in 1988 suggests either the *absence* of existing use rights, or that their scale was inadequate for Adams Bros' purposes. As we noted earlier, the pleading suggested the establishment of

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212 Above at [41].
213 HC judgment, above n 23, at [83] citing *Britten v Auckland Council* [2011] NZEnvC 357, [2011] ELHNZ 361.
214 RMA, s 10(1)–(2).
215 See Quarries Act 1944, s 22; and Quarries and Tunnels Act 1982, s 32.
216 CA judgment, above n 23, at [152].

commercial quarrying by the Drakes "c1982", whereas s 10 of the RMA would have required lawful establishment by 1978, and the absence of any interruption lasting more than 12 months. The 2007 decision of the hearings commissioner considering Mr Daisley's resource consent application did not find commercial-scale existing use rights, the evidence suggesting prior use had been, in the words of the Judge, "relatively low-scale".[217] Nor does the evidence given by Mr Drake before Toogood J sustain such rights.

[139] That leaves the commercial rates levied on the quarry. Much was made of that at trial, as some sort of red flag. But we do not consider it offered a material indication of an underlying LUC for quarrying, for three reasons. The first is that it might only have indicated existing use rights. That, indeed, was how Mr Daisley really relied upon the rating information from the end of 2005. Secondly, the assertion of existing use rights by Mr Daisley in fact suggested the *absence* of an LUC, as we noted above, and did not serve to place the Council on inquiry at all as to the existence of that alternative source of rights. Thirdly, at the end of the day the commercial rating information proved inconclusive anyway—first, because the rating demands held by Mr Daisley turned out to have related to another quarry entirely; and secondly, because as Council officers reminded Mr Daisley at the time, the fact that the Council may have been rating Mr Daisley on that basis did not create existing use rights where the requirements of s 10 of the RMA had not been satisfied.[218]

[140] Council officers had formed a view that the LIM was a correct statement that no LUC existed and put Mr Daisley to proof on the existing use rights on which he now seemed instead to rely. As Toogood J observed in the High Court:[219]

> The significance of the erroneous statement in the LIM … is that it is probable that Council officers thereafter made no attempt to investigate whether the LIM accurately reflected the true state of affairs.

Their negligence was twofold: inaccuracy in generating the initial LIM, and then in relying on it. That was negligent indeed, but we cannot infer from the evidence actual knowledge or wilful blindness as to the existence of an LUC, and as to wrongfulness.

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217 HC judgment, above n 23, at [80]–[82].
218 See above at [44].
219 HC judgment, above n 23, at [212].

If anything, the focus of all parties on existing use rights pointed them in the opposite direction entirely.

[141] The Court of Appeal found that Council officers were not wilfully blind, in the sense of knowing the Council files likely contained an LUC and consciously choosing not to look for it.[220] Its contrary conclusion as to recklessness appears to turn on an evidential inference that the Council's officers had sufficient information to put them on notice that the LIM might have been incomplete (as to the existence of a consent)—and unreasonably failed to check.[221] That may be so, but that is the very essence of the claim in negligence, based as it is on the enforcement action rather than the LIM itself. The evidence reviewed above does not establish the higher requisite standard of knowledge required to trigger the s 28(b) extension of limitation for fraudulent concealment, i.e., actual knowledge or wilful blindness as to the likely existence of an LUC—both of which the Court of Appeal correctly excluded on the evidence—and like appreciation of wrongfulness in taking no further action to disclose the facts known to them.

[142] As we see it, the conclusion of the Courts below improperly assimilates the claim in negligence with equitable fraud, and is open to the very objections expressed by Lord Millett and Lord Scott in *Cave*,[222] and Lord Reed P in *Canada Square*, that doing so unreasonably extends the limitation period and subverts the purpose of the Limitation Acts.[223] Here, the Council officers lacked awareness of the essential fact that an LUC was likely to exist and were found not to have been wilfully blind as to its existence by the Court of Appeal. In the absence of such actual or imputed knowledge, they had no reason to apprehend the wrongfulness of their actions. Those actions were certainly negligent, perhaps grossly negligent, but not fraudulent in the equitable sense necessary to extend the limitation period under s 28(b).

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220 CA judgment, above n 23, at [165].
221 Above at [102].
222 See above at [93]–[94] discussing *Cave v Robinson Jarvis & Rolf*, above n 104.
223 *Potter v Canada Square Operations Ltd*, above n 104, at [93]–[105].

Conclusion on concealment by fraud exception

[143] It follows from the foregoing that the appeal must be allowed on this ground. Unless the next issue avails Mr Daisley, his claim against the Council was largely statute-barred because the fraudulent concealment exception does not apply on the facts. While that may seem hard on Mr Daisley, and subject to the continuing breach issue we are about to address, the short point is that he failed to advance his claim for almost three years, during which time he knew of the Council's failings and could have issued proceedings without a limitation issue arising. That he did not do so because of a solicitor's negligence means only that the solicitor may have to bear that loss, proceedings against him having been brought within time. There is no justification for subverting limitation principles to impose the burden instead upon the negligent Council.

Limitation: was the continuing breach doctrine engaged?

[144] We can deal with this issue relatively briefly. We have summarised the divergent decisions of the High Court and Court of Appeal on this matter at [64] and [70]–[71] above. We note that Mr Daisley sought (and was granted) extension of time to support the judgment of the Court of Appeal on the ground that, contrary to that Court's conclusion, the original proceeding was in any case issued within the limitation period by virtue of the principle of continuing breach. This was, appropriately, very much a secondary submission in oral argument in this Court.

Pleading

[145] The plaintiff's negligence pleading centres on the abatement notices issued by the Council on 21 February and 16 November 2005. However, it is the second of those that is relevant for present purposes, because no cause of action arose until September 2006 (there being no loss prior to that month). Shorn of inessentials, the pleading is that the Council had a duty of care to have reasonable grounds for believing the quarrying activity contravened a rule in the relevant plan before issuing the abatement notice, and that required a "complete and substantive … [i]nspection and review of its own records … and … circumstantial evidence". The issue of the abatement notice, and subsequent infringement and enforcement notices, constrained the quarry's

operation. The Council's "failure to be reasonably satisfied that an abatement notice could be issued was negligent and easily avoided by the [Council] carrying out a reasonable and thorough search of its own records". But for the Council's acts and omissions, the quarry would have operated profitably as a commercial quarry.

[146] That pleading, as we see it, would ordinarily be understood to plead a single, temporally-conjoined omission (failure to undertake a proper search) and act (issue of the abatement notice), in November 2005, thereafter causing (1) loss of revenue (more properly, profit), (2) diminution in value of the property, (3) special damages in "losses and expense incurred in responding" to the Council's actions, and (4) consequential losses. However, we will also examine liability and limitation on the basis that embedded in the pleading is an allegation of episodic breach—on the issue of each further abatement, infringement or enforcement notice after November 2005, up to the application for an enforcement order on 31 July 2009. Finally, we will also examine whether the pleading, and then facts, support an extension of liability via the continuing breach principle.

Submissions

[147] Mr Farmer submitted that the focal point of Mr Daisley's claim was the continued failure of the Council to conduct more than a cursory search of its records, while over a long period taking several different active steps designed to put him out of the quarrying business (and ultimately having that effect). The Court of Appeal's conclusion that there had been periods where the case could be analysed in terms of continuing breach, involving numerous breaches in relation to the prosecution enforcement proceedings that "had the same unifying element: the failure to check historic records",[224] should naturally have led to a finding that the Council was in breach of duty on a continuous basis through until discovery of the LUC in September 2009, as the High Court Judge found.[225]

Discussion

[148] It is best to start with first principles.

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224 CA judgment, above n 23, at [85].
225 HC judgment, above n 23, at [376]–[380].

[149] First, in the case of negligence, a cause of action accrues on the date on which the breach of duty causes more than trivial damage.[226] That cause of action then includes all further damage of the same kind and attributable to the same cause of action even if that damage only manifests later, and by instalment.[227] Further damage arising from the same breach does not create a new right of action or restart the running of time,[228] unless it is clearly distinct from the other damage preceding it.[229] One breach causing one of kind damage may be described as a *singular* cause of action, at least for limitation purposes.

[150] Secondly, causes of action may arise in an *episodic* way. That involves a series of distinct causes of action, involving repeated breaches of duty causing damage.[230] Time runs separately in relation to each episodic cause of action—usually triggered by the manifestation of non-trivial loss, as discussed above.[231] That can be important, because it can bring a claim based on otherwise non-distinct loss into the six-year limitation period (provided there is a sufficient causal nexus between that loss and the fresh episode of breach).[232] Time runs in relation to each episode for six years from the consequent manifestation of loss.

[151] The English case of *Sciortino v Beaumont* provides a neat example.[233] In April 2011, a barrister gave his client initial advice that he had good prospects of success in a proposed appeal. The client proceeded with preparations for the appeal. In October 2011, the barrister (now in receipt of fuller information) reiterated that advice in writing, saying the appeal had a 55–60 per cent chance of succeeding. The appeal ultimately failed, and in October 2017 the client sued in negligence. The claim was

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226 *Davys Burton v Thom* [2008] NZSC 65, [2009] 1 NZLR 437 at [15]–[16] per Elias CJ and [38] and [46] per Tipping, McGrath and Wilson JJ.

227 See at [25] per Elias CJ; and *Homburg Houtimport BV v Agrosin Private Ltd* [2003] UKHL 12, [2004] 1 AC 715 [*The Starsin*] at [89]–[91] per Lord Hoffmann as cited in *Attorney-General v Edmonds* [2006] LGHNZ 22 (CA) at [64]–[66].

228 *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 (HL) at 771–772 per Lord Reid and 779–780 per Lord Pearce.

229 *Bowen v Paramount Builders (Hamilton) Ltd*, above n 67, at 424 per Cooke J; and *Ward Ranch Ltd v Minister of Conservation* [2018] NZHC 2893, [2019] NZAR 210 at [47].

230 See for example *Johnson v Watson* [2003] 1 NZLR 626 (CA).

231 *Sciortino v Beaumont* [2021] EWCA Civ 786, [2021] Ch 365 at [59], [62] and [81] per Coulson LJ.

232 See for example *Johnson v Watson*, above n 230, at [25]. We reiterate that *distinct* loss, even without episodic breaches, can create a fresh cause of action and thereby restart time even where the original cause of action arising from the breach of duty is time-barred: *Ward Ranch Ltd v Minister of Conservation*, above n 229, at [47]; and see above at [149].

233 *Sciortino v Beaumont*, above n 231.

clearly out of time in respect of the April 2011 advice, but just in time in respect of the October 2011 advice. The Court of Appeal concluded:[234]

> The claim in respect of the first advice is statute-barred, and so there will be elements of the [losses] which the appellant incurred and which he will not be able to recover from the respondent. But there is no reason in law to conclude that the claim in respect of the second advice is statute-barred: it simply gives rise to a separate, albeit smaller, claim.

