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IN THE SUPREME COURT OF NEW ZEALAND SC 59/2024

I TE KŌTI MANA NUI O AOTEAROA [2025] NZSC Trans 6

BETWEEN **WHANGAREI DISTRICT COUNCIL**

Appellant

AND **MALCOLM JAMES DAISLEY**

Respondent

Hearing:	18 – 19 March 2025
Court:	Winkelmann CJ Glazebrook J Ellen France J Kós J O'Regan J
Counsel:	D H McLellan KC, P A Robertson and S O H Coad for the Appellant J A Farmer KC and D J MacRae for the Respondent

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CIVIL APPEAL AND CROSS-APPEAL

MR MCLELLAN KC:

As the Court pleases. McLellan, Mr Robertson behind me, and Mr Coad to the left.

WINKELMANN CJ:

Tēnā koutou.

MR FARMER KC:

If the Court pleases. I appear with my learned friend Mr MacRae for the respondent/cross-appellant, Mr Daisley.

WINKELMANN CJ:

Tēnā korua. Now counsel we sent down a note suggesting an order but that, realising as we did so that you might have come up with an alternative order, so we wanted to give you a chance to have a look at it and see what you thought. It's not a direction, it was a suggestion.

MR MCLELLAN KC:

By happy coincidence that's exactly what my friend and I agreed before the hearing.

WINKELMANN CJ:

Well it was a formal approach, so that's good.

MR MCLELLAN KC:

And as far as the suggested timing I've had a quick chat to my friend now and I would hope to finish my submissions on the main appeal by perhaps 3 o'clock today.

WINKELMANN CJ:

I mean you should proceed on the basis that we have all read quite carefully your submissions, that we've read the main cases that you're relying upon, so we had hoped that you would be able to move more promptly through them,

and we're happy to offer up a half-hour with only very limited interruption to give you a little bit of wind to assist.

MR MCLELLAN KC:

Well certainly that's, I'm going to get into the heart of it reasonably…

WINKELMANN CJ:

Because it seemed there were some core concepts that repeat themselves throughout the submissions.

MR MCLELLAN KC:

Yes, you have my road map which is a simplified version of the written submissions.

WINKELMANN CJ:

So that's just a communication about hope and expectations Mr McLellan. Mr Farmer, do you have anything to say?

MR FARMER KC:

No your Honour.

WINKELMANN CJ:

Go ahead Mr McLellan.

MR MCLELLAN KC:

The core question or core issue relates of course to the interpretation of section 28(b) and the appellant says that the Court of Appeal adopted an unorthodox test for fraudulent concealment and in doing so misconstrued section 28(b). There's been a centuries old understanding of the meaning of "fraud" in the context of limitation, and that's namely wilful, deliberate concealment by the defendant of its actual knowledge of the plaintiff's right to sue the defendant. But that's been replaced by the Court of Appeal's test which provides for the extension of the limitation period through the concealment of a mere risk that a fact might exist which could give rise to a right of action.

Then the second part of what I say is a very unorthodox approach to section 28(b) is that contrary to the same long settled principles requiring subjective knowledge of all the elements of concealment, the Court of Appeal imposed an objective reasonableness standard as to whether the defendant should have taken more steps to determine whether the fact exists, and a clue to why that is an unorthodox approach in that second stage of the test, is that section 28(b) requires that the right of action be concealed by the fraud of the defendant. So I say that without subjective knowledge of all the elements of fraudulent concealment, there can be no extension of the limitation period.

So that is the core of the argument for the appellant and because this is, although we, so much has been written about fraudulent concealment it is easy to forget that this is, at its heart, a statutory interpretation exercise so a starting point is text and policy, and I've started that in the road map, but at 1.1 and in the submissions around, in section 2, and I don't need to dwell too much on this, but of course those principles lying behind limitation rules are central to the interpretation of the fraudulent concealment exception, and as we've said at 6.3 of the written submissions, there are three sets of irreconcilable interests behind limitation, firstly to provide fairness to defendants, and of course that was a central tenet in this Court's decision in the *Credit Suisse Private Equity LLC v Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 decision, and the Limitation Act 1950 secures the wider public interest in justice, access to justice is important, but the Act gives effect to a higher principle, namely the fair administration of justice. There's the risk of evidentiary decay through historic claims being brought late. Public confidence can be eroded because of that. So too if long-established rights are unsettled by dormant claims with the result that the public cannot safely assume that the slate has been wiped clean of ancient obligations. So the key principles of legal certainty, finality, and what some have referred to as repose or these are statutes of peace.

Of course plaintiffs have an interest in vindicating their legal rights but the six-year limitation arrived at under the 1950 Act would narrow exceptions follows centuries of English reforms, later modified by Parliament to meet this

country's conditions, particularly in the Limitation Act 2010, obviously not so much in the 1950 Act which, if you've looked at the Parliamentary materials, you can see that the intention was to follow as far as possible the UK Limitation Act 1939, except with some local alterations. But the text of section 28(b) is identical, word for word, to the UK 1939 section 26.

Finally on these issues of policy, limitation rules don't recognise sympathy. They are strict rules for the very reasons that I have just set out. It's a strict regime with no discretion, in the sense of judicial discretion, to extend time, only very narrow exceptions.

So the written submissions go into a wider sweep of historical developments, and I'll come back and touch on some of the more important ones, particularly with the authorities, but now I think it's useful if I just turn straight to what I say should be the controlling test, in most respects at least, in the three decisions: *Inca Ltd v Autoscript (New Zealand) Ltd* [1979] 2 NZLR 700 (SC) 136, *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 (HC) 150, and finally *Wrightson Ltd v Blackmount Forests Ltd* [2010] NZCA 631 179, a decision of the Court of Appeal.

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If I can dip into *Wrightson* now, which is tab 11. This was, of course, a strike-out decision, but the Court was required to determine fundamental principles relating to section 28(b), particularly in light of the decisions of Justice Mahon in *Inca* and Justice Tipping in *Matai Industries*, and if we start at 39, which is under the heading of "A duty to disclose the facts" which I'll come back to, but just to understand the background to the case at 40, half way down that paragraph, sorry, starting at 40: "It is common ground between the parties that a duty to disclose may arise from a fiduciary relationship between the contracting parties." And in that case the duty arose out of the contract between the parties, and the defendant didn't challenge, this is at 41, the proposition that Wrightson arguably owed Blackmount a duty to disclose the facts that could give rise to a cause of action.

At paragraph 43 and 44, this is where the dispute between counsel has arisen. The defendant submitted that when, "… what Blackmount must establish is that someone within Wrightson made a conscious decision to conceal the essential facts giving rise to the right of action. He has termed that 'wilfulness' and says it involves either active concealment, which he says is not alleged here, or deliberate (passive) non-disclosure…".

Then a very, an important section of the judgment at paragraph 47, referring to what seemed "to be a distinction between counsel's respective positions. But the reality, in our view, is different. If someone within Wrightson knew that Wrightson had breached the contract with Blackmount and knew Wrightson was under a duty to disclose the relevant facts which would have alerted Blackmount to those breaches, then that person's failure to disclose the facts could only have been deliberate or wilful. The focus… 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… If they are established, then the concealment will indeed be wilful."

Then going forward to paragraph 54 where the Court examined Justice Mahon's reasoning in *Inca* and agreed with it, in that passage that is cited from *Inca*, at the beginning of that paragraph there's a reference to the distinction between 28(a) and 28(b), or 26 of the UK Act, which is what his Honour was referring to. "Paragraph (b) covers causes of action other than fraud, and the limitation defence will be barred for the appropriate period either where there is dishonest concealment of the cause of action, equivalent to common law fraud, or where there is non-disclosure occurring in such circumstances as to amount to equitable fraud. *In either case the concealment must be wilful.*"

In the paragraph that follows of the Court of Appeal: "We agree with that passage, which to us is reasonably clear in its meaning. Mr Miles submitted

that the four sentences after the italicised sentence represent a qualification of the statement that 'the concealment must be wilful' and effectively link wilfulness to knowledge." That is the passage starting: "The defendant must know all the facts…" where Justice Mahon respectfully disagreed with the decision in *Moore v Russell Going Ltd*, where the facts were really just of inadvertence by, or negligence by the property developer and where his Honour said: "He could not," that's the property developer, "in my view have wilfully concealed the right of action which he did not know existed."

Then going back to paragraph 55 of the Court of Appeal's judgment. "There is, of course, a link, as we hope we have made clear. The defendant must know all the facts which together constitute the cause of action; if the defendant does not know them, then of course the defendant cannot be guilty of concealment." And I respectfully agree with that statement of principle which anchors the exception into the bedrock of actual subjective knowledge by the defendant of all the facts which constitute the cause of action, namely that the defendant has committed a wrong to the plaintiff, and then has a choice whether to reveal it, disclose it, or conceal it, and if the defendant does the latter, then that is fraudulent concealment.

KÓS J:

What does the word "all" add, if anything?

MR MCLELLAN KC:

The Act refers to the right of action. So it must be the facts, I don't think that "all" means a great deal. It must be the material facts which give rise to the cause of action, and I don't think that one would take a – that this is a test to be applied to laypeople and I don't think that an intention was there to have to loyally an approach to what those facts were, but in general terms they must be facts which the defendant knew that it had a choice whether to reveal or conceal. So they must be the core facts, the material facts, which constitute the right of action.

At paragraph 58 the Court of Appeal turned to Justice Tipping's decision in *Matai*, which can be dealt with briefly, but there is yet another important reiteration of the principle at 57 where Justice Tipping, referring to Justice Mahon's analysis, said that: "...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." A restatement of the same idea.

WINKELMANN CJ:

Mr McLellan, was my recollection of the facts, reading the facts, is that recklessness was not at issue.

MR MCLELLAN KC:

Recklessness wasn't an issue.

WINKELMANN CJ:

No.

MR MCLELLAN KC:

So that is *Wrightson* and that takes us in the road map down to, into the end of 2.1, and I'll come back to discuss the – perhaps if I just touch on that breach of duty point, because obviously in *Wrightson* it was said that the breach of duty was part of the test. *Potter v Canada Square Operations Ltd* [2023] UKSC 41, [2024] AC 679, the UK Supreme Court decision says that it's not an essential requirement. It doesn't matter, in my submission, on the facts of this case because the core fact which the Court of Appeal in this case, what was in issue was the existence of the LUC, the land use consent, and clearly if the Council was aware of the land use consent, then they had a duty to disclose it. So there's no factual issue but in the event that is of assistance in this Court's formulation of this test, and I'll make some brief comments on that point.

WINKELMANN CJ:

Before you do, can I just take you back to that phrase from *Wrightson* which I think is at paragraph 54 or 55. "The defendant must know all the facts which

together constitute the cause of action; if the defendant does not know them then of course the defendant cannot be guilty of concealment." In equity we know that there are different concepts of knowledge. This is not a case about concealment rights and – what do you say if you take into account as to what is knowledge where a defendant is wilfully blind to the existence of that fact could they escape public liability on that basis?

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MR MCLELLAN KC:

Could the defendant escape?

WINKELMANN CJ:

No. So, if the defendant…

MR MCLELLAN KC:

Was wilfully blind?

WINKELMANN CJ:

Yes, was wilfully blind, would that be sufficient, would you accept that sufficient for the purposes of that statement in *Wrightson*?

MR MCLELLAN KC:

If by "wilfully blind" and, of course, it's key always to understand what the facts might be behind the hypothesis such as that because there is some loose language used in some of the decisions where recklessness appears to be equated with wilful blindness, or in *Beaman v ARTS Ltd* [1949] 1 KB 550 (CA) 202, for example, it's really not recklessness at all, it's not even wilful blindness, it's conscious concealment of the right of action but if wilful blindness means that the defendant knows, is conscious of the key facts giving rise to the cause of action but chooses to turn a blind eye to them, then that is unconscionable because the defendant actually knows the truth.

GLAZEBROOK J:

I'm not sure I quite understand the distinction between that and actually knowing?

MR MCLELLAN KC:

There can't be ultimately a distinction between those two concepts so they're – because for the exception to apply the defendant has to know the key facts. The fact that the defendant has not then taken the final stage of making an inquiry, or whatever the facts might be, doesn't matter because the belief that the defendant has is that those facts are true and that he or she is acting unconscionably by keeping those facts from the plaintiff.

WINKELMANN CJ:

So, I think at law wilful blindness is generally not equated with actual knowledge, that it's culpable because you actively avoid knowledge, ostrich-like behaviour.

MR MCLELLAN KC:

Ostrich-like. You know enough for it to be active, for it to be concealment of the facts. Sorry, by "of the facts" I mean of the cause of action because that's what we have to keep coming back to in the words of section 28(b).

KÓS J:

Well, your key fact is the existence of a land use consent granted in 1988. Mr Farmer's key fact is that you were put on inquiry of that. You say that's not enough. That's the nub of the case, isn't it?

MR MCLELLAN KC:

No, that's the difference between us that arises. Not so much in the previous, in the High Court or the Court of Appeal, but following receipt of my friend's road map, I see that the emphasis is now on the evidence that might have – as it might be called of facts which should have put the Council on notice that there may well, as the Court of Appeal put it, might well be a consent in its files somewhere but perhaps if I just dispense of that now. Firstly, those are not

facts which give rise to a cause of action. They are background facts that have no more meaning, have no meaning in equitable fraud principles but they do have meaning in the tort of negligence because they are classic indicia leading to the ought to have known of the existence of a consent therefore the Council should have looked harder but that is a purely negligent standard. The –

WINKELMANN CJ:

So you say they weren't put on inquiry, they should have been put on inquiry?

MR MCLELLAN KC:

They ought to have, they ought to have carried out a more diligent search.

WINKELMANN CJ:

Well, actually can I just ask you that. If they were put on inquiry, would you accept that was enough?

MR MCLELLAN KC:

For?

WINKELMANN CJ:

They were put on inquiry, that given their duties, their public law duties and their statutory duties, would you accept that if they were put on inquiry that was enough?

MR MCLELLAN KC:

For section 28(b)?

WINKELMANN CJ:

Yes.

MR MCLELLAN KC:

No. No, that is simply a negligence standard.

WINKELMANN CJ:

Well, if they knew of facts which suggested the possibility of the existence of a consent but chose, consciously chose not to look?

MR MCLELLAN KC:

Again, that is a negligent standard.

GLAZEBROOK J:

I'm not quite sure where you'd get to, I'm still not quite sure what you say is wilfully blind. Can we relate it to the facts of this case?

MR MCLELLAN KC:

Well –

GLAZEBROOK J:

It may be you say there isn't really a wilfully blind exception because it has to be actual knowledge but you do seem to accept there might be a wilfully blind exception?

MR MCLELLAN KC:

Yes, it's – perhaps it's a matter of terminology as much as anything. The level of knowledge – well we cannot erode too much the wording of section 28(b) otherwise we erode one of the key tenets of limitation rules. So it has to be unconscionable conduct as equity recognises it in this narrow field. Not necessarily another field such as constructive trusts because the centuries old jurisprudence has developed the notion of what equitable fraudulent concealment means and that requires a conscious knowledge of the right of action and a decision, this is a really important part of the test, a decision, an election to conceal rather than to disclose and, as *Wrightson* says, you can only exercise that election if you know of facts which give rise to a cause of action and so they need to be potent facts that actually give rise to the cause of action, and if you call that wilful blindness in some factual settings that's okay, but at the end of the day it has to tick the box of conscious, of actual subjective

knowledge of the right of action and a decision to conceal it which, as I say, that decision can't –

GLAZEBROOK J:

You say the right of action, does that mean they have to be lawyers or?

MR MCLELLAN KC:

No, as I was saying to Justice Kós earlier, that it can't be a lawyerly standard because it is the fraud in section 28(b) the words are the right of action is concealed by the fraud of the defendant and so it is a subjective test and in some of the authorities we see that it has been held sufficient by the Courts that a defendant had an honest belief that what he or she had done was not a wrong. I think perhaps of the – is it the old *Trotter v MacLean* (1879) 13 Ch D 574 (Ch) *501* decision where the defendant had started mining coal underneath his neighbour's property, and there it was held that the parties were in negotiation to grant a licence to do that but the negotiations had not got to the point of finalisation and nevertheless the Court held that because the defendant's mind was relatively – well it was – the defendant thought that a licence would be granted.

KÓS J:

Well there was no concealment in *Trotter* anyway?

MR MCLELLAN KC:

That's true.

KÓS J:

It was an overt act.

MR MCLELLAN KC:

That's true as well although on the point I rely on is that it was also there may have been obiter but it was nevertheless part of the factual findings and, of course, there are other cases to the same effect. The Will which had been concealed from the plaintiff in *Llevellyn v Mackworth* (1740) 1 Barn Ch 445, 27

ER 714, which is in the written submissions, which the defendant didn't know that he actually had in his possessions.

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It was nevertheless, and again of course there couldn't be active concealment there, but these cases are at the other side, at the innocent side of the boundary help to understand, help us to understand where the boundaries are, and for it to be equitable fraud it has to be unconscionable, that's the, as we described it in the submissions, the touchstone of section 28(b).

Just quickly on the duty point, the relevant provision in – the relevant section in the UK Supreme Court's decision is 98 to 101, and I'll just quickly take you to that, which is at tab 25 *[sic]*, *Potter v Canada Square*, and it was a central issue in that case as to whether there was a, whether a duty needed to be owed by the defendant to disclose, and Lord Reed at the top of page 712 of the report, referred to the Court of Appeal finding where Lord Justice Rose stated that: "…inherent in the concept of 'concealing' something is the existence of some obligation to disclose it' (para 75). I respectfully disagree. As was explained at para 67 above, the word 'conceal' means to keep something secret, either by taking active steps to hide it, or by failing to disclose it. A person who hides something can properly be described as concealing it, whether there is an obligation to disclose it or not. For example, an elderly lady who was afraid of burglars might conceal her pearls before going to bed, without any implication that she was obliged to leave them lying in plain sight. In paragraph 99 his Lordship gives the example of Samuel Pepys concealing the contents of his diary by writing in code, but that doesn't imply that he was under an obligation to reveal it to anyone, and as the Court of Appeal in *Wrightson* said, in general terms a tortfeasor doesn't owe a duty, an obligation to his or her victim to disclose the tort.

WINKELMANN CJ:

But might the existence of a duty, might that not bear upon how the Court views the failure to act to make enquiries say when you're on notice.

MR MCLELLAN KC:

I think we've said in the submissions, and certainly in the road map, the short point there that breach of duty can provide evidence of wilful concealment because if a defendant knows full well of a duty, for example, in *Blackmount* to arguably, at least, to disclose that there'd been negligence by *Wrightson* by the pruning of trees, or whatever it was, then that might make it easier for the plaintiff to prove a decision to conceal. But it's evidential rather than – it least in Lord Reed's view, being an essential element, and…

KÓS J:

If there had been a – let's just imagine the only negligence for the Council here was the issue of the LIM, which was the very first of what, by my count, are 16 assertions by your client of the absence of a right to quarry. There might or might not be an obligation to disclose that if you later on discover that the LIM was wrong. But when you have over the period of four years, four and a half years, repeated assertions of an absence of a right to quarry, doesn't a duty to correct emerge from that pattern of behaviour?

MR MCLELLAN KC:

If the defendant became aware of a consent, then there would probably be an obligation to disclose that, at the very least when those opportunities that your Honour has referred to came up.

KÓS J:

Well let's just take the LIM. Imagine that was the only act, and then sometime later you discover that there was actually a land use consent and the limb was wrong. Do you say there was then a duty to disclose that?

MR MCLELLAN KC:

To effectively correct the LIM?

KÓS J:

To correct the LIM.

MR MCLELLAN KC:

I think I would accept that. If what was discovered was the existence of land use consent which of course would directly contradict the contents of the LIM which said no consents.

KÓS J:

Right.

WINKELMANN CJ:

So in this case, in terms of the public duty, you would accept that it was a relevant factor to fact-finding that the Council had these duties to maintain, keep records, and to check them, and you would accept that there are various pieces of evidence which show the Council was put on inquiry that there was a consent of some form to mine including the rating of the land and the assertion that it had been quarried in the past. So these are all things that you say are available to a fact-finder in deciding whether there was a conscious decision not to check.

MR MCLELLAN KC:

In my submission none of those factors reach that level of section 28(b), arguability, so they certainly approach the level of negligence, because they are classic ought to have known facts, but they are not facts – where there were concurrent findings that the, that no council officer knew of the consent, and where the existence or otherwise of the consent was central to the availability of a right of action, in the absence of that fact there couldn't be a decision to conceal or disclose the consent. There were merely risks to put, to use the Court of Appeal's language, but they are in the category of ought to have known facts.

WINKELMANN CJ:

Because the additional fact here is that they believe they didn't have, that it was for Mr Daisley to make the case?

MR MCLELLAN KC:

Yes.

WINKELMANN CJ:

To get consent, and that was an additional factor taken into account.

MR MCLELLAN KC:

The Court of Appeal and the High Court made something of that. In my submission it's a very long bow to draw between saying that the Council, as Justice Toogood held it, erroneously took that position that Mr Daisley had the onus of proving that he had a consent, or existing use rights. It was a long bow to draw between that proposition and that the Council knew that there actually was a consent, and factually it's important to appreciate, of course, that while there appears to have been – well while there have been findings that no officer knew of a consent, the existence of existing use rights may have been a rather more open question, simply because of a possibility for that to be a long historical fact accumulated over time.

KÓS J:

Well they're very different concepts.

MR MCLELLAN KC:

Exactly.

KÓS J:

And the decision below does seem to run them together a bit.

MR MCLELLAN KC:

And in one of the key paragraphs of the Court of Appeal's decision I think it's at 171, they do exact – the Court does exactly that, runs them together, that there was a risk that there might well be a consent or existing use rights, and the existing use rights might be an easier issue because the quarry was being used as a quarry – well not an easier issue factually, but from the perspective of negligence.

KÓS J:

Well no one here was talking about a land use consent because absolutely no one knew about it.

MR MCLELLAN KC:

Correct.

KÓS J:

So everyone was talking about existing use rights. That was the premise on which Mr Daisley thought he was entitled to quarry. He didn't know about the land use consent. Neither did the Council.

MR MCLELLAN KC:

No, but the Council and the historical evidence that my friend relies upon is predominantly about the existence of existing use rights, so from the previous owners of the property that you will have seen.

So at 3.7 of the written submissions we draw together the, what I have described as the exhaustive test for equitable fraud, and they are, of course, only when a defendant deliberately conceals the right of action. The defendant must have actual subjective knowledge of the matters of the right of action and the failure to disclose. The failure to disclose must be to wilfully conceal and nothing short of wilful concealment suffices under section 28(b).

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Then at 2.2 I discuss the or compare rights with the Court of Appeal's decision in the present case, and if we can go to the Court of Appeal's judgment, this is just a taste of the Court of Appeal's judgment. I come back to discuss the facts in particular later on but now if I can start with paragraph 151. We've already discussed this, but just to pinpoint it, the Court of Appeal held logically that: "The concealed fact that was essential to Mr Daisley's cause of action in negligence was the existence of the 1988 land use consent. The consent not only supplied a complete or near-complete defence to the abatement notices

and application for an enforcement order but also authorised quarrying on the scale necessary to sustain the damages sought."

Now there were, of course, issues in the High Court as to how complete a defence it was but over particularly the type of material and the location on the property from which it could be mined but clearly the first sentence of that is really what concerns us and that is logically correct.

Then if we just look at paragraph 164, concurrent findings of both Courts: "We agree with the Judge that the evidence does not show any Council officer who was dealing with Mr Daisley actually knew of the 1988 land use consent. That being so, they cannot wilfully have failed to disclose it" and, with respect, that's a completely correct statement of the law but the case should have ended with that proposition. And his Honour, I'm sorry the Court of Appeal, then goes on to say that his Honour in the High Court reached the same conclusion.

Then if we go back to paragraph 154, again a reiteration of this: "Toogood J was not persuaded that any Council officer actually knew the 1988 land use consent existed until it was found in 2009. There was not sufficient evidence that any of Mr Barnsley, Mr Lucas and Ms Hislop knew about it and deliberately withheld knowledge of it." So, on orthodox principles we have findings, concurrent findings, that the defendant's officers did not have knowledge of the key facts giving rise to the cause of action and nor could they have deliberately withheld knowledge of it for that same reason that they didn't know about it.

Then back to paragraph 165: "The Judge found that Council officers were wilfully blind, which would ordinarily mean that they knew the Council files likely contained a consent and consciously chose not to look for it. As we have explained, that would be at least subjectively reckless and perhaps tantamount to actual knowledge of the consent. However, we do not think that is what the Judge meant. He expressly based the inference on the Council's persistent and, as he saw it, reckless view that it was for Mr Daisley to prove the consent. In our view this reasoning adds nothing to his finding that Council officers acted recklessly."

KÓS J:

And again when we talk about proving the consent, what they're really needing is proving the right to quarry and the frame or reference at the time was existing use rights because the Council, neither the Council nor Mr Daisley, were thinking in terms of consent.

MR MCLELLAN KC:

Correct.

KÓS J:

So, again, that's an example of the two terms being interwoven.

MR MCLELLAN KC:

Used interchangeably. Of course, the focus came back to the existence of a consent in 2009 when the Council was asked to undertake a further search, and then at 2.2(a) of the road map I say that the Daisley recklessness test nullifies *Wrightson* by reasoning that WDC fraudulently concealed the LUC through its negligent failure to search diligently for the LUC, and that's because WDC was found to have fraudulently concealed the LUC because its officers had credible information showing that Council records might well contain evidence of an LUC or existing rights, and that's at paragraph 171 where we find that language indicating the Council records might well contain and note – not might well contain the land use consent but "might well contain evidence of a land use consent or existing use rights." So that's the point that we've already discussed and then –

ELLEN FRANCE J:

Sorry, what are you saying, why do you emphasise evidence of a land use consent?

MR MCLELLAN KC:

Because there are several steps back from this being proof of the existence of a right of action. All this is, is again the language of negligence that they were – and if we have a look at the –

WINKELMANN CJ:

There's not really much to be built on that. Evidence of the existence of a land use consent is evidence of the land use consent, isn't it, so it's not much of a point?

MR MCLELLAN KC:

Well, the words seem to have been used – the word seems to have been used deliberately and it also relates not just to land use consent or existing use rights.

GLAZEBROOK J:

What do you take from that because existing use rights would allow use as well in the same way as that a land use consent would also, why do you say that they would have to know about the land use consent specifically?

MR MCLELLAN KC:

Well they wouldn't. If there were existing use rights then that would be sufficient but the word, and I don't mean to pass the language unduly, but the –

GLAZEBROOK J:

Well, if they knew that there was either a consent or existing use rights and wilfully refused to search for them, what do you say there?

MR MCLELLAN KC:

Well, they didn't know there was a consent because there are positive findings that they didn't know that there was a consent. This case is not based on the existence of existing use rights.

GLAZEBROOK J:

Well, didn't have actual knowledge of it but from the information they had, either it had been quarried in the past totally wrongfully…

MR MCLELLAN KC:

Or there was a consent or there were existing –

GLAZEBROOK J:

Or there was a consent or there were existing use rights?

MR MCLELLAN KC:

Correct, and –

WINKELMANN CJ:

I mean, is there any reason why the finding had to be so narrow as a land use consent? Wasn't the critical issue as to whether there was a lawful basis for the quarrying to be occurring? So it could just have said there quite legitimately Council records might well contain evidence of lawful authority for the quarrying.

MR MCLELLAN KC:

Well, the case has certainly proceeded on the basis that – as to whether the Council deliberately concealed the existence of a land use consent, not whether it concealed existing use rights, and coming back to my friend's road map he –

GLAZEBROOK J:

Well, yes, because it wasn't – the actual quarrying wasn't based on existing use rights, in fact, it turns out but on a land use consent.

MR MCLELLAN KC:

Correct, whereas –

GLAZEBROOK J:

So if somebody – if the Council thought well we think there's a land use consent but we're not going to search for it and then find actually there wasn't a land use consent but it was existing use rights, the person's still in exactly the same position, aren't they?

MR MCLELLAN KC:

The plaintiff is, yes, yes, indeed.

GLAZEBROOK J:

Yes.

MR MCLELLAN KC:

And, of course, those facts, which my friend now relies on more heavily, the evidence of existing use rights effectively were known to both the Council and the plaintiff so they're not facts that have been concealed from –

KÓS J:

Yes, that's important. I mean a lot of this credible information referred to at 171 came from Mr Daisley.

MR MCLELLAN KC:

Correct.

KÓS J:

Including his rating bill.

MR MCLELLAN KC:

He was paying the rates, yes.

KÓS J:

Yes. I mean it's screamingly negligent on your client's part not to have, you know, added up one and one to get two. If you're getting – I mean how could it have been rated commercially on that basis if there hadn't been existing use rights?