[152] Thirdly, *continuing* breach involves a continuous breach of duty resulting in repeat or continuous loss of the same kind.[235] Continuing *breach* should not however be conflated with continuing *damage*, which ordinarily meets the bar described above at [149]. Continuing breach of duty, in the positive sense, describes a continuing, consistent course of negligent conduct which cannot logically be separated into discrete episodes,[236] and which causes damage on an ongoing basis.[237] A breach might also be continuous in the negative sense of a sustained negligent omission to perform a duty, though that is more controversial.[238] The former case is close to episodic breach, but distinguished by a lack of clearly identifiable, positive acts each capable of supporting a fresh cause of action. In the latter case, the omission is more clearly recognisable as a single continuous breach—although, as discussed above, a cause of action in negligence will only accrue where non-trivial damage is suffered as a result (and for each clearly distinct incident of damage thereafter).[239]

[153] In *Jalla v Shell International Trading and Shipping Co Ltd*—a private nuisance case concerning unremediated oil spillage from the Bonga Spill off the coast of Nigeria—the United Kingdom Supreme Court said a continuing breach required

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234 At [77] per Coulson LJ.

235 It does not apply in negligence cases where a defendant is in breach of duty on a continuous basis but no damage arises until a later, singular incident. In such cases, the cause of action arises only on the date of damage, so resort to continuing breach is unnecessary; the claim will instead be one of ordinary, singular breach: see *Midland Bank Trust Co Ltd v Hett, Stubbs & Kemp (a firm)* [1979] Ch 384 (Ch) at 433, and contrast at 438. See also *Allen v Sir Alfred McAlpine & Sons Ltd* [1968] 2 QB 229 (CA).

236 See *Johnson v Watson*, above n 230, at [15].

237 See *Jalla v Shell*, above n 81. This might arise where the conduct consists of a combination of acts and omissions, as was the case in *Barber v Somerset County Council* [2004] UKHL 13, [2004] 1 WLR 1089 at [67]–[70] per Lord Walker. Contrast *Brown v KMR Services Ltd* [1995] 4 All ER 598 (CA) at 640 per Hobhouse LJ.

238 See *Johnson v Watson*, above n 230, at [27].

239 See for example *Darley Main Colliery Co v Mitchell* (1886) 11 App Cas 127 (HL) at 132–133 per Lord Halsbury, 145–147 per Lord Bramwell and 150–151 per Lord FitzGerald. See also *East Suffolk Rivers Catchment Board v Kent* [1941] AC 74 (HL) at 91–94 per Lord Atkin dissenting, and related comments in *Johnson v Watson*, above n 230, at [16]–[27].

"repeated activity by the defendant or an ongoing state of affairs for which the defendant is responsible which causes continuing [damage]".[240] In that case, the Court held the spill was "a one-off event" as the leak which had caused it was stopped within six hours, and there was therefore no repeated activity or ongoing state of affairs for which the defendants were responsible.[241] That must be right. All the elements of the cause of action manifested within weeks of the original spill, giving the affected landowners ample time to bring a claim. The alternative approach would have extended the limitation period indefinitely until the tainted land was restored—undermining the principles of limitation, as briefly summarised above at [78].[242]

[154] As the Court of Appeal explained correctly in the judgment under appeal, the continuing breach principle permits a plaintiff to sue for loss accruing within the permitted limitation period despite the fact the breach originally manifested outside the limitation period, and despite the fact that the loss accruing from time to time is not distinct in character.[243] That is because the cause of action constantly refreshes so long as the breach is extant and continues to cause loss.

[155] But, as the Court of Appeal also explained correctly, the continuing breach principle does *not* enable the plaintiff to recover loss accruing outside the limitation period—i.e., between the initial manifestation of the breach and the date six years prior to the commencement of the claim.[244] This, as the Court of Appeal explained, is the corollary of the principle that successive actions lie for each successive accrual of damage.[245] That principle applies equally in cases of singular and episodic breach.

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240 *Jalla v Shell*, above n 81, at [26]. There, the relevant damage was "undue interference with the use and enjoyment of the claimant's land".

241 At [37].

242 At [36].

243 CA judgment, above n 23, at [84]. See *Sciortino v Beaumont*, above n 231, at [103(iii)] per Stuart-Smith LJ concurring.

244 The defendant will in principle be liable only for damage incurred within the limitation period: see Todd, above n 82, at 1563. In cases where it is difficult to determine when damage was incurred, however, the onus rests on the defendant to apportion damages: *Clarkson v Modern Foundries Ltd* [1957] 1 WLR 1210 (QB).

245 Mr Daisley, of course, sought to avoid that difficulty by claiming for projected loss of profits on the basis that but for the Council's negligence, he would have run the quarry as a successful commercial operation and would not have sold it. Damages accordingly were assessed on an expectation basis in the High Court, on the assumption the quarry would have been profitable until 2017: see above at [61]

[156] We turn now to the application of these principles to the facts of the underlying appeal. The next port of call must be the pleading. The essential negligence pleading by Mr Daisley, in his fourth amended statement of claim, was that the Council failed to take reasonable care to check the legal status of the quarry before issuing its abatement notices in February and November 2005.[246] As we noted above at [146], it is arguable the pleading in this case sought to advance a claim of episodic breach of this kind—arising on the issue of each abatement, infringement and enforcement notice, and application for enforcement order, up to July 2009.

[157] Neither singular nor episodic breach helps Mr Daisley very much, however. As the Court of Appeal noted, no new breach of any kind after the limitation date, 14 August 2009, was pleaded.[247] Only in one respect might they assist Mr Daisley: that concerns the distinct form of loss claimed for loss of value of the property arising after that limitation date. We address that shortly.[248]

[158] Hence the importance for Mr Daisley of the application of continuous breach principles. As to that, however, we do not consider the pleading could reasonably be read as advancing a claim based on continuous breach. Certainly, the text does not suggest such a claim is being advanced. But nor, in our view, could it have been in any case on these facts.

[159] The relevant question, had a pleading of continuous breach been made, would have been whether the Council's negligence was more accurately characterised as a sequence of negligent acts of a similar kind or rather as a single, continuous omission. The High Court appeared to prefer the latter approach, saying "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", and finding the cause of action "accrued on a continuing basis from the time the Council opposed the 2006 resource consent application until the discovery of the 1988 LUC in September 2009".[249] The Court of Appeal took the

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246 We record that this pleading was not drafted by the solicitors representing Mr Daisley on appeal.
247 CA judgment, above n 23, at [86].
248 Below at [164]–[170].
249 HC judgment, above n 23, at [376] and [378].

former view, saying "there were numerous breaches of duty over a period of years and each had the same unifying element: the failure to check historic records".[250]

[160] We think the Court of Appeal was right in this respect, for two reasons.

[161] First, a breach must be something capable of causing damage. The Council's continued failure to check its records and verify the contents of the LIM did not in itself cause damage to Mr Daisley. Rather, it occasioned the numerous positive actions taken by Council officers against Mr Daisley and his business in the form of abatement and infringement notices, and application for an enforcement order, up to July 2009. Those actions, and their consequences, were what resulted in the accrual of causes of action in negligence.

[162] Secondly, the Council's negligent acts here were discrete acts of negligence. We do not accept the High Court's view that the Council's negligence continued until the LUC was discovered in September 2009, and that all the damages flowing from the totality of that negligence were therefore within time.[251] Nor do we accept that the Council's actions after 14 August 2009 gave rise to a fresh cause of action. While ungracious, we do not consider the Council's actions following discovery of the LUC amounted to a fresh breach of duty so as to cause a new cause of action to accrue, supporting expectation damages running through to 2017.[252]

Conclusion on continuing breach

[163] For the reasons just given, we conclude the continuing breach principle does not assist Mr Daisley.

Limitation: was the loss of value distinct damage?

[164] We agree with the Court of Appeal that (absent concealment by fraud) Mr Daisley can have a live cause of action only in respect of fresh damage incurred

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250 CA judgment, above n 23, at [85].

251 We note that even if negligence may amount in a particular case to a single continuous breach, it does not follow that all related losses will be within time provided the claim is brought within six years of the breach coming to an end: see above n 244.

252 See below at [178].

after 14 August 2009—i.e., damage which is clearly distinct from the damage flowing from statute-barred causes of action which accrued before that date. Such damage gives rise to a fresh cause of action because it completes the elements of negligence so as to give rise to a new cause of action distinct from the time-barred one (notwithstanding that the breach element of both causes of action is satisfied by the same breach of duty).[253] It thereby meets the requirements stated at [149] above.

[165] As the Court of Appeal recognised, the only damage fitting that description was the loss from the forced sale of the Knight Road property in December 2009.[254]

[166] Mr McLellan submitted that even this loss was neither fresh nor distinct, and so is also time-barred. He submitted the loss arising from forced sale was insufficiently distinct, but simply a continuation of a loss that first occurred in 2006 when the Council's negligence first prevented quarry operations. We disagree and can be brief.

[167] First, we consider the case of *Stratford v Phillips Shayle-George*, upon which the Council places reliance, can be distinguished from the present case.[255] In *Stratford*, the owner of a property was found to have suffered loss at the time she took out an ill-advised mortgage in reliance on negligent advice, rather than at the time the mortgage was ultimately required to be discharged, rendering her claim time-barred. The Court of Appeal emphasised that there was "no contingency attached to the obligation to pay the moneys secured by the mortgage" even if it was payable in the future rather than when the obligation was incurred.[256] Here, however, any arguable loss in the value of Mr Daisley's property before the forced sale occurred was necessarily contingent on indeterminate future events.[257] This is related to the next point.

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253 *Bowen v Paramount Builders (Hamilton) Ltd*, above n 67, at 424 per Cooke J.

254 See above at [71].

255 *Stratford v Phillips Shayle-George* (2001) 15 PRNZ 573 (CA).

256 At [18].

257 As in *Roose v Duthie* [2016] NZCA 600, (2016) 24 NZCPR 255, where the Court of Appeal said that "[w]here damage is purely contingent (that is, subject to a contingency that may or may not occur), the cause of action accrues only when the contingency occurs giving rise to some loss": at [28] (footnote omitted). See also *Davys Burton v Thom*, above n 226, at [46] per Tipping, McGrath and Wilson JJ.

[168] Secondly, we do not accept that the forced sale loss was simply reflective of the "loss" of the right to quarry. The High Court found that Mr Daisley purchased the property in 2004 "on the basis that there was no resource consent", and that the forced sale in 2009 was transacted "effectively on the same basis".[258] On that basis the price difference was "attributable to his having no option but to sell to avoid a mortgagee sale", rather than to any loss of quarrying rights.[259]

[169] As to the issue of distinctness, we note the observation of Cooke J in *Bowen v Paramount Builders (Hamilton) Ltd* that it is "a question of fact and degree whether damage is sufficiently distinct to result in a separate cause of action".[260] We are not persuaded on the evidence and submissions before us that departure from the factual findings below on this issue is appropriate.[261]

[170] We therefore confirm the decision of the Court of Appeal in respect of the forced sale loss. There was no challenge before us to the methodology adopted by the Courts below in fixing damages under this head at $90,000. We adopt that figure and confirm the award of damages in that sum.

Misfeasance: was the Court of Appeal wrong to reverse the High Court's conclusion on misfeasance?

[171] Again, we have summarised the divergent conclusions of the High Court and Court of Appeal at [63] and [75]–[76] above. The Court of Appeal held that the Council was not liable for misfeasance because, in exercising enforcement powers, no officer of the Council knowingly exceeded, or was recklessly indifferent to, the scope of their legal authority.[262]

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258 HC judgment, above n 23, at [555].

259 At [555]–[556].

260 *Bowen v Paramount Builders (Hamilton) Ltd*, above n 67, at 424 per Cooke J; *Mount Albert Borough Council v Johnson*, above n 67, at 239–240 per Cooke and Somers JJ, and 243 per Richardson J. See also *Ward Ranch Ltd v Minister of Conservation*, above n 229, at [49], n 20.

261 Due to the significantly different approach taken in the High Court, this issue was not squarely addressed at first instance, but the Judge's treatment of this head of loss appears consistent with its being distinct in kind from the other losses. This Court also treated forced sale losses as distinct from loss of opportunity and consequential expenditure (albeit in a different legal context) in *Routhan v PGG Wrightson Real Estate Ltd* [2025] NZSC 68, [2025] 1 NZLR 306.

262 CA judgment, above n 23, at [181]–[184].

[172] In reaching this conclusion, the Court of Appeal applied the legal principles for misfeasance in a public office stated by that Court in *Garrett v Attorney-General*.[263] That decision defined four limbs to the tort:[264]

(a) The defendant held a public office.[265]

(b) In purported exercise of a public power, the officer knowingly acted, or omitted to act, unlawfully (either with actual knowledge that their acts or omissions went beyond the limits of their legal authority, or with reckless indifference as to those limits).

(c) In doing so they acted, or omitted to act, either with malice toward the plaintiff or with knowledge of, or reckless indifference toward, the fact their conduct was likely to cause harm to the plaintiff.

(d) The plaintiff suffered loss caused by the misfeasant act or omission.

[173] We note that the correctness of the principles in *Garrett* was not itself challenged by either party.

Submissions

[174] Although Mr Farmer maintained his argument that misfeasance occurred both before and after the discovery of the consent, his argument before us focussed on events after discovery. That was in September 2009. He submitted that the evidence showed that Council officers were then recklessly indifferent as to the limits of their authority, and recklessly indifferent as to the consequences for Mr Daisley. After discovery of the consent, the Council maintained enforcement action (which had been premised on the non-existence of existing use rights or an LUC) and continued

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263 *Garrett v Attorney-General*, above n 60, as cited in CA judgment, above n 23, at [180]–[181]. See generally Andru Isac "Abuse of Public Office" in Stephen Todd and others (eds) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) 1211 at [18.2].

264 See also *Currie v Clayton* [2014] NZCA 511, [2015] 2 NZLR 195 at [40].

265 Or, in cases of vicarious liability, the defendant's servant or agent: see *Racz v Home Office* [1994] 2 AC 45 (HL) at 53.

to maintain that Mr Daisley was not entitled to operate the quarry. It was that conduct which Toogood J considered tipped the balance in favour of an award.[266]

[175] Mr Farmer also submitted that the Court of Appeal was wrong to diminish the importance of the Council's failure to withdraw the enforcement proceedings because legal discussions were occurring between the parties as to adjournment of the proceedings. That did not excuse the Council's actions, he said. In any event, by that point "the die was cast" and the mortgagee sale was in train.

Discussion

[176] Our factual conclusions in respect of fraudulent concealment (under the first, limitation issue) must at least for practical purposes also resolve this cross-appeal. We have found the Council to have been negligent in its management of records and in relation to the enforcement action it took against Mr Daisley. But we do not find it acted during this time with any awareness of the existence of a consent. If existing use rights were involved, that was a matter for Mr Daisley to establish.

[177] It cannot in our view be said on the evidence before us that the Council's officers knew their acts or omissions exceeded the scope of their legal authority or were recklessly indifferent as to that fact. That in effect resolves the claim for misfeasance in respect of the Council's conduct before the LUC was discovered.

[178] The Council's subsequent actions, on Mr Daisley's production of the consent, were dilatory and ungracious. We agree with the Court of Appeal's observation that the Council should have withdrawn and apologised at that time.[267] However, and as the Court of Appeal found, the litigation context clouds the condemnation which this conduct might otherwise earn. The abatement notice was in any event withdrawn by letter from the Council dated 15 October 2009, and Mr Daisley's involvement in the quarry appears to have ended with its sale six weeks later.

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266 HC judgment, above n 23, at [342]–[343].
267 CA judgment, above n 23, at [186].

Conclusion on misfeasance

[179] It follows we do not accept the argument advanced by Mr Daisley on cross-appeal as to misfeasance in a public office. It is therefore unnecessary to consider the issue of exemplary damages. That aspect of the cross-appeal will also be dismissed.

Result

[180] The appeal is allowed in part. The finding that the appellant fraudulently concealed the respondent's right of action is set aside.

[181] The appeal in respect of the award of damages of $90,000 for loss of the value of the Knight Road property, and interest on that sum in the terms set out by the High Court, is dismissed.

[182] The damages awarded to the respondent are otherwise set aside.

[183] The cross-appeal is dismissed.

[184] Making a modest deduction of $5,000 for the modest achievement noted above at [181], the respondent must pay the appellant costs of $45,000 plus usual disbursements. We allow for second counsel.

WINKELMANN CJ

Table of Contents

Introduction

[185] I agree with the majority that the cross-appeal should be dismissed. However, I would have upheld the findings in the Court of Appeal that the appellant fraudulently concealed the respondent's right of action, and therefore would have upheld the quantum of damages awarded by the Court of Appeal. I now provide reasons for my dissent on those points.

[186] In deciding the appeal, the majority have accepted aspects of the test proposed by the Council for fraudulent concealment, which as the majority explain, is largely derived from the judgment of the Court of Appeal in *Wrightson Ltd v Blackmount Forests Ltd*.[268] It is convenient to repeat the Council's formulation of that test here, as stated by the majority:[269]

> (a) the defendant must have known [in the sense of having had actual knowledge of or wilful blindness to] the essential facts comprising the right of action;
>
> (b) the defendant must also have appreciated [in the sense of having actually known or been wilfully blind to] (in light of the known facts) that he or she had committed a wrongful act such that they were aware of the right of action and could have disclosed it;
>
> (c) the defendant must have 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 foregoing, the defendant must have failed to disclose the right of action with the result that it was concealed "by means that would attract the epithet 'wilful' or 'deliberate'".

[187] The majority leave for another day whether element (c) above, formulated by the Court of Appeal in *Wrightson*, must be established for fraudulent concealment.[270] The majority says that it is unnecessary to decide, because there clearly was such a duty in this case.[271] The majority also qualifies element (b) by saying it does not

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268 *Wrightson Ltd v Blackmount Forests Ltd* [2010] NZCA 631.
269 Above at [84].
270 Above at [127]–[130]. See *Wrightson*, above n 268, at [41] and [47].
271 Above at [130].

consider Chambers J, in *Wrightson*, was suggesting the defendant needed to appreciate the exact legal form the wrongful act took.[272]

[188] I disagree with the majority's test for the application of s 28(b) of the Limitation Act 1950 (1950 Act). I set out a summary of my reasons for this, expanding upon them more fully below.

[189] The majority's test does not accord with the language of the provision. As the majority accepts, the word "fraud" in s 28(b) has a particular meaning, specific to that context. It is used in the sense of equitable fraud.[273] Equitable fraud captures the concept of unconscionable conduct, and is not limited to moral turpitude or dishonesty.[274] In *Sandman v McKay*, this Court made clear that a finding of wilful blindness entails a finding of dishonesty.[275] By limiting relevant knowledge to actual knowledge or wilful blindness, the majority sets the bar at the level of dishonesty, even in a case where it concedes there was a special relationship giving rise to an obligation of disclosure.[276]

[190] The majority's test is also overly prescriptive and complex. By setting one standard of knowledge, the majority overlook the possible implications of the relationship between the parties in the particular factual matrix giving rise to the cause of action. The test also requires separate analysis of whether the defendants knew (in the sense of actually knew or were wilfully blind) that they had committed a wrongful act — mere knowledge of the essential facts is not enough. This overlooks the variety of factual circumstances in which the test could come to be applied.

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272 Above n 183.

273 Above at [82].

274 In the context of limitation periods see *Beaman v ARTS Ltd* [1949] 1 KB 550 (CA) [*Beaman* (CA)] at 564–566 per Lord Greene MR and 569 per Somervell LJ; *Kitchen v Royal Air Force Assoc* [1958] 1 WLR 563 (CA) at 572–573 per Lord Evershed MR; and *Applegate v Moss* [1971] 1 QB 406 (CA) at 413 per Lord Denning MR. But it is also the sense in which equitable fraud is used more generally: see Ben McFarlane "Fraud, Undue Influence And Unconscionable Transactions" in Steven Elliott (ed) *Snell's Equity* (35th ed, Sweet & Maxwell, London, 2025) 219 at [8-001] and [8-002], n 16; *Nocton v Lord Ashburton* [1914] AC 932 (HL) at 954 per Viscount Haldane LC; *Earl of Aylesford v Morris* (1873) LR 8 Ch App 484 (Court of Appeal in Chancery) at 490–491 per Lord Selborne LC as cited in *Nichols v Jessup* [1986] 1 NZLR 226 (CA) at 227–228 per Cooke P; and *Armitage v Nurse* [1998] Ch 241 (CA) at 250–253.

275 *Sandman v McKay* [2019] NZSC 41, [2019] 1 NZLR 519 at [78] per Glazebrook, O'Regan, Ellen France and Arnold JJ.

276 Above at [130].

[191] In agreement with the Court of Appeal, I consider that unconscionable, rather than dishonest, conduct is the standard for equitable fraud for the purposes of s 28(b).[277] I also consider that in cases such as the present, where the wrongdoing is not deliberate but negligent, a failure to disclose suspicion of wrongdoing will only be unconscionable where there is some additional level of blameworthiness beyond that inherent in the negligence.

[192] Unlike the majority, I address the relevance of a special relationship, because it is necessary to do so to explain the nature of the factual inquiry the court must undertake. On my approach, proof of a special relationship is not a necessary element of fraudulent concealment. The existence of such a special relationship may be part of the circumstances giving rise to a finding of unconscionability but, as the cases show, unconscionability may arise from conduct in circumstances where there is no special relationship.[278]

[193] The ultimate issue is whether there is concealment of a cause of action which amounts to fraudulent concealment. In all the circumstances of this case, recklessness as to the existence of the essential facts giving rise to a cause of action was enough for the purposes of s 28(b).

[194] The Council owed duties of care to exercise reasonable care and skill in keeping the record of resource consents reasonably available for inspection, to exercise reasonable care and skill in the provision of information about such matters, and to conduct reasonably diligent inquiries into the existence of a resource consent whenever that was in issue. As found by the High Court Judge, it failed in those

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277 *Whangarei District Council v Daisley* [2024] NZCA 161, [2024] 2 NZLR 660 (Miller, Gilbert and Mallon JJ) [CA judgment] at [109]–[111] citing *Kitchen*, above n 274, at 572–573 per Lord Evershed MR, *Guerin v R* [1984] 2 SCR 335 at 390 per Dickson, Beetz, Chouinard and Lamer JJ, *M (K) v M (H)* [1992] 3 SCR 6 at 57 per La Forest, Gonthier, Cory and Iacobucci JJ and *Pioneer Corp v Godfrey* 2019 SCC 42, [2019] 3 SCR 295 at [54] per Wagner CJ, Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ.