MR MCLELLAN KC:

Potentially because there were existing use rights.

KÓS J:

Yes, exactly.

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MR MCLELLAN KC:

But the true answer was not known and critically for this case no officer knew of the existence of the land use consent, and just to round that off in paragraph 171, they, the Council officers were "…on notice that there might

well be an historic consent or existing use rights". So again this language of "might well". Might well exist and that they were "on notice" which again, in my submission, is the language of negligence rather than equitable fraud.

WINKELMANN CJ:

Well that's not generally how cases in relation to equitable fraud proceed on the basis of knowledge, don't they. They treat it as equitable fraud when you're on notice and you wilfully decline, decide not to make an inquiry.

MR MCLELLAN KC:

Well certainly in the context of fraudulent concealment. Actual knowledge is required because without actual knowledge, as *Wrightson* says, you cannot make that election whether to disclose or conceal.

WINKELMANN CJ:

So do you have a case where recklessness is at issue, unlike *Wrightson*, where that point is made?

MR MCLELLAN KC:

Well there are the English cases where the word "reckless" is used, which we've covered in the submissions, and Lord Reed addresses those cases very thoroughly in the *Canada Square* decision and in my submission in none of those cases were the findings based on a standard lesser than wilful concealment of subjectively known facts, and I'll come back to discuss those cases.

WINKELMANN CJ:

So what's said about *Canada Square* is that that's a different legislative framework now but the difficulty you would say that the respondent, that Mr Daisley has is the finding of the Court of Appeal which looks like not wilful blindness but just a failure to enquire?

MR MCLELLAN KC:

Correct. Might well exist. Risk of. On notice of.

WINKELMANN CJ:

That's not the language is it. You took us to the paragraph earlier which is 165, they say that the trial Judge didn't find subjective recklessness.

MR MCLELLAN KC:

Correct, yes.

WINKELMANN CJ:

Because that does, in fact, entail being on notice and not – and could have made enquiries. So that's, the language can be the language both of negligence and of subjective recklessness.

MR MCLELLAN KC:

In my submission the language in paragraph 171 is the language of negligence, and that's before we even get onto the second limb which is the unreasonableness standard, which again is a negligence standard, an objective standard. Which is 2.2(b) of the road map, but after those findings that "might well be" was enough. The next question, this is at paragraph 172 of the Court of Appeal judgment: "The next question is whether, in the fact of that information, it was reasonable for the officers not to search Council records before taking or continuing enforcement action." So what the Court of Appeal appears to have done is apply by analogy the Crimes Act 1961 definition of "murder" where it uses "recklessness" as part of the mens rea electronic monitoring, and as this Court interpreted in *Cameron v R* [2017] NZSC 89, [2018] 1 NZLR 161, that's reasonably consistent with what the Court of Appeal has done in this case, but in my submission it's a wholly inappropriate test to apply to equitable fraud requiring wilful concealment of a subjectively actually known fact.

WINKELMANN CJ:

Sorry, what approach to recklessness are you talking about in this Court's decision in *Cameron*?

MR MCLELLAN KC:

So this is, I'm just finding the reference in the Court of Appeal's judgment and that's at paragraph 150 where *Cameron* is footnoted at 117 where the Court was explaining what, or trying to define "recklessness" and there we see in the second sentence a mixed subjective objective test which aligns largely with the Crimes Act definition as interpreted –

WINKELMANN CJ:

What footnote?

MR MCLELLAN KC:

Sorry, it's 117, and the paragraph is 115. So that's possibly how the Court of Appeal has arrived at the test which it ultimately applied in 172, or adopted in 172, and then applied to the facts in 173 and following. But that was essentially that the Council officers, the Court of Appeal asked the question, or put it at paragraph 174: "There may be circumstances in which Council officers might reasonably rely on a recent search… So the question can be reframed as whether it was reasonable for the officers, knowing of the LIM, not to search the records before taking action to stop Mr Daisley quarrying. We find that the failure to search was unreasonable in circumstances known… for several reasons."

WINKELMANN CJ:

I was just pausing over *Cameron* because it was a drugs case, wasn't it? I'm just surprised to hear it described as a… I thought it was a drugs case.

ELLEN FRANCE J:

It is. The synthetic ones.

WINKELMANN CJ:

Yes, controlled drugs. I was a little bit taken aback.

MR MCLELLAN KC:

Yes, you are quite right. It did refer to section 169B of the Crimes Act in relation to recklessness.

WINKELMANN CJ:

So high enough, serious crimes, but not high enough for section 29(b) *[sic]*.

MR MCLELLAN KC:

Section 28(b).

WINKELMANN CJ:

28(b).

MR MCLELLAN KC:

No, because we're talking about a very different animal, the reasons why Parliament and the courts have adopted a recklessness test for, well Parliament firstly has expressly said that recklessness is sufficient. The court's task was to interpret what recklessness means in that Crimes Act context, and settled on a mixed subjective and objective test for no doubt good policy reasons, but the courts since the 18th century have adopted a very different test I say primarily because of the wording of – well, firstly because of the equitable concept that was developed by the Chancery Courts when there was no statute of limitation applying to equitable cases, and that that concept has come up deliberately through the statute starting with the Real Property Limitation Act 1833 in the UK, which is in our bundle, and then the 1939 Act, but until the 1939 Act the equity courts continued to adopt the same motion of equitable fraudulent concealment by analogy or by obedience, whichever view you take, to the original Limitation Act 1623.

WINKELMANN CJ:

So you're saying that the *Cameron* approach is what's apparent in 172?

MR MCLELLAN KC:

That, given the express reference to it at paragraph 115, and the similarities, that appears to be what the Court has done in 172, and they have then gone on at 174, 175 to say that it was objectively unreasonable because there are no further findings about the state of mind of the Council officers, a line effectively having been drawn under that by the unequivocal earlier findings that no council officer knew of the existence of the consent.

So that takes me to the end of section 2 of the road map, and onto wilful concealment in my submission being the correct test and that the New Zealand authorities and indeed *Canada Square* accurately represent the law as it has been for a great number of years.

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As I say over the page at 3.1 the touchstone for section 28(b) is unconscionability and preventing a defendant from taking advantage of their own wrong, and the relevant section in the submissions is around 5.3 where we survey the older authorities. I might take you to one or two but I anticipate that you're not going to be assisted by overly thorough survey of those cases because in general terms they speak for the notions that I already have made submissions to you on, namely wilfulness means wilful. It is an entirely subjective test and concealment can't occur without that actual subjective knowledge of the relevant facts. I will take you to a helpful summary of the historical position and this is Brunyate's article which is at tab 38.

KÓS J:

Why in this context is knowledge of a risk of extant rights not a relevant subject to a knowledge of relevant fact? Why is risk not a relevant fact?

MR MCLELLAN KC:

Because it is – because the Act requires fraudulent concealment of the right of action and the fact that there is a risk that you may be on notice of does not amount to the concealment of a right of action. I deal with that later in the written submissions when we talk about those. You might recall there are a couple of English authorities. There was one, *Brocklesby v Armitage & Guest* [2002]

1 WLR 598 (CA), which were then rejected resoundingly in the House of Lords decision in *Cave v Robinson Jarvis & Rolf (A Firm)* [2002] UKHL 18, [2003] 1 AC 384 250 because effectively what they were saying was that because a surgeon, for example, knew of the risk that he or she may have acted negligently that that might be sufficient because in how the House –

WINKELMANN CJ:

That's a different kind of scenario though, isn't it, because every professional knows that there's a risk that acting negligently and do their best to avoid it?

MR MCLELLAN KC:

And that's the point that we make in the written submissions that, as it was put in *Cave*, if that were the test, which I say that Daisley does represent, then defendants would have no choice but to defend themselves on the merits of the case in order to have a limitation defence. They'd have to show that they weren't negligent in order to have a limitation defence.

WINKELMANN CJ:

Well, sometimes you do have cases where people have to defend themselves on the merits of the case to succeed with their limitation. That's the ones that survive strike-out.

MR MCLELLAN KC:

That is because there are – there should be alternative propositions. Firstly, proof of negligence and then, secondly, proof that the defendant had acted fraudulently in concealing the cause of action but if you have to have proof of negligence to establish the cause of action and then the test on the limitation exception is whether the defendant was merely negligent as to whether the cause of action existed, then we can see the circularity of that and that it circumvents the purpose of the limitation rules.

WINKELMANN CJ:

But on that point there are authorities to say that the concealment might consist of one of the very – it may be one of the elements of the cause of action, there's not any problem with that fact?

MR MCLELLAN KC:

No, so that would be a *Bulli Coal Mining Co v Osborne* [1899] AC 351 (PC) 233 case so that's really section 28(a) rather than (b). That's where the act itself is fraudulent and by the act itself the right of action is concealed. So that's the distinction that Justice Mahon in particular talked about at some length in the *Inca* decision.

So I was about to take you to the Brunyate decision but I've given you the wrong – the article is in fact at tab 43 and at page 175 of the article. So this is a 1930 article which reviews in considerable detail the position since the 1623 Act was enacted in England and at 175 the learned author goes through that history and he talks firstly about the 1623 Act. The Act was "limited actions of simple contract" so it had no direct reach to equitable causes of action. So, as we will see, the Courts of Equity adopted the 1623 Act where it was in good conscience to do so, not where there was an exception but: "The Act" the author says "was defective in several respects…it made no provision for fraud." The only exceptions it had were for prisoners, married women and perhaps one other, minors. "In particular, it made no provision for fraud, so that it would even protect a defendant who had defrauded the plaintiff so cunningly that his fraud had not been discovered for six years. The Courts of Equity," this is in the last part of that paragraph, "however, adopted the Statute in their own proceedings, and in doing so they established the rule that in some cases, when the defendant had been fraudulent, the period of limitation would only run from the date when the fraud was discovered. It is this adoption of the Statute in equity and the equitable rule that I propose to examine."

Then he goes on to consider the jurisdictions of the Common Law Courts and the Courts of Equity and where there was either exclusive equitable jurisdiction or concurrent jurisdiction the Courts of Equity would apply their own exception

in good conscience to avoid the unconscionable reliance on the very strict terms of the 1623 Limitation Act and it's summed up at 178 half way through that page talking about Lord Redesdale's decision in *Hovenden v Lord Annesley* (1806) 2 Sch & Lef 607 and –

WINKELMANN CJ:

What page, sorry?

MR MCLELLAN KC:

Sorry, page 178 and a little over half way down he says: "The cardinal difference" in those two cases "results appears when we consider the question of fraud. On the first interpretation the Courts of Equity are bound by the Statute as firmly as they would be if suits in equity were expressly included in it and to introduce an exception in cases of fraud is to graft the exception upon the plain words of the statute. On the second, and it is submitted the correct, interpretation the Courts of Equity, in a case of fraud that the plaintiff has not discovered in time, will act according to the well-known rule that equity does not follow the law when it would be unjust for it to do so and upon this rule will refuse to apply the Statute." And what then develops in the Courts of Equity is the test that I've made submissions to you on, which has consistently been the same rule requiring deliberate wilful concealment of known facts and of the wrong, and in the written submissions we've provided you with, this is at 5.6, some of the older decisions going back to one of the originals, that's *Gibbs v Guild* (1882) 9 QBD 59 (CA) in 1882 and you've –

GLAZEBROOK J:

The article doesn't summarise those cases?

1110

MR MCLELLAN KC:

Gibbs v Guild is dealt with on page 180 of the article. There's also Brunyate's more thorough text, which is also in the bundle of authorities, which does carry out a wider survey of those authorities. So *Gibbs v Guild* is dealt with at 180 of the article. Another leading case, *Booth v Earl of Warrington* (1714) 4 Bro PC

163, 2 ER 111 (HL) on the same page, and over the page at 181 citing Lord Justice Brett: "… the Courts of Equity, on doctrines of their own, sometimes applied, if other circumstances arose, a particular kind of equity. They did not construe the statute so as to give an equity, they adopted an equity which was quite independent of the statute, but which no doubt had an effect on the transactions notwithstanding the statute, that is to say, they said if the existence of the cause of action given by the defendant was fraudulently concealed by the defendant from the plaintiff until a period beyond six years, then they, the Courts of Equity, "would not allow the defendant to prevent the plaintiff from supporting his right to his remedy on the ground that the statute was a bar."

More of the same over the page at 182, dealing with the important decision in *Bulli Coal*, which we have already referred to, that's a section 28(a) fact setting. Then a summary at 188: "The conclusions which we have reached may be summarized as follows: 1. The equitable reply to the Statutes of Limitations in cases of fraud arises from the fact that the Statutes were only in a limited sense binding upon the Courts of Equity. 2. Concealment is not a necessary part of the equitable reply. It is enough that the fraud has not in fact been discovered earlier than the statutory period preceding the action. 3. The balance of authority is against the view…" and that's more to do with the Judicature Act.

The section that deals with wilful concealment being repelled, as the Courts use the word, wilful concealment repelled the 1623 Act in equity, that's dealt with from 7.9 in our written submissions.

There's one other academic text that I want to take you to, which is L A Sheridan, who is referred to at 7.10, whose work is at tab 41. This was published in 1957 after the 1939 Act. If I can just take you to – so just to orientate you, page 167 is the start of a section dealing with the definition of fraud and kinds of frauds, so again a helpful review of the older authorities. Then at 172 under chapter 9, so the way this is, the way his work is structured is to have started with the discussion of the forms of fraud, and then he's

brought it together in what is a classification process effectively culminating in a flowchart at the end which I'll take you to quickly.

WINKELMANN CJ:

I noted the earlier statement at 169 A, under the capital A, then (b): "It may be equitable fraud if the circumstances are the same as in *(a)* except that, instead of a belief in the truth of the statement being absent, there exists a grossly negligent belief in its truth."

MR MCLELLAN KC:

Yes. I was going to take you to that and if I can just stay with 172 for the moment, then I'm going to come back to that when we get to his table, because he makes some other comments about that. It's equitable fraud, this is under Chapter IX (a): "It is equitable fraud for a person who acquires property, knowing that he acquires it subject to some restriction or obligation, to set up a title free from that restriction or obligation." That's his first example.

If we go down to (x)(a): "It is equitable fraud for a person, knowing that another has a cause of action against him, to conceal the existence of the cause of action from that other, so that that other could not with reasonable diligence discover it."

WINKELMANN CJ:

Sorry, where are you?

MR MCLELLAN KC:

Sorry, Roman x, page 172, under the "Chapter IX" heading.

WINKELMANN CJ:

There's so many Roman numbers on the page.

MR MCLELLAN KC:

I know. It is a challenging work structurally, but it's got some good stuff in it. So (a) is the equivalent of our section 28(b) and his (b) is the equivalent of our

28(a), *Bulli Coal* fraud. Then if we come back to the, if we go to his table, which is at his, the page after 180. Perhaps at 180, just so that we understand the terminology that has been adopted, down, just above the heading "F: Fraud Re-classified" the author says that: "The doctrine of concealed fraud…", and then you'll see the footnote cites back to the page that your Honour took me to, 172: "The doctrine of concealed fraud is an example of circumvention, and can be put under head (i) (c)," which is equitable fraud.

WINKELMANN CJ:

Where are those words? I'm finding it hard…

MR MCLELLAN KC:

Just above the bold heading at the bottom.

WINKELMANN CJ:

Just above it, right.

MR MCLELLAN KC:

Roman (x).

WINKELMANN CJ:

Got it.

MR MCLELLAN KC:

Then over the pages his table, where he summarises these ideas, or many of them, it's not exhaustive, but on the left-hand side, to help myself I used a highlighting pen to go down the right path, but you start with "misrepresentation" of fact, "of intention (doctrine of part performance)" and then "statement not believed to be true", so this is talking about, and "deception" lower down. That is actual fraud, common law fraud, and then we go down to "circumvention" and those letters do correspond with the paragraphs, the sections we've been talking about before. "Circumvention" and "doctrine of concealed fraud".

1120

So that's where that lies, and you'll see that the, in the second row next to "statement not believed true", is the "grossly negligent statement" and in brackets "(doubtful)" and we see that over the page and he's put that in the same category as "negligent statement or advice by fiduciary agent," similar category at least, and then over the page, that table is really a schematic of what follows on page 182 where he says under "I. Fraudulent Misrepresentation A. Of Fact," we can see the same things that he's entered in that table and then: "(b) Circumvention. (1) Tort of deceit. (2) Doctrine of concealed fraud. (ii) Grossly negligent statement (doubtful)" and on that I would say that no authority that I am aware of –

WINKELMANN CJ:

Although I note that in Meagher, Gummow and Lehane they cite Justice Mahon's authority for it, don't they, or am I hallucinating that fact? I'll have to find it later. I'm pretty sure that Meagher, Gummow and Lehane cites Justice Mahon's authority for the same proposition. But in any case we can come back to it.

MR MCLELLAN KC:

Yes, well certainly *Inca* was a case of conventional concealed fraud because the printers knew that they were charging the counterclaim plaintiff a higher, a lesser discount than to other of the printers' customers and that's what Justice Mahon held to be fraudulent concealment under section 28(b).

WINKELMANN CJ:

I'm sorry, I'm wrong about that actually. It's not Meagher, Gummow and Lehane, it's not quite that. What text is that? It's Dal Pont at page 329, 711 of the authorities so Dal Pont, I'm not sure what tab that is in the authorities.

KÓS J:

39.

WINKELMANN CJ:

And you would say that's the bleak hole proposition that's been cited as authority for?

MR MCLELLAN KC:

Is this the – this is at 15.32?

WINKELMANN CJ:

Yes, and it's footnote 124.

MR MCLELLAN KC:

Yes. "Yet case law envisages that fraudulent concealment can arise from the manner in which the act that gives rise to the right of action is performed" so that's *Bulli Coal* "against the backdrop of a legal duty to disclose the information, and is not confined to instances of active concealment of the right of action once it has arisen." So that is *Inca* but all that's saying is that it includes cases of passive concealment but that still requires the passive concealment to be against the actual subjective knowledge of the right of action and of the wrong.

WINKELMANN CJ:

And it cites *Beaman* and there's an example of it.

MR MCLELLAN KC:

Well, it is talking about fraudulent concealment, which I say is the conventional notion that we're talking about because it requires wilfulness, and when we get to *Beaman* we'll see that *Beaman* was indeed a case of wilful concealment of a known wrong.

KÓS J:

Just to go back to Sheridan, that analysis, that tabular analysis, has that attracted much support in the authorities? I mean I know Sheridan's work but this is new to me so it seems to be a bit of a rabbit hole.

MR MCLELLAN KC:

Possibly. All I'm really doing is that with both Brunyate and Sheridan they have drawn together the historical strands through what was then nearly 300 years of equity to show what the categories of, what the recognised categories of equitable fraudulent concealment were so that's all I'm – so it's really a helpful collection of those authorities.

KÓS J:

Right. I think we have to see how that's applied in the more modern authorities really.

MR MCLELLAN KC:

Correct, although I would say that with the – once we get through some of the later English authorities and get into the more settled territory of particularly the House of Lords' decision in *Cave*, and the very thorough analysis by Lord Reed in *Canada Square*, then I will say that there is in fact consistency over the centuries but with one or two bumps along the road.

WINKELMANN CJ:

In terms of Sheridan, can you take us to where the author discusses the cases which he draws the principle that that extension, the gross negligence is doubtful? That must appear in the text, I assume, preceding text, or did he just – I imagine he can't just include that authority?

MR MCLELLAN KC:

On my search the only references to gross are in those three. So the page 172 that you took me to, your Honour, and then the table and then the sort of classification list on page 182.

WINKELMANN CJ:

I imagine he must have discussed the earlier material because that's the way the test goes, isn't it?

MR MCLELLAN KC:

I'll come back to that, your Honour, once I've had a chance to consider that point.

So I'm in the road map at this point at 3.2(c), which I can summarise given the depth we've already gone into, but the *Lleveylln* case used the words: "Voluntary concealment required, active concealment of an intentional wrong qualifies; but a defendant is also fraudulent if they knowingly commit a wrong and stay silent (*Bulli Coal*). Courts distinguish between 'ignorant or wilful, innocence or fraudulent'." So the former not falling within the exception, the latter falling within it. That's *Bulli Coal* and *Re McCallum* [1901] 1 Ch 143 (CA) uses the words – in fact I might just take you very quickly to *McCallum* which is *Re McCallum*, tab 27, 457 in the bundle, and this was a case where the mother had executed a deed that would convey the house to the daughter but she gave it to her solicitor with the instructions that if she, this is at page 144 of the report, down in the last paragraph: "I want you to do me the favour of taking charge of the enclosed papers unopened and keeping the envelope till I require it. At my death it is still to be retained for Emily until her father's decease, after which it is to be given to her, provided she is not then the wife of X., as, should that be the case, I never intend to benefit either of them." So clear instructions and the question was whether this amounted to –

WINKELMANN CJ:

Was she the wife of X at this point?

1130

MR MCLELLAN KC:

No, no, that would make it an even more explicable instruction, and we can see counsel's arguments at 147, this is counsel for the plaintiff: "Of course mere ignorance on the part of the real owner would not be enough to prevent the statute running," the plaintiff being the daughter "but for the purpose of s. 26 there may be a fraud, even though the person who does the act honestly believes it to be right. This is not like an action of deceit in which the plaintiff must prove conscious fraud."

And the finding of the Chief Justice Lord Alverstone starting at 149, about four lines down: “Upon the facts I come to the conclusion that there was on the part of the mother a concealed fraud within the meaning of s. 26 of the Real Property Limitation Act, 1833. I think the mother intentionally concealed from the daughter that she had given her the house, with the intention that the deed of conveyance should not become known to her except in certain events.”

And the majority of the argument, the discussion over the page is about whether the fraud had to be the fraud of the defendant which under our Act is not an issue because it's explicitly the defendant, but perhaps as just reinforcing the subjective nature of the test for fraud in the second paragraph half way down the page: “I read the words ‘may have been deprived by such fraud’” in the act “as intended to point to the action of the person who is seeking to rely upon the statute…”. So it ought to follow from that that the plaintiff must prove fraud on the part of the defendant which means wilful fraud, subjective fraud.

Just towards the bottom of that page citing the *Petre v Petre* (1853) 1 Drew 371, 61 ER 493 decision which we've included in our submissions: “… and when Vice Chancellor Kindersley in *Petre v Petre* was considering the meaning of the same section, he used these words: ‘It does not mean the case of a party entering wrongfully into possession; it means a case of designed fraud, by which a party, knowing to whom the right belongs, conceals the circumstances giving that right, and by means of such concealment enables himself to enter and hold.’”

Then at 3.3 I say that: “Recklessness does not qualify as equitable fraud. For example, in *Trotter*” which is at tab 30, this is another mining case –

GLAZEBROOK J:

Maybe after the adjournment.

MR MCLELLAN KC:

I'm sorry. Yes, I think we’ve probably had enough.

WINKELMANN CJ:

Yes, sorry, I failed to notice it was the adjournment. That was a polite reminder to me. We'll take the adjournment.

COURT ADJOURNS: 11.33 AM

COURT RESUMES: 11.54 AM

WINKELMANN CJ:

Mr McLellan, it might help to indicate that, for my part at least, going to lots of cases where recklessness is not at issue, to see the same principle restated, is not all that enlightening. But it's for you how you take us through your submissions?

MR MCLELLAN KC:

My purpose in doing so is to understand how historically there has been a coherent and consistent understanding of what is meant by equitable fraudulent concealment, and that requires those elements that I've spoken about in *Wrightson*, and there is just one other case that I would like to draw to your attention where recklessness was referred to, and that is the *Trotter* case that I've already mentioned, which is tab 30, and this is the case where, as the headnote shows –

WINKELMANN CJ:

There's a lot of cases about mines, isn't there.

MR MCLELLAN KC:

I don't know whether this is interesting or not, or whether it's really in the geek zone of the case, but my learned junior has found an entire English treatise solely devoted to mining cases in the 19th century. So we can provide that to you if it would…

WINKELMANN CJ:

No thanks.

MR MCLELLAN KC:

But it was, industrially speaking it was an obviously very significant part of England and that's why it has – and of course the words that are so often used in those cases of "secret" and "furtive", "taking", can readily happen in the mining environment. But as we can see from *Trotter*: "The owner of a mine commenced to work from his own mine into an adjoining mine vested in trustees, in the *bona fide* belief that he was about to obtain from them a contract authorizing him so to work…", and if we just have a look at the argument for the plaintiff which is at 579, we're half a dozen lines down: "In a Court of Equity the question is one of conscience. A reckless dealing with your neighbour's property, though by a mere technicality of law it is not larceny, yet in the view of a Court of Equity is equivalent to it. The *Statute of Limitations* does not apply, and the account ought to be taken during the whole period…", and Justice Fry's decision is at 583, and the relevant part is on the following page 584, just at the bottom of the second to last paragraph: "When fraud or any other equitable circumstance exists, undoubtedly the statute will not apply. Now were the entry and possession of the Defendant in the present case and his trespass fraudulent? In my view they were not. I think that, although no agreement is proved to have been come to between him and the trustees in October, 1871, it is proved that there was a negotiation then, and that there was on both sides the expectation that a bargain or agreement would be arrived at, and, more than that, that there was knowledge in one of the trustees, which I must impute to them all, because it was his duty to communicate it to his fellow trustees, that immediately after [that date], the coal under their land would be worked by the Defendant."

So on the first point clearly that submission of recklessness was rejected by Justice Fry and in its place there is a requirement for fraud in the sense that I've been advancing to you.

KÓS J:

Yes, but there was no recklessness as a matter of fact. It doesn't tell us much about what the position would be had there been recklessness.

MR MCLELLAN KC:

No, perhaps not, but it does expressly, well, implicitly it rejects the submission that recklessness would be sufficient and says on the holding that, in fact, it was an innocent. I understand the point your Honour is making.

That then takes us to 3.4 in the road map and I will give you a, the reference to the Law Revision Commission *Fifth Interim Report* in 1936, which is at tab 44, and the relevant pages are 29 to 31, and the only reason I do that is to show that the Law Revision Committee expressly took into account the leading decisions of *Willis v Earl Howe* [1893] 2 Ch 545 (CA), *Gibbs v Guild*, *Bulli Coal*, *Lynn v Bamber* [1930] 2 KB 72, in arriving at what became the 1939 section 26 fraudulent concealment provision. So I'm doing this simply to demonstrate how these older authorities have traced through into the –

KÓS J:

That's helpful as far as I'm concerned. So can we look at that?

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MR MCLELLAN KC:

Yes, so that's at tab 44. So it's the *Fifth Interim Report – Statutes of Limitation* and the relevant section is from page 29 on the report under the heading "The Effect of Concealed Fraud." The general purpose is set out there and half way through, or towards the bottom of that first paragraph: "It is obviously unjust that a defendant should be permitted to rely upon a lapse of time created by his own misconduct, but the present state of the law is so obscure and pregnant with difficulties that it must be regarded as uncertain whether a fraudulent defendant can in all cases he prevented from setting up the plea… Up to a point the law is reasonably clear."

Over the page at 30, just citing *Willis*. *Willis* by the way was a case that also used the words "concealed" means "facts known to [him]… and designedly concealed… from the real owner." That's at page 552 of *Willis*.

"Much of the ground is also covered by the equitable doctrine that a plaintiff is not to be affected by the lapse of time where his ignorance is due to the fraud of the defendant, and he has had no reasonable opportunity of discovering such fraud… still a matter of doubt and controversy."

Down the bottom of that page: "It seems to be clear, where there is a fraudulent concealment of a cause of action based on fraud, that the equitable rule will prevail at the present day…" That is *Gibbs v Guild*. "But it is still an open question whether, in the case of an action which was formerly only cognizable in a Court of Law, it is an answer to the Statutes to say that, although there has been no active concealment of a cause of action, nevertheless the cause of action itself is fraud and that the plaintiff did not discover the fraud until after the statutory period of limitation had expired."

So this becomes of less relevance for our purposes from that point because that's talking about the distinctions between equitable and – equitable actions and actions at law, and you can see from the provision which is in the recommendation (a) and (b) that there is specific reference to Courts of Equity and that didn't follow through into the final section 26, but my point about this section is that it does adopt the notions of concealed fraud that come through from those leading authorities that I've taken you to, and of course that statute was then directly adopted by the New Zealand Parliament in the 1950 Act.

WINKELMANN CJ:

So in terms of your outline those authorities are the ones you've set out at 3.2(c), or is it elsewhere as well?

MR MCLELLAN KC:

They're in the submissions, so you will find the fuller version from 7.9 through to 7.19 where I finish saying authorities in the early 1900s leading up to the 1939 Act proceeded on the settled principles. In other words conscious concealment of known rights of action.

Then we come to *Canada Square*, this is at 3.5 of the road map –

GLAZEBROOK J:

There doesn't seem to be anything in the material you've just taken us to to support that proposition that you've just given us.