278 *Pioneer Corp*, above n 277, at [53] per Wagner CJ, Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ; *Applegate*, above n 274, at 413 per Lord Denning MR; and *King v Victor Parsons & Co (a firm)* [1973] 1 WLR 29 (CA) [*King* (CA)] at 35 per Lord Denning MR. See also *Kitchen*, above n 274, at 572–573 per Lord Evershed MR.

duties.[279] That is sufficient for the finding of negligence. But there were additional circumstances that rendered Council's conduct reckless:

(a) Through the course of its dealings with Mr Daisley, the Council became aware of evidence that tended to prove that prior to Mr Daisley's ownership, and over a lengthy period of time, quarrying had taken place on the site, including commercial quarrying.

(b) The Council had not only tolerated that quarrying, but it had levied mineral rates against the site and one of its predecessor territorial authorities had itself taken material quarried from the site.

(c) The Council was therefore aware of the likelihood that there would be information on the Council files as to the basis on which quarrying on the site had been conducted. But the Council failed to undertake a search of the archived material. Indeed, for a long time, the Council failed to undertake any search of its records.

[195] Building on this finding, in the circumstances of this case, the Council's failure to search amounted to fraudulent concealment:

(a) Council employees also knew that the Council files were the best source of information to clarify the existence of a lawful basis for such quarrying, since the Council was the relevant regulatory body and had a statutory duty to keep records.

(b) The Council controlled access to the files. Through control of access to the files, the Council also controlled access to the evidence establishing the Council's breaches of duty.

(c) Council employees' positive decision not to search those files notwithstanding that evidence amounted to concealing it.

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279 *Daisley v Whangarei District Council* [2022] NZHC 1372, (2022) 23 ELRNZ 839 (Toogood J) [HC judgment] at [22]–[23] and [230]–[231].

(d) There existed a special relationship between the Council and Mr Daisley. He was a member of the class to which the Council's statutory duties were owed and the member of that class most directly affected by the Council's failure to diligently discharge its duties.

(e) As noted, given the knowledge of Council employees, the failure to search was reckless. But in light of the duties owed by the Council to exercise reasonable diligence in searching for the information, its relationship with Mr Daisley, its control of the records and its positive decision not to search, that conduct was unconscionable, amounting to equitable fraud.

[196] I would therefore have upheld the Court of Appeal's finding that, on the particular facts of this case, there was fraudulent concealment for the purposes of s 28(b).[280]

What amounts to a fraudulent concealment for the purposes of s 28(b)?

[197] I start with the language of the provision:

> **28 Postponement of limitation period in case of fraud or mistake**
>
> Where, in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake,—
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it …

[198] The meaning of this provision "must be ascertained from its text and in the light of its purpose and its context".[281] It is not in dispute that the language utilised in

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280 CA judgment, above n 277, at [178].
281 Legislation Act 2019, s 10(1).

s 28(b) has a special meaning to be ascertained from the required contextual analysis — the relevant context being its historical origins.[282] These historical origins assist in understanding the text and its purpose. They also provide necessary context.

Legislative history and purpose

[199] I adopt the Court of Appeal's discussion of the purposes of the 1950 Act.[283] The Court described the standard account of limitation statutes as serving three purposes:[284]

(a) defendants should be able to rest secure in the reasonable expectation that they will not be held to account for ancient obligations;

(b) claims should not be decided on evidence that has become stale through the passage of time; and

(c) plaintiffs should pursue their claims with reasonable diligence.

[200] However, as the Court notes, these rationales might suggest a legislative limitation model requiring a case-by-case evaluative analysis, focused on the facts, evidence and parties' circumstances.[285] This is not the model the 1950 Act adopts. By providing that causes of action founded on tort or contract are not to be brought after the expiry of six years from the date on which the cause of action accrued,[286] the Act adopts a rule which bars claims regardless of their substantive merits, the court's ability to determine the issues fairly between the parties and the cause of delay.

[201] This approach, and the detailed provisions in the 1950 Act, are modelled on the Limitation Act 1939 (UK) (1939 UK Act) which codified the law of limitation.[287] Prior to the 1939 UK Act, the law was to be found across legislation and in case law. To understand the purpose behind the legislative scheme of the 1950 Act, it is

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282 Above at [82] per Glazebrook, Ellen France, Kós and O'Regan JJ.
283 CA judgment, above n 277, at [99]–[103].
284 At [99].
285 At [100].
286 Section 4(1)(a).
287 Limitation Act 1939 (UK) 2 & 3 Geo VI c 21.

necessary to go back to its English origins, at least as far back as the English Statute of Limitations 1623, which established statutory time limits for the bringing of particular forms of actions.[288] That Statute had no direct application within the courts of equity but was applied by analogy in those courts unless there was an equitable ground for repelling that application. Those equitable grounds were succinctly described in a leading case as "fraud or any other equitable circumstance".[289]

[202] The Supreme Court of Judicature Act 1873 (UK) effected a fusion of common law and equity.[290] Because that Act provided that equitable rules were to prevail over common law rules,[291] it could be expected that the equitable approach to limitation periods would be applied irrespective of whether the cause of action was previously cognisable at law or equity. However, the approach of the courts was inconsistent, with some courts refusing to apply the fraudulent concealment exception to statutory limitation periods where the cause of action had previously been subject to the jurisdiction of common law courts.[292]

[203] In the early 1930s the English Law Revision Committee was asked by the Lord Chancellor to inquire into whether the law of limitations as captured in statute and judicial decisions required amendment for modern conditions and whether it required unification.[293] In a 1936 report, the Committee addressed the general model to be applied to limitation, considering the inclusion of a general discretion to extend periods, or alternatively a rule of reasonable discoverability, such that time would begin to run from the time that the plaintiff knew or, but for their own default, might have known, of the existence of a claim.[294] The Committee rejected either model, concluding that a discretionary standard would be too onerous for the courts, and too uncertain in application. It also rejected a standard of general discoverability. While accepting that such an approach would have "attractive features", giving relief where the plaintiff was unaware and could not have been aware of their claim until it was

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288 Statute of Limitations 1623 (Eng) 21 Jac I c 16.
289 *Trotter v Maclean* (1879) 13 Ch D 574 (Ch) at 584.
290 Supreme Court of Judicature Act 1873 (UK) 36 & 37 Vict c 66.
291 Section 25(11).
292 Law Revision Committee *Fifth Interim Report (Statutes of Limitation)* (Cmd 5334, December 1936) at [22].
293 At [1].
294 At [7].

barred by statute, the Committee said those situations would be comparatively rare, and again the approach would introduce too much uncertainty. Moreover, it considered that the purpose of the statute should go beyond preventing dilatoriness but extend to "putting a certain end to litigation and at preventing the resurrection of old claims".[295]

[204] Even so, the Committee recommended carrying forward the existing fraudulent concealment exception, so that it would be an answer to a plea of limitation that the plaintiff's ignorance of the claim was brought about by the fraudulent conduct of the defendant.[296] As to the need for reform, the Committee noted the uncertainty in the law in this area following on from the fusion of law and equity and recommended that the law be clarified to provide:[297]

> … that in all cases to which the Statutes of Limitation apply or are applied by analogy, where a cause of action is founded on fraud, … or where a cause of action unconnected with fraud is fraudulently concealed from the plaintiff by the defendant or his agent, … the right of the plaintiff to sue shall be deemed to have first accrued at the time when he discovered such fraud or could with reasonable diligence have discovered it …

This was the conceptual framework, and by and large the language, carried forward into the 1939 UK Act,[298] and then on into New Zealand's 1950 Act, and other statutes of limitation throughout the Commonwealth.[299]

[205] There is a considerable body of case English case law, some of which is discussed below, confirming that in the expression "fraudulent concealment" in the 1939 UK Act, "fraud" is used in its equitable sense.[300] Since that legislation is the model for New Zealand's 1950 Act (and for other Commonwealth legislation as I come to), it follows that the word "fraud" in s 28(b) is used in the sense of equitable fraud — a proposition not doubted by the majority.[301]

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295 At [7].
296 At [22].
297 At [22(a)].
298 See s 26.
299 See, for example, Limitation of Actions Act 1958 (Vic), s 27; Limitation Act 1953 (Malaysia), s 29; Limitation Act 1959 (Singapore), s 29; Limitation Act 1969 (NSW), s 55; and Limitation of Actions Act 1974 (Qld), s 38.
300 Below at [219]–[227].
301 Above at [82].

[206] It is relevant also that the 1950 Act, like the 1939 UK Act on which it was modelled, contains no principle of reasonable discoverability, and relevant also that the courts have refused to read such a principle into the legislation.[302] Part 2 instead contains a series of provisions that detail the circumstances in which a relevant limitation period may be extended: disability,[303] special provisions as to the effect of acknowledgment of the obligation or part payment,[304] and fraud and mistake — the provision with which this appeal is concerned.[305]

[207] The Court of Appeal in this case explained the resulting overall scheme of the legislation and how the fraudulent concealment provisions fit within that scheme:[306]

> [103] The 1950 Act mitigates injustice by extending limitation periods in certain circumstances, notably where the plaintiff is under a disability, the action is based on the fraud of the defendant, the right of action is concealed by the fraud of the defendant or their agent, or the action is for relief from the consequences of a mistake. In such cases it is not reasonable to expect the plaintiff to have acted before they ceased to be under a disability, or before they knew of the fraud or mistake or could with reasonable diligence have learned of it. And a defendant who has fraudulently concealed the cause of action has no right to repose, for they have only themselves to blame for not being sued in time. Cases in which a defendant is said to have concealed the claim warrant an inquiry into the causes of delay, both in the interests of justice in the instant case and to limit incentives to conceal claims in other cases. So long as defendants acted unconscionably and plaintiffs are not too readily granted an extension, such inquiries do not confront legislative policy behind the fixed period.

English authorities

[208] Most of the case law bearing upon the interpretation of s 28(b) is contained in the English courts' interpretation and application of s 26 of the 1939 UK Act. As I explain below, this case law provides authority for the proposition that under that Act, fraudulent concealment captured conduct that did not involve dishonesty or fraud and

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302 *Cartledge v E Jopling & Sons Ltd* [1963] AC 758 (HL) at 771–772 per Lord Reid and Lord Hodson, 773–774 per Lord Evershed, 776 per Lord Morris, 784 per Lord Pearce; and *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721 at [2] per Blanchard J, [69] and [74] per Tipping J, [101]–[102] per McGrath J and [142]–[143] per Henry J. However, ss 23C and 23D of the Limitation Act 1950 create a special limitation regime for actions in respect of the abuse of an infant or in respect of a gradual process, disease or infection injury. This regime confers a discretion upon the court to extend the relevant limitation period.

303 Section 24.

304 Sections 25–27.

305 Section 28.

306 CA judgment, above n 277 (footnotes omitted).

could extend to conduct which could be characterised as reckless in its concealment of wrongdoing, where that reckless conduct was unconscionable in all the circumstances.