MR MCLELLAN KC:

That there needed to be conscious concealment of…

GLAZEBROOK J:

Yes. Is there anything else that you want to take us to that explicitly says that?

MR MCLELLAN KC:

Well, these cases c consistently refer to intentional concealment, so starting with the section from 7.9 under the heading "Wilful concealment repelled the 1623 Act in equity". Then over the page under the heading "Leading authorities are consistent with wilful concealment test", *Llevellyn v Mackworth*, for example, at 7.14, the concealment "must be a voluntary and fraudulent one". Accidental concealment of facts which the defendant has no knowledge of is not fraudulent.

WINKELMANN CJ:

Sorry, where are you?

MR MCLELLAN KC:

Sorry your Honour, so the sections that I've referred to start at 7.9 and go through to 7.19.

WINKELMANN CJ:

So we'll look at that.

MR MCLELLAN KC:

The particular paragraph I'm looking at is 7.14 where I've referred to *Llevellyn v Mackworth* et cetera, and at 7.16 for example, intentional concealment was endorsed in *Dean v Thwaite* (1826) 21 Beav 621, 52 ER 1000. That's just over the page at 7.18 the important decision of *Bulli Coal*.

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

So then *Canada Square*, which is dealt with starting at 9.4 of our written submissions, and it was in Lord Reed's decision that the concepts, the differing concepts between contemporaneous and concealment and subsequent concealment was outlined, summarised. That's at 9.4 of our submissions.

At 9.5, the point that I've already referred to briefly, that in adopting that test set out in the previous paragraph, the submissions the Court clarified that wilful concealment doesn't depend on violating a duty of disclosure, and the reasoning for that is set out there, and in particular at 98 of the judgment.

WINKELMANN CJ:
That's arguably a significant expansion, isn't it?

MR MCLELLAN KC:
Saying that no duty is required?

WINKELMANN CJ:
Mmm.

MR MCLELLAN KC:
Well in some ways one can see why it's not necessary to have a duty of disclosure, it's not important to my case whether there is or isn't, but as a matter of principle it's the unconscionability of hiding your wrong that matters.

WINKELMANN CJ:
Well yes, my point, why I'm asking you is that one of your submissions is that this would be to extend the – you say it's an extension of the law, and it will be

extremely, create extreme uncertainty, arguably Lord Reed took quite, that was quite a bold step by him to take to dispose of a duty to disclosure.

MR MCLELLAN KC:

Yes it is and I can simply see cases in which it may be too constraining for there to be a requirement for a duty where a plaintiff nonetheless has committed a wrong, knows of it, but has no duty to disclose in the conventional sense that we lawyers might try to understand it, whereas –

WINKELMANN CJ:

Someone is stealing their neighbour's coal, yes.

MR MCLELLAN KC:

Well, yes, although as the Court of Appeal said in *Wrightson*, you can commit torts of that nature and you still have no duty. There's no actionable duty in that sense, the plaintiff could sue you for not disclosing the right of action, and perhaps it's better to look at it in reverse, look at it from a limitation rules perspective and say, well okay, there's no actual breach of a duty but what there is is a finding that it's unconscionable for the defendant to rely on the exception and therefore the election not to disclose disentitles the defendant from relying on the limitation period, and that disentitling language is used in particular in Lord Denning's decision in *King v Victor Parsons & Co (A Firm)* [1973] 1 WLR 29 (CA) case that we'll come to where he said: "It is unconscionable conduct such as to disentitle them from relying on the statute."

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So it perhaps can be seen equally in the sense of an election. You've got a choice between two rights. You can stay silent or you can disclose. If you stay silent you may not be able to be sued for that but you do remove reliance on the limitation defence. That's perhaps one way of seeing it.

KÓS J:

We have a duty is still part of the leading authority rights on which you rely on?

MR MCLELLAN KC:

I'm sorry, your Honour, I missed that.

KÓS J:

The duty element is still part of the leading authority rights on which you rely on?

MR MCLELLAN KC:

Yes, it is and just for context on that, of course, it was not an issue. Neither party argued that there was no duty requirement and it proceeded on the assumption that there was at least an arguable duty owed by *Wrightson*.

KÓS J:

It's a bit harder to see the duty here if the factual situation was an error in the LIM but it's the 15 subsequent assertions by your client of an absence of right that perhaps gives rise to a duty to disclose.

MR MCLELLAN KC:

Potentially.

KÓS J:

But that would depend on knowledge.

MR MCLELLAN KC:

That would require knowledge of the very thing that both Courts have said there was no knowledge of.

KÓS J:

Yes, otherwise what are you disclosing.

WINKELMANN CJ:

Well, you don't dispute there's a duty here though do you because there's a duty on the Council to keep and maintain records et cetera so that is a sufficient duty of the purposes we're talking about, isn't it? That's not where you're fighting your argument I think.

MR MCLELLAN KC:

No, no, I'm not and that's why I say I'm largely agnostic about this point about the duty but no doubt it's a matter of interest to your Honours.

O'REGAN J:

Respondents say that *Canada Square* is not something we should rely on in interpreting the 1950 Act because it's dealing with a different statutory wording, what do you say to that?

MR MCLELLAN KC:

I say that the substance of it is the same as the New Zealand Act. The scheme is the same, its purpose is the same. A different language is being used, particularly the use of the word "deliberate" because of the perception that fraud in the old Act created confusion but the tests adopted, apart from the duty of disclosure, the tests adopted by *Wrightson* and *Canada Square* are on all fours and, as I said, the substance of the text of section 32, the English Act, is the same.

WINKELMANN CJ:

Well, it uses different language and it adds in the word "deliberate" so pursuing the broader equitable concept of fraud.

MR MCLELLAN KC:

It uses the word "deliberate" in place of fraud but – accept where it's a *Bulli Coal* situation where it's an actual fraudulent cause of action but the choice in the other provisions, the equivalent of our section 28(b) was to use the word "deliberate" instead of fraudulent but, as I hope I've showed all of the old authorities and *Wrightson*, when they are talking about fraud, they are talking about wilful concealment, or indeed as *Wrightson* itself said, deliberate concealment. So, in my submission, there's no distance of substance between the provisions.

WINKELMANN CJ:

So, if I may reframe your submission, your submission is that the legislation simply has updated the language to reflect the state of the law, the case law?

MR MCLELLAN KC:

I don't think that it has made any substantive change to the statutory law. It has, as I said, used different language but with similar purposes.

WINKELMANN CJ:

So, again to reframe your submission, you're saying that this isn't a disjuncture in the law, it's a continuity. It's simply framing a new statutory, updated statutory language, the principles that already exist in the case law and so –

MR MCLELLAN KC:

In the pre-1980 –

WINKELMANN CJ:

– there's no need to see it as a new departure?

MR MCLELLAN KC:

No, correct.

KÓS J:

What is the practical impact of removing the duty element in terms of how we should look at the exception? That was a package before. Is there any exception? If we take away one of the limbs, what does that do to the other?

MR MCLELLAN KC:

Well, because the other limbs would remain requiring –

KÓS J:

Unchanged?

MR MCLELLAN KC:

Unchanged because they would still require wilful concealment of that –

GLAZEBROOK J:

I'm just worried that you might not be coming through on the transcript.

MR MCLELLAN KC:

Thank you, your Honour. Because the existing elements of unconscionability based on deliberate or wilful concealment of facts subjectively actually known to the defendant remain the same, and I think that where the duty became relevant is in the election that the defendant has between revealing and concealing, and you can test that by saying well that's certainly where the duty, if there was a duty of disclosure, that's where that would be relevant but in the absence of a duty of disclosure, the defendant's state of mind is still one that him or her making a conscious choice between concealing and revealing and logically that doesn't really require the existence of a legal duty to speak out. Equity would say you have that choice and you've deliberately kept the cause of action from the plaintiff.

WINKELMANN CJ:

Well, isn't there something different in kind though between someone who has a duty to the plaintiff in some way, say arising out of a bailment relationship or a fiduciary relationship or a public law duty, knowing a fact and declining to reveal it to someone who has no existing relationship of care?

MR MCLELLAN KC:

And in a setting like that, which is really *Beaman*, without that relationship there wouldn't be the exchange of property, there wouldn't be the need for the defendant to consider whether – so there wouldn't be a breach of bailment, there wouldn't be a wrong and there wouldn't be a need for the defendant to consider whether they had to disclose the existence of the wrong or not. So, the settings are all fact-dependent but for myself I don't see the necessity for a duty though it will clearly be relevant in cases –

WINKELMANN CJ:

It seems to me Justice Kós' question is quite an interesting one though, isn't it, because the existence of the duty and the nature of the duty you might think

might have a bearing upon what one regards as fraud for the purposes of the Act.

MR MCLELLAN KC:

I don't think it has a bearing or necessarily has a bearing on what is fraud but it has a bearing on the relationship between the plaintiff and the defendant and therefore on whether the defendant exercises the choice whether to disclose or not wilfully and in knowledge of a wrong.

WINKELMANN CJ:

And I think you said earlier you accept that it might be relevant to a factual finding as to whether there was wilful concealment?

MR MCLELLAN KC:

In cases where there is an actual duty to disclose it may be relevant. We've said in our submissions that it may have, may be evidentially relevant but at a level of principle. I don't necessarily see it as being a necessity.

GLAZEBROOK J:

It might be difficult to say you choose not to disclose if you don't think you have a duty to do so and don't in fact have that duty.

MR MCLELLAN KC:

Well, that might be a case – well in a case such as *Inca* where there might be some ambiguity about what the contractual obligations are but perhaps it's just simpler to see it in a case where, or see it as a matter of disentitling conduct.
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So whatever the fact setting is, if the defendant has made a conscious choice not to disclose a known wrong then that may be disentitling in relation to reliance on the Limitation Act.

KÓS J:

Well, when a week ago, Mr McLellan, I accidentally nudged Justice Glazebrook's car with my car, an example of negligence, not of a very gross nature, I went upstairs and revealed that tort to her but I wasn't under a legal duty to do so.

MR MCLELLAN KC:

No, you were not, and if that tort occurred in circumstances where it was not discoverable for many a long day, as the cases say, and you withheld that fact from Justice Glazebrook, wilfully, then that may –

GLAZEBROOK J:

But I'm not sure what "wilfully" adds there, that's the problem, because – I mean I suppose "wilfully" in the sense that Justice Kós decided not to 'fess up…

MR MCLELLAN KC:

He knew what he'd done was wrong. I'm sorry to focus this on you but, you know, your Honour, you –

KÓS J:

The relevance is we're talking about negligence rather than some of these other more high-faluting torts.

MR MCLELLAN KC:

Yes.

KÓS J:

This is garden negligence.

MR MCLELLAN KC:

Quite, and as *Wrightson* said, in response to Justice Glazebrook's point, where a defendant, in at least some circumstances, knows full well what they have done wrong and they stay silent, then that's usually going to be wilful, and so there'll be some cases which pivot the other way where it's the election between

right, knowing that you've done right or wrong, that matters, whereas hitting the car is an easy case.

KÓS J:

Well, you hit the car here, just you hit it about 16 times.

MR MCLELLAN KC:

Sure, but that doesn't alter the principle behind section 28(b). Negligence is still negligence. It's not fraud, and if we were to turn it into something that is fraud then we would be altering the calibration that Parliament has given to section 28(b). So…

GLAZEBROOK J:

So the submission seems to be that if you know you have been negligent and you don't disclose that, that is wilful concealment?

MR MCLELLAN KC:

If you knowingly – there are two parts to it that –

GLAZEBROOK J:

There's no knowingly. You just didn't. You must have meant not to tell them.

MR MCLELLAN KC:

Well, as I say, there –

GLAZEBROOK J:

I have difficulty with the "wilful" element, especially in absence of a duty, because I can understand – although if you don't know you have a duty that comes to the same difficulty, doesn't it?

MR MCLELLAN KC:

Well, I think it may just be easiest to see it in that sense that Lord Denning used, that if you consciously withhold your knowledge of the wrong that you've committed then you disentitle yourself from relying on the Limitation Act.

GLAZEBROOK J:

So you have to know it's negligent, or you have to know the facts that would show it to be negligent? There's lots of very fine distinctions that seem to be being drawn here that I'm having some difficulty with.

MR MCLELLAN KC:

I'm not sure they are fine distinctions because we come back to the wording of the Act at the end of the day and that requires the fraudulent concealment of the right of action. The right of action, and the defendant fraudulently conceals that from the plaintiff. So the authorities have interpreted what "fraud" means in that context, pretty consistently, in my view, and it requires deliberate knowledge of the wrong and withholding it, and beyond that it is the right of action that is being concealed, and that's important in this case or relevant in this case because I say that the Court of Appeal's findings about a risk that a fact might well exist or that there's – might uncover evidence of it if they look harder, that is not the concealment of a right of action.

So just to come back to *Potter v Canada Square*, so at 700 of the report Lord Reed considered the 1980 Act and went on then to survey the leading authorities in some detail, so it is of considerable assistance in understanding the reasons for the decisions and where there were some bumps in the road along the way.

Cave, the House of Lords Decision, is dealt with at 702 of the report and there were differing decisions between Lord Millett and Lord Scott although agreeing as to the meaning of "deliberate" in section 32, and at paragraph 64: "Lord Millett's starting point was that 'Concealment and non-disclosure are different concepts'. Lord Scott disagreed, stating that 'deliberate concealment for section 32(1)(b) purposes may be brought about by an act or an omission', and that the claimant must 'show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information'. I agree with Lord Scott. As a matter of ordinary English, the verb 'to conceal' means to keep something secret, either by taking active steps to hide it, or by failing to disclose it."

Then over at 66: "… Lord Millett treated section 32(1)(b) as being concerned with cases of active concealment, and section 32(2) as covering situations where active concealment was not required and where non-disclosure was therefore sufficient." Then: "Lord Millett found a historical basis for that analysis in the pre-1980 law of concealed fraud, on the view that a distinction could be drawn between cases involving concealment," so again that deliberate active versus passive. "Lord Scott again disagreed, as I shall explain shortly. In my view he was right to do so. Lord Millett was correct in regarding section 32(2) as historically rooted in cases such as *Bulli Coal Mining Co v Osborne*, where a breach of duty was deliberately committed in circumstances [where] it was unlikely to be discovered for some time. But that does not imply that the 1980 Act draws a binary distinction between cases involving active concealment and cases of non-disclosure, … As Lord Scott accepted, a plain reading of section 32(1)(b) encompasses both concealment by taking positive steps and concealment by non-disclosure," which is the position according to *Wrightson* as well under our provision.

Then at 68: "Lord Scott explained this point very clearly: 'A claimant who proposes to invoke section 32(1)(b) in order to defeat a Limitation Act defence must prove the facts necessary to bring the case within the paragraph. He can do so if he can show that some fact relevant to his right of action has been concealed from him either by a positive act of concealment or by a withholding of relevant information, but, in either case, with the intention of concealing the fact or facts in question," and that is, I say, on all-fours with the New Zealand position. Then over the page Lord Reed dealt with –

WINKELMANN CJ:

I just note you haven't taken us to the earlier part where the Court sets out how this, the law, this Act was intended to amend the law, and I wonder if you're going to tell us why we can proceed on the basis that there is in fact continuity even though the Law Reform Committee recommends reform?

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MR MCLELLAN KC:

So that section is at paragraph 50, and a major interest in the, at that time arising from the 1970s were the latent damage building defect cases, and you'll see the references to the *Anns v Merton London Borough Council* [1978] AC 728 –

WINKELMANN CJ:

And the Committee's recommendation was to include reckless breach of duty, but that was not enacted.

MR MCLELLAN KC:

Correct, that's over the page at 52: "The proposed test was therefore whether the right of action was based on a deliberate or reckless breach… not, as subsequently enacted…", well as the Act says. "The committee rejected the idea of a provision to the latter effect as being unrealistic and unduly complex." So essentially a retention of the old principles of –

WINKELMANN CJ:

Have we got the Committee's report in the papers?

MR MCLELLAN KC:

Yes, it's footnoted at 72 of our submissions by memory. No, I'm sorry…

KÓS J:

It's tab 45.

MR MCLELLAN KC:

Thank you your Honour.

WINKELMANN CJ:

I mean if we look at the note of 51 of the submission, of the judgment, it says that actually that the law, it could be enacted in a way which more properly reflected the law which includes embracing recklessness. At 51.

MR MCLELLAN KC:

Yes, and then at 52 the Committee put forward a suggested reformulation which attempted to cure those defects.

WINKELMANN CJ:

And it wasn't enacted.

MR MCLELLAN KC:

And it wasn't enacted.

WINKELMANN CJ:

The critical issue, though, is whether the Committee thought that the law, as it had been applied by the Courts, included unconscionability in that broad sense.

MR MCLELLAN KC:

It doesn't, well what was suggested there would have involved a significant expansion from the 1939 test, and from the authorities that I've reviewed.

WINKELMANN CJ:

This is going to be said against you Mr McLellan, so I'm just raising it, that the Judge is saying that the Committee's assessment of the law as it stood was that unconscionability was given a very broad meaning, and that the Act should be amended to bring it into compliance with the provision as it was interpreted by the Courts.

MR MCLELLAN KC:

Yes, and that maybe because unconscionability was being used in the broader sense rather than the tethered sense. Tethered, that is, to the principles that have come through the authorities and come through in our three New Zealand leading authorities.

WINKELMANN CJ:

Right.

KÓS J:

I mean it's not clear to me where we've seen authority that does embrace recklessness.

MR MCLELLAN KC:

I'm sorry, seen an authority that…

KÓS J:

Where we have actually seen authority which embraces recklessness in the way suggested by the Committee apparently.

MR MCLELLAN KC:

No, and it'll no doubt be suggested for my friend that the best cases for the plaintiff, the respondent are *Beaman* and *Victor v King [sic]* and *Kitchen v Royal Air Force Assoc* [1958] 1 WLR 563 (CA), but as I've already said those cases do not turn on recklessness and, if anything, recklessness seems to have been used in a somewhat undefined sense, because it is a difficult word.

WINKELMANN CJ:

What this suggests is that the Law Reform Committee thought that the Act as applied prior this amendment included and encompassed, the criminal law encompassed, the interpretation of that Act encompassed recklessness and they were recommending the legislation be amended to reflect the Court's interpretation, and the Act wasn't so amended, in fact it was rather amended in the opposite direction, and your submission is to the extent the Committee says that that was how the Act was being interpreted, that's a misapprehension of the common law.

MR MCLELLAN KC:

Except in one or two outlier cases or so, they're the ones I've referred to, like *Brocklesby*, which were then rejected by *Cave* and – but the case, all of the cases that I've referred to I believe, and certainly that triumvirate of slightly misunderstood English cases such as *Beaman*, in fact turned on truly

unconscionable conduct anchored in equitable fraud of the kind that I've discussed, as opposed to some broader concept of unconscionability.

KÓS J:

If you look at page 837 of the English report, which is tab 45, they are basing that recklessness proposition expressly on Lord Denning's judgment in *King v Victor Parsons*, which itself was then based on *Beaman*. We can see that at 2.23, page 837, and then at 2.11 at page 834 where Lord Denning said: "To this word 'knowingly' there must be added 'recklessly': see *Beaman v ARTS Ltd*."

MR MCLELLAN KC:

Correct.

KÓS J:

So that's where they get it from.

MR MCLELLAN KC:

That's where they get it from and you can see at paragraph 2.22 the paragraph that's quoted by Lord Reed, and that "the traditional expression is 'unconscionable conduct'". But to the extent that the authors said what they said in 2.23 on the basis of *Victor King*, I respectfully disagree with that.

Paragraphs 2.23(i) and (iii) are acceptable. "Not limited to fraud in the common law sense." That's orthodox. And: "Is not limited to cases of active concealment." Because, of course, passive concealment is also included.

So I was just in Lord Reed's decision where he comes to a number of other authorities, and in particular *Williams v Fanshaw Porter & Hazelhurst* [2004] 1 WLR 3185.

O'REGAN J:

Where is this in the judgment?

MR MCLELLAN KC:

I'm sorry your Honour. It's at 705 of the report.

O'REGAN J:

What paragraph? 74 is it?

MR MCLELLAN KC:

Paragraph 74 on page 705. We can see the facts quickly explained in paragraph 75, and then at 76 he refers to the three judgments in the Court of Appeal. "Park J noted at para 9 that *Cave* decided that section 32(2) 'required the defendant, not just to know what he was doing, but also to know that it was a breach of duty'." Lord Justice Mance said that *Cave*'s duty "… decided that the wording of section 32(2)… requires a defendant not merely to have intended to do an act which constituted a breach of duty, but also to realise that the act involved a breach of duty… Deliberate commission of a breach of duty involves knowledge of wrongdoing." Lord Reed said: "Those statements are entirely consistent with *Cave*."

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WINKELMANN CJ:

These are all cases he's referring to under the present form of the legislation?

MR MCLELLAN KC:

Under the 1980 Act?

WINKELMANN CJ:

Yes.

MR MCLELLAN KC:

Yes. Then over the page at 706, up the top: "For reasons explained below, in the context of the meaning of 'deliberate', the point made in the first sentence is in my view correct, and of critical importance," namely, on the previous page: "'It is, I think, plain that, for concealment to be deliberate, the defendant must have considered whether to inform the claimant of the fact and decided not to.

I would go further and accept that the fact which he decides not to disclose either must be one which it was his duty to disclose, or must at least be one which he would ordinarily have disclosed in the normal course of his relationship with the claimant, but in the case of which he consciously decided to depart from what he would normally have done and to keep quiet about it.'"

WINKELMANN CJ:

For my part, I mean, the difficulty I have with these cases is that Lord Reed has a consciousness that he's dealing with a changed piece of legislation. The cases you're referring to are under a – attach a great deal of significance to the word "deliberate" which is not in our Act, is it?

MR MCLELLAN KC:

It is not but "fraud" has been interpreted in *Wrightson* to mean just that, deliberate, and in my submission it is entirely consistent with the old case law which we're referred to either "wilful" or "intentional". I don't think there's any distance between those concepts for –

WINKELMANN CJ:

Yes. I just think that, I'm concerned that we're getting – and I know my colleagues are interested in these cases but I just should tell you that I think there is quite a significant difference in the legislative schemes and there's a, you know, going through – we're going a long way away from New Zealand.

MR MCLELLAN KC:

Well, section 32, as I say, well, as you saw yourself, there was a conscious decision not to move to a more expansive definition of what is fraudulent concealment, but to get rid of that language of fraud, because it had caused difficulties in the past although in my submission there is a consistent body of case law that tells us what it does indeed mean.

WINKELMANN CJ:

Although it came from the equitable jurisdiction, didn't it, the language?

MR MCLELLAN KC:

Well, it had to because the Courts of common law had no jurisdiction to depart from the 1623 Act.

WINKELMANN CJ:

Where you've taken us to that history.

MR MCLELLAN KC:

So that is absolutely unashamedly where its genesis is.

KÓS J:

I mean it is a different piece of legislation but perhaps in this particular respect not so different.

MR MCLELLAN KC:

Not – on the facts of this case there's no distance, I say, between the issue, the broad, the key issues that Lord Reed and the others in the Supreme Court had to decide and the present case. There's only…

WINKELMANN CJ:

Well, we can read the case, I think. Is there anything particular thing you wanted to draw our attention to?

MR MCLELLAN KC:

No, no, I'm moving on from that point. The other point, of course, that is relevant arising out of *Canada Square* is that part of the decision rejecting recklessness, and that's dealt with at 9.7 of – sorry, starting at 9.4 but primarily 9.7 of our submissions, and the relevant section of the judgment starting at 43 and this is the section dealing with those English authorities of *Beaman*, *King* and *Kitchen*, and it may suffice to refer to the summary of the cases rather than going into *Beaman* unnecessarily.

At 43 we can see the – obviously there'd been considerable reliance on *Beaman* as in the case before your Honours and that passage where he

referred to “recklessness” but he says: “It should be noted at the outset that there was no argument directed to recklessness in relation to section 26(b),” in *Beaman*, “so far as appears from the report; that Lord Greene MR did not define what he meant by recklessness; that he did not explain the relevance of recklessness to his analysis; and that recklessness was not mentioned in the judgments of the other members of the court.”

Over at 44: “It was in the course of a discussion of Denning J's finding that the defendants had acted from honest motives that Lord Greene MR referred to recklessness. He considered that, in accepting the defendants’ evidence that they had acted in good faith, [the Judge] had misled himself ‘into accepting the protestations of the defendants’ witnesses at their face value’. If the defendants formed the opinion that it would be beneficial to the plaintiff to give away her property, as they claimed, ‘that belief was entertained with a recklessness which I can only attribute to self-deception’. If they believed it was impossible to communicate with her because of wartime conditions, as they claimed, ‘The truth … is that [they], in [their] haste to disembarrass the defendants of a trust, which was at the moment inconvenient to perform, quite recklessly made an assumption which [they] thought would assist them in achieving that object without giving any honest consideration to the question whether that assumption was true or false’. The ‘dominating influence … was the desire to obtain the commercial benefit of disembarrassing themselves of an obligation …’”.

And at 45: “It appears from these extracts that Lord Greene MR considered that the defendants had knowingly acted in breach of their duties as bailees, and, by making no attempt to communicate with the plaintiff, in circumstances where to their knowledge she was reposing confidence in them to perform their duties, had ensured that she remained in ignorance of what they had done. That amounted to fraudulent concealment … So far as I can judge, the defendants’ recklessness in making self-deceiving assumptions to justify their breach of their duties as bailees does not appear to have been an element in the reasoning which led to Lord Greene MR’s conclusion that there had been fraudulent concealment.”

Then over the page, sorry, at the bottom of the previous page: "But he also made it clear that an honest motive didn't matter in any event, as had earlier been decided in *In re McCallum* [1901] 1 Ch 143, stating that 'No amount of self-deception can make a dishonest action other than dishonest; nor does an action which is essentially dishonest become blameless because it is committed with a good motive'." Then he concluded: "The language used by Lord Greene MR is suggestive of conscious wrongdoing, or at least wilful blindness."

Then *King*, which was the defective foundations case, and we have set out that section of the judgment at 47 of Lord Reed's decision in our submissions and, in particular, in the middle – I'm sorry, four lines down: "The cases show that, if a man knowingly commits a wrong (such as digging underground another man's coal); or a breach of contract …, in such circumstances that it is unlikely to be found out for many a long day, he cannot rely on the [Limitation defence] … In order to show that he 'concealed' the right of action 'by fraud', it is not necessary to show that he took active steps to conceal his wrong-doing or breach of contract. It is sufficient that he knowingly committed it and did not tell the owner anything about it." So he's distinguishing between "active" and "passive" non-disclosure. "He did the wrong or committed the breach secretly. By saying nothing he keeps it secret. He conceals the right of action … 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."

1250

And Lord Reed dealt with that over the page at 48: "It is to be noted that Lord Denning MR referred in that passage to a person who acted 'recklessly … Like the man who turns a blind eye… He refrains from further inquiry lest it should prove to be correct'. A person who turned a blind eye, or refrained from further inquiry lest awareness of a risk should prove to be correct, was said to be in the same position as a person who acted knowingly. That would be in accordance with the wider principle according to which equity sometimes

attributes constructive notice… When Lord Denning MR went on to apply the law to the facts, he noted that the developers had disregarded the advice of their architects as to the type of foundations that were necessary, and knew that there was a risk of subsidence, but let the purchaser think that the foundations were properly constructed. Lord Denning MR described that as 'a *reckless* disregard… No doubt it was, but it was also a conscious breach of contract, as the other members of the court concluded… there was an implied contractual term that the foundations were 'proper and workmanlike and… reasonably fit for the dwelling'."

At paragraph 49 his Lordship commented on, as is apparent from the authorities: "… the way in which the courts construed section 26… strained the language of the provision." Referring to *Tito v Waddell (No 2)* [1977] Ch 106: "Sir Robert Megarry V-C commented that '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 it is enough.'" And I note that that decisions is in the my friend's authorities, but clearly his Lordship is not referring to that with any approval.

WINKELMANN CJ:

Can I just ask you, no doubt he says at the end of paragraph 48: "No doubt it was, but it was also a conscious breach of contract, as the other members of the court concluded." Well the wrong was but what about – how does that bear upon – I mean, because the other members of the Court did not rely upon wilful blindness, but how does that bear upon the basis for which they found that there was a fraudulent concealment.

MR MCLELLAN KC:

So that means that on the facts and on the findings consistently across the judgments, there was a conscious breach of contract. In other words the defendant knew that it had breached the contract and concealed that fact from the plaintiff. So they knew that – the developers knew they'd disregarded the advice of their architects. They were told you have to have a foundation of a particular kind. If you don't there's a rubbish dump underneath and the house

will crack or collapse, which is what happened. So they knew that they were disregarding that advice. They knew there was a risk of subsidence, but they let the purchaser think that the foundations were properly constructed. That's classic or fraudulent concealment of a conscious kind, of an unconscionable kind, because it is conscious.