[209] *Beaman v ARTS Ltd* was a case concerned with a disposal by the bailee, outside the terms of the bailment.[307] The events occurred against the backdrop of World War II. In 1935, the bailor, Ms Beaman, deposited several packages with the defendants, which they were to store and then at a later date send to her in Istanbul.[308] They sent one package over in 1936, but Turkish border regulations had been made such that the remaining packages could not be sent. The defendants agreed to hold those packages pending further instructions. Years passed, and the bailor provided no such instructions. In 1938, the defendants again contacted her, seeking instructions to insure the baggage and requesting information as to whether there were any very valuable articles in the packages. Ms Beaman did not insure the items, nor stipulate that there were valuable items in the baggage. She said she hoped to return to England, but she never came. War broke out. Early in 1940, she asked the defendants if it was possible to send the packages to Greece. They replied it was, sending her the necessary forms, which she did not complete or return. In June, Italy entered the war against Great Britain and shortly thereafter fighting broke out between Greece and Italy. When the Mediterranean Sea closed, communication between Ms Beaman and the defendants ceased. At the end of 1940, Ms Beaman went to India and remained there until the end of the war. She wrote to the defendants, but they did not receive that correspondence. Ms Beaman thought the packages had probably been destroyed in the bombing of London and made no further inquiry.

[210] What happened to the goods? The defendants had been in rented accommodation. In February 1940, due to the war, the defendants gave up those premises and began paying a third party to store goods bailed to them. The defendant company was controlled by Italian nationals and, also due to the war, their business became vested in the Custodian of Enemy Property. With most of the staff at war, the goods stored by a third party, and the company vested in government control, the

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307 *Beaman v ARTS Ltd* [1948] 2 All ER 89 (KB) [*Beaman* (KB)].
308 At 90.

business was, as the trial Judge, Denning J, put it, "practically at an end".[309] The last remaining staff member, Mr Ingram, was to be called up to serve and wished to resolve the status of the packages. Storage fees were due to the defendants, and by them to the third party. In consultation with Mr Ingram's superior, it was decided to inspect the goods.[310] Mr Ingram thought them worthless, and so the decision was taken to donate them to the Salvation Army. Before that occurred, Mr Ingram helped himself to a suitcase for his own use. Denning J recorded that the suitcase "was produced at the trial and was obviously of little value".[311]

[211] In August 1946, Ms Beaman visited the defendants asking after her packages. She was told they had been donated to the Salvation Army.[312] They could not be traced because the Salvation Army's records had been destroyed in the bombing of London. Ms Beaman alleged the packages had contained highly valuable jewellery (although she had earlier failed to identify valuable items and declined to insure the packages).

[212] Denning J said that in assessing the conduct of the defendant, it was "necessary to recapture the atmosphere of 1940. Goods and chattels were then of small concern compared to the lives of men."[313] It was against this overall background that he found that the bailees had acted honestly in disposing of the goods, and otherwise in their actions.[314] Because the Ms Beaman did not discover the conversion of her goods until after the war, the statutory time limit for her action in conversion had expired. The issue at trial was whether the defendants had fraudulently concealed their wrongful conduct, so extending that limitation period. Denning J found on the facts that the defendants genuinely believed that the true owner was not available.[315] He said that for the purposes of both s 26(a) and (b) of the 1939 UK Act (corresponding to s 28(a) and (b) of the 1950 Act) the word "fraud" imported some element of moral turpitude.[316] In this case, since there was no moral turpitude, the fraudulent concealment provision did not apply to extend the statutory time limit.

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309 At 90.
310 At 91.
311 At 91.
312 At 91.
313 At 94.
314 At 94–95.
315 At 94–95.
316 At 94.

[213] That finding — that for the purposes of s 26(b) fraud requires moral turpitude — was overturned on appeal, on the basis that the s 26(b) proviso was not so limited.[317] This decision has therefore long been treated as authority for the Court of Appeal's finding in this case that fraud in this sense can encompass subjective recklessness. However, the majority says *Beaman* is not authority for that principle because only Lord Greene MR mentioned recklessness, and all Judges wrote in language redolent of deliberate and dishonest conduct.[318] It says that the case is better viewed as a case of actual knowledge of wrongfulness followed by deliberate deception or wilful concealment.

[214] I respectfully disagree with that analysis. It is true that the language used by all Judges in the Court of Appeal in *Beaman* at times employed the language of dishonesty. But it is critical that the trial Judge did not find dishonesty.[319] Whilst both Lord Greene MR and Somervell LJ doubted the trial Judge's finding of honesty, they did not substitute a finding of dishonesty.[320] They were each content to proceed on the basis that proof of dishonesty was not necessary for fraudulent concealment — recklessness was enough.[321] The third member of the Court, Singleton LJ, was alone in proceeding on the basis that proof of conscious wrongdoing was required, finding, as he explained, ample evidence of it on his analysis of the facts.[322]

[215] The majority note the variety of ways in which the defendants were reckless.[323] These included a failure to communicate with Ms Beaman to tell her what they had done.

[216] In a recent decision of the United Kingdom Supreme Court, *Potter v Canada Square Operations Ltd*, Lord Reed P reviewed some of the decisions under the 1939

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317 *Beaman* (CA), above n 274, at 569 per Somervell LJ.
318 Above at [106]–[108].
319 *Beaman* (KB), above n 307, at 94–95.
320 *Beaman* (CA), above n 274, at 563–564 per Lord Greene MR and 568–569 per Somervell LJ.
321 At 565–566 per Lord Greene MR (where he treats recklessness as to the wrongfulness of conduct, and reckless failure to disclose that conduct, as sufficient for the purposes of fraudulent concealment) and at 569 per Somervell LJ.
322 At 572.
323 Above at [106].

UK Act.[324] He noted that in *Beaman*, while Lord Greene MR referred to recklessness, he did not define it.[325] Lord Reed P saw this as significant because of the different definitions of recklessness used in the civil and criminal law.

[217] It is true that Lord Greene MR did not define recklessness for the purpose of his judgment. Yet it is plain enough he used it in the subjective sense. He was using it in the context of a section addressing concealment through equitable fraud — it being necessarily implicit that the conscience of the defendant must be affected. As the Court of Appeal in this case observed, in this context, it is reckless to take a risk in circumstances where the defendant knows there is a real possibility of harm should they act or fail to act in a certain way, yet proceeds to run that risk, when, in the circumstances known to the defendant, it was unreasonable to do so.[326]

[218] *Beaman* was a case involving an intentional tort. The principle articulated by Lord Greene MR, that subjectively reckless conduct was enough to invoke fraudulent concealment, has however subsequently been applied in cases in the context of other causes of action.

[219] At issue in *Kitchen v Royal Air Force Assoc* was a solicitor's negligent failure to commence proceedings within time.[327] The fact of the expiry of the time period was kept from the plaintiff for a period of time by an (unfavourable) settlement of the primary claim.[328] It was found that the doctrine of fraudulent concealment applied to extend the time.[329]

[220] Lord Evershed MR said of that finding and its basis:[330]

> I repeat that there is no finding and no justification for any finding of dishonesty as that word is ordinarily understood. But it is now clear that the word "fraud" in [s 26(b) of the 1939 UK Act], is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v ARTS Ltd* that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable

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324 *Potter v Canada Square Operations Ltd* [2023] UKSC 41, [2024] AC 679 at [40]–[49].
325 At [43].
326 CA judgment, above n 277, at [115].
327 *Kitchen*, above n 274.
328 At 570 per Lord Evershed MR and 579 per Sellers LJ.
329 At 574 per Lord Evershed MR, 576 per Parker LJ and 579 per Sellers LJ.
330 At 572–573.

> fraud is a matter which Lord Hardwicke did not attempt to define 200 years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other.

[221] Lord Evershed MR thus confirmed that equitable fraud for these purposes can be established in cases where a "special relationship" exists between the parties, but was also explicit that this does not describe the full extent of the jurisdiction — invoking Lord Hardwicke's famous statement: "Fraud is infinite".[331]

[222] The majority in this case say that *Kitchen* also should not be regarded as an authority for the proposition that subjective recklessness may amount to fraud because the solicitors, whose negligence was at issue in the case, deployed a deliberate device to conceal their own wrongdoing.[332] That being the case, recklessness did not come into it. Again, I disagree. It is possible to speculate that on the facts of the case, conscious wrongdoing (moral turpitude) could have been found, but that was not the basis on which the case was decided by the majority. Lord Evershed MR and Parker LJ each decided the case on the basis of recklessness.[333] While Parker LJ was reluctant to find solicitors to have fraudulently concealed their negligence in this particular sense, he nevertheless accepted the judgment of Lord Evershed MR on the point.

[223] The next English case we were referred to was *King v Victor Parsons & Co (a firm)*, concerning a house built with defective foundations.[334] On appeal, it was not in dispute that the defect was a breach of an implied warranty that the foundations were reasonably fit for the dwelling; however, the defect was not discovered by the plaintiff until after the expiry of the statutory time limit for contractual causes of action.[335] The issue was whether the vendors, who were estate agents, valuers and surveyors practising in the area, had fraudulently concealed the plaintiff's cause of action. The trial Judge's finding was that the defendants ought to have known of the defect

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331 Letter from Lord Hardwicke to Lord Kames regarding the principles of equity (30 June 1759) in Joseph Parkes *A History of the Court of Chancery* (Longman, Rees, Orme, Brown and Green, London, 1828) 501 at 508.

332 Above at [112].

333 *Kitchen*, above n 274, at 573–574 per Lord Evershed MR, with whom Parker LJ agreed at 576.

334 *King* (CA), above n 278.

335 At 33–35 per Lord Denning MR.

and failed to warn the plaintiff of the facts giving rise to the risk, and that was enough.[336]

[224] There were three sets of reasons in the Court of Appeal. Lord Denning MR commenced with a general statement of principles. He said that the word "fraud" in the expression "fraudulent concealment" in the 1939 UK Act was not used in the common law sense but rather in the equitable sense, to denote conduct that would make it "against conscience" for a defendant to avail himself of the lapse of time.[337] If the defendant knowingly committed a wrong not likely to be discovered "for many a long day, he cannot rely on the Statute of Limitations as a bar to the claim".[338] It is sufficient that he knowingly committed it and did not tell the plaintiff — no further active steps need be shown:[339]

> He conceals it by "fraud" as those words have been interpreted in the cases. To this word "knowingly" there must be added "recklessly" … 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 … 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), or a breach of contract (by putting in an insufficient foundation) then he could avail himself of the Statute of Limitations.

[225] Reviewing the trial Judge's finding on knowledge, Lord Denning MR found that the trial Judge put matters too low when he found the vendors ought to have known there was a risk of subsidence. Lord Denning MR instead framed his finding in terms of subjective recklessness.[340] On his analysis of the evidence the vendors did know of a risk of subsidence "and nevertheless they took their chance on it", thereby concealing the cause of action.[341] This was "unconscionable conduct such as to disentitle them from relying on the statute".[342]

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336 *King v Victor Parsons & Co* [1972] 1 WLR 801 (QB) at 808 and 812.
337 *King* (CA), above n 278, at 33.
338 At 33 citing *Bulli Coal Mining Co v Osborne* [1899] AC 351 (PC) and *Applegate*, above n 274.
339 At 34 citing *Beaman* (CA), above n 274, at 565–566 and *Kitchen*, above n 274 (citations omitted).
340 At 35.
341 At 35.
342 At 35.