KÓS J:

I can't think of an exact analogy with *King v Parsons*, but I can in relation to *Beaman*. If a bailee decides simply to clear out one of its sheds and is reckless as to whether the plaintiff's property is in that shed, but isn't sure about it, that's distinguishable from what happened in *Beaman* because they were quite sure in *Beaman*'s case that they were getting rid of Mrs Beaman's clothes.

MR MCLELLAN KC:

Correct. They had all the elements of knowledge to understand that she had not given them permission. They remained the bailee of her goods. They knew that they couldn't, that they hadn't been able to get in touch with her, and of course one of the directors of ARTS Ltd decided that one of the packages was, did indeed have some value, so he took it for himself. That's why the combination of the judgments when they are read together of Lord Greene, who is the only one who refers to recklessness, and then Lord Singleton and Lord Somervell make it very clear that they consider that this was indeed moral turpitude of a kind which it would not be conscionable for the defendants to rely on the limitation defence.

KÓS J:

I'm trying to find a parallel with your situation. So the parallel might be the sloppy bailee, as your clients were sloppy about the existence of the existing use rights.

MR MCLELLAN KC:

Negligence has been found in relation to the failure to diligently search the land use consent, but nobody knew that there was a land use consent, and I have

talked a great deal today already, and in the Court of Appeal of course, but it does reduce to that fairly straightforward proposition.

That takes us through *Canada Square* to the hypothetical examples that we've set out 3.6 and in the submissions at 5.7. I think (a) and (b) we have sufficiently dealt with wilful blindness. I've referred to how Lord Reed dealt with it in *Potter* and I'll come back to that when I talk about the Court of Appeal's judgment, but I think that takes us through 3.6.

The points in 3.7 have been demonstrated by *Potter* and *King* and also the House of Lords decision in *Cave* is, I say, quite a significant one in reinforcing the need for deliberate or wilful conduct, as is picked up in *Potter*, and that then takes –

WINKELMANN CJ:

Can I just take you back to your 3.6(c), that isn't, that your description of a wilful blindness there does not accord with the sense in which wilful blindness is used in the law of equity, which doesn't require actual knowledge. It, I mean obviously, because otherwise it'd be actual knowledge, it encompasses being put on inquiry, and a conscious decision not to make that enquiry lest you find out the answer you don't want to receive, or you're fearful of receiving, and you say that wouldn't be moral turpitude but it is regarded as dishonesty at equity.

MR MCLELLAN KC:

Yes, for wilful blindness, to the extent that it is explained by anyone with a great deal of clarity in the authorities, I stand by what I've said in 3.6(c) that it requires actual, as opposed to constructive knowledge of the wrong, constructive knowledge was, of course, rejected by the Court of Appeal as being sufficient here, to which they consciously turned a blind eye to avoid confirming what they know to be true. So they have an honest belief –

WINKELMANN CJ:

Look, can I just ask you, because I think you're answering a different question to what I'm asking. You're taking us back to the authorities which you say mix

up recklessness and deliberate wrongdoing. I'm asking you as a matter of principle should it not encompass wilful blindness as that is commonly understood in the law of equity, which is not actual knowledge, but it is being so put on inquiry that you have to make a conscious – that facts may be, may, if you were to make inquiry you might discover a wrong, or some fact that shows a wrong, so you make a conscious decision not to make those enquiries, and it is the conscious decision not to pursue a line of inquiry because you've got a pretty – you believe that you're likely to find out, you fear you might find out something you don't want to know. It is the moral wrong.

MR MCLELLAN KC:

If you made a conscious decision because you fear the truth, then that's – you essentially believe that the fact that you suspect exists, does indeed exist, and you refrain from further inquiry because you know what you will discover, then that's wilful blindness.

WINKELMANN CJ:

It's actually the law is if you fear. Not believe that the facts are, you fear the facts are.

MR MCLELLAN KC:

Yes, unlike other areas of equity though what is required here is for it to be unconscionable in terms of section 28(b) of the Limitation Act, and mere suspicion cannot be enough. So you have to have knowledge sufficient that you believe that there is a right of action against you but you refrain from making those final inquiries that might confirm it absolutely.

1300

WINKELMANN CJ:

So, really you say wilful blindness is not enough, you say it's actual knowledge?

MR MCLELLAN KC:

It is so close to actual knowledge. If it's not very close to actual knowledge and I'm trying to help here because I understand that there are going to be factual settings that do create challenges but –

WINKELMANN CJ:

Well, what is the gap though because you have to know it, you have to know that you're going to find it out then you know it?

MR MCLELLAN KC:

And that may be the outcome in the majority of cases otherwise you expand the exception beyond what was intended. You then run the risk of doing what the Court of Appeal did in this case which was to say you thought that if you – that there might well be a consent or evidence of a consent, which I say is calibrating it far too much towards negligence.

WINKELMANN CJ:

Why I'm asking you that is because of my point, which is that equity has traditionally regarded wilful blindness, as I've articulated, which is a fear of finding out, as dishonesty.

MR MCLELLAN KC:

And in the context, for example, of a –

WINKELMANN CJ:

And you say in this context not.

MR MCLELLAN KC:

– fiduciary relationship I say that it's calibrated differently under the Limitation Act and to my knowledge no court has adopted a test of that kind which may be appropriate for fiduciary relationships.

KÓS J:

This is not limited to fiduciary.

MR MCLELLAN KC:

No, I understand that.

KÓS J:

The Chief Justice's proposition is much wider than that.

MR MCLELLAN KC:

I understand that but I see nothing in the authorities that have allowed the adoption of a test close to what the Court of Appeal has done here which is to base concealment on the existence of a risk that something might exist.

KÓS J:

You said it can't be done in a lawyerly way so to meet the Chief Justice's requirement they would have to suspect or fear that they were wrong in asserting about the absence of quarrying right, that they had made a gross blunder at some point earlier on?

MR MCLELLAN KC:

Well, we start from the factual position here that they did not know.

KÓS J:

Yes, I understand that.

MR MCLELLAN KC:

And from there the graduations would – well we don't know. We don't know what the answer is.

KÓS J:

Yes, well my test shouldn't terrorise you.

MR MCLELLAN KC:

No, I understand that.

KÓS J:

Because it's quite a high hurdle.

MR MCLELLAN KC:

Exactly. Otherwise you contradict the purpose of section 28(b). So certainly what I can say is that what the Court of Appeal allowed here is far too far removed from the purpose of section 28(b) and it's effectively a negligence standard and wilful blindness on the facts may be available in other cases but certainly not this one because the Court of Appeal has effectively rejected wilful blindness as a possibility. You will recall that they said that the trial Judge didn't counter meant or didn't really mean what he said about wilful blindness. I'm just conscious that we've gone a little over, your Honour.

WINKELMANN CJ:

We have so we'll take the break now but you'll be finished by three I take it because that's quite a generous allocation of time for the main appeal I think.

MR MCLELLAN KC:

Yes, I think I may go a little bit over that but not very much.

WINKELMANN CJ:

I think you should aim not to go over it.

MR MCLELLAN KC:

I will aim not to go over that, your Honour.

COURT ADJOURNS: 1.04 PM

COURT RESUMES: 2.18 PM

WINKELMANN CJ:

Mr McLellan.

MR MCLELLAN KC:

In the road map I am at part 4 on the last page and I think I am able to move through that fairly promptly. Starting with 4 –

ELLEN FRANCE J:

Before you go to that, just going back to the discussion, for example, in the Law Revision Committee's Report about recklessness, et cetera, the Committee refers to Lord Denning talking about recklessness in the context of breach of the duty to disclose as opposed to recklessness more generally. So if you look at that, I think it's at 2.23 – sorry, that might not be the best description of it. Actually, probably better is in *Canada Square* at 106 where the reference is to showing: "… that the defendant was reckless as to its breach of a duty [to disclose]".

1420

MR MCLELLAN KC:

Yes, and that's adopting the subjective test that's referred to in previous sentences.

GLAZEBROOK J:

Can you perhaps pull the microphone over.

MR MCLELLAN KC:

I was just on my way.

ELLEN FRANCE J:

Sorry, just explain that.

MR MCLELLAN KC:

So in the previous sentence the Court's referring to concealment in a subjective sense, in the *R v G* [2003] UKHL 50; [2004] 1 AC 1034; [2003] 3 WLR 1060; [2003] 4 All ER 765, HL(E) sense, which is the next subject of objective criminal recklessness standard, and took, and we can see similarity with our Court of Appeal's reasoning in the final sentence in that she realised there was a risk that it was under a duty to disclose, "… the defendant realised that there was a risk that it was under a duty to disclose the information… and took that risk in circumstances where it was unreasonable to do so."

ELLEN FRANCE J:

So you don't see the Court of Appeal in this case as saying anything different from that?

MR MCLELLAN KC:

No I think it is a broadly similar concept bouncing off the *Cameron* interpretation of the Crimes Act definition of, or use of recklessness. But I, certainly *Canada Square* has rejected recklessness, certainly in that form, and it has – well in any form, and it has stuck to, or reverted to the orthodox view of fraudulent concealment, which is as I believe I have expressed it.

ELLEN FRANCE J:

Yes, I understand that. I was just not sure whether in fact the Court of Appeal in this case had, were taking a broader position, but you say no, it's broadly similar.

MR MCLELLAN KC:

That's how I read it, and I was going to go in this section to 141 of the judgment where they do set out the recklessness test. So I will come back to that.

ELLEN FRANCE J:

Yes.

WINKELMANN CJ:

I think what you're being asked about, and perhaps I'm missing it, is what the recklessness must consist in, what it must subsist in, must subsist in a failure to find out there's been a wrong, or must the recklessness subsist in a failure to communicate a wrong.

MR MCLELLAN KC:

Well I don't accept a recklessness standard per se.

WINKELMANN CJ:

No, but it's open to you to say, well actually there are two errors because the Court of Appeal's adopting an incorrect approach, incorrect standard, recklessness, and it's also focusing on the wrong issue which is discovery of wrong, whereas what it should be focusing on is the duty to communicate.

MR MCLELLAN KC:

It should be focusing on the existence of the consent. Knowledge as to the existence of the consent, and then the decision whether to disclose it or conceal it.

WINKELMANN CJ:

Yes, we see – what Justice France was asking you I think, and I maybe putting this wrong, is your submission is clearly that there has to be actual knowledge of the existence of the consent, because that's the cause of action, and what Justice France was asking you is it's open on this statement in *Canada Square* and possibly the Law Reform Committee's, or whatever they're called now, report to make the submission that furthermore any discussion in case law about recklessness is not in connection with knowledge of the cause of action, but it's actually in connection with the duty to communicate, whether there is a duty to communicate. Recklessness is still whether there's a duty to communicate.

MR MCLELLAN KC:

At the concealment choice end of the spectrum.

WINKELMANN CJ:

Yes.

MR MCLELLAN KC:

Yes, well, I reject that as a tenable proposition simply because there must be a conscious choice to conceal the facts, and as I read paragraph – where the House of Lords is gone on at 108: "For the reasons developed below in the

discussion of the word ‘deliberate’ in section 32(2), I would in addition reject the contention that ‘deliberately’ in this context, can mean ‘recklessly’.”

WINKELMANN CJ:

So on that submission, so if I was to put it, if I was to assume that you are making a double submission then, it would be that you actually have to know that there’s been a wrong, and then you also have to deliberately decide not to communicate it. You can't be reckless in your failure to communicate it.

MR MCLELLAN KC:

No, absolutely.

WINKELMANN CJ:

And on that – if that’s your submission then you would say the Court of Appeal is wrong in another respect, not just adopting a recklessness standard, but also in focusing on knowledge of the cause of action whereas what they should’ve been focusing on is the duty to communicate.

MR MCLELLAN KC:

Well both. So there is the – they have to know of the consent, and they have to make a decision to conceal it, a deliberate decision to conceal it, and where they’ve gone wrong on the second part is in holding that it was sufficient for a reasonableness objective standard to be adopted.

WINKELMANN CJ:

Well you would say on that standard that they’re actually going wrong because they’re not actually even getting to the decision to conceal it. They’re actually focusing recklessness in the first part, which is know of the consent.

MR MCLELLAN KC:

Correct. They can't conceal what they don’t know.

KÓS J:

Yes, that’s the point.

MR MCLELLAN KC:

So it should fall at the first hurdle.

KÓS J:

That's why agnostic about the second.

MR MCLELLAN KC:

Well, yes, although as a matter of principle it's important to get the right, I say, unconscionable standards at both ends of the spectrum. You can't – they're note independent of one another. The choice to conceal has to, it is dependent upon the knowledge of the right of action.

WINKELMANN CJ:

And that cases that do talk about recklessness, which you say is the wrong standard, may in fact be talking about that second part, which is the decision to conceal.

MR MCLELLAN KC:

Yes, and which in *King* the use of that word was effectively said by Lord Reed to be redundant because on the facts of that case there was conscious wrongdoing and concealment. They knew they hadn't followed the design, and they had led the plaintiffs to believe that the design was adequate. Both of which had to be conscious decisions.

WINKELMANN CJ:

And if that's right then adopting, abandoning any notion of duty might change the approach, because recklessness makes sense in the second part. Recklessness can be sensible in the second part if it's based on a duty. You are reckless as to whether you had a duty to communicate or not. But if you don't need a duty the cause of action simply consists of deliberate – the extension is consistent –

MR MCLELLAN KC:

Yes, well that's why the duty part is perhaps a bit of a distraction because the concentration should be on the choice to conceal.

KÓS J:

Yes, because in that situation you have no right of replies.

1430

MR MCLELLAN KC:

Quite. So I just have already dealt with the parts of the Court of Appeal judgment dealing with the fact that no council officer actually knew about the LUC but I want to just build on that with some additional references. Firstly, in the High Court decision at paragraph 307 where his Honour said: "I am not persuaded that any Council officer knew the consent existed until it was found in 2009. A finding that any…" of the officers knew about the consent "…and deliberately withheld knowledge of its existence from Mr Daisley would require substantial proof, rather than an inference based on an assumption that they were competent in the execution of their duty. The evidence of tension between Mr Daisley and some of the Council employees does not take the evidence across the threshold of probability."

Then going slightly deeper into the Judge's reasons for this at 332 his Honour held that: "A reasonably diligent inquiry…would have revealed the existence of the file…" and then lower down that paragraph his Honour said: "I infer, therefore, that such inquiry as was made with the LIM was prepared for Mr Daisley in November 2004, and when Mr Barnsley embarked on the abatement procedure in February 2005, went no further than a cursory search of the Council's then current files in which the existence of the consent may not have been apparent."

Then a few paragraphs along at 335 his Honour's conclusion: "I have found that the Council was negligent in failing to keep a copy of the consent reasonably available when it archived the consent file. I have also found that the Council's officers assumed for the reasons discussed that no consent existed…".

One final reference at 386: “The Council then having reported to Mr Daisley in the LIM that no consent existed, it is also likely, in my view, that that became the Council’s default position. On subsequent occasions when the question of whether or not there was an existing consent was germane to any action taken by the Council, the default position was accepted and no one bothered to carry out a further, more diligent search.”

So the inference from that is that the Council officers relied on the LIM, they obviously did not know of the existence of the consent and they believed that the existence – I'm sorry, they believed that the LIM excluded the existence of a consent and that became their default position. So, Mr Barnsley knew of the LIM and assumed it excluded a consent, therefore no belief that a consent existed. So all of that is simply consistent with there having been no knowledge on the part of the Council that a consent existed.

And then if we bring – if we then go forward to the Court of Appeal’s decision at 141 which is where he sets out the subjective – I'm sorry, where the Court sets out the subjective recklessness test: “We think it plain that subjective recklessness may amount to unconscionable conduct, through the combination of actual knowledge of a fact or circumstances and the exercise of choice about its concealment.” Now, there's not much to take issue with in that test and it isn't actually recklessness because it's speaking of actual knowledge and the exercise of choice about the facts concealment. You have to read their right of action to make it consistent with section 28(b) but I don’t think that the Court was differing on that basis.

Then if we go to 156, which I've already taken you to, but this is where the Court refers to that passage I've just taken you to in the High Court judgment about the default position being assumed that there was no consent: “Turning to equitable fraud, the Judge stated that it was likely that no one searched the historic records when the LIM was sought in 2004 and thereafter that became the Council’s ‘default position’”.

Then at 165 there's that paragraph again, just for completeness, that I've already taken you to about how the High Court Judge found that the Council officers were wilfully blind but against that background the Court of Appeal says, I think rightly: "However, we do not think that is what the Judge meant. He expressly based the inference on the Council's persistent and…reckless view that it was for Mr Daisley to prove the consent."

So, there is ample support in the factual findings in both Courts that there was simply no basis for a finding of wilful blindness, or indeed recklessness I say, because there was an honest belief that there was no consent based at least in part on the fact that the search done for the LIM found no consent and that became the Council's default position. Negligence but no more.

And then when we – I can skip over points 4.2 and just go really to the concluding issue which is then to go to the findings in the Court of Appeal judgment on recklessness where at 170 the Court has referred to those background facts that we've talked about, historic quarrying et cetera, evidence given to the Hearings Commissioner that rock had been quarried over many years and then the conclusion that's clearly linked to the previous paragraph. The conclusion that's reached in 171 on the basis of the previous paragraph is that: "Council officers were provided with credible information indicating that Council records might well contain evidence of a land use consent or existing use rights… They were on notice…that there might well be an historic consent or existing use rights." So, in my submission, that falls well short of any test – well it falls short of the right test for unconscionable fraudulent concealment of a right of action for the reasons that I've already touched on.

Then the final point, of course, flows from the test in 172 which is an objective reasonableness test which again has no support in the authorities, is contrary to the previous leading authorities in this country and certainly contrary to cases such as the House of Lords in *Cave* and the UK Supreme Courts in *Canada Square*.

So with time in hand those are my submissions.

WINKELMANN CJ:

Well done.

MR MCLELLAN KC:

Thank you, your Honour.

WINKELMANN CJ:

Seven minutes Mr Farmer you've got extra.

MR MCLELLAN KC:

I'm sorry?

WINKELMANN CJ:

I was just telling Mr Farmer he had seven minutes extra thanks to you.

MR MCLELLAN KC:

Not at all.

MR FARMER KC:

Yes, if the Court pleases. I'll go through the oral argument notes that we filed yesterday and beginning with a statement of what we see as the key facts because this case is fact-specific and the first fact which my learned friends rely on, of course, is that the trial Judge found that individual officers did not know of the consent and the Court of Appeal agreed with that.

1440

What then though flowed from that was a question of whether or not in a corporate sense the Council should have imputed to it knowledge of the consent by virtue of its duty to maintain the records, and by virtue of the fact that included in those records was the actual consent. On that there is a difference of opinion between the trial Judge and the Court of Appeal. The trial Judge at 393 said that: "A distinguishing feature of this case is that the Council controlled the records and the information that gave rise to the cause of action." And that is a key fact whatever view one takes of this issue that I'm looking at now.

"There was no way for Mr Daisley or a third party to discover the consent without themselves checking the Council's records. I have held it would not be reasonable to find that Mr Daisley should have done that. The very purpose of the Council's record-keeping obligations is to enable the public to participate in matters under the RMA. This is not a situation where the defendant was honestly ignorant or acted in good faith, such as a builder who unknowingly laid negligent building foundations. The Council granted the consent and held the record of it among the information it was bound by statute to keep reasonably available. Knowledge of the existence of the consent must be –

WINKELMANN CJ:

Can you just pause Mr Farmer. Is your junior going to put the documents up or is he not confident to do so? He has the look of someone who doesn't know what I'm talking about.

MR MCLELLAN KC:

Mr Coad will take on that.

WINKELMANN CJ:

Thank you Mr Coad. We will disqualify you on the grounds of age Mr MacRae.

MR FARMER KC:

One can assume I wouldn't have known either.

WINKELMANN CJ:

Mr MacRae is certainly looking bewildered. So what paragraph were you at?

MR FARMER KC:

Paragraph 393, and I'd got down to about four or five lines from the bottom of that paragraph. "The Council granted the consent and held the record of it among the information it was bound by statute to keep reasonably available. Knowledge of the existence of the consent must be imputed to the Council (as the entity being sued), even if individual Council officers did not have actual knowledge of it."

That was actually consistent with a concession that was made at the trial by the Council, which is recorded in the trial Judge's judgment at paragraph 310. So 310: "In his closing submissions Mr Robertson said the Council accepts it had knowledge of the 1988 LUC 'in a corporate sense'. That is a proper concession. Council employees granted the 1988 LUC and a record of it was held by the Council pursuant to its statutory obligation to keep that record reasonably available . Moreover, prior to February 2005, the Council had been aware that the quarry had been operated as a commercial quarry without any prior interference, interruption or dispute." Then there's some detail given about that.

Then at paragraph 311: "I am satisfied, therefore, that Mr Robertson's concession is appropriate and that the Council should be held to have known of the existence of the consent. The question, however, is whether that type of knowledge is sufficient to found a claim for exemplary damages on the grounds of misfeasance." The Judge was considering in that context.

Now the Court of Appeal disagreed with that and said at paragraph 164, half way through the paragraph: "To the extent that he found the Council's corporate knowledge of the consent sufficient for purposes of s 28(b), we respectfully consider that he was wrong. Fraudulent concealment requires that the defendant or its agent subjectively know of the matter concealed. It is not in dispute that the Council officers who dealt with Mr Daisley were its agents for this purpose."

Now irrespective of the rights and wrongs of that, what we say in our notes is that that in paragraph 1, we say that they, and the Council, that is to say the individual officers concerned, Mr Barnsley, Mr Lucas, and Ms Hislop, they and the Council were aware of facts which suggested, at least, the possibility of a resource consent or of existing use rights, and we submit that really there's no, the real question on that last point is that the issue is whether or not there was lawful authority for Mr Daisley to carry on the business of a quarry, either by way of a consent, formal consent, or by way of existing use rights.

We've set out there the facts which the Council officers, the individual officers, were aware of, and that we've seen them before, evidence of historical commercial use of the quarry, commercial rating of the property, notation of minerals on the title, the requirement of reasonable grounds under s 322(4) of the RMA for issuing an abatement notice, which is a fact known to the Council officers, any record of a land use consent to the knowledge of council officers would be found in the Council's files, which by law the Council was required to maintain so as to provide ready access to it. Council officers failed to undertake a diligent search of the Council files. Then finally, the Council persistently maintained the view that it was for Mr Daisley to establish that he had lawful authority to operate the quarry and took the view that there was accordingly no need for them to undertake a diligent search of the Council files. Now the Court of Appeal judgment, we say, was to the same –

WINKELMANN CJ:

Well I can just ask you before you move onto that. Are you maintaining the point you're opening with that – I mean are you saying that the Council did have knowledge, notwithstanding – I mean are you maintaining that is a basis to meet the first part of what Mr McLellan has put as the test? I mean, because when you read that sentence of the Court of Appeal judgment it seems to have a non sequitur in the middle of it, but I'm not quite sure what the law is on who has to have knowledge for these things.

MR FARMER KC:

I think it's difficult for me to maintain that position, to go back to the High Court, but it is, it's one of the contextual facts, namely that the Council, important parts of the Council was under a duty to keep records. The Council did have in its records the actual consent, and thirdly the Council failed to search for – search adequately for that record. So that's, when one, one doesn't need to then take the final step that the trial Judge took of saying that the Council had, should have attributed to it corporate knowledge. Notwithstanding the fact that the concession to that effect was made at the trial, and we haven't, I have to fairly

acknowledge that in our written submissions we have not made a point that this was a distinct and separate ground for establishing wilful concealment.

GLAZEBROOK J:

Well it could be though, couldn't it?

O'REGAN J:

These facts – I'm sorry.

GLAZEBROOK J:

Because it must be the defendant who has the knowledge and the defendant is the Council operating through individuals, one assumes, but not necessarily the particular three individuals, is it?

MR FARMER KC:

Well, it must be the case that in a corporate sense the Council knew of the record but that doesn't necessarily get you to the end result which is to establish that the Council wilfully concealed that consent.

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GLAZEBROOK J:

Well, yes, so the second part it mightn't get you to.

MR FARMER KC:

No.

GLAZEBROOK J:

But it does get you to the knowledge requirement? Is that the submission?

MR FARMER KC:

Yes, yes.

GLAZEBROOK J:

So there is a corporate knowledge but the fact that that corporate knowledge existed doesn't mean that there's a wilful concealment and are you saying that these matters (a) to (g) do give you that wilful concealment?

MR FARMER KC:

Yes, they do because they are the matters that led to the Council being under an obligation to actually search the records on the basis that those matters gave to the individual Council officers knowledge that there might well be in the records a consent and therefore an obligation on them, particularly having regard to the requirement under section 322(4) of the Resource Management Act 1991, to have reasonable grounds before taking abatement action, that those matters imposed on those Council officers an obligation to undertake a diligent search and they failed to do that and it's that failure, the failure both to undertake the search, and also the failure to advise Mr Daisley that they had actually not conducted a search which leads in total to a finding that they wilfully concealed the cause of action.

O'REGAN J:

But these factors just show the Council was negligent, don't they? So are you saying basically if your negligence involves not disclosing something, then in every case there's no limitation period?

MR FARMER KC:

Well no each case depends on its facts and I agree the fact that you're purely negligent and nothing more, then that would be the end of it, but this is not a case where there is nothing more. This is a case where there is a lot more and the lot more is other things that I've indicated because the Council –

O'REGAN J:

But all those things do is show why the Council was negligent.

MR FARMER KC:

Yes, but they also – the consequence of their negligence was that they took abatement action contrary to their statutory obligation under section 322 –

O'REGAN J:

But that doesn't change the fact that they were negligent?

MR FARMER KC:

No, no, it doesn't but it adds to the negligence the fact that they took that – they took abatement action –

O'REGAN J:

Look the recklessness has to be in not disclosing. The fact they took abatement action, that's got nothing to do with not disclosing.

MR FARMER KC:

Well, it has a lot to do with their not disclosing because the abatement action then had dramatic effects on Mr Daisley's business.

O'REGAN J:

Yes, but it was nothing to do with non-disclosure. Abatement action is an enforcement action. It's completely separate. The recklessness has to be in the non-disclosure.

MR FARMER KC:

Yes, it is in the non-disclosure.

O'REGAN J:

And you've just set out all these factors which were the reasons why the Judge found they were negligent, and then you're saying because the Judge found they were negligent ipso facto, there's no limitation period and that just doesn't seem right.

MR FARMER KC:

No, well they found, both the High Court and the Court of Appeal found that those factors establish both negligence and a failure to disclose wilful concealment because the recklessness was not only in not searching but in not disclosing the fact that they hadn't searched.

O'REGAN J:

But if they didn't search of course they didn't disclose. I mean it's just pig on pork, isn't it? You're just saying the same thing is (1) negligent breach of duty of care and (2) fraudulent concealment but that means that in every case of negligence involving non-concealment that you wouldn't have a limitation period and that's just not – that can't be right.

MR FARMER KC:

No, it's not right but, your Honour, I'm trying to say that there is added to the negligence there is added to it the failure to disclose in particular that they'd failed to do a search of the records and –

O'REGAN J:

But the negligence was failing to do a search and failing to disclose. That was what the negligence was. You're just saying the same thing amounts to two different elements at the same time.

MR FARMER KC:

Well, if I take you to the Court of Appeal judgment, paragraph 148, the Court refers to *Beaman* and *Kitchen* and *King*, the three cases, the three English cases in which recklessness was a standard that was adopted. So in those cases the Court said: "…the act of concealment occurred after the wrong had been done and after loss had been suffered. In each case the defendant knew of an obligation to the plaintiff and a connection between the facts concealed and the plaintiff's realised or likely loss. The present case is relevantly similar. The duty of care corresponded to the Council's statutory duty to keep and disclose records. It was breached by failing to search those records for evidence of existing use when taking enforcement action. Council officers knew

of the duty, they knew that Mr Daisley's business activities depended on the consent, and they must have known, but failed to tell him, that they had not searched for the consent before taking action to stop him. For these reasons" the next paragraph, "we are not persuaded that a subjective recklessness standard is over-inclusive under the 1950 Act. Equitable fraud remains the touchstone, and the English authorities we have surveyed establish that concealment may be unconscionable where it meets the test of subjective recklessness. That warrants inquiry at trial into the defendant's knowledge in any case where equitable fraud is pleaded with sufficient specificity and evidential foundation to survive a strike-out or summary judgment application." So that encapsulates what I'm trying to say, your Honour.

O'REGAN J:

It seems to me what that says is in the middle of paragraph 148. It says that corresponded with the duty of care and then it says they should have told him that they hadn't looked for the record but what they had to conceal was the record, not the failure to tell someone you hadn't looked has got nothing to do with the fact you didn't find it.

MR FARMER KC:

Well, unless you adopt a recklessness standard and the recklessness was the failure to conduct a search when you knew certain facts, which are the ones that I've listed, and knew that there must be a possibility that in the records was to be found a consent.

O'REGAN J:

But that's what made it negligent.

MR FARMER KC:

Well…

O'REGAN J:

It's just a completely circular – you're using exactly the same requirements to meet both tests.

MR FARMER KC:

Yes, well they are –

O'REGAN J:

But that means in any case involving negligence on non-disclosure you would never have a limitation period and that just can't be right.

MR FARMER KC:

Well, your Honour, every case is fact-specific and the facts of this case are as we've recited them and I don't accept –

O'REGAN J:

Well, on your analysis any case where a person has a duty to keep records and they negligently don't search those records and the person who would have benefitted from that search suffers loss, they're liable for negligence, for breach of duty and they are also guilty of fraudulent concealment and therefore don't have the benefit of a limitation defence.

MR FARMER KC:

Well those are the facts of this case and I –

O'REGAN J:

But that's just a – that would apply to any case involving negligence and keeping records and disclosing records.

WINKELMANN CJ:

Well, perhaps Mr Farmer you could tell us what the principle is you say does govern? How would you articulate the principle because we've heard Mr McLellan tell us the same principle over and over and we just failed to understand his submission. Would you like to articulate what you say is the principle that should govern? So Mr McLellan said it has to be shown that the defendant actually knew of all the facts and circumstances which give rise to this cause of action and made a conscious decision not to disclose.

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MR FARMER KC:

His position is that the knowledge that you had to have was knowledge of the actual consent whereas my position, the position of the trial Judge and of the Court of Appeal, was that it was sufficient that they knew facts, and they listed, that gave rise to the prospect of there being a consent in the records.

WINKELMANN CJ:

But if you abstract that out into a general principle of law that governs the area.

MR FARMER KC:

Well the standard is that of recklessness, if you go back to the *Beaman* case, the Court in that case considered, or was considering a situation where the defendants made certain assumptions about the position of the plaintiff. The plaintiff they assumed was not interested –

KÓS J:

That's a side issue.

WINKELMANN CJ:

Just let Mr Farmer answer it. Make certain assumptions…

MR FARMER KC:

In that case assumptions were made about the facts. In this case assumptions were made about the facts, the assumption being that there was no record, there was no consent.

KÓS J:

They're utterly different cases Mr Farmer. In *Beaman* they knew they were disposing of their bailor's property.

MR FARMER KC:

Yes.

KÓS J:

They knew that absolutely, just as in *King v Parsons*, they knew that they were using the wrong bricks.

MR FARMER KC:

Yes, yes.

WINKELMANN CJ:

I think Mr Farmer's point is that they didn't know – they assumed that she had no interest in it so they'd abandoned, she'd abandoned it, so they assumed it wasn't a wrong.

MR FARMER KC:

Yes, that is my position yes, and in what was said in *Beaman* was that it was reckless of them to make those assumptions of that, and what is, we say, here is that it is, was reckless of council, or the council officers to make an assumption that there was no consent to be found in the records when they knew the facts that suggested there might well be.

GLAZEBROOK J:

So you're making a distinction between negligence and recklessness are you?

MR FARMER KC:

Sorry?

GLAZEBROOK J:

Are you making a distinction between negligence and recklessness?

MR FARMER KC:

Yes.

GLAZEBROOK J:

So recklessness is what?

MR FARMER KC:

Recklessness in this case is –

GLAZEBROOK J:

Well just generally, because we're trying to make a general principle here. In this context, sorry, a general principle in the context of wilful concealment.

MR FARMER KC:

Well in the context of wilful concealment the wilful concealment was acting recklessly in not disclosing to Mr Daisley that they had not conducted a search of the records when they were clearly under a duty to do so.

KÓS J:

Well he had no reason to believe they had conducted a search of the records. Most of those facts (a) to (g) your client knew, in fact several of them were sourced for him.

MR FARMER KC:

Yes, he did know those facts but –

KÓS J:

Well where's the concealment there?

WINKELMANN CJ:

Well not that I want to help you out here Mr Farmer, but I think they would have, your client might have assumed they'd searched the record before they commenced abatement proceedings against him.

MR FARMER KC:

Exactly, exactly.

KÓS J:

So that one –

MR FARMER KC:

In fact he actually said to the Council because of historic use, commercial use, and because of the commercial rating there must be a consent given at some time, or at the very least existing use rights established. Actually put that to them and that was ignored.

GLAZEBROOK J:

I'm having difficulty in a concealment sense of not disclosing that there'd not been a search. I would, if I was saying that this was enough, I would've said that they acted recklessly given the knowledge they actually had in saying there is no consent when, as a corporate entity, they knew there was such a consent because of the obligation to keep records.

MR FARMER KC:

Yes, yes.

GLAZEBROOK J:

Then the question is whether acting recklessly in the face of information is sufficient to be concealment.

MR FARMER KC:

Which we would say it is and –

GLAZEBROOK J:

And based on *Beaman* and *Parsons* is it, or merely that it's unconscionable to act in that way, that's more than negligence, that's an unconscionability aspect or…

MR FARMER KC:

Yes and the Court of Appeal expressly referred to unconscionability in finding paragraph 178, in finding there was fraudulent concealment, if you go to that: "For these reasons, which differ somewhat from those of Toogood J, we are satisfied that the Council's failure to search its records for a land use consent or evidence of an existing use was subjectively reckless. That being so, it was

unconscionable, amounting to fraudulent concealment for purposes of s 28(b) of the Limitation Act 1950." That was the basis on which they ultimately, the Court of Appeal ultimately found that we had made out a case of fraudulent concealment under section 28(b).

I will perhaps, I'll go back to my notes, paragraph 2 –

KÓS J:

Just to be clear about that, the second line of paragraph 178: "… the Council's failure to search its records for a land use consent…" that was also the particular negligence, wasn't it?

MR FARMER KC:

Yes, it was, yes, particular negligence.

GLAZEBROOK J:

But you say it went further than negligence – well I assume you say it went further than negligence because of the facts that they knew that made it clear they should've searched.

MR FARMER KC:

Yes, they knew they should have searched, and they didn't.

KÓS J:

Well that means it's –

O'REGAN J:

That's why they were negligent.

KÓS J:

Yes, or very negligent.

GLAZEBROOK J:

Well that's why I said they seem to be saying…

MR FARMER KC:

Well I noticed in some of the Law Reform, Law Committee material that my learned friend referred to this morning, there was a concept of grossly negligent as being sufficient, but we haven't run the case on that basis. But it's another way, perhaps, of putting it.

KÓS J:

I mean it does seem to me perhaps that that's exactly what you are saying. That what is negligent here and what is the wilful concealment are the same thing and your argument is that it reached such a pitch of negligence as to amount to wilful concealment.

MR FARMER KC:

Yes. Well I'm content with that, putting it that way too.

WINKELMANN CJ:

Well your point, I think, they're on notice of so many things indicate that there would be something on their records.

MR FARMER KC:

Yes, yes, they are.

WINKELMANN CJ:

That their minds were engaged that that was a possibility and they decided not to check.

MR FARMER KC:

They decided not to check and by so doing they wilfully concealed the cause of action.

O'REGAN J:

They didn't wilfully conceal it. You're not saying they wilfully concealed it are you?

MR FARMER KC:

Yes.

O'REGAN J:

You're saying you don't need it to be wilful.

MR FARMER KC:

Well, it's really wilful blindness that we're talking about here, and I'm going to come and make that point.

O'REGAN J:

Okay.

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MR FARMER KC:

That the Court of Appeal, in fact let me go to it now, paragraph 116 my learned friend in his submissions basically says, and I've given the reference in our notes, that the Court of Appeal found wilful blindness to be something different from recklessness but actually on 116 the Court said: "A person is wilfully blind where they know of a risk that the relevant fact or circumstance exists, as opposed to not giving any thought to it, but they have consciously put it out of their mind. Equity may treat the failure to disclose as deliberate, but the person is at least subjectively reckless." So that's where the Court ties wilful blindness into recklessness and that's a point actually we make in our notes, the second page, paragraph numbered 3, where we say: "Wilful blindness, deliberate non-disclosure, recklessness are all forms of wilful or fraudulent concealment." They are just different ways of looking at the matter.

WINKELMANN CJ:

And what Mr McLellan says is that they didn't consciously put it out of their mind. They decided they didn't – they had no legal obligation to look because they didn't bear the burden of proof.

MR FARMER KC:

Well, that – they're taking the position wrongly, as it turned out, wrongly as a matter of law, that the onus was on Mr Daisley to establish lawful authority to conduct the business. The other side of that coin both Courts said was that there was – Council took the position therefore there was no need for it to do a search because the onus was on Mr Daisley to establish he had lawful authority and given the facts that the Council knew it was unconscionable for it to take that position.

KÓS J:

Why is that –

WINKELMANN CJ:

So is your point that there may be that legal gloss but they're still fundamentally seeing there's a risk or a possibility it's on their files and deciding not to search?

MR FARMER KC:

Put that to me again?

WINKELMANN CJ:

Because Mr McLellan says against you well look they're not in a morally wrongful way deciding not to search, they think they're not obliged to, and you're saying that's a legal gloss, they still knew there was a risk that the documents existed on that file and they consciously decided to take that risk.

MR FARMER KC:

And in the context where under section 322 they were obliged to have reasonable grounds for issuing an abatement notice.

So I'll just go back to paragraph 2 on page 1 where I was looking at the way the Court of Appeal we say was to the same effect as the High Court Judge in its consideration of the facts that were known to the Council that triggered in the Council an obligation to conduct a search. They put it rather – the way they put it, I've just set it out here a little bit differently, so the first fact was: “The Council

officers failed to tell Mr Daisley," this is the paragraph I've read, "that in breach of their statutory duty to keep and disclose records, they had not searched the records before taking action to stop his quarrying."

Secondly: "Between February 2005 and the 2006 resource consent hearing, Council officers were provided with credit information," that's the historic use et cetera, "indicating that Council records might well contain evidence of a land use consent or existing use rights" and the way the Court put it in paragraph 171 is: "We do not think there is any room for argument about this. Mr Barnsley and Mr Lucas were involved throughout and were plainly aware of this information. They were on notice at the outset that there might well be an historic consent or existing use rights."

Thirdly, thirdly: "Council officers knew of the statutory duty to keep and disclose records (which corresponded to the duty of care), they knew that Mr Daisley's business activities depended on the consent and they knew, but failed to tell Mr Daisley, that they had not searched for the consent before taking action to stop him" and that's at paragraph 148 which I've taken you to.

O'REGAN J:

Can I just ask you, the part of that analysis seems to be that Mr Barnsley knew there had been extensive quarrying in the past but if you look at the High Court judgment at paragraph 107 there's a quote there which I think is attributed to Mr Barnsley where he says –

MR FARMER KC:

Sorry, I'll just find it if I could.

O'REGAN J:

Yes, so paragraph 107 of the High Court judgment.

MR FARMER KC:

Yes, I've found that.

O'REGAN J:

Just on the top of the next page.

MR FARMER KC:

That's a quote.

O'REGAN J:

So is that Mr Barnsley speaking there? I think it is.

MR FARMER KC:

Mr Barnsley didn't give evidence.

O'REGAN J:

No, this must have come from some other –

KÓS J:

This is the affidavit in support of the abatement action I think or the enforcement action.

O'REGAN J:

Okay. Because there he says: "… would appear that the previous owner of the property worked the quarry…that has never been established and indeed seems improbable that any previous such activity would have been at a similar scale to the level of activity undertaken by Mr Daisley…". So that seems to indicate that he thought the historic use didn't indicate extensive quarrying and presumably quarrying at a level that didn't need a consent.

MR FARMER KC:

There was an issue about the extent of the quarrying that was permissible that any land owner is entitled to do a very limited amount of quarrying per year on their property. Mr Daisley was seeking to do more than that and therefore to do more than he either had to have a consent or existing use rights and – but the abatement notice actually sought to stop Mr Daisley from in effect carrying

on a commercial quarrying operation and this affidavit from Mr Barnsley was filed in the Environment Court after the consent had been discovered.

O'REGAN J:

Okay. It certainly doesn't support the Court of Appeal's view that he was on notice that there had been extensive quarrying undertaken historically because he says essentially they contracted that, doesn't he?

MR FARMER KC:

Well, I think what the Court of Appeal said was that when Mr Barnsley made his first visit to the quarry after Mr Daisley had bought the property, it was clear that there'd been extensive quarrying over a period of time so that's what that –

WINKELMANN CJ:

Didn't one of the witnesses actually give evidence that the Council had itself quarried the property for a period of time?

MR FARMER KC:

Yes, yes, that's right. So that's the basis on which the Court of Appeal said what it did.

ELLEN FRANCE J:

Sorry, just going back to 171 of the Court of Appeal judgment which you were just referring to before, that's the "…Council records might well contain evidence…on notice at the outset that there might well be an historic consent," that use of the terminology "might well" is that how you understand recklessness being used say in *Beaman* for example?

MR FARMER KC:

Yes, yes. Yes, it is. The assumed fact made by the Council was that there was no existing consent or existing use rights. What the Court of Appeal is saying is that that is not supported by the knowledge of the things they did have which suggests that there might well be a consent and they said, as you can see:

"We do not think there is any room for argument about this" so it was a very strong finding made by the Court of Appeal.

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ELLEN FRANCE J:

Well might well is not likely, is it? It's a risk, isn't it?

MR FARMER KC:

Well…

WINKELMANN CJ:

Well, might very well is likely. Now section 66(2) jurisprudence we say might very well for likely.

MR FARMER KC:

I think those – might well is interchangeable with likely.

WINKELMANN CJ:

Some of us think that, some of us don't.

MR FARMER KC:

That's 171. The facts that the Court relied on, and I won't take you through it, but expressing those views are those found in 168 to 170 and, in particular, actually 166 is where it really starts where the Judge set out five, the trial Judge set out five considerations that led to his conclusion that the Council officers were reckless and the Court of Appeal wasn't minded to adopt all five but they did adopt the critical ones which was the third one that: "…the officers' mistaken belief that Mr Daisley had to prove the existence of the consent (the necessary corollary being that they believed they need not look for it)…".

KÓS J:

Well, I wonder about that because no one was thinking about a consent. No one was on notice of a consent. Everyone had forgotten about it. Everyone was thinking about existing use rights.

MR FARMER KC:

That is basically correct, your Honour, except that Mr Daisley did say to the Council, I think I said this earlier, that given the historic use and given the commercial rating of the property, there must be a consent somewhere, there must have been a consent given. He put that to the Council.

GLAZEBROOK J:

Can you just take us to that?

MR FARMER KC:

I don't have the reference.

GLAZEBROOK J:

You can just refer us to it later.

WINKELMANN CJ:

Well your junior can be looking it up.

MR FARMER KC:

So that was the third. The fourth one, the circumstances pointing to historic commercial use and the fifth one that: "The Council's negligence not only caused Mr Daisley's loss but also concealed his cause of action from him until September 2009" and the Court of Appeal has really taken account of those last three as being relevant to its finding in paragraph 171 that: "Council officers were provided with credible information indicating that Council records might well contain evidence of a land use consent or existing use rights."

So I think where I'm at now, I've taken you to paragraph 178 of the judgment, and so paragraph 4 of my notes turn to the English cases and we say the English cases decided under the 1939 Limitation Act "establish that concealment may be unconscionable where it meets the test of subjective recklessness". Now that's how our Court of Appeal, what it said, how it viewed those cases and if I take you to the judgment at 139 which begins: "We respectfully agree with the United Kingdom Supreme Court that

Lord Greene in *Beaman v ARTS* did not explain what he meant by recklessness, and also that his language contains indications that he considered the defendants had acted dishonestly. He found that they acted for their own commercial benefit and that made 'all the difference'. Singleton LJ evidently saw it as a case of dishonesty. But when the judgments are read with those of Denning J at first instance" he being the trial Judge "we think *Beaman v ARTS* is correctly classified as a case of subjective recklessness. The defendants did not know that the plaintiff would surface after the eventual end of the war and ask for her goods, or whether they would have value to her at that time, or whether the value would be exceeded by the charges which would have accrued by then. The Court of Appeal does not seem to have doubted the evidence to that effect and the Judges acknowledged that the trial Judge had found the clerk an honest and reliable witness. Lord Greene found that the defendants 'assumed' communication was impossible, 'recklessly and without taking the least trouble to verify the facts assumed' the plaintiff had not troubled about her goods, and 'recklessly formed the opinion' that the goods were valueless. The appeal was allowed because the Court of Appeal rejected the defendants' justification for their actions, finding their decision to take the risk that the plaintiff would not reclaim her goods unreasonable in the circumstances known to them."

And on our notes, I won't take you to the *Beaman* case, but we have given the page references, this is in paragraph 4, pages 561, 562, 565, 566 where Lord Greene referred to recklessness being involved in the assumptions of fact and in the conduct of the defendant company.

The next case we have referred to is *Kitchen*. That is in the cases, it's tab 21, page 340 of the casebook. That was the case of the claimant's husband who had been electrocuted. He was employed by the Royal Air Force at the time. His widow later, much later, sought to sue, and in particular she sought to sue the solicitors who had acted for her and who had failed to file a proceeding within the statutory time limit and who had been involved surreptitiously with communications with the Royal Air Force Association with a view to their making an ex gratia payment but without concealing – but without letting the

widow know that they were making this payment as a result of the husband's death, and so the question was whether or not the concealment of those facts were sufficient to give the, to allow the claim to be brought out of time and looking at the headnote in the second ruling at the foot of the page: "That the failure of the solicitors to inform the plaintiff of her possible claim under the Fatal Accidents Act did not of itself constitute a concealment of her right of action…" it was clearly negligence but not of itself a concealment of her right of action "…against the solicitors by 'fraud' within" the terms "of the Limitation Act, 1939, so as to prevent the Act running…". But looking at (3) that: "…the concealment by the solicitors from the plaintiff of the electricity company's offer to pay £100 amounted to 'fraud' for the purposes of section 26(b); no degree of moral turpitude was necessary to establish fraud for the purposes of that section, since it covered conduct, which, having regard to the relationship of the parties, was unconscionable and, accordingly, the solicitors were not entitled to rely on the Limitation Act...".

And then referred to in support of that finding was *Beaman*, *Beaman* applied, and in particular page 573 of the judgment. *Beaman* is set out, extracts from *Beaman* are set out and in particular each of the references made by Lord Greene to recklessness are all listed there on that page.

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WINKELMANN CJ:

Be that as it may, however, this case is a case in which the solicitors used a device to conceal from the plaintiff to source the money and they were her solicitors.

MR FARMER KC:

Yes, to source the money, that's right, yes.

WINKELMANN CJ:

So you could say that's deliberate concealment, couldn't you, in the words of the 1980 statute?

MR FARMER KC:

Well, the way it was put after the extracts from *Beaman* had been referred to at the bottom, down at page 573, at the bottom of the page, Lord Evershed, Master of the Rolls, said: "In my judgment, similar reasoning applies in this case. The nature and consequences of the relationship between solicitor and client are, to my mind, more powerful in favour of the plaintiff here than was the relationship of bailee and bailor. I think that in this case the conduct of the appellants 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."

WINKELMANN CJ:

I mean it is interesting that they place a lot of significance in determining what is, what meets the threshold the nature of the relationship.

MR FARMER KC:

Yes, they do, they do and the relationship here was, in effect, a forced one because Council was taking abatement action against Mr Daisley but it was nevertheless a relationship that arose by virtue of the fact that they were taking abatement action and that they were thereby under a statutory duty towards him. So that's –

KÓS J:

Can I just ask you, you put some weight on the second of the holdings that the failure of the solicitors to inform the plaintiff of her possible claim wasn't a concealment but isn't that exactly parallel with the situation here? The solicitors knew there might be a claim. They instructed junior counsel to give an opinion. He said they should get expert advice and they didn't do anything more.

MR FARMER KC:

They didn't do anything more, that's right.

KÓS J:

Well, isn't that exactly parallel to what the Council did here and yet that wasn't concealment?

MR FARMER KC:

Yes, there is that comparison that can be drawn. What the solicitors did was they failed to get the expert advice but instead they determined to solve the situation by, or deal with the situation by way of organising an ex gratia payment but without telling their client.

KÓS J:

Well that's right but that was jiggery-pokery. There was no jiggery-pokery here by the Council.

WINKELMANN CJ:

A device I think is a good way of putting it. It's what they say in the judgment.

KÓS J:

Yes, device.

MR FARMER KC:

A device, yes. Anyway, that is *Kitchen* and then the third one is *King v Victor Parsons* which is at tab 20 and that's the foundation of the house that was built on a pit that had – a chalk-pit and looking up the headnote the ground relied on by the, or stated by the Court of Appeal in dismissing an appeal to it is: "…that on a review of the evidence as transcribed and applying the Judge's view of the credibility of the witnesses the Court could and should hold that the plaintiff had proved that at the date of the contract the vendors by themselves or their agent, the builder, knew all the material facts, including the fact that the site was an infilled rubbish dump and therefore knew that the warranty given was untrue; and that as they had not told the plaintiff of the risk of subsidence their conduct was so unconscionable and reckless as to constitute concealment by fraud…". It was in the meaning of the Limitation Act, section 26(b) and this is the case of course that has that famous passage from Lord Denning's judgment which is cited by everyone which says that to the word knowingly there must be added the word recklessly and his Lordship gives a reference immediately in support of that to *Beaman*.

So those are the cases that our Court, the Court of Appeal, held were applicable. The *Canada Square* case, the United Kingdom Supreme Court which my learned friend took you to, as has been mentioned already this morning, that case is explicable on the basis that it was decided under a later version of the Limitation Act, Limitation Act 1980, where the concept of fraudulent concealment was replaced by the term deliberately concealed and it was that formed the basis on which the UK Supreme Court considered the continued application of the recklessness line of cases and held that recklessness was no longer a relevant standard because deliberately and recklessly are two different concepts and there are a number – that issue is considered at some length, and I've given the references in the notes at paragraph 4 to all the places where that is discussed, but I think what I can do is just take you to the main finding. So this is –

WINKELMANN CJ:

So Mr McLellan's basic submission about this is that there is no discontinuity, there's actually continuity and that when you read the judgment, the case is properly pre the 1980 Act, they are consistent with the content of the 1980 Act and that is what Lord Reed is saying in the judgment. That was the submission against you.

MR FARMER KC:

Well, it's true that Lord Reed does seek to explain *Beaman* and the other cases as being decided on more conventional terms other than recklessness but he can't, in fact, ignore the fact that recklessness was the standard that they used because that's why, in fact, he then at considerable length goes on to consider whether reckless and deliberate are the same things and he decides that they're not and he – I'll just take you to the actual final statement there. I've given all the page references. There's quite a number of them where this issue is actually discussed but going through to – well looking at 111 first of all: "The issue raised by the decision of the Court of Appeal" it's in his case, "is whether 'deliberate' includes 'reckless', in the sense in which that term was defined in *R v G* (or in the modified version of the *R v G* definition explained in paragraph 20 above), ie the taking of a risk of which the person is aware in circumstances

where it is objectively unreasonable to do so." And he says in 112: "As a matter of the ordinary use of language, the adjectives 'deliberate' and 'reckless' have different meanings."

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Then finally going to 153: "For all these reasons, the reasoning of the Court of Appeal in relation to section 32(2)," which is the 1980 Act, "cannot be accepted. 'Deliberate', in section 32(2), does not include 'reckless'. Nor does it include awareness that the defendant is exposed to a claim. As Lord Scott said in *Cave*… the words 'deliberate commission of a breach of duty' are clear of English. They mean, as he added at para 61, that the defendant 'knows hie is committing a breach of duty'."

Cave, my learned friend referred to and relied on *Cave* this morning. *Cave* was a case also decided under the 1980 Act, as indeed were I think one or two of the other cases that my learned friend referred to and relied on, so the same reasoning applied. They can't be regarded as authorities for holding in this case that recklessness is not a standard that has been adopted under the 1939 Act and therefore applicable here because the wording under our Act is the same as under the 1939 Act.

At paragraph 5 of our notes we just note that the Council relying on rights in *Inca* and *Matai* says that the defendant must have knowledge of the relevant facts that constitute the cause of action, and what we say are relevant facts here, of which the Council is aware, are those which we've been discussing. Those facts constitute a cause of action and negligence, which is common ground, of which the Council was aware but failed to disclose to Mr Daisley, a failure that was, alternately, either deliberate, wilfully blind or reckless, and that's that paragraph 116 of the Court of Appeal's judgment where it says that wilful blindness can be deliberate or at the very least can involve subjective recklessness.

It is not, we say, necessary –

WINKELMANN CJ:

Can you just tell me what it is that the Council – so you're saying here that the reckless failure is the failure to disclose to Mr Daisley or is the recklessness the failure to search?

MR FARMER KC:

Well it's both. It's both. At the end of paragraph 6 we say it's not necessary to show that the Council took active steps to conceal its wrong, *Bulli Coal Mining* is authority for that proposition, and we end with saying that Justice Toogood thought that a key factor was, we mentioned this already, was that pursuant to the statutory obligation to do so and to make them readily available the Council controlled the records and the information including the consent that it had granted, information and records that gave rise to the cause of action. The Court of Appeal was of the same view.

So that's our fraudulent concealment argument. Then we go onto consider continuous breach, which is not, if I may say so, at the forefront of our case. The forefront of our case is what I've just been through, and that is because the Court of Appeal agreed with what Justice Toogood said about that, but did not agree with what Justice Toogood said about continuous breach, and we've been given leave to raise that as another ground to be considered.

So I'll go fairly quickly through this. At paragraph numbered 8 of our notes there are three components that can be said to be continuing. Continuing duty, continuing breach of duty, and continuing loss. The focal point of all three is the continued negligence of the Council, evidenced by its failure to conduct more than a cursory search of its records while over a long period of time taking several active steps designed to put Mr Daisley out of the quarrying business and –

WINKELMANN CJ:

I think the Court of Appeal's primary response was this argument didn't really help you much anyway.

MR FARMER KC:

Sorry?

WINKELMANN CJ:

Wasn't the Court of Appeal's primary response to this argument that it didn't really help you much in any case?

MR FARMER KC:

Yes, yes, it's, we put it forward but without the same enthusiasm as we've put forward the fraudulent concealment case.

GLAZEBROOK J:

Well you'd have to be enthusiastic if you didn't run on fraudulent concealment, wouldn't you.

MR FARMER KC:

Sorry, we wouldn't need to have shown –

WINKELMANN CJ:

You would need to be enthusiastic if you did not win on fraudulent concealment.

MR FARMER KC:

Yes.

WINKELMANN CJ:

Wasn't the Court of Appeal's point that you had a problems with the loss, causation of loss? Because even if it's a continuous breach you still would only have some – only a small amount of the loss would fall within –

MR FARMER KC:

Except that what the Court of Appeal did say was that the loss on sale was a distinct and separate loss from the previous losses, and that finding is said by my learned friends in their written submission, not repeated this morning I don't think, said to be wrong, and it is the case to establish continuous breach it's

necessary to show a repeated or new breach and a new loss, both outside the expired limitation period, and we say that they both can be shown here.

WINKELMANN CJ:

So what, can you just remind us what happens after – what happens within the limitation period with your continuous breach, can you remind us, help us with the time scale?

MR FARMER KC:

Well the, in 2009 in I think August, the Council instituted enforcement proceedings in the Environment Court. In September the land use consent was found, and then what happened was that the abatement notices were withdrawn but the Environment Court proceeding was not withdrawn, because the Council took the view that the terms of the existing – of the consent, did not enable Mr Daisley to do what he wanted to do, and so they in fact did not withdrawn the enforcement proceedings.

WINKELMANN CJ:

So that's the past, the enforcement proceedings in relation to past.

MR FARMER KC:

The past, yes.

WINKELMANN CJ:

So they had a consent in their file but no one knew the content because they hadn't found it.

MR FARMER KC:

Yes.

WINKELMANN CJ:

They issued abatement notices then enforcement proceedings.

MR FARMER KC:

Yes.

WINKELMANN CJ:

And they continue with the enforcement proceedings in respect of past wrongs because they say it's outside the form of the consent that nobody knew about.

MR FARMER KC:

That's right. They basically – they raised what were effectively new arguments to say that the terms of the existing consent did not allow Mr Daisley to conduct the business that he was or had been conducting, which included location on a particular site, the area defined on the site, included the type of rock that he was quarrying, and basic –

WINKELMANN CJ:

Blue instead of just red?

MR FARMER KC:

Brown.

WINKELMANN CJ:

Brown, was it brown.

MR FARMER KC:

Yes, yes, and so that standoff took place over another two years, and it was only after Mr Daisley had been forced to sell, forced by threat by his bank of a mortgagee sale, and he sold the property at a loss, considerable loss –

KÓS J:

That was very soon after the discovery, though, of the land use consent.