[226] Megaw LJ found that the defendants did know all of the essential matters, so that no point of law arose as to the proper interpretation of s 26(b).[343] However, he rejected the trial Judge's finding that "ought to know" was sufficient to establish concealment by fraud:[344]

> The defendants say that "ought to know" is not enough. I agree. I do not think that the cases go so far; or that, at least as a general principle and in the absence of very special circumstances, the meaning of "concealed by fraud" should be extended to cover a case where the defendant … did not know the fact or facts which constituted the cause of action against him.

Megaw LJ therefore did not address subjective recklessness, although it is notable that he contemplates that in "very special circumstances" recklessness, in the objective sense (the reference may also have been to negligence), might be enough.

[227] Reviewing the evidence, Brabin J found that the defendants had actual knowledge of the matters the trial Judge had found they ought to have known. The defendants therefore knew of the risk of subsidence due to the foundations utilised.[345] He concluded that their conduct was "unconscionable and reckless".[346] Brabin J was the only Judge to address the existence of a special relationship. He found there was a special relationship of the type referred to in *Kitchen* because of the relationship of vendor and purchaser.[347]

[228] The majority say that all Judges found actual knowledge of the wrong.[348] I do not consider that is correct, and certainly two of the Judges, Lord Denning MR and Brabin J, said they were deciding the case on the basis of recklessness. The explanation of the difference of approach between those two Judges and Megaw LJ may lie in differing views as to what facts were necessary to establish the cause of action — and in particular whether knowledge of damage was necessary. Lord Denning MR and Brabin J seem to have proceeded on the basis that the subsidence completed the cause of action, finding the defendants reckless as to the risk of that occurring. In contrast, Megaw LJ found that the warranty was breached at the

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343 At 36 and 38.
344 At 36.
345 At 41.
346 At 42.
347 At 41.
348 Above at [114] and [116].

time that it was given, because the defendants knew that the foundations were not reasonably fit for the dwelling.[349]

[229] Without excavating which was the better analysis at the time of that decision, it can nevertheless be said that the decision stands as authority for the proposition as stated by Lord Denning MR, that recklessness as to the risk of an actionable wrong may be sufficient knowledge of the cause of action for fraudulent concealment. It can also be said that none of the Judges doubted that recklessness was enough.

[230] The majority's analysis of this trilogy of cases builds on that of Lord Reed P in the decision of the United Kingdom Supreme Court in *Potter*.[350] For the reasons I have set out above, I respectfully disagree with the majority's analysis. It is right to acknowledge that each of these cases concerned very particular facts. It is true also that *Beaman* is by no means a straightforward case. But in light of the judgments of Lord Greene MR and Somervell LJ, it is correct to treat it as authority for the propositions that moral turpitude is not required to prove fraudulent concealment and that recklessness as to the risk of an actionable wrong may be sufficient knowledge for fraudulent concealment. That latter proposition was not doubted in English case law until *Potter*, a case decided under a different statute.

[231] As to when recklessness will be enough, it is noteworthy that in each of the cases discussed above, *Beaman*, *Kitchen* and *King*, the Courts identified some blameworthy conduct on the part of the defendant which concealed the original wrongdoing but was in addition to it. Each of those cases were decided on the application of principles that were broadly stated — principles tied to unconscionability rather than dishonesty.

[232] This approach is consistent with the approach to equitable fraud in other contexts. It is consistent with the long-established understanding of "equitable fraud" as extending beyond dishonest conduct to include unconscionability.[351] What amounts

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349 *King* (CA), above n 278, at 36 and 38.

350 *Potter*, above n 324, at [40]–[49].

351 McFarlane, above n 274, at [8-001] and [8-002], n 16; *Nocton*, above n 274, at 954 per Viscount Haldane LC; *Earl of Aylesford*, above n 274, at 490–491 per Lord Selborne LC as cited in *Nichols*, above n 274, at 227–228 per Cooke P; and *Armitage*, above n 274, at 250–253.

to equitable fraud is not capable of strict exhaustive categorisation because of the multiplicity of circumstances in which the issue of blameworthy conduct giving rise to concealment may arise.[352]

[233] In argument, we were also referred to more recent English authorities (including *Potter*).[353] However, it is important to note that in 1980, the United Kingdom Parliament first amended the 1939 Act as it related to fraudulent concealment,[354] then enacted consolidating legislation — the Limitation Act 1980 (UK) (1980 UK Act). In the 1980 UK Act, fraudulent concealment is dealt with under s 32(1)(b), which postpones the commencement of the limitation period where "any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant". Also relevant, s 32(2) further provided that for the purposes of s 32(1):

> … 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 involved in that breach of duty.

[234] This amendment to the legislation providing for the "fraudulent concealment" exception to statutory limitation periods was preceded by a report of the Law Reform Committee on the limitation of actions.[355] In relation to "concealed fraud", the Committee explained that its essential feature was that "it operates on some degree of blameworthiness on the part of the defendant beyond his mere failure to comply with his legal obligations; the traditional expression is 'unconscionable conduct'".[356] It observed that the title and wording of s 26 were misleading in that s 26 "(i) is not limited to fraud in the common law sense; (ii) embraces recklessness; and (iii) is not limited to cases of active concealment".[357] In this, the Committee echoed the words of Megarry VC in *Tito v Waddell* that for the purposes of s 26:[358]

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352 See above n 351 and *Pioneer Corp*, above n 277, at [54] per Wagner CJ, Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ citing *Performance Industries Ltd v Sylvan Lake Golf & Tennis Club Ltd* 2002 SCC 19, [2002] 1 SCR 678 at [39] per McLachlin CJ, L'Heureux-Dubé, Gonthier, Major, Binnie and Arbour JJ.

353 *Cave v Robinson Jarvis & Rolf (a firm)* [2002] UKHL 18, [2003] 1 AC 384; and *Potter*, above n 324.

354 Limitation Amendment Act 1980 (UK).

355 Law Reform Committee *Twenty-First Report (Final Report on Limitations of Actions)* (Cmnd 6923, September 1977).

356 At [2.22].

357 At [2.23].

358 *Tito v Waddell (No 2)* [1977] Ch 106 (Ch) at 245.

> … as the authorities stand, 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.

[235] The Committee made a recommendation as to how this state of the law could be captured in any consolidation.[359] That recommendation was not, however, adopted; the wording of s 32 set out above was instead utilised. Importantly, the new s 32 was not an attempted codification of the pre-existing law, a matter which Lord Browne-Wilkinson observed in *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd*:[360]

> … the immediate predecessor of section 32 of the Act of 1980 is not section 26 of the Act of 1939 but section 7 of the Limitation Amendment Act 1980 … in [that] amending Act all references to concealment by fraud were deleted and there was substituted the concept of deliberate concealment of relevant facts. This was done deliberately because of the confused effect and misleading terminology of the old equitable doctrine of concealed fraud. In my judgment it is inconsistent with the plain Parliamentary intention lying behind the amendment of the Act of 1939 to continue to construe the Act of 1980 as if it were still a statutory enactment of the equitable doctrine of concealed fraud. The Act of 1980 is not.

[236] For these reasons, cases decided under the 1980 legislation are of limited assistance. It is however necessary to refer to the appellant's reliance upon *Potter*, the recent decision of the United Kingdom Supreme Court.[361] As noted above, Lord Reed P, who was writing for the Court, reviewed some of the case law under the 1939 legislation. He did so to support the Court's decision that under the 1980 legislation, recklessness is not enough for s 32.[362] In the present appeal, counsel for the Council drew heavily on that analysis to support their submission that recklessness does not suffice for fraudulent concealment. However, it is a decision under a different legislative framework, and I therefore take my discussion of it no further.

Canadian authorities

[237] We were also referred to Canadian authorities. The principle that unconscionability is the touchstone for equitable fraud in this context, rather than proof of dishonesty or moral turpitude, is well established in Canada. Four of the eight

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359 Law Reform Committee, above n 355, at [2.24].
360 *Sheldon v RHM Outhwaite (Underwriting Agencies) Ltd* [1996] 1 AC 102 (HL) at 145.
361 *Potter*, above n 324.
362 At [153].

Judges of the Supreme Court of Canada applied *Kitchen* in the case of *Guerin v R,* finding that the Crown could not rely upon a limitation period to bar a claim by an Indigenous Band.[363] Although in that case the Crown had not acted dishonestly or with improper motives, or with knowledge that its own acts were wrongful, it failed to make full disclosure to the Band of a lease entered into by the Crown on behalf of the Band in respect of valuable reserve land.[364] This non-disclosure was found to have concealed the existence of a cause of action and was unconscionable having regard to the fiduciary relationship existing between the parties in respect of the use of the land.[365]

[238] In a later case of *Pioneer Corp v Godfrey*, the issue was revisited by the Supreme Court.[366] That case concerned the certification of a class proceeding against manufacturers of optical disc drives for price fixing. Part of the claim was outside of statutory time limits, and the issue for the Court was whether it was plain and obvious that the action was time-barred or whether fraudulent concealment could extend the time, notwithstanding the absence of a fiduciary relationship.[367]

[239] Writing for the majority, Brown J cited the dicta from Lord Evershed MR in *Kitchen* set out above, in support of the propositions that proof of moral turpitude is not required to make out fraudulent concealment and that it is not possible or appropriate to attempt to exhaustively define the circumstances in which it may be invoked.[368] Brown J said that the inquiry for the Court was whether it was "for *any* reason, *unconscionable* for the defendant to rely on the advantage gained by having concealed the existence of a cause of action".[369] The breadth of that principle lay behind the Court's rejection of a requirement that a special relationship exist between the parties.

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363 *Guerin*, above n 277, at 390 per Dickson, Beetz, Chouinard and Lamer JJ.

364 At 356, Ritchie, McIntyre and Wilson JJ record the trial Judge's finding that the Crown's conduct flowed "from [the Crown's] paternalistic attitude to the Band rather than from any intent to deceive them or cause them harm". At 390, Dickson, Beetz, Chouinard and Lamer JJ find that: "Although the Branch officials did not act dishonestly or for improper motives in concealing the terms of the lease from the Band, … their conduct was nevertheless unconscionable, having regard to the fiduciary relationship between the Branch and the Band."

365 At 390 per Dickson, Beetz, Chouinard and Lamer JJ.

366 *Pioneer Corp*, above n 277, at [51]–[55] per Wagner CJ, Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ.

367 At [25] per Wagner CJ, Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ.

368 At [52]–[53].

369 At [54] (emphasis in original).

New Zealand authorities

[240] As to authorities in New Zealand relating to the application of s 28(b), we were referred to *Inca Ltd v Autoscript (New Zealand) Ltd*, *Matai Industries Ltd v Jensen* and *Wrightson*.[370] As the Court of Appeal observed, and the majority in this case accept, the critical issue as to whether recklessness will suffice for fraudulent concealment has not arisen directly in New Zealand before, as these cases were all concerned with wilful non-disclosure, not recklessness.[371] I do not discuss those cases further although, of course, my reasons necessarily engage with the test extracted from the discussion in *Wrightson*.