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MR FARMER KC:

No, no, it was within – it was, I think…

WINKELMANN CJ:

Where's the chronology?

KÓS J:

I thought it was December of the same year, wasn't it?

MR FARMER KC:

I thought it was actually some time after. I'll have to check.

WINKELMANN CJ:

Have we got a chronology?

MR FARMER KC:

There's one attached to our submissions, your Honour.

KÓS J:

Yes, there it is. 12th – 2nd of December 2009. So it's the same year.

MR FARMER KC:

Okay. But the actual Environment Court proceeding was not withdrawn until 2011.

KÓS J:

But the property's long sold?

MR FARMER KC:

The property was sold and in fact the Council then granted an amendment to the consent that allowed the various things that they said were not within the consent and they were the same things that, when 2006, when Mr Daisley had applied to the Council for a resource consent at its urging at the time and he put forward a proposal for – that included the same conditions that ultimately were accepted by the Council to the new owner, and that was commented on adversely by the trial Judge who, and indeed by the Court of Appeal, who said that after the consent had been adopted the Council should have been contrite and acted reasonably to allow Mr Daisley to resume quarrying but it didn't do so and, in fact, that's what Justice Toogood effectively said was that that precluded Mr Daisley from going to his bank and renegotiating with his bank for

a continuation of his loan facility on the basis that he could now operate the quarry which he couldn't do before and which had led to the bank taking action.

KÓS J:

I mean what's an unusual feature of this case is that within three years of the loss first starting to accrue, 2006, September 2006, the Council's gross negligence was disclosed and Mr Daisley would have been well within time to have recovered all his losses apart from the fateful trip he made to a solicitor who told him he had no claim, well within time.

MR FARMER KC:

Who told him, his solicitor at the time told him that he should endeavour to negotiate with the Council, and that's what he happened to do unsuccessfully, and the – but what Justice Toogood said in effect was that the Council failing to allow Mr Daisley, as soon as that consent had been found, to resume operating the quarry, that what Mr Daisley then suffered was an opportunity cost, the opportunity cost being the ability to go to the bank and negotiate a continuation of his loan facility, and it's that which was a cost that's not measured in terms of the damages award that was granted and which I think no doubt, my learned friend is going to deal with this, but no doubt supports the award of exemplary damages for misfeasance where Justice Toogood basically said that the post-discovery conduct of the Council tipped the balance in favour of a finding of misfeasance and an exemplary damages award.

So going back to our notes, paragraph 9, the Court of Appeal did not accept the continuous breach argument. It adopted the test of continuing cause of action articulated in *Jalla v Shell International Trading and Shipping Co Ltd* [2023] UKSC 16, [2024] 1 AC 595, and that's…

WINKELMANN CJ:

So the continuing breach, you rely on those, what's the persistence, you rely on the persistence, or what do you say?

MR FARMER KC:

Well, we say the continuing breach is what occurred after the land use consent had been discovered and the Council advised of it.

So *Jalla* is at tab 57, the casebook is at page 1052, *Jalla v Shell International Trading*.

WINKELMANN CJ:

Now it's 3.56. How long do you think you'll be on this case, Mr Farmer?

MR FARMER KC:

More than four minutes possibly, so I'm quite happy to start again in the morning on it.

WINKELMANN CJ:

I think we'll start again in the morning. Thank you. We'll adjourn.

COURT ADJOURNS: 3.56 PM

COURT RESUMES ON WEDNESDAY 19 MARCH 2025 AT 10.01 AM

WINKELMANN CJ:

Mōrena Mr Farmer.

MR FARMER KC:

If your Honours please, there was one loose end left over from yesterday. You'll recall that I said that Mr Daisley had said to the Council that because of the historic use of the land of the quarry there must be a consent in the Council records, and your Honours asked for a reference in the evidence for that. I do have some references. It's not quite as I put it but I'll –

WINKELMANN CJ:

Well, it's set out in paragraph 22 of the Court of Appeal judgment I think, which Justice Kós picked up yesterday, and should have passed onto you. It might have forestalled your efforts.

MR FARMER KC:

Yes, that's certainly the clearest reference to it, but that was followed subsequently, and I'll just give you the, take you to the evidence.

WINKELMANN CJ:

Yes, thank you.

MR FARMER KC:

That was followed subsequently two years later in 2007 when Mr Daisley engaged Hesketh Henry Solicitors to pursue the question of whether the Council had information that would establish at least existing use rights. He gives that evidence in his reference and I'll give you the reference 201.0022 where he simply advises or says that he engaged Hesketh Henry as a specialist in resource management to address the Council's continued abatement action and their work included making official requests for all information held by the Council for the property and the quarry and then a little further on at 201.0023 paragraph –

WINKELMANN CJ:

So can you help with that? So Hesketh Henry are actually making OIA requests over a period of time before the one that led to the discovery of the consent?

MR FARMER KC:

Yes, yes, indeed and I was just going to take you to those. So 201.0023 he refers to two requests under the Official Information Act seeking information from Council records and the first letter I'll take you to is 302.0128 which is a letter dated 28 November 2007 and Hesketh Henry wrote to the Council, it's quite a short letter: "We have instructions from Daisley contracting Limited concerning an abatement notice issued by Council against both the company and MJ Daisley personally. The Daisleys were not aware of the implications of the abatement notice until the meeting with elected members of Council in the week of 12 November. The Daisleys have since been overseas on business. On their return we anticipate instructions to challenge the abatement notice." Then in paragraph 3: "In the interim, we are told that Council staff are aware that the quarry in question has been operating for decades. Please provide us with all information held by Council showing any consideration of existing use rights by the enforcement officer who issued the abatement notice, namely Katie Hislop." And then that letter, that's 302.0128, that letter was –

GLAZEBROOK J:

Do you say anything about what the Council is obliged to do if they receive an OIA request?

MR FARMER KC:

It doesn't say anything.

GLAZEBROOK J:

As a matter of law?

MR FARMER KC:

Well, the letter doesn't say that, no.

GLAZEBROOK J:

Do you rely on there being an obligation as a matter of law to search out that information?

MR FARMER KC:

Absolutely, yes, yes, indeed.

O'REGAN J:

But this is requesting evidence that Ms Hislop considered it rather than actually asking for the consent, isn't it?

MR FARMER KC:

No, well it was followed by another letter a short while later which is 302.0129. It's a letter of the 10th of December. That says, it's headed "Official Information Request: Quarrying at Knight Road." "On behalf of Daisley Contracting Limited, we make a request for information pursuant to section 10 of the Local Government Official Information and Meetings Act 1987 concerning information or documents held by the Whangārei District Council relating to the property located at Knight Road, Ruatangata, Whangārei that is legally described as…" legal description given. And then the documents described that are sought are described as: "Any information on the property that relates to mineral extraction, quarrying or burrowing. Any information on any mineral extraction, quarrying or burrowing previously operated by the Drake Family at Knight Road. Any and all information held on file for the property. This request is made following the receipt of an abatement notice…and is therefore considered urgent. 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. Please do not hesitate to contact the writer if you have any queries concerning the scope of this request." So that is December 2007. So that's –

WINKELMANN CJ:

And the response to that?

MR FARMER KC:

There was – the response to that was that there was information given but not of a kind that advanced the matter.

WINKELMANN CJ:

So did it indicate that they had done a search though?

MR FARMER KC:

Yes. I don't have the reference in the evidence but the Council subsequently sent Mr Daisley an invoice for $500 for conducting a search but it was a fairly cursory one clearly because it didn't reveal anything of any relevance and Mr Daisley says that in 201.0024, he says that in paragraph 53 that: "By the following July 2008 the first defendant had refused to withdraw abatement notices, had denied any existing use rights, had failed to deliver up full copies of records held by council (including the Land Use Consent file we now know existed) and was watching our every move."

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Paragraph 54: "In the absence of the relevant information we were faced with a continuing argument pertaining to existing use rights. All our professional advisers to that date had expressed to us the opinion that the quarry's operation should have been recognised. Hesketh Henry recommended we engage a planner and take steps to establish existing use rights."

ELLEN FRANCE J:

I see the Court of Appeal says in relation to the requests on 10 November 2000 and the another one on 5 June they say at paragraph 30: "The Council did not search its historic records before responding."

MR FARMER KC:

No, that's right.

KÓS J:

And was that because the evidence was that they had assumed that the LIM had done that?

MR FARMER KC:

Yes, it would seem so, it would seem so.

WINKELMANN CJ:

Well, we don't know do we because none of them gave evidence, did they?

MR FARMER KC:

None of them gave evidence, that's right, but the – either the trial Judge or the Court of Appeal assumed in favour of the Council that they would have been aware of the LIM and what the LIM had said and they therefore assumed that there was no consent. Although the LIM had been of course issued for a different purpose when Mr Daisley was looking at purchasing the property is this information about the property and –

KÓS J:

Well I mean a LIM doesn't necessarily identify existing use rights.

MR FARMER KC:

No, no, that's quite…

WINKELMANN CJ:

And there was, in terms of their non-appearance to give evidence, there was evidence, was there, that one could not be located?

MR FARMER KC:

That was said I think possibly from the Bar table.

WINKELMANN CJ:

And one was in a different country?

MR FARMER KC:

Yes.

WINKELMANN CJ:

And there was no explanation of the third, Ms Prior or Price.

MR FARMER KC:

No, no, that's right. There had been an approach made by our side to, before the trial, to one of the three, and I can't recall which one it was, who – to give assistance and that led to a letter from the Council's solicitors to my instructing solicitor warning that that was not to happen, there was to be no approach to Council witnesses and then subsequently at the trial there was a submission made that we had – that there was no property in a witness and that we had failed to call any of the Council witnesses which was, it's claimed, available to us, which was a little ironic having regard to the warning that had been given to us.

WINKELMANN CJ:

So why would any lawyer pay attention to that warning?

MR FARMER KC:

Well, ultimately the submission that we made was that the onus was on the Council to call those witnesses –

WINKELMANN CJ:

As it was.

MR FARMER KC:

– and that the failure to do so enabled the Court to draw appropriate inferences.

KÓS J:

Can you show me where the reply was to the OIA requests?

MR FARMER KC:

It's 302.0132.

KÓS J:

And what was the attachment?

MR FARMER KC:

I'm just looking for that. That's the invoice.

KÓS J:

It's the first paragraph I'm interested in.

MR FARMER KC:

Yes, yes. The evidence was that the information that was given was of no relevance to the question the purpose of the request that was made and I'll just – no there's no attachment on this, to this letter in the record.

WINKELMANN CJ:

It would be a substantial volume in any case, wouldn't it, if it's – well we can work out 834 pages, isn't it?

MR FARMER KC:

Yes, 834 pages.

WINKELMANN CJ:

So that's a few Eastlight files.

MR FARMER KC:

Mr Daisley said, this is on page 201.0023, at the end of paragraph 52: "Although a lot of information was received, Hesketh Henry were not provided with a copy of the Land Use Consent file that we now know existed at the time."

O'REGAN J:

The request was also for evidence of previous use by the Drake family. It didn't help with that either?

MR FARMER KC:

No. The Drake family were the vendors of the property to Mr Daisley and they had operated the quarry. Prior to that there had been others who had operated it. The land use consent had been operated to a licensee in 1988 who had been operating the quarry under licence from the then owner.

WINKELMANN CJ:

Including the Council had operated it?

MR FARMER KC:

And then the Council, yes, there was a brief period where the Council operated it.

WINKELMANN CJ:

It is gross negligence.

MR FARMER KC:

Yes. So if that deals with that point, I can go back to continuous breach to I think where I got to in my notes was that I read paragraph 8 that the three components of what might be said to be continuing; the continuing duty, continuing breach of duty and the continuing loss and what we said there is: "The focal point of all three is the continued negligence of the Council, evidenced by its failure to conduct more than a cursory search of its records while over a long period of time taking several active steps designed to put Mr Daisley out of the quarrying business and ultimately having that effect."

Now the law as to what is a continuing breach is two, primarily two English cases. The first of them is *Phonographic Performance Ltd v Department of Trade and Industry* [2004] EWHC 1795 (Ch). I haven't put that in the notes but that is found in tab 58 which is a decision in the Chancery Division 2004. Just looking at the headnote: "The claimant" who is Phonographic Performance Ltd "was a licensing body which owned the copyright in the sound recordings of record companies" and they "instituted proceedings against the Crown on the ground that it was in breach of its European Community obligations

arising…" from a European Council directive under which "if a phonogram was published for commercial purposes or was broadcast the performer and producer had a right to be paid a single equitable remuneration by the user."

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The English Government had, the UK Government had failed to implement the Council directive and so the Phonographic Performance had been unable to collect royalties from the users of particular recordings, and they instituted proceedings. That default occurred over a considerable period of time and the Limitation Act was pleaded by the Crown and the paragraph 28 the continuing breach point that was raised in response was accepted.

Paragraph 28: "For all those reasons I accept the submission for PPL that its claim falls within accepted principles relating to the accrual of causes of action summarised in all three of the textbooks to which I have referred. In my view its claims are not statute-barred because they are both claims in respect of a continuing breach of duty and a cause of action in which damage is an essential ingredient. The loss for which damages may be recovered is limited to that sustained within the six years immediately preceding the issue of proceedings on 10 March 2003, and if the actions proceed, the particulars of claim should be amended to reflect that fact."

So that is one of the facts of continuing breach that there can be no claim for losses occurred in the limitation period, the six years preceding the issue of the writ.

The other case which is referred to by our Court of Appeal is *Jalla*. That is found in tab 57, which was a nuisance case where there'd been an oil spill at sea which reached the claimant's land, and that oil was over a long period of time had never been removed or cleaned up, and the claimants brought an action in private nuisance, and their question was whether or not there was a continuing nuisance, and ultimately the United Kingdom Supreme Court held there wasn't because there had not been a repeat of the original breach of duty, which was the oil spill. All that had happened was that the consequences of

that oil spill, which was the damage that was done to the property, was still there, but that had continued, but there had been no continuing breach of duty. There'd been no repeated breach of duty, no further oil spill, and the relevant paragraphs in the judgment are 13(iii), where the claimants had referred to and relied on another, an earlier case, *Delaware Mansions Ltd v Westminster City Council* [2002] 1 AC 321, which was a case where the roots from a tree had damaged an adjoining property over a long period of time, and what the Supreme Court said here about that was: "Although the claimants relied on… ('Delaware Mansions') [2002] 1 AC 321 as authority for the proposition that failure to remediate the consequences of a single event can be a continuing nuisance, that case was distinguishable and did not assist the claimants. Roots from a tree on an adjoining pavement had caused cracks in the claimant's building. The claimant was held entitled to recover from the defendant highway authority the cost of carrying out the necessary underpinning works. Stuart-Smith J considered that that was a case of a continuing nuisance where the continuing presence of the tree roots gave rise to a continuing need for underpinning that would have been avoided if the defendant had removed the tree. That was very different from what he described as the 'normal' case of private nuisance where there is a single escape for which all damages must be claimed at once even if the consequences of the nuisance persist. The present case was a single escape case and there was no continuing nuisance."

Then the Court, over the next few pages, went through the judgments of the courts below, and basically those judgments were to the same effect. At paragraph 16 there's a reference to Lord Justice Coulson in the Court of Appeal where his Lordship had said: "A continuing cause of action in tort will usually involve a repetition of the acts or omissions which give rise to the original cause of action." It said the paradigm example was the tree roots cause just referred to.

The Lord Justice has added on: "On the assumption that a one-off event or an isolated escape can comprise an actionable private nuisance, there is no authority for the proposition that a one-off event or an isolated escape can give

rise to a continuing nuisance. Here the event occurred on 20 December 2011 and the leak had been stopped within six hours. It was a single, one-off event, giving rise to a single, and not a continuing, cause of action. The oil that remained on the claimants' land was the consequence of that single event. Delaware Mansions was distinguishable from the present case because the tree and its roots were still there. Unlike the present case, there was therefore a relevant continuing event or state of affairs."

The Lords in their judgment here in paragraph 26 said: "In principle, and in general terms, a continuing nuisance is one where, outside the claimant's land and usually on the defendant's land, there is repeated activity by the defendant or an ongoing state of affairs for which the defendant is responsible which causes continuing undue interference with the use and enjoyment of the claimant's land. For a continuing nuisance, the interference may be similar on each occasion but the important point is that it is continuing day after day or on another regular basis. So, for example, smoke, noise, smells, vibrations and, as in *Fearn* [2024] AC 1, overlooking are continuing nuisances where those interferences are continuing on a regular basis. The cause of action therefore accrues afresh on a continuing basis." So that is the test and our Court of Appeal referred to that judgment.

WINKELMANN CJ:

Mr Farmer, can you just outline for me what's your best possible outcome on the continuing breach argument?

MR FARMER KC:

Our best possible outcome would be, this is why I said yesterday we're not quite so enthusiastic about this argument, would be that the repeated breach which occurred after the discovery of the land use consent, and I'm going to come to what that was, would give rise to a new and distinct loss, which the Court of Appeal recognised as new and distinct, was the loss on the sale of the property. So the loss of profits in the earlier period that deemed to be outside the limitation period would not be recoverable.

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WINKELMANN CJ:

So I'm not sure what you're saying. Can you just repeat what your best case is? I'm sorry I lost the thread in the middle of that answer. So the best case is that you would…

MR FARMER KC:

The best case is that our damages would be limited to $90,000.

WINKELMANN CJ:

So the best case is that the loss on the re-sale would be on the sale, for sale would be –

MR FARMER KC:

Recoverable.

GLAZEBROOK J:

Why would the continuing breach be after the discovery of the land use consent?

MR FARMER KC:

Well I'm just going to come to that point if I could.

KÓS J:

That doesn't really matter for this analysis, does it? You issued proceedings on the 14th of August 2015 so losses prior to the 14th of August 2009 would be excluded on the basis set out in *Phonographic Performance*?

MR FARMER KC:

Yes, yes, that's right.

KÓS J:

So you get from the 15th of August 2009.

MR FARMER KC:

Yes.

KÓS J:

Which is, in effect, only the sale loss.

MR FARMER KC:

Yes. Well that is the only loss that the Court of Appeal recognised as being new and distinct. That's in paragraph – I'll take you to the Court of Appeal's judgment.

GLAZEBROOK J:

But that doesn't seem to accord with the cases you've just shown us. I mean it does in the facts of this case because of the dates but if, in fact, you went back to 2007 and you succeeded in continuing breach, I don't see why you don't get loss of profits from 2007. Of course that is irrelevant here because of the actual timing.

MR FARMER KC:

Yes, yes, that's right. I mean Justice Toogood has an alternate finding to the section 28(b) ruling that he gave, found there was continuing breach and he did not limit the damages there for continuing breach but he didn't really – his main finding was really the 28(b) one and so that clearly is the losses are fully recoverable for the entire period.

If I take you to the Court of Appeal judgment, paragraph 83 is where the Court refers to *Jalla v Shell International Trading* and half way through paragraph 83 the Court said: "What matters is that the wrong is continuing on a daily or other regular basis. If so, the cause of action accrues afresh on a continuing basis. The cause of action does not continue merely because loss from the original wrong continues to accrue within the limitation period."

Then in 84: "In a continuing breach case, the plaintiff may sue for loss suffered within the six-year limitation period, notwithstanding that the continuing wrong was first committed more than six years earlier and notwithstanding that the loss suffered within the limitation period is of the same kind. But damages cannot be recovered for occurrences of the wrong that happened more than

six years before the claim was commenced. That is a corollary of the rule that successive actions lie for each successive accrual of damage. Applied to the facts here, the doctrine of continuing breach would allow Mr Daisley to sue for profits lost or costs incurred after 14 August 2009 if the breach of duty was repeated after that date, but he could sue for profits lost or costs incurred earlier as a result of breaches between 2004 and 14 August 2009."

KÓS J:

And that's consistent with what Sir Andrew Morritt said at paragraph 28 of *Phonographic Performance*?

MR FARMER KC:

Yes, that's right, yes. But it's a different approach that was taken by the trial Judge. The trial Judge, Justice Toogood, just set that out in paragraph 10 of the notes. He held: "That the Council was in breach of duty on a continuous basis from the time it issued the LIM in November 2004 until the discovery of the LUC in September 2009 and suffered continuing damage or loss from September 2006 when the Council dealt with his resource consent application until July 2011 when it withdrew the Environment Court proceedings. Accordingly, the cause of action accrued from September 2006 (when loss was first suffered) until the discovery of the LUC" in September 2009. And the reference is in a judgment, pages 376 and 378 to 380.

But going back to the Court of Appeal, paragraph 85 is interesting and we say, in effect, is critical in terms of determining whether the Court of Appeal was wrong to find that there had been no continuing breach. Paragraph 85 the Court said: "We accept that there were periods in which this case might be analysed in terms of continuing breach. The Council's duty was to keep records and produce them on request or to review them before taking enforcement action. One would not expect a local authority's error in responding to a LIM to give rise to a continuing cause of action, but here there were numerous breaches of duty over a period of years and each had the same unifying element; the failure to check historic records. Some of them, such as the prosecution of enforcement proceedings, can naturally be seen as giving rise to a continuing

obligation of disclosure so long as the proceeding continues." And what we say in our notes is that analysis should naturally have led to a finding in the present case of continuous breach.

But the basis in which the Court of Appeal declined to do so follows in paragraph 86: "But we agree with Mr McLellan that nothing turns on continuing breach. There was no allegation of repeated breach of duty after 14 August 2009. The statement of claim pleaded no new breach of duty between that date and 22 September 2009, when the 1988 land use consent was disclosed. Thereafter it pleaded failure to withdraw the enforcement proceeding and alleged that the Council's conduct caused continuing loss and evidenced bad faith, but these are not allegations of continuing breach of the duty to keep and disclose records."

Now we take issue on the pleading point and I need to take you to that. What we say in our notes is that the, this is paragraph 11: "The fourth amended statement of claim alleges that after the discovery of the LUC the Council sought to dispute its continued validity and applicability to the quarrying operations" of that consent and that we say is "an allegation of the same nature and effect as the initial denial of the existence of the LUC." Either way, either that it didn't exist, or that it existed but wasn't valid or applicable to the quarrying operations, either way the Council was in breach of its duty and the –

WINKELMANN CJ:

How is it in breach of its duty? Can you just be particular on that?

MR FARMER KC:

Yes, well in the fourth amended statement of claim which is at 103.0001, at 101.0048 we plead what happened, or the effect of what happened after the discovery of the LUC under the heading at 123: "Continued ultra vires action of first defendant. 123. Notwithstanding that it had been determined that mineral extraction at the quarry at the Knight Road property was a consented and lawful activity, the first defendant continued to pursue legal action against the plaintiff, suggesting: (1) that the activities to be undertaken by the plaintiff and his

business operations would include extraction of a type of rock which the first defendant did not consider to be covered by the 1988 consent… Seeking to impose limits to the consent… Seeking to justify the past ultra vires actions by suggesting," and I don't know what, that sentence doesn't seem to be completed, "by suggesting the abatement notices."

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Then paragraph 124: "The first defendant formally withdrew the abatement notices issued on 28 November 2008 and the infringement notices issued on 5 March 2009 and 8 April 2009. However there was no formal withdrawal of the earlier abatement notices nor acknowledgement the rights of the owner had been wrongfully curtailed."

Paragraph 125: "It was apparent the first defendant was: 125.1. Unwilling to accept that a land use consent once granted runs with the land and survives any future change to the zoning or other controls in the District Plan; 125.2. seeking to impose limits retrospectively to a land use consent to constrain its unlimited terms of operation and volumes of extraction of minerals."

Paragraph 126: " Notwithstanding that the first defendant had been in possession of the land use consent at all relevant times, it did not discontinue the Environment Court proceedings, wishing to obtain an enforcement order with curtailing conditions to the land use consent thereby curtailing the activities of the plaintiff."

So our point is that, but notwithstanding that the land use consent had been found, the Council refused to give proper recognition to it to enable Mr Daisley to actually to operate his quarry in the way that he sought to operate it, and that that is, we would say, is an allegation of a repeated breach of the same kind as the allegation that the Council failed to discover the land use consent and –

WINKELMANN CJ:

How is it, can you just articulate the duty that they are breaching in failing to do that in a way which accords with the earlier breach which is a failure to conduct a search.

MR FARMER KC:

A failure to conduct a search –

WINKELMANN CJ:

And leading to negligent misstatement.

MR FARMER KC:

And the taking the position, the corollary of that, taking the position that the onus was on Mr Daisley to establish that he had lawful authority to conduct the quarry, that that constituted a breach of the duties of the Council, a duty to maintain and provide access to records. A duty to undertake, have reasonable grounds for issuing abatement notices et cetera, and equally here, after the consent had been discovered, the failure to give full recognition to it, and to enable Mr Daisley to conduct the operation that he wished to operate, is of the same nature and effect as the initial breach which was denying that there was any lawful authority to conduct the business.

KÓS J:

Except that he sells the property within two and a half months of discovery, so it doesn't bite on much loss, does it?

MR FARMER KC:

By that time, of course, the die was cast because the bank had already threatened a mortgagee sale.

KÓS J:

If the die was cast, Mr Farmer, that suggests that the loss on the resale was a result on the earlier breach.

MR FARMER KC:

Well the Court of Appeal did recognise the loss on sale as being a distinct breach, that's paragraphs 87. I'll take you back to that. "It is not in dispute that Mr Daisley's losses from earlier breaches of duty continued to accrue after 14 August 2009. Such losses are recoverable, in an action which is complete on the happening of loss, where they are sufficiently distinct from losses suffered outside the limitation period. Whether such losses are distinct, or merely a part of earlier losses or consequential upon them, is a question of fact and degree. In this case, the only loss incurred after 14 August 2009 which we find distinct is the loss on sale of the property. The loss of profits which began in 2006 continued unchanged. The most recent breach of duty was the enforcement proceeding commenced in the Environment Court on 31 July 2009. Mr Daisley had already begun to incur costs in connection with that action; he had briefed his lawyer. Costs incurred in connection with the enforcement proceeding after that were losses of the same type. It follows that loss on sale of the property was the only loss that was within time for limitation purposes, unless the running of time was postponed under the Limitation Act 1950." That's the section 28(b) point.

ELLEN FRANCE J:

Can I just check in terms of the pleadings. Am I right that in relation to the notion that the conduct was ultra vires, that subsequently is raised in respect of the misfeasance cause of action.

MR FARMER KC:

Yes, yes.

ELLEN FRANCE J:

And not elsewhere.

MR FARMER KC:

That's relevant to the misfeasance cause of action. My learned friend Mr MacRae is going to deal with that shortly.

WINKELMANN CJ:

I was going to ask, when we look at how the claim that was allowed is formulated by the Court of Appeal at 45 and 46 it says that it was pleaded for Mr Daisley "that the Council owed Mr Daisley a common law duty of care in the exercise of these powers, meaning that the Council was required, before taking action against him, to inspect its own records and to examine and reconcile circumstantial evidence." It "was said to have been breached in several ways." It gave no consideration to its historical records.

MR FARMER KC:

Yes.

WINKELMANN CJ:

"… knew or ought to have known that the quarry's operation" and consents and existing rights. "Council… failed to… check… [and] consider circumstantial evidence… [and] relied on inaccurate records given by neighbours who wanted to shut the quarry down." So I'm just wondering how that fits into this post-land consent. How are you – where we find the duty of care – how that breach continues post-discovery of the land use consent.

MR FARMER KC:

It's – there's a difference between the breach that occurred before the discovery, and the breach that occurred after, but the effect is the same. What the common feature of both is the denial of there being lawful authority to conduct the quarry business.

GLAZEBROOK J:

Isn't the post-conduct actually pleaded as a separate wrong.

MR FARMER KC:

Yes it is, it's –

GLAZEBROOK J:

It doesn't seem to be a continuance of the same wrong because in fact the consent is there and known.

MR FARMER KC:

Well there is that difference, there is that difference, but my point is that the effect, it is in effect a repeated breach of the denial of lawful authority, which is what the initial breach was.

WINKELMANN CJ:

Well that wasn't, but that's not what was pleaded and that's not what was found against the Council. The Council was found to be negligent, as I understand it, through its failure to uphold its duty to maintain, keep, and inspect records.

MR FARMER KC:

But allied to that was the position taken by the Council that the onus was on Mr Daisley to prove that he had lawful authority, and the abatement notices were issued on the basis that he didn't have lawful authority, and it's that which prevented Mr Daisley from operating the quarry, and what I'm saying is that that feature is also present in the post-discovery allegation that's in the statement of claim.

WINKELMANN CJ:

I mean it seems to me, and I don't know if it's properly pleaded, but isn't it as Justice Glazebrook says that it's more that they were, they negligently maintained a position which was wrong.

MR FARMER KC:

Yes.

WINKELMANN CJ:

Notwithstanding the information they had.

MR FARMER KC:

Well yes, yes, indeed.

WINKELMANN CJ:

And that does seem to be a little bit of what's pleaded there, but now we've got the statement of claim haven't we?

MR FARMER KC:

Yes.

WINKELMANN CJ:

Although it's under a heading "ultra vires" isn't it?

MR FARMER KC:

Well, the ultra vires, continued ultra vires action, that's the taking the position that there was no lawful authority, and that therefore to operate the quarry – and that therefore either an abatement notice or enforcement proceedings in the Environment Court would lie, and the Environment Court enforcement proceeding had been issued before the discovery of the consent, and it continued to exist for another two years after.

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WINKELMANN CJ:

Where are the pleadings?

ELLEN FRANCE J:

That does seem to me to be linked rather more into the misfeasance claim than some separate…

MR FARMER KC:

Sorry, what is the question your Honour?

ELLEN FRANCE J:

Sorry, it just seems on a reading of the statement of claim that that's directed more to the misfeasance aspect.

MR FARMER KC:

Yes, it goes to both, it goes to both. My learned friend is certainly going to take you back to this in his misfeasance submissions, and indeed Justice Toogood said that the pre-discovery conduct of a council was not, of itself, quite enough to give rise to a misfeasance finding, but he said it's post-discovery conduct tipped the balance, the two taken together did constitute misfeasance and certainly both courts, the High Court and the Court of Appeal, agreed that the Council's conduct after discovery left a lot to be desired. They were not contrite, they were obstructive, and they continued to maintain this position that he had no authority, that consent did not give authority to operate the quarry the way that he was seeking to do. I think that's as far as I can –

WINKELMANN CJ:

So what does it mean – is it useful to look at the particulars of the breach of duty of care owed by the first defendant, would it be in that part of the statement of claim?

MR FARMER KC:

That's going back to – the duties, relevant duties are set out in paragraph 13 and following.

WINKELMANN CJ:

I mean there is meaning at 148: " But for the deliberate interference with that commercial operation by the issue and service of the abatement notices, infringement notices and enforcement notices by the first defendant, the plaintiff would have operated the quarry as a commercial quarry supplying the local and burgeoning Auckland market." That's particulars of breach of duty of care against the first defendant.

MR FARMER KC:

Yes, the actual – as I said the relevant duties are set out at 13 and following, and then just going on from where your Honour has taken me, paragraph 156 that: "Having regard to all the relevant facts and circumstances, the conduct of the second defendant amounts to breach of fiduciary duty… actions which were

in breach of the second defendant's duty of care and… conduct amounting to a breach of implied contractual obligations."

WINKELMANN CJ:

What paragraph is that sorry?

ELLEN FRANCE J:

That's the second defendant, isn't it, not the Council.

WINKELMANN CJ:

Yes it is I think.

MR FARMER KC:

I'm sorry, yes. Yes it is. It's the second defendant. The first defendant is…

WINKELMANN CJ:

Yes, "Second and alternative cause of action – Against first defendant – Common law negligence" at 194, is it there?

MR FARMER KC:

At which sorry?

WINKELMANN CJ:

194 and following.

MR FARMER KC:

Yes, yes, so it begins at 188: "First cause of action: Breach of statutory duty by carelessness simpliciter – against first defendant." Paragraph 189 pleads a duty of care, and 190: "By reason of the matters pleaded in paragraphs 141 to 149 this course of conduct amounted to a breach of a duty of care against the plaintiff." So if we go back to 141 –

KÓS J:

It's a very muddled pleading, isn't it?

MR FARMER KC:

Sorry?

WINKELMANN CJ:

It's not the best work.

KÓS J:

It's a very muddled pleading. I mean this is breach of statutory duty which is now embracing a duty of care. It's 194 that's the negligence claim that seems to have prevailed in the High Court.

WINKELMANN CJ:

Although, there is the statutory duty of care as well isn't there.

MR FARMER KC:

Yes, the – well the way that negligence cause of action is pleaded, it starts at 188: "Breach of statutory duty by carelessness simpliciter" which is sort of an odd term I agree, and then the second alternative cause of action is at –

WINKELMANN CJ:

That seems to be the one you want. The second and alternative cause of action.

MR FARMER KC:

Yes, 194, that's the –

WINKELMANN CJ:

Because it has 201, paragraph 201 builds upon 198.

MR FARMER KC:

Yes. 198 and 199.

KÓS J:

I'm not quite sure what happened to the breach of statutory duty.

MR FARMER KC:

Well that's, that is –

KÓS J:

It seems to have been sort of absorbed into the negligence claim in the judgment.

MR FARMER KC:

Yes, into the misfeasance claim, yes. Well perhaps, not many say that's a claim that survive, or are immune from critical analysis when it gets to this, as far as this Court.

WINKELMANN CJ:

Well we're not sitting here criticising, we're just trying to find what you're relying on Mr Farmer.

MR FARMER KC:

Yes, yes, sure. Well I think Justice Kós' comment may have been legitimately regarded as a criticism of the statement of claim.

KÓS J:

And perhaps also is legitimate.

MR FARMER KC:

Yes indeed.

WINKELMANN CJ:

Well anyway, I don't think we were looking at the right part of that point. I do think whoever drafted the statement of claim seems to have done a reasonably good job at this point, don't they, because 194 to 201 seem to be on point.

MR FARMER KC:

Yes, yes. Well that's about as far as I can take the continuous breach issue.

WINKELMANN CJ:

So it is really pleaded as a continuous breach. It's not – there's no pinning of it to the new wrong once they've got the new documents failing, persisting in an unreasonable point of view.

MR FARMER KC:

Well it's dealing with the defence, the Limitation Act defence. So it's not a matter that would be pleaded specifically in the statement of claim, but all the ingredients of it are there.

WINKELMANN CJ:

But my point is there doesn't seem to be – I mean you could perhaps say that there is adequate pleading of a persistence notwithstanding the finding of a land use consent, an unreasonable persistence after that land use consent. Is there anything in there to plead that?

KÓS J:

I think 194 repeats paragraphs 13 to 149 and that therefore includes 123, which is the one that you were relying on?

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MR FARMER KC:

Yes, yes. Those were my submissions, and my learned friend Mr MacRae is going to address the misfeasance issue.

WINKELMANN CJ:

Excellent. So at the moment then we have, is it Mr Coad or Mr McLellan?

MR FARMER KC:

Mr McLellan.

WINKELMANN CJ:

Is Mr Coad going to make any submissions?

MR FARMER KC:

No, sorry.

WINKELMANN CJ:

No, but aren't we next –

ELLEN FRANCE J:

No, we do misfeasance don't we?

WINKELMANN CJ:

No, we are, sorry, right. I'm skipping again. We've got misfeasance first and then will Mr Coad be making any submissions?

MR MCLELLAN KC:

No, your Honour. I will address your Honours on the remaining matters relatively briefly I think.

WINKELMANN CJ:

Did you say you were going to be brief Mr McLellan?

MR MCLELLAN KC:

Yes, I've got that reply on the equitable fraud part and then –

WINKELMANN CJ:

You have reply.

MR MCLELLAN KC:

Which I will be brief on.

WINKELMANN CJ:

You've got response on the continuing breach.

MR MCLELLAN KC:

Response on continuing breach which I'll focus on the property sale, the post-discovery matters and then I'll be –

WINKELMANN CJ:

And then you'll have a response on the misfeasance which we're about to hear from.

MR MCLELLAN KC:

I plan to be fairly brief on exemplary, on misfeasance too.

MR MACRAE:

Thank you, your Honours. If I could just start with taking you to paragraph 341 of the High Court judgment. That's at 102.0114. So I'll just go through that. It's obviously exemplary damages the finding in the High Court. So at 342 the Judge states: "Although I have held that no Council officer knew" of the existence of the consent "they did not act maliciously and that the Council's deemed corporate knowledge of the existence of the consent is insufficient to attract an exemplary response. I am satisfied that 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. Taking these factors on their own, I would be prepared to say that the Council's conduct in that regard fell short of the high threshold of moral indignation that would justify an award of exemplary damages."

So that passage obviously relates to pre-discovery of the consent and then Toogood goes on to state post discovery: "But the Council's response upon the discovery of the consent tips the balance, in my view, in favour of an award. I regard the Council's stubbornly obstructive attitude between September 2009 and July 2011 as inexcusable when considered in the light of the way in which the Council treated Ark's proposals based on Mr Daisley's plans for his quarry. A realistic, contrite and apologetic approach by the Council might have salvaged the situation for Mr Daisley, despite five years of being ground down by the Council's resistance to his proposals." And then –

KÓS J:

I think we're being a bit unrealistic here about what the Council would have done. I mean, as I pointed out yesterday, in 2009 Mr Daisley had three years ahead of him in which he could have issued proceedings to recover all his losses. The Council was a sitting duck and it's understandable that, faced with that potential liability, the Council might have acted in a way that's not a best citizen's response. They were a likely defendant. They're going to be a bit cautious about what they say. They're not going to fall on their swords.

WINKELMANN CJ:

And you would say they're exercising public power?

MR MACRAE:

That's right, your Honour. I think that's right. I think that the crucial period, as you've identified, is between discovery of the consent and the sale of the property in terms of the misfeasance claim. I think that there is an element of after that that there is, there's obviously dialogue between the solicitors acting for the parties and I think that, in terms of the misfeasance claim, that becomes largely redundant because of the sale of the property, redundant to Mr Daisley in any event because the damage has occurred by that time.

KÓS J:

So it's a small claim at best?

MR MACRAE:

Well, it's for exemplary damages so the award in the High Court was 50,000 so that is the limit of the award. So Justice Toogood in his decision went on to talk about that point in fact: "The knowledge that the Council would, at least, facilitate Mr Daisley's ambition to establish a commercial enterprise on the property may well have made a difference to the views of his bank. It is relevant to the question of exemplary damages, therefore, that the Council continued to maintain an uncompromising position…". Well that goes on to talk about

post-sale but the main point there is really the loss of opportunity for Mr Daisley to go back to his bank and avoid the sale.

KÓS J:

What was the evidence of that? Mr Farmer said before that the die was cast.

MR MACRAE:

Yes, I think the die was cast at the time of the sale.

KÓS J:

Well plainly. I mean it's gone then.

MR MACRAE:

So the critical period is from discovery of the consent in September through those two and a half months, the conduct of the Council after that in relation to the enforcement proceedings.

WINKELMANN CJ:

Mr Farmer put it yesterday on the basis that he lost the – Mr Daisley lost the opportunity to negotiate with the bank. So if he'd been able to say: "Look, the Council has come to me, they say they've got it all wrong, let's try and work out a situation" which one would have thought the Council would be sensible to do is try and work out a situation where we can go through the necessary consents, we'll give you assistance to understand what are the appropriate steps then that might have been a different picture for the bank?

MR MACRAE:

Correct, yes.

WINKELMANN CJ:

And was there any evidence, I don't know what kind of evidence you might get, but was there any evidence relevant to that?

MR MACRAE:

To the Council's approach to Mr Daisley?

WINKELMANN CJ:

About how realistic an opportunity that was. I'm not suggesting there would have to be, I'm just asking if there was.

MR MACRAE:

No, there isn't, there isn't any evidence in relation to any dealings between Mr Daisley and the bank if that's your question, your Honour. There's no evidence of that that I'm aware of, no. I suppose the point is it's a lost opportunity to do that. So then if I could then take your Honours to –

GLAZEBROOK J:

And the findings on that?

MR MACRAE:

Sorry, your Honour?

GLAZEBROOK J:

Were there findings on that?

WINKELMANN CJ:

A lost opportunity.

MR MACRAE:

Well, no, because I think that the, in terms of compensation, the compensation dealt with the loss on the land on the sale which was the 90,000 but there's been no – there's been no compensation, if that's your question, in relation to the loss of opportunity and I think that that is what we say –

WINKELMANN CJ:

So Justice Glazebrook was simply asking you, does Justice Toogood narrate the effect of the Council's uncompromising position?

MR MACRAE:

Well only, it's really limited to that passage that I just read out, your Honour.

WINKELMANN CJ:

And it occurs to me, and this may just be pie in the sky, but if the Council had said: "Look and this is – we found this consent and we've got it wrong and this is the pathway forward," even if the property had to be sold, would it have created – was there any valuation evidence about difference in value for the property with clear-cut quarrying rights?

MR MACRAE:

No, there's no such evidence.

WINKELMANN CJ:

That would be quite difficult valuation evidence given the complexity of the situation.

KÓS J:

Well, this is what I can't understand because the difference in price of $90,000 doesn't seem to reflect what would obviously be the difference between a property with rights to quarry and a property without rights to quarry as the Council had been asserting and when he sold to – when he entered into this process of sale at that stage, the right to quarry was uncertain and now we have a claim here for millions of dollars on the basis of lost quarrying right, how on earth can the difference in value between a can quarry and can't quarry property be $90,000?

MR MACRAE:

I think that the – I think that for exemplary – for misfeasance the test is not so much what the loss is because the compensation deals with that. What we're –

WINKELMANN CJ:

It's the expression of condemnation.

MR MACRAE:

Correct, yes.

KÓS J:

That's right but we've been told by Mr Farmer that the difference, the continuing breach argument, which will bring in the loss on the sale which has nothing to do with misfeasance, that's negligence –

MR MACRAE:

Yes, that is a separate issue.

KÓS J:

– gives rise to a $90,000 compensatory damages amount which seems bizarre.

MR MACRAE:

Well that is a separate issue that relates to – and that has been compensated for but what we – but with the misfeasance claim we're talking about deterrence and penalty –

WINKELMANN CJ:

So you're just addressing us on the misfeasance claim?

MR MACRAE:

Yes.

WINKELMANN CJ:

Right.

1110

MR MACRAE:

So then just in relation to the Court of Appeal judgment, the key finding on that is at paragraph 184, and that's at 103.0059. So that's – and I'll go backwards into this, but: "For these reasons, the appeal against the finding of liability for misfeasance in public office will be allowed. The award of exemplary damages must be set aside, both as a matter of pleading," so that's the first basis, "and because the necessary element of deliberate wrongdoing or subjective recklessness was absent." So there are two bases for it. The first one is the

pleading point, and that has more or less been covered off already. We've looked at those sections, relevant sections of the statement of claim that dealt with the ultra vires action, and we do say in terms of the misfeasance claim that they are continuing, so they continue pre and post discovery of the consent.

WINKELMANN CJ:
What deficiency in the pleading did the Court of Appeal identify?

MR MACRAE:
I'll take you to that your Honour.

WINKELMANN CJ:
Because it might be an idea to take us to it for the particular deficiency and why you say it's not a deficiency.

MR MACRAE:
Yes.

GLAZEBROOK J:
He's going to go backwards, he said.

MR MACRAE:
So if we go back to paragraph 50 of the Court of Appeal judgment. So this is really the key paragraph: "The pleaded breaches of duty all concern events which occurred before 14 August 2009. [Then the Judges do recognise] The statement of claim pleads, under the heading 'Continued Ultra Vires Action'", and those were the ones that we've just referred to.

Then they go on to say about half way through that paragraph: "None of the particulars concerning breach of the Council's duty of care plead anything done after 14 August 2009. The particulars do allege that through its enforcement actions the Council deliberately interfered with Mr Daisley's business. That may be said to have continued until he sold the property, but only because the

Council did not immediately discontinue the enforcement proceeding…". And that's really the point in terms of the misfeasance claim. So, yes, there's certainly no separate breach pleaded in the statement of claim after the 14th of August 2009. It is a continuing breach and we certainly rely on those passages of the fourth amended statement of claim we've been through just this morning.

WINKELMANN CJ:

So you say that the statement of claim and the passages we went through this morning does plead actions after 14 August?

MR MACRAE:

Yes, yes.

GLAZEBROOK J:

And are you relying on whatever that bit is.

MR MACRAE:

Sorry, it's 123 to 127. There are also further passages a little bit later on in the claim, and perhaps I should take, it is under the heading "Misfeasance of the Council" so I should really, for completeness, take you to those as well.

ELLEN FRANCE J:

Those are the passages I was asking Mr Farmer about, aren't they?

MR MACRAE:

173 to –

ELLEN FRANCE J:

173, yes.

MR MACRAE:

Oh, you've already been through them, I'm sorry, I missed that.

ELLEN FRANCE J:

I don't think we've been taken to them, but that's what I was referring to when I was asking Mr Farmer about that.

MR MACRAE:

I see. I understand. Yes.

GLAZEBROOK J:

Sorry, I missed…

ELLEN FRANCE J:

Paragraph 173 of the statement of claim.

MR MACRAE:

Paragraphs 173 and 174. So this is under, if you just scroll up a little bit there should be a heading there "Misfeasance of the Council" somewhere. So this is under the section "Misfeasance of the Council" so 173 the pleading is: "The first defendant has accepted the land use consent was on record and available to be discovered at all material times. The named officers therefore: Knew and did not disclose the existence of the consent or were wilfully blind… Notwithstanding that knowledge elected to continue with the first defendant's course of enforcement action notwithstanding that such conduct was ultra vires…". So it doesn't really add much to what's been said before in terms of ultra vires action but it's just reinforcing that under the misfeasance part of the claim.

WINKELMANN CJ:

And it is an allegation of continuation of conduct once they know of…

MR MACRAE:

Yes, yes.

ELLEN FRANCE J:

Although with the course of enforcement action is the focus.

WINKELMANN CJ:

Yes.

MR MACRAE:

Yes, yes, so it's –

GLAZEBROOK J:

Well there's nevertheless 125.2 which has the imposing limits retrospectively.

MR MACRAE:

Yes.

GLAZEBROOK J:

Which is presumably brought in under 173, although not explicitly referred to.

MR MACRAE:

Yes. So in terms of – so what we're talking about certainly pre-discovery of the consent is the Council's conduct in being recklessly indifferent to the limits of its duties, and that continues post-discovery but in a slightly different context because pre-discovery you're then recklessly indifferent to the searching for the consent itself, but post-discovery they're recklessly indifferent in relation to continuing with the enforcement action.

WINKELMANN CJ:

And there was no opportunity to cross-examine these council – to put to them what their motivation might have been in that regard?

MR MACRAE:

There was no opportunity as I understand it.

WINKELMANN CJ:

Because if their motivation was indeed litigation posturing, as Justice Kós has suggested it might have been, what would you say to that?

MR MACRAE:

Well I suppose that comes down to whether they were lawfully entitled to continue with the enforcement action, and I think there has to be an element of reasonableness within that as well because the basis upon which they commence the enforcement action in July 2009 was essentially because there was no consent, and abatement notices had been issued. So once the consent was found the basis of the enforcement action essentially fell away. There was no basis to continue it and the –

GLAZEBROOK J:

Well at least in that form, I suppose.

MR MACRAE:

In that form, yes, but it effectively prevented – it effectively denied – it didn't recognise the existence of the consent at all and continued to deny Mr Daisley the right to operate the quarry.

KÓS J:

I thought there was some finding in the Court of Appeal that the continuation of the enforcement order was the product of some clever advice by Mr Daisley's silk, Mr Casey.

MR MACRAE:

Again, I think that was after the sale. So yes there was some – I think that it's difficult to know exactly what that correspondence amounts to. I think one way you could say that Mr Daisley and Mr Casey weren't really in any other position but to try and agree. I mean, yes, there was no letter back saying "you must withdraw this otherwise we will hold you to account" but I think that what we're really talking about in terms of misfeasance is the Council's actions notwithstanding what was said by Mr Daisley's counsel at the time.

KÓS J:

Well there wasn't just a question of the Council perhaps engaging in litigation posturing, which wasn't quite what I was suggesting, but rather they would be

cautious about falling on their swords, but the other factor was that there was a genuine argument about the scope of the consent.

MR MACRAE:

Yes.

KÓS J:

The consent, for instance, was limited to red and brown rock and there was obviously some argument going on about the extent to which something else could be taken.

MR MACRAE:

I accept that point your Honour. I think that though the, that could have been dealt with in a different forum.

WINKELMANN CJ:

Well don't you say there's a counterfactual immediately apparent to us which is the new purchaser who had a completely different experience of dealing with the Council.

MR MACRAE:

Yes, correct, so that's the counterfactual that occurs later. The counterfactual is that the application for consent in 2006 by Mr Daisley was essentially accepted on the same terms in 2011 and granted to the new owner of the property.

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KÓS J:

Just on that, what was the evidence as to the identity of the new owner and was that a related party to Mr Daisley?

MR MACRAE:

Well there is – the evidence on that is a little bit confusing. In terms of Ark itself, Mr Daisley I think had an equitable interest I think you could say because he

wasn’t a director or a shareholder of the company but I think the evidence suggests that Mr Daisley had some interest in it, and I think that the evidence does – there's some communications just immediately prior to the Council granting the consent in 2011 to suggest that, as Mr Daisley is no longer involved, yes he is no longer involved, we will grant the consent. I'm sorry, I don’t have that particular communication.

GLAZEBROOK J:

Is it in the evidence?

ELLEN FRANCE J:

Is it in the record?

MR MACRAE:

It's in the record, it's in the evidence, yes.

GLAZEBROOK J:

So perhaps you can find it over the adjournment.

MR MACRAE:

Yes, I could certainly try, yes.

WINKELMANN CJ:

And do you rely on that?

MR MACRAE:

Not particularly, no.

WINKELMANN CJ:

You don’t rely on that as suggesting animus towards Mr Daisley?

MR MACRAE:

Well I think I'm not – it does, but I'm not, I'm not convinced that it's entirely relevant to the Council’s action.

WINKELMANN CJ:

You're not trying to build a bigger case?

MR MACRAE:

I'm not trying to build a bigger case, your Honour, yes, because the critical period, I do come back to the fact that post immediately after the consent was discovered the foundation of the application for the enforcement action fell away and so the Council ought to have immediately taken steps. In fact, if I could refer you to –

WINKELMANN CJ:

In terms of building a bigger case, surely it's – well always be aware of a question that starts with the word surely. It seems relevant to me, and I would expect a public authority to take into account their conduct to date, when they find out that they're mistaken and the impact of their conduct to date when they find out they're mistaken as to the steps they then take going forward.

MR MACRAE:

Yes, as evidence of their conduct at the time.

WINKELMANN CJ:

So the conduct in the past shapes how you assess the conduct from that point on.

MR MACRAE:

Yes, I agree with that and, in particular, I think at the time of discovery of consent, I think their conduct in the past in terms of the negligence, as soon as the consent was discovered, they were immediately on notice of their negligence. So you would think that in terms of conduct going forward, they would be doing everything they can to unwind that and I think that that was – that the trial Judge was particularly critical of the Council's conduct in that regard.

KÓS J:

The reference to the association between Ark and Mr Daisley that I had seen was at 201.0029. I just note it, if you're checking it at morning tea, 201.0029.

MR MACRAE:

Thank you.

KÓS J:

It describes it as a joint venture.

MR MACRAE:

Yes.

KÓS J:

With the Kellers.

MR MACRAE:

Yes.

GLAZEBROOK J:

Are we getting that up?

KÓS J:

No, he's going to check it.

GLAZEBROOK J:

Okay.

MR MACRAE:

So just returning to the Court of Appeal decision, it seems that – so in fact if we go to paragraph 183 it states: "The Judge did not find that the officers were recklessly indifferent to the limits of their authority. He was not prepared to find that they acted in bad faith."

And then the paragraph goes on to say towards the end: “We have accepted that Council officers were subjectively reckless to the existence of the consent but that finding does not extend to recklessness with respect to their lawful authority to take enforcement action.” And, of course, taking enforcement action occurred before discovery of the consent and also the reference to the trial Judge not being prepared to find that they acted in bad faith also is reference to the Council’s conduct before the consent was discovered because, as we read before, the trial Judge did say that they didn’t act maliciously before the discovery of the consent but, in fact, the passage we read through earlier suggested that certainly after the consent was discovered that wasn’t the case.

So, it seems that the Court of Appeal approached it on the basis that, given the pleadings and given their view of the trial Judge’s finding, their ruling was really related to pre-discovery conduct and so we say that’s where the Court of Appeal respectively erred because they didn’t take account of the Council’s conduct after discovery of the consent.

WINKELMANN CJ:

So can you just take us back to the findings by Justice Toogood that tipped the balance?

MR MACRAE:

Yes, so that’s back at paragraph 342 of the High Court judgment.

WINKELMANN CJ:

Right, so he's making a finding there that they – what's the high standard he's just referring himself to at 342? We might have to scroll back to where he sets the standard because all he's doing is making a finding, they’ve met that standard, isn't he? It's earlier. You don’t know the paragraph, Mr MacRae?

MR MACRAE:

I'm sorry –

WINKELMANN CJ:

The paragraph that he's setting the standard.

MR MACRAE:

The standard for exemplary damages in terms of –

WINKELMANN CJ:

Yes, so he's referring back to the standard he has articulated earlier in the judgment.

MR MACRAE:

Right.

WINKELMANN CJ:

I just don't have it printed out myself.

MR MACRAE:

Gosh, I'm sorry, your Honour.

ELLEN FRANCE J:

Is it 281, Mr MacRae?

WINKELMANN CJ:

I'm not sure that it was.

MR MACRAE:

In terms of the elements of –

ELLEN FRANCE J:

The standard he's talking about.

WINKELMANN CJ:

284 perhaps or maybe, yes.

MR MACRAE:

I think perhaps it is 281 and 284 in the sense that we're talking about the elements of misfeasance and I think that –

WINKELMANN CJ:

He's obviously referring to a legal standard there though, isn't he, moral condemnation?

ELLEN FRANCE J:

Yes, I just thought 281 because that's relating it to this particular case so in terms of what they had to show acted with malice et cetera.

WINKELMANN CJ:

It's strange because he uses the word as if he's quoting from a case but I'm not seeing moral condemnation.

MR MACRAE:

I think maybe the answer to that is that in terms of applying the principles in *Garrett v Attorney-General* [1997] 2 NZLR 332 (CA) in terms of acting recklessly indifferent as to whether or not the Council in this case was acting within the limits of their public office doesn't attract, there's no – it's not an intentional element, in other words, it's not – malice is – you don't need to show malice for that. It's just whether or not the Council officers are acting within the limits of their public office, but certainly in terms of the acting with reckless indifference as to the consequences, I think that is where you look at it's more of a subjective test where malice can come into it but it doesn't necessarily need to come into it.

WINKELMANN CJ:

Well, in any case, when he discusses exemplary damages he does set a high standard and he's saying he's finding that high standard made out.

MR MACRAE:

Yes.

WINKELMANN CJ:
And it's the morning tea break.

COURT ADJOURNS: 11.31 AM

COURT RESUMES: 11.47 AM

MR MACRAE:
So, your Honours, just before the adjournment I think we were at the point of my submissions where I was talking about the Court of Appeal judgment focusing on the conduct of the Council before the consent was discovered, and in particular that there was no malice or bad faith element during that period, and it seemed from Justice Toogood's decision that any malice or bad faith occurred afterwards.

So just in terms of the pleadings, we've been through those and we've dealt with the continuous breach point, so really now turning to the elements of misfeasance set out in *Garrett v Attorney-General* [1997] 2 NZLR 332 (CA) and summarised in other cases such as *Currie* and *Hawkins v Clayton* (1986) 5 NSWLR 109 (CA). There are really two key elements to consider whether or not the – in this case whether or not the Council officers were recklessly indifferent to the limits of their authority, and then whether or not they were recklessly indifferent to the consequences for Mr Daisley, and the last element really to look at is damage or injury.

So as I think I've submitted already, the Council was recklessly indifferent to the limits of their legal authority both before and after discovery of the consent in slightly different ways. Before the discovery they were – their failure to search for and obtain the consent, and after discovery their failure to withdraw the enforcement proceedings.

WINKELMANN CJ:
But you're only aiming targeting – targeted after discovery, aren't you?
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MR MACRAE:

Correct. That's where the element – that's where the second recklessly indifferences to the consequences comes in, the second element set out in *Garrett.* So – and that's whether or not Mr Daisley would be harmed by continuing to maintain their opposition to the operation of the quarry, and that's really referring back to the trial Judge, Justice Toogood's decision at paragraph 343, as we've already looked at. The key point there is that had the Council "adopted the same attitude" – oh, we've already looked at that: "The knowledge that the Council would, at last, facilitate Mr Daisley's ambitions to establish a commercial enterprise on the property may well have made a difference to the views of his bank." I think that's the key point in terms of the second limb of *Garrett*.

And in fact, notwithstanding the Court of Appeal's finding in relation to misfeasance, both the High Court and the Court of Appeal realised that post-discovery the Council did Mr Daisley a "considerable wrong". I think "considerable wrong" is the term that the Court of Appeal used. So the submission is that the Council's conduct after it had discovered knowledge of the consent must be regarded as being intended to cause harm to Mr Daisley, and that's on the basis articulated in *Bourgoin SA v Ministry of Agriculture, Fisheries, and Food* [1986] QB 716 (CA) and the *Garrett* decision. So in terms of –

WINKELMANN CJ:

And reckless indifference is said to be equivalent to intent?