The principles to be applied in this case

[241] Based on the foregoing analysis, I conclude that s 28(b) was intended to, and did, carry forward the equitable jurisdiction to relieve against the application of statutory time limits where the existence of the cause of action has been concealed through conduct of the defendant that amounts to equitable fraud. The legislative history of the provision, including the history of its English forebear, supports that conclusion, as does the line of English cases referred to above.

[242] In s 28(b), fraud is not used in the common law sense of that word. It need not entail moral turpitude or dishonesty on the part of the defendant. It need not entail subjective knowledge that the defendant has committed a wrongful act. Rather, it refers to some conduct on the part of the defendant that has the effect of concealing the essential element or elements of the cause of action such that it is unconscionable for that defendant to be able to rely upon a limitation defence.

[243] At least in the case of negligence, that blameworthy conduct must be additional in some way to the wrongful conduct which makes up the cause of action. That must be so, because to find otherwise would fundamentally undercut the statutory time limit for tort claims. But recklessness is different to negligence, because inherent the concept of recklessness is subjective knowledge of risk taking, which engages the

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370 *Inca Ltd v Autoscript (New Zealand) Ltd* [1979] 2 NZLR 700 (SC); *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 (HC); and *Wrightson*, above n 268.

371 CA judgment, above n 277, at [114]; and see above at [103]–[104] per Glazebrook, Ellen France, Kós and O'Regan JJ.

conscience of the defendant. This involves a state of mind which, in the particular circumstances of the case, may mean that the defendant's conduct is blameworthy such that they should not be able to invoke a statutory limitation defence. Negligence is merely a failure to comply with a particular standard of conduct and may not engage the conscience of the defendant at all.[372]

[244] I have limited this analysis to cases involving negligence. Given the multiplicity of causes of action, circumstances and relationships between plaintiff and defendant that the rule must respond to, I do not think it appropriate to attempt a comprehensive account of when the fraudulent concealment definition will be applied. In my view, it is for this reason that the courts applying the English-equivalent statutory provision under the 1939 UK Act resisted the temptation to create a comprehensive definition of equitable fraud.[373]

[245] I do not consider that the language of s 28(b), when interpreted in light of its text, purpose and context, supports limiting its application to cases in which it can be shown that the defendant had actual knowledge or was wilfully blind to the essential facts comprising the cause of action and knew they had committed a wrongful act. It is at least clear that recklessness may be enough in some circumstances. In *Kitchen* and *King*, recklessness was sufficient because special relationships existed between the parties such that acting recklessly was blameworthy. In each of those cases, the defendant's actions kept the knowledge of their wrong from the plaintiff, in the context of a relationship that gave them control over access to that information. That said, the cases make clear that the requisite blameworthiness may be found outside of a special relationship. The essential issue is whether, in all the circumstances of the case, blameworthiness on the part of the defendant, above and beyond the blameworthiness inherent in the negligence, means that it would be unconscionable for the defendant to avail themselves of the statutory limitation defence.

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372 Donal Nolan "Varying the standard of care in negligence" (2013) 72 CLJ 651 at 679.

373 See above at [220]–[221] and [224]–[226].

Majority's objections to a test which includes recklessness

[246] The majority advance several reasons as to why subjective recklessness should not in this case, or indeed in any case, suffice as a basis to invoke the doctrine of equitable fraud. Most of these reasons are addressed above, but it might assist comprehension if I set out, in short order, how my reasons differ on these points.

[247] First, the majority says there are sound policy reasons for clarity in the definition and extent of an exception to a firm, time-based statutory rule of limitation.[374] But on either approach (the majority's or mine) the application of s 28(b) requires a case-by-case analysis. On either approach, questions about the sufficiency of the defendant's knowledge arise.[375] Therefore, setting the threshold at dishonesty does not deliver clarity. As the Court of Appeal observed:[376]

> Cases in which a defendant is said to have concealed the claim warrant an inquiry into the causes of delay, both in the interests of justice in the instant case and to limit incentives to conceal claims in other cases. So long as defendants acted unconscionably and plaintiffs are not too readily granted an extension, such inquiries do not confront legislative policy behind the fixed period.

[248] Second, the majority says that setting the threshold at actual knowledge or wilful blindness ensures that the failure to disclose is unconscionable.[377] The majority says that this approach avoids unjustified condemnation of a defendant acting in complete ignorance of the essential facts and averts the risk of simply assimilating the s 28(b) limitation to the cause of action whenever carelessness is involved.

[249] I agree that the statutory scheme requires that s 28(b) not be given an interpretation such that the exception consumes the rule. As I explain above, on my approach, where the wrongdoing is not deliberate but negligent, a failure to disclose suspicion of wrongdoing will only be unconscionable where there is some additional level of blameworthiness beyond that inherent in the negligence.[378]

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374 Above at [123].
375 CA judgment, above n 277, at [146].
376 At [103].
377 Above at [124].
378 Above at [245].

[250] On the other hand, the error in the majority's approach flows from the attempt to create rules that apply in all circumstances and thereby, it says, avoid being overinclusive. But the majority's comprehensive framework will inevitably result in defendants being able to invoke the limitation period even though it is unconscionable for them to do so. As described above, earlier authority makes clear the case-by-case analysis required to preclude defendants from unconscionably invoking the limitation period.

[251] Third, the majority says that the scheme of the Limitation Act 2010 supports the conclusion that its drafters saw no need to loosen the meaning of fraud to include recklessness.[379] In my view, it is difficult to read the 2010 Act as casting any light on the issue now before this Court. That is because the 2010 Act adopts a very different model — including as a general exception to limitation periods for "money claims" (which include tortious claims for monetary relief) a limitation period starting after a "late knowledge date", which is the date on which the claimant gained knowledge or ought reasonably gained knowledge of the essential facts of the claim.[380] In substance then, it adopted the reasonable discoverability rule, which had been considered and rejected for the 1939 UK Act and the 1950 Act, and which this Court had said was not available under the 1950 Act.[381] Given the adoption of that rule, the equitable fraud exception could have no work to do. The new legislative scheme does not focus on the defendant's conduct — but rather whether the plaintiff knew or ought to have known of particular facts about the cause of action. It is therefore considerably more protective of the plaintiff's rights than the previous regime. If this legislative regime had been in force, it seems very likely that Mr Daisley would have fallen squarely within the "late knowledge" proviso.

[252] As part of this third objection the majority also says that this Court should not now "tinker" with the principles relating to limitation settled under *Wrightson* because the context of the 2010 Act suggests that fraudulent concealment needs to be deliberate.

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379 Above at [125].

380 Sections 11(2)–(3) and 14.

381 *Murray*, above n 302, at [2] per Blanchard J, [69] and [74] per Tipping J, [101]–[102] per McGrath J and [142]–[143] per Henry J.

[253] In response, it must be observed that *Wrightson* did not in any sense settle the law on the point at issue on this appeal. The Court of Appeal was hearing an appeal from a strike-out decision. It upheld the refusal to strike out on the basis of a limitation defence, because there was an arguable case that the defendant knew the relevant facts and an arguable case also that the defendant knew it was under a contractual duty to disclose them to the plaintiff. The Court of Appeal was satisfied that if these facts were established at trial, that would amount to a wilful non-disclosure.[382]

[254] Fourth, and finally, the majority says that in this case there is no injustice in their approach because Mr Daisley could have claimed against the lawyer who gave him defective legal advice.[383] However, the fact Mr Daisley could have claimed against his lawyer is simply not relevant to the question of whether the Council fraudulently concealed his cause of action and acted unconscionably in so doing. That is the issue before us on appeal.

The factual context in this case

The Council's wrongful conduct

[255] The trial Judge found that the Council had statutory duties:[384]

> (a) Under s 35 of the [Resource Management Act 1991 (RMA)] to gather information and keep records of resource consents; and
>
> (b) Under s 322 of the RMA to have reasonable grounds for believing that the circumstances justifying the service of an abatement notice exist …

[256] He further found that these duties provided a basis for holding that the Council owed to the public (including Mr Daisley, potential objectors and other interested parties) common law duties to:[385]

> (c) Exercise reasonable care and skill in keeping the record of resource consents reasonably available for inspection;
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> (d) Exercise reasonable care and skill in the provision of information about such matters; and

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382 *Wrightson*, above n 268, at [43] and [47]–[50].
383 Above at [126].
384 HC judgment, above n 279, at [185].
385 At [185].

(e) Conduct reasonably diligent inquiries into the existence of a resource consent whenever that was in issue.

[257] The Judge found the Council breached its common law duties to Mr Daisley continuously from November 2004 to September 2009 by:[386]

(a) Failing to keep a copy of the 1988 LUC in its register of the current files related to the Knight Road property so as to make it "reasonably available at its principal office";

(b) Failing through its officers to conduct diligent searches for the existence of a consent:

(i) On 21 February 2005 when the first abatement notice was issued;

(ii) When Mr Daisley made the 2005 application for resource consent;

(iii) When the Council opposed Mr Daisley's 2006 application for a resource consent on the grounds that there was no existing consent and required him to publicly notify the application;

(iv) At the time of the subsequent abatement notices and the enforcement application to the Environment Court; and

(v) Every time the Council provided Mr Daisley with an incorrect response to a request for information about the existence of a consent.

The narrative that emerged at trial

[258] It was a significant feature of the trial that none of the Council officers involved in the critical dealings with Mr Daisley were called by the Council to give evidence. One, Mr Barnsley, was uncontactable; one, Mr Lucas, was out of the jurisdiction (it is not clear whether any attempt was made to call him). Ms Hislop was an employee of the Council when the proceedings were issued and discussed giving evidence with the Council's lawyers. The Judge inferred from Council's failure to call her that her evidence would not have helped the Council's case.[387]

[259] When Mr Daisley was considering purchasing the Knight Road land and quarry, the land's owner, Mr Drake, gave him what turned out to be an accurate narrative of facts. The land had been a quarry since 1964 and had been in operation

386 At [23].
387 At [323].

since then. A former quarry inspector gave evidence that sometime between 1988 and 1995 one of the Council's predecessor territorial authorities had been carting metal out of the quarry. The quarry had long been rated on the basis that it was land on which mineral extraction took place. It was clear, from the condition of the site, that there had been quarrying on site in the past.

[260] Mr Daisley requested a land information memorandum (LIM) from the Council prior to settling the purchase of the land. The LIM showed no record of any permit or consent affecting the land. Mr Daisley was not surprised. He believed there were at least existing use rights.

[261] The first abatement notice was issued by the Council on 21 February 2005. A week later Mr Daisley wrote to the Council responding to that statement including the following:

> While I am happy to apply for a resource consent, I find it hard to believe that the council has not issued a consent to the previous owners as the quarry has been in use for 35 years that I know of, and I believe it unlikely that council would condone long-standing non-permitted quarrying for more than three decades. WDC have been collecting rates on it as a quarry all through that time.

[262] At this point, Mr Daisley was asserting the existence of a consent. Mr Daisley followed up with an application for resource consent. In his accompanying letter, while again asserting long-standing quarrying acquiesced to by the Council, he raised the possibility of existing use rights under the RMA. This assertion of existing use rights was, of course, a natural position in the face of Council's assertion that there was no existing consent — an assertion contained in the LIM, but repeated by means of the issue of an abatement notice and the requirement to apply for a resource consent.

[263] Mr Drake, the previous owner of the property, provided a written statement to the Council in support of Mr Daisley's request that the application for resource consent proceed on a non-notified basis. Mr Drake detailed the quarrying that had taken place on the land by his father, and then by himself when he bought the property in 1978. He narrated long-standing use of the quarry, the carrying out of commercial quarrying by the Adams brothers and the likewise long-standing rating of the property on the basis that it was in commercial use as a quarry.

[264] The Council did not pause to check its records in light of this information evidencing long-standing quarrying on the site. The Council rejected the application for resource consent as incomplete on the day it received it. By letter dated 17 March, Mr Grundy on behalf of the Council responded to the matters raised by Mr Daisley. He maintained that Mr Daisley needed a resource consent. He said that having received complaints about the quarrying, the Council was obliged under s 84 of the RMA to ensure compliance with the provisions of the District Plan. As to the claim the site had been quarried by the previous owners, Mr Grundy merely responded:

> The previous owners of the quarry were not issued with an abatement notice as far as I am aware. Council usually becomes involved in these issues when we receive complaints. As far as I am aware no complaints were received about the previous owners' activities.

[265] The initial abatement notice was withdrawn in November 2005 because of a defect, but new abatement notices were issued that same month. In December 2005, the Council issued infringement notices, each notice imposing a fine of $750. Mr Daisley was advised that further activity relating to mineral extraction would result in further infringement notices.

[266] By 2006, Mr Daisley had engaged extensive professional assistance to help him deal with the perplexing situation in which he found himself. He owned a quarry that had been worked for decades, in a regulatory environment that carefully prescribed the circumstances in which such activity could be lawfully conducted (resource consent or existing use rights), and yet the Council claimed it had no record that there was a lawful basis for that quarrying. He filed a fresh application for resource consent. However, engaging planning experts did not assist Mr Daisley in persuading Council *either* that the quarrying was being lawfully undertaken *or* that his resource consent application should be considered on the basis that commercial quarrying had been taking place on the site for decades. In fact, things only became more complex for him.

[267] In March 2006, Mr Lucas sought and obtained a search warrant for Mr Daisley's property. In the affidavit in support of the application, Mr Lucas deposed that a resource consent was required for quarrying of that quantity, but there was no resource consent. He stated his belief that the quarrying activity was in breach of the

RMA and that offences had been committed. That search warrant was executed on 8 March, with police in attendance.

[268] Shortly after, the Council obtained information from the Department of Labour that significant tonnage was extracted from "Drakes Quarry". That information was shown to a neighbour of Mr Daisley, who claimed that the "Drakes Quarry" referred to in those figures, was in fact located elsewhere in the region — on Drake Road — and not on Mr Daisley's property. The Council did not immediately speak to Mr Drake or Mr Daisley about this claimed confusion. It did however make inquiry of Quotable Value (QV), who had collected the tonnage information provided by the Department of Labour. QV concluded that the figures it had collected *may* have inadvertently been in relation to a quarry on Drake Road. But, it said, it could not confirm this disparity, as the records were historical.

[269] In November 2006, Mr Lucas met with Mr Daisley's planning advisors and presented his own conclusion that the extraction records relied upon by Mr Daisley for the quarry were in fact for a quarry on Drake Road. Mr Lucas told Mr Daisley's advisors that it was for them to produce records of extraction volumes, because the Council and QV had no records. He suggested that in light of this information the application for resource consent should proceed on its merits, and not on the basis of existing use rights.

[270] In fact, QV's advice, as set out above, had been more equivocal than represented by Mr Lucas, and no search of the Council records had been undertaken to check this new version of events proposed by Mr Lucas. Moreover, even if the particular figures came from another property, this did not disprove the information the Council had been provided — that commercial quarrying had taken place over a lengthy period of time at the site, as reflected in mineral rates being *levied* and *paid* by the owners, and that the Council had itself used that commercial quarry.

[271] In November 2006, the Council cancelled the mineral rates assessment for the site.

[272] A hearing of the resource consent application took place the same month. The Council opposed the application, asserting in written submissions that there was no resource consent for quarrying activities nor written confirmation of any existing use rights issued by the Council. The Hearings Commissioner therefore proceeded to determine the application on the basis that there was no existing consent. While evidence of existing use was produced, the Hearings Commissioner found that the level of use fell short of the level Mr Daisley wished to extract. On 2 February 2007, the application for a resource consent was declined.

[273] Further abatement and infringement notices from the Council followed over the next two years. At the same time, Mr Daisley and his advisors continued to pursue access to information and material from the Council's records to support Mr Daisley's assertion that there must be a lawful basis for quarrying on the site. In November 2007, through his solicitors, Mr Daisley requested any material documenting consideration of existing use rights by Ms Hislop, the enforcement officer who issued an abatement notice the previous month.

[274] On 10 December 2007, the solicitors again wrote to the Council, on this occasion making a request under the Local Government Official Information and Meetings Act 1987 (LGOIMA) for any information held by the Council regarding mineral extraction or quarrying on the site and any and all information held on file for the property, including historical records. The letter included the following statement: "Pursuant to section 11 of LGOIMA, we request the Council's reasonable assistance in notifying us of any records that may be missing, or archived, or destroyed, relating to the property." In late January, the Council provided 834 pages but did not, notwithstanding the explicit request, search its historical records. Nothing of assistance to Mr Daisley's request was received.

[275] On 31 July 2009, the Council applied to the Environment Court for an enforcement order. Mr Barnsley swore an affidavit in support of that application. He narrated the long history of complaints regarding "unlawful mineral extraction activities" being undertaken by Mr Daisley and his company. The affidavit detailed the procedural history in connection with abatement and infringement notices and the failed application for resource consent. It recorded that from time-to-time Mr Daisley

had asserted existing use rights, but noted that Mr Daisley had never established that the previous owner had worked the quarry, and opined that it was in any case improbable that the level of activity would have been at the level of recent activity. Mr Barnsley also made reference to the very difficult relationship Council staff had with Mr Daisley from their very first interactions.

[276] The commencement of enforcement proceedings prompted Mr Daisley's solicitors once again to request the Council for its historical records. His solicitors requested "all files relating to the quarry operation, including rates, any infringement notices, mineral extraction records etc". This request seems to have been received by a different staff member from those with whom Mr Daisley usually dealt. That staff member accessed the historical records, which contained a land use consent granted in 1988 to the "Adams brothers" to operate a quarry for the extraction of red brown rock at the Knight Road property. They were the commercial operators Mr Drake had identified in his correspondence to the Council supporting Mr Daisley's first application for resource consent.

[277] The existence of this consent was of profound importance to Mr Daisley. It vindicated his position — maintained throughout — that it was highly probable there was a lawful basis for the quarrying on site. If it had been produced in response to the repeated requests made of the Council to search their records, including requests asking them to search for archived material, it would have changed the course of events affecting Mr Daisley's use of the land. That this is so is evidenced by the ease with which the subsequent owner was able to progress their own consent application.[388]

[278] Even with the discovery of the consent, further procedural complexity still lay ahead for Mr Daisley, as is narrated in the judgments of the courts below.[389] I do not rehearse that here.

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388 At [94]; and see CA judgment, above n 277, at [40]–[42].
389 CA judgment, above n 277, at [35]–[40]; and HC judgment, above n 279, at [11].

[279] Because the key Council officers did not give evidence, the Court of Appeal considered that it was not at a disadvantage when making findings regarding the officers' knowledge.[390] I consider that the same is true in this Court.

[280] The Court of Appeal found that the Council officers were subjectively reckless as to the existence of a consent.[391] As the trial Judge found:[392]

> … the Council's officers acted recklessly in assuming the consent did not exist, despite evidence to the contrary, and in failing to make proper inquiries at relevant times, especially when issuing enforcement proceedings.

[281] A finding of subjective recklessness was inevitable. For example, as the Court of Appeal recorded:[393]

> [173] To recap, the Council now accepts that none of its officers searched any Council records for a consent or existing use rights at any time between November 2004, when the LIM was issued, and 25 January 2008, when the Council responded (without finding the 1988 land use consent) to the first official information request from Mr Daisley's solicitors.

[282] The High Court Judge's finding, adopted by the Court of Appeal, was that the Council officers failed to diligently search the files.[394]

[283] As noted above, the failure to conduct the search was negligent. But there were additional circumstances that render Council's conduct unconscionable, so as to amount to fraudulent concealment.

[284] It is important to note that there was a special relationship between the Council and Mr Daisley. He was a member of the class to which the statutory duties set out in the RMA were owed. As the owner of the land, he was *the* member of that class most directly affected by the Council's failure to diligently discharge those duties.

[285] From very shortly after the purchase of the property, Mr Daisley put information before Council which suggested that there was a lawful basis for the operation of a quarry on site — the information from the former owner Mr Drake that

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390 At [163].
391 At [178].
392 HC judgment, above n 279, at [342].
393 CA judgment, above n 277.
394 HC judgment, above n 279, at [23(b)]; and CA judgment, above n 277, at [6].

the Adams brothers had undertaken commercial quarrying onsite, and the long-standing collection of mineral rates for the property by the Council. He initially suggested that lawful basis was provided by a resource consent, and then by existing use rights. Throughout the period from 2005 until the Council finally conducted a proper search in 2009, Mr Daisley and his agents continued to protest that there must be a lawful basis on which the property had been quarried, to provide evidence in support of that proposition and to press Council to, as they understood it, further search their records to check whether there was such a basis.

[286] Council officers did not check the files in light of this new information. They did not check those records before issuing abatement notices (despite the statutory requirement for reasonable grounds for issue), before taking enforcement action, or before swearing an affidavit obtaining a search warrant of the property or an affidavit obtaining enforcement orders. Nor did they check archival records when specifically asked to.

[287] As the High Court Judge and Court of Appeal found, the Council officers made a decision not to search the files for a consent or evidence of existing use. The High Court Judge found that this was because of their view that it was for Mr Daisley to prove a lawful basis for quarrying.[395] Whatever the reasoning, the important point is that a decision not to search was taken. It was taken on multiple occasions and in circumstances where the Council officers knew of evidence suggesting their position was wrong, to the detriment of Mr Daisley.

Conclusion

[288] In light of this finding, was it unconscionable for the Council to invoke a limitation defence? It was. The reckless decision not to search was made although the Council was in a special relationship with Mr Daisley in respect of the particular statutory duties. The ongoing failure to search had the effect of concealing the Council's breach of duty because:

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395 At [331].

(a) the files were the only possible source of information that could clarify the existence of a lawful basis for such quarrying, since the Council was the relevant regulatory body and had a statutory duty to keep records; and

(b) the Council controlled access to the files and thereby controlled access to the evidence establishing the Council's breach of duty.

In this context, it would be unconscionable for Council to invoke the statutory time limit.

[289] For these reasons, I would have dismissed the appeal.

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