MR MACRAE:

Yes. Well that's right, yes. It's not necessary to show actual intent, is the – yes, as those cases have demonstrated. It is sufficient the Council's actions were recklessly indifferent to any harm that may result, and as we've said, the harm in this case is the being deprived the opportunity to negotiate with his bank after the consent had been discovered. So on that basis, the submission is that the Court of Appeal was wrong to diminish the importance of Council's failure to

withdraw the enforcement proceedings on the grounds that at some point discussions took place between the solicitors. And perhaps –

KÓS J:

How does he lose the opportunity to negotiate with the bank when there is a land use consent? I mean it's – that's gold?

MR MACRAE:

Oh, well that's right, but the Council were – the Council's conduct was essentially saying that he didn't – they, the Council in terms of their conduct didn't recognise that consent.

KÓS J:

Well they qualified it. They didn't deny its existence, they limited its scope?

MR MACRAE:

So I suppose that begs the question, what ought to they – what ought they have to done after they discovered the consent, and that is certainly not continue with the enforcement proceedings, which were based on the lack of the consent and abatement notices. And bearing in mind that those abatement notices were in fact withdrawn, the foundation of the enforcement proceedings were based on the abatement notice dated 28th of November, and that was in fact withdrawn on the 7th – on the 15th of October.

Perhaps to give it some context, if I could refer your Honours to –

WINKELMANN CJ:

I mean their – the Council's attitude really was that the consent didn't avail Mr Daisley much, wasn't it? That was the approach, that it didn't authorise what he was doing, it was in the wrong place, it wasn't what he was doing?

MR MACRAE:

Those are the grounds in which they communicated back. Those were their concerns that they set out in the correspondence that followed, but those

concerns, it's not – we say it's not appropriate to be dealt with in the sense of enforcement action where we're then going –

WINKELMANN CJ:

No, but isn't that part of the conduct that you're relying on? It's not – is it, or isn't it? Is it just the enforcement proceedings? Because –

MR MACRAE:

Oh, the – certainly the conduct, yes, yes. To give that some context, if I could refer your Honours to a document, 303.0153.

O'REGAN J:

Say that again?

MR MACRAE:

303.0153. So this is a – it's the second email, so if you just scroll down. So this is an email dated 26th of August 2009. So this is four weeks before the consent was discovered, an email from the Council's lawyers to Mr Daisley's lawyer, and so we'll just read through some of it.

So: "Dear Wayne," that's Mr Daisley's lawyer at the time: "Further to our meeting this morning, I have now spoken to Paul Dell and confirm the Council's position as follows: 1. If your client wishes to assert existing use rights then the burden of proof rests with them. I will provide you with a copy of the Historic District Plan Ordinances," and he goes on to refer to those and then it ends, the second to last paragraph: "Beyond that, commercial quarrying either required a consent or alternatively there was a 500 cubic metre limit. Council has no record of any resource consent having been granted for quarrying on the site."

Then the second paragraph: "In terms of process, Council will consider any evidence you produce of existing use rights for the purposes of the hearing." And then at paragraph 3: "If your client is unable to produce the required evidence of existing use rights by the Court's deadline then the alternative is for the parties to agree to an Interim Enforcement Order being made. That order

would require that mineral extraction activities immediately cease on the site and continue to cease until such time as your client applies for and obtains a certificate of existing use rights from the Council. If such a certificate fails to be obtained then Council will proceed with the final Enforcement Orders on the terms set out in its current application."

WINKELMANN CJ:

But that's before the consent is –

MR MACRAE:

That's before the consent. So that's – to give it some context, the submission then is effectively what happens is after discovery of the consent the Council's position doesn't change from that.

WINKELMANN CJ:

So they're saying – they actually say "we're going – we will withdraw the enforcement proceeding" they try and strike a deal making Mr Daisley enter into agreements with them, don't they, to get the enforcement proceedings withdrawn?

MR MACRAE:

That's if – yes, then the alternative is for the parties to agree an interim, but that order would –

WINKELMANN CJ:

No, no, this is after the consent is found.

MR MACRAE:

Sorry, you're talking now after?

WINKELMANN CJ:

Yes.

MR MACRAE:

Yes, I'm sorry, your Honour. So after the consent was found they did more or less take, adopt the same position. They tried to strike up an agreement between the parties as to the scope of the consent.

WINKELMANN CJ:

Isn't it – wasn't it more than that? Wasn't it worse for Mr Daisley than that, is my recollection of the evidence?

MR MACRAE:

Well certainly they – very little happened until after the property was sold and then they sought to impose – they sought to, I think the expression they used is "regulatorise" the consent. So they were essentially holding onto the enforcement proceedings we say unlawfully on the basis that unless Mr Daisley agreed to some conditions they were opposing which they referred to as "regulatorising", the enforcement action would continue, and in fact I think they state, later state, and that's been referred to by other Court of Appeal, that interim orders would be sought restricting any mining activity if agreement wasn't reached.

WINKELMANN CJ:

Well it's at 35, 36, and 37.

KÓS J:

I mean I'm not certain that you can condemn the Council too much in relation to this. For a start, it's not surprising that they would say in that earlier email that Daisley should prove existing use rights because that's the normal course of event. And existing use rights and land use consents, if they did exist, can expire as a result of non-use.

MR MACRAE:

Yes.

KÓS J:

So there was an uncertainty here at that time.

MR MACRAE:

Yes, I accept that.

KÓS J:

Now once you had the land use consent discovered it had certain limits. It also had certain enormous benefits for the Daisleys because very strangely it didn't seem to have any kind of volumetric limit.

MR MACRAE:

I would agree with that. I think that the problem for the Council was that it was fairly open, it was a very open consent.

KÓS J:

Absolutely, and the local environment had changed with the smallholdings and so forth?

1200

MR MACRAE:

Yes, so the question is whether they had a basis for continuing with the enforcement action is the key, because the enforcement action, in addition to other conduct which was covered, which is –

KÓS J:

I entirely agree with your submission on that point.

MR MACRAE:

Yes.

GLAZEBROOK J:

Are you going to take us to some of the evidence of what happened afterwards?

MR MACRAE:

In terms of the communications or?

GLAZEBROOK J:

Yes.

WINKELMANN CJ:

Or Mr Daisley's evidence.

GLAZEBROOK J:

It's probably okay if you just want to take us to the highlights and give us other references later.

MR MACRAE:

I think there was an element – so there was an initial approach, in fact I do – so at document 304.0114, so this is a document that was really the next substantive communication between the discovery of the consent and the sale of the property, and this is in fact what I was referring to a little earlier in terms of the Council raising issues which you've identified with the scope of the consent in seeking to regularise the conditions. I'm not sure if I can refer to anything in that letter that hasn't been covered already.

WINKELMANN CJ:

So they were trying to do an all up deal, which includes agreeing to the terms of the enforcement order, and your point is that that was improper.

MR MACRAE:

Correct.

WINKELMANN CJ:

Because there was no basis for the enforcement proceedings.

MR MACRAE:

That's right your Honour.

GLAZEBROOK J:

Was there evidence as to the effect of those conditions? Those – well, the conditions they're referring to?

MR MACRAE:

Yes. I think that Mr Daisley's application for a resource consent in 2006 did have some conditions which were, I haven't been through them line by line, but there were some conditions in that application which clarified the scope of the consent that he was requiring at the time. So that was – and the fact that the Council in 2011 more or less granted that application to Ark, there was certainly a basis for the Council, as soon as the consent was discovered, to revert to Mr Daisley's 2006 application for a resource consent, and we would say that that wouldn't be an unreasonable approach for the Council to take.

GLAZEBROOK J:

But this was, is the submission?

MR MACRAE:

What's that your Honour sorry? It was, it was a reasonable approach to take. It was a reasonable option available to the Council.

WINKELMANN CJ:

What was a reasonable option?

MR MACRAE:

To adopt the 2006 consent that Mr Daisley had filed in 2006.

WINKELMANN CJ:

But it was an unreasonable one to extract from Mr Daisley a resolution of an enforcement proceedings which had no basis, which entailed him agreeing to an enforcement order rather than just discontinuing and I think face costs?

MR MACRAE:

Yes, yes.

KÓS J:

Well perhaps but you have Mr Casey acting for Mr Daisley. He knows what he's doing in this area. He didn't apply to strike out the enforcement action.

MR MACRAE:

No he didn't your Honour. I think my reading of the correspondence is that he was engaged to advise on the consent itself and – on the terms of the consent itself and what they meant and, rather than his engagement to correspond – so his retainer was limited to his expertise with those matters rather than to seek to – it maybe a…

KÓS J:

Well the letter we're looking at is addressed to him.

MR MACRAE:

Yes.

KÓS J:

I mean if there's something fundamentally wrong that constitutes a misfeasance by the Council he would've thought he would've identified it.

MR MACRAE:

It would certainly be nice if there was a letter back, as I think, my submission before, to say you withdraw it otherwise there'll be consequences. We don't have that. But of course we say that, the submission is we don't have to have that to, because what we're talking about is the Council's conduct.

KÓS J:

I certainly accept you're on strong ground in saying the enforcement action shouldn't continue in any form.

MR MACRAE:

So just then finally dealing with the other two points, or really the last, really the only other point really made by the Court of Appeal is that the, is the fact that

exemplary damages were not necessarily having regard to the substantial aware of compensatory damages, and there are some cases that talk about exemplary damages and an award being in addition to compensatory damages and it's really to deter and punish is the effect, and both the *Kuddus v Chief Constable of Leicester* [2001] UKHL 29 and *McLaren Transport Limited v Somerville* [1996] 2 ERNZ 336 (CA) cases set that out. Sorry, just before I –

WINKELMANN CJ:

Sorry, that's not referred to in your written submissions is it, what case do you say it was?

MR MACRAE:

I think they are your Honour. Are you looking at the oral notes or the…

WINKELMANN CJ:

No, I'm looking at your submissions. Is it in your oral notes? There's so many bits of paper and I have to say the submissions are not labelled in the clearest way so it's very hard to find your way through them. Nobody's submissions are labelled in the clearest way.

KÓS J:

There are a lot of moving parts here.

MR MACRAE:

Yes.

WINKELMANN CJ:

It probably would have been just useful for people to have adopted their name, for one thing, as opposed to appellant, cross-appellant, et cetera.

MR MACRAE:

Yes. So in our more substantive written –

WINKELMANN CJ:

They are quite substantive aren't they?

MR MACRAE:

Yes, so in the substantive submissions dated 15 November 2024 those cases are referred to at paragraph 49 and onwards, 54 and 55.

WINKELMANN CJ:

The cases are. So it's just *McDermott* and *McLaren*? I thought it was named another case.

MR MACRAE:

Yes and *Kuddus*.

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WINKELMANN CJ:

Curtis *[sic]* as well you cite there, do you?

MR MACRAE:

Yes.

WINKELMANN CJ:

Where is it?

MR MACRAE:

Footnotes, where's that, 49. It's paragraph 49.

WINKELMANN CJ:

Oh, *Kuddus*. So you also cite that for your passage at 54 and 55. Are those your submission Mr MacRae?

MR MACRAE:

Just before I finish I did check the, Mr Daisley's evidence, and it is correct, that reference number 201.0029 does refer to the joint venture arrangements. So that is where it is in the evidence. I also referred to –

WINKELMANN CJ:

Did that feature in the argument in the High Court?

MR MACRAE:

No, no.

WINKELMANN CJ:

So it's just a passing interest?

MR MACRAE:

Yes, yes.

ELLEN FRANCE J:

Mr MacRae, can you just tell me whereabouts we find Mr Daisley's conditions that he was suggesting for the resource consent. You don't have to do it now, but just at some point.

MR MACRAE:

Yes, thank you. Just finally I did refer to a communication just before the 2011 consent was granted to Mr Ark that suggested that Mr Daisley was no longer involved. I might have been putting that a little bit too strongly. I can refer you to that document. It's 304.229 and 304.230.

WINKELMANN CJ:

Sorry, can you just go through those numbers again?

MR MACRAE:

It's 304.229 and then the next page 304.230. So if you don't mind scrolling down. So that's at, I think the first email, just scroll down a little bit further please. I think that this is just before, so this is from the Council's lawyer asking if consent will be given to the proceeding withdrawn – oh sorry, that's actually Mr Daisley's lawyer I think. Yes, and if you scroll up, then there's advice from the lawyer that Ark consents to the withdrawal of the proceeding.

Ark Contractors, this is the relevant owner. "Mr Daisley the former owner, has no ongoing involvement."

Then if you scroll up further up the chain it just says: "Council agrees…". So I think I might have been putting it too strongly before. I don't think there's a direct connection between Mr Daisley no longer being involved and the fact that the Council withdraws the proceedings but it's mentioned.

WINKELMANN CJ:
Okay. But it's confirmation that he's no longer involved at that point?

MR MACRAE:
Correct.

KÓS J:
Is that correct?

WINKELMANN CJ:
May not know since it wasn't an issue in the proceeding.

MR MACRAE:
Yes. I think that's probably…

KÓS J:
Right.

MR MACRAE:
Those are my submissions your Honours.

WINKELMANN CJ:
Thank you Mr MacRae.

MR MCLELLAN KC:
Dealing with the equitable fraud issues and my reply to some points which I deal with fairly briefly. There was an exchanged with my learned friend

Mr Farmer I think your Honour the Chief Justice suggesting to Mr Farmer that the Council knew that they hadn't done a proper search and my response to that proposition, if I understood it correctly, is that there was no finding to that effect and indeed the proposition is contrary to what I've already submitted to you that after the LIM search was undertaken, the Council officers assumed what the High Court Judge described as the default position, namely that there was no consent. So that couldn't be repurposed into a finding that the Council knew they'd made an error because that suggests the circularity of reasoning that the omission itself can amount to –

WINKELMANN CJ:

So there's no finding that – I mean they knew what they'd done. There's no finding that they knew they had not done a – there's no finding that they were conscious that they hadn't searched for archives.

MR MCLELLAN KC:

Correct. There's no finding to that effect, nor that they –

WINKELMANN CJ:

I don't think I suggested that there was, but how, in what context did that arise?

MR MCLELLAN KC:

I think it, no, I'm afraid I can't recall exactly the context, I just made a note of the exchange to that effect, and also that they decided not to carry out another search, which I think was your follow-up proposition and again I say that they, the Council officers assume the default position, namely there was no consent, but –

GLAZEBROOK J:

What about the OIA request that specifically asked for?

MR MCLELLAN KC:

I'm just coming to that because there's a bit more to that than has been suggested so far.

WINKELMANN CJ:

So what is your position? There was – can we just be clear what you say. There was no finding that the Council knew it had not done a proper search, nor any finding that…

MR MCLELLAN KC:

That the Council decided not to carry out a further search.

WINKELMANN CJ:

A further search after the LIM?

MR MCLELLAN KC:

Correct. But if we come –

WINKELMANN CJ:

But rather the finding was that after the LIM search was undertaken the Council proceeded on the basis that they did not need to undertake a search because Mr Daisley carried the burden. Is that it?

MR MCLELLAN KC:

It's perhaps not quite as straightforward as that. Probably the best finding on this, there are a couple of references to it in the High Court judgment, but 386, which we've already gone to: "The Council then having reported to Mr Daisley in the LIM that no consent existed, it is also likely, in my view, that that became the Council's default position."

WINKELMANN CJ:

So the Council didn't turn its mind to a search? Up until the OIA I imagine, but the fact that no consent existed.

GLAZEBROOK J:

No one bothered to carry out a further more diligent search.

MR MCLELLAN KC:

No one bothered, correct.

WINKELMANN CJ:

What paragraph is that in?

MR MCLELLAN KC:

That's the same paragraph.

KÓS J:

Your point here is that there is nothing misleading or deceptive. They're not saying "we have carried out a search" when they haven't carried out a search.

MR MCLELLAN KC:

Correct.

GLAZEBROOK J:

Well they must have known they hadn't bothered to carry out a search because there's a finding they didn't.

MR MCLELLAN KC:

They didn't carry out a further search for the reason that Justice Toogood set out –

GLAZEBROOK J:

Well it doesn't matter what the reason is, they knew they hadn't done a proper search, and you say –

MR MCLELLAN KC:

No, paragraph 386 doesn't –

GLAZEBROOK J:

– that was no finding to that effect. There must have been in 386, they didn't bother to conduct a further search.

MR MCLELLAN KC:

Paragraph 386 says that the –

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GLAZEBROOK J:

It doesn't matter why they didn't do so. They knew they hadn't.

KÓS J:

Well that's not what paragraph 386 says.

MR MCLELLAN KC:

No, no, that's not – I'm sorry.

GLAZEBROOK J:

I mean that might be relevant to equitable fraud, but if it's no finding that they did not do a proper search, you say, why is paragraph 386 not a finding that they didn't do a proper search?

MR MCLELLAN KC:

No, it's a finding that they didn't "carry out a further, more diligent search". It is not a finding that they had an appreciation that the search that they had undertaken was not a proper search. What we know after all of the evidence is that the –

GLAZEBROOK J:

Well that's different from saying there wasn't a finding, they didn't do a proper search. So there was not a finding that they had an appreciation that the search they had done was inadequate?

MR MCLELLAN KC:

Correct, I –

GLAZEBROOK J:

Is that the…

MR MCLELLAN KC:

Well the proposition I've started with was that the Council knew they hadn't done a proper search. That was the proposition from her Honour the Chief Justice that I was originally responding to, and I say that there is no

finding to that effect in the other reference in the High Court judgment to similar effect is at paragraph 332 which I took you to.

ELLEN FRANCE J:

Sorry, I just missed the number?

MR MCLELLAN KC:

Paragraph 332.

WINKELMANN CJ:

Sorry, it's in Justice Toogood, paragraph 332?

MR MCLELLAN KC:

Correct.

GLAZEBROOK J:

Paragraph what, sorry?

MR MCLELLAN KC:

Paragraph 332.

WINKELMANN CJ:

So you're saying there was no conscious appreciation that they had not done a proper search. Is that your fundamental point?

MR MCLELLAN KC:

That is the fundamental proposition.

WINKELMANN CJ:

Yes.

MR MCLELLAN KC:

That's the simple proposition, and then if we go to the –

WINKELMANN CJ:

I mean they knew what search they had done, you accept that?

MR MCLELLAN KC:

They knew the search that they had done and the outcome of it, and then if we go forward to the OIA request which was just referred to firstly at 302.1 – you were taken to 302.132 which showed the – well the search that had been undertaken at this point in January 2008, which is a subsequent search because – and they have discovered 834 pages of potentially relevant –

WINKELMANN CJ:

So we're onto the OIAs now?

MR MCLELLAN KC:

This is the OIA. So this is the document you were taken to which was the initial response from the Council, 302.0132, which you've seen, and then if we go to the actual response which you haven't yet seen, that's at 302 –

GLAZEBROOK J:

Can you perhaps not just flick off things before we've managed to look at them? Thank you.

MR MCLELLAN KC:

Oh.

WINKELMANN CJ:

That's the one we've seen before, 302.

MR MCLELLAN KC:

Thank you, yes.

GLAZEBROOK J:

Oh, that was the invoice, thank you.

MR MCLELLAN KC:

So staff time four hours, 834 pages, and the response is at 302.0133.

WINKELMANN CJ:

Is this the response to the OIA request?

MR MCLELLAN KC:

Yes, it is. I'm sorry, I'm just having a technology issue.

WINKELMANN CJ:

Because it doesn't look like it.

KÓS J:

That seems to be a site visit report.

MR MCLELLAN KC:

302.01…

WINKELMANN CJ:

33?

MR MCLELLAN KC:

33. So – no, I'm sorry. The response to the OIA request was what you have just seen.

KÓS J:

Yes.

WINKELMANN CJ:

So we were taken to it.

MR MCLELLAN KC:

That's the – yes, and here is the follow-up letter which –

GLAZEBROOK J:

But we don't know – there was nothing to say what the information provided was.

MR MCLELLAN KC:

I don't believe that's in the record. Do you mean the 800-odd pages?

GLAZEBROOK J:

That's what we were told before, that –

KÓS J:

That's what we know it is. That's all we know.

MR MCLELLAN KC:

And I'm pretty sure that's not in the record, nor I understand was it before the High Court. But I take you to this really just – so this is May 2008, that OIA response was January 2008, and it's just recording a site visit, and in the third paragraph the references to the taking of blue and brown rock and reference to the amounts, of course 500 BCM were permitted and that's in the fourth to last "under the provisions of the Whangārei District Council mineral extraction" paragraph.

So I'm just taking you to this to understand the difference between Mr Daisley and the Council at this point in time and how it also interrelates with the consent when it was discovered, because the consent provided for the extraction of only brown rock and that particular location was in –

WINKELMANN CJ:

Not red rock? I thought it was red and brown.

MR MCLELLAN KC:

It's interchangeably, as I understand, described as brown rock or brown/red. It's not –

WINKELMANN CJ:

The consent, in any case, as I said on the first day, didn't extend to blue rock?

MR MCLELLAN KC:

Correct.

WINKELMANN CJ:

Yes.

MR MCLELLAN KC:

That's the difference. And the –

KÓS J:

I mean, goodness knows whether that's material or not.

WINKELMANN CJ:

I think Mr McLellan is going to bring us to why it is.

MR MCLELLAN KC:

I'm – well I'm just contextualising the – what my friend has put to you because the suggestion was that there was unhelpfulness in the response by the Whangārei District Council to the – when these requests were being made. Obviously there has been a search done to comply with the OIA request and then there is a constructive response followed up in May with a site visit and discussions, and also just around this offer –

WINKELMANN CJ:

So are we dealing with your reply on the equitable fraud issue at the moment? Or what are we in, are we –

MR MCLELLAN KC:

Well, yes, this follows from where I started with the proposition that there was no search undertaken, but I won't be repeating this, though it is relevant to the matters that were raised on the misfeasance point.

WINKELMANN CJ:

So how is this – can you just perhaps signal to us where you're going with this? Because I'm just finding it hard to see where you're going at the moment.

MR MCLELLAN KC:

It is – it follows on from where I started, that there was no search and that there was a lack of co-operation or…

WINKELMANN CJ:

Well that's – yes. So your point is there was a search in response to the OIA request?

MR MCLELLAN KC:

Correct.

WINKELMANN CJ:

And this last part you say is relevant when we get to the misfeasance?

MR MCLELLAN KC:

Yes, and just to round that off I'll just take you to paragraph 306 of the High Court judgment. Oh, look, no, your Honours, I don't really need to do that. It's just a follow-up correspondence to similar effect. I think I've taken –

WINKELMANN CJ:

Well we're there now.

MR MCLELLAN KC:

Oh. So paragraph 306, so a month later, more correspondence on similar issues and just finishing with: "The tone of the letter is helpful and by no means aggressive or combative." I don't take the point any further than that.

WINKELMANN CJ:

Yes, so I think the High Court Judge made a finding that it didn't – the conduct of the Council didn't cross the line into misfeasance until after the LUC was discovered.

MR MCLELLAN KC:

That's right. And my final point in reply is to go back to the *Kitchen* decision which my friend Mr Farmer addressed you on. And I just want to flesh out the facts of *Kitchen* because it's relied upon as with *Beaman*, which I've already addressed you on and have suggested that the judgments can't be read as being anything other than conscious concealment.

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But the facts of *Kitchen* in general which you will appreciate were that the – after the death of the plaintiff's husband by electrocution the plaintiff suspected that the local electrical company who had installed the stove was responsible and negligent for his death. She went to the RAFA, one of the defendants, the main defendant was the solicitors who ultimately had liability, but she went to the RAFA who directed her to a solicitor and the solicitor got in contact with the local electrical company and the facts are set out..

WINKELMANN CJ:

And the solicitor participated in device to conceal from her that the money, the payment was coming from the electricity –

MR MCLELLAN KC:

So the approach was will you, the electrical company, make an ex gratia payment to her in full and final settlement. She had given no instructions. The solicitors had not sought instructions as to whether it would be a full and final settlement, in fact the woman did not know about the approach at all, and the electricity company came back and said: "No, we're not prepared to do that" and…

KÓS J:

But the critical thing was that the, you had a one-year limitation period.

MR MCLELLAN KC:

There was a one-year limitation period on the –

WINKELMANN CJ:

The solicitors had actually delayed in relation to that too so there's issues of solicitors' negligence as well, wasn't there?

MR MCLELLAN KC:

Well that's the first issue, and then the second issue was whether this –

WINKELMANN CJ:

But they're not unrelated, I think, on your case.

MR MCLELLAN KC:

Was whether the solicitors had consciously concealed by fraud her cause of action against the solicitors. So the, if I can just –

WINKELMANN CJ:

So they're not unrelated.

MR MCLELLAN KC:

Well this – I'll come to the point that Justice Kós raised with my learned friend about one of the grounds which was rejected as fraud, and the important facts are set out on page 569 to 570 of Lord Evershed's judgment where he – the notes were taken of the conversations and on 569, down the bottom in the final paragraph, third line: "It will be recalled that by the letter which the appellants had written to the [electricity company's] solicitor, they had suggested that any grant made by the· company would be reciprocated by an undertaking on the part of the plaintiff to accept it in full and final settlement…".

Then there was a file note: "Attending solicitor of West Kent Electric on phone when he informed us that his company was unable to make any ex gratia payment to Mrs. Kitchen because she may consider this as an admission of liability on the part of his company. However, the board might consider making a donation to the Royal Air Force Association but they would want to know how the money would be used. We undertook to make inquiry…".

There were further discussions with the RAFA and the defendant's solicitors, and then about 10 lines down on page 570: "We undertook to inform this to the company and keep Squadron Leader O'Donnell informed. We also advised him that we," the law firm "would have to make a small deduction in respect of our charges." And it becomes apparent later that the law firm did that because they didn't want to send a noted fee to their actual client the plaintiff.

KÓS J:

Who they'd let down badly.

MR MCLELLAN KC:

Who they had let down badly because there had been a finding that they had let the limitation period expire and the, just on the limitation period, there were two relevant limitation periods. The first was under the…

KÓS J:

Fatal Accidents Act.

MR MCLELLAN KC:

Fatal Accidents Act, and under the Law Reform Act, and the limitation period under the former was only one year, whereas it was six years under the latter, but the former Act provided the plaintiff with a stronger remedy, but the evidence was fairly clear that the solicitors simply let that go by, they didn't think it was worth suing, but importantly they kept the limitation period from the plaintiff. Then going back to the conversations on page 570 –

WINKELMANN CJ:

It's not that complicated, though, is it Mr McLellan. They participated in a scheme to pass payment through to her without disclosing to her, taking their own fees, in circumstances where they themselves had been negligent.

MR MCLELLAN KC:

That's it, and if you have a look at just above the middle of –

GLAZEBROOK J:

You said you were going to show us something that didn't amount to concealment. Can you just articulate what that is before we go to the evidence of that?

MR MCLELLAN KC:

Yes, so that's the point that Justice Kós raised with my friend yesterday and the point is on the, in the headnote right at the bottom, the first ground after the finding of negligence against the solicitors: "That the failure of the solicitors to inform the plaintiff of her possible claim under the Fatal Accidents Act did not of itself constitute a concealment of her right of action against the solicitors by 'fraud'…".

That is dealt with by Lord Evershed at page 569 where he disagreed with the Judge's conclusion that it did, in fact, amount to concealment by fraud, and around the middle of the page, after the reference to *Bulli Coal*, because that would be similar, conceptually, to a *Bulli Coal* case where the concealment was wrapped up in the wrong itself, and his Lordship said: "That, however, is not, in my judgment, the present case. Indeed, a decision to the effect that the failure to inform the plaintiff, while being an act of negligence, also constituted the requisite concealment by fraud, would be contrary to the decision in *Wood* v *Jones,* where it had been suggested that the failure of solicitors to give the client proper information as to a valuation also constituted the necessary concealment. That suggestion was rejected, and, in my judgment, rightly so, by [the trial Judge]."

So I say that there is some reasoning by analogy to the present case because this was an allegation against the solicitor that they had a duty to inform the plaintiff of a right, and they failed negligently to do so, but that couldn't be construed as fraudulent concealment.

WINKELMANN CJ:

Do you say it would be decided the same way today?

MR MCLELLAN KC:

Yes I do. Yes, there's no reason for it not to be because it is simply negligence not wilful concealment of a known fact.

KÓS J:

The classic example of where the tort would itself amount to fraudulent concealment is deceit, or as in *Bulli Coal*, where what you're engaging in is a furtive known trespass.

MR MCLELLAN KC:

Yes. Wherever the wrong is itself deliberate and at the same time it is carried out in circumstances, or with the intention of concealing the fact from the plaintiff.

WINKELMANN CJ:

Well, and in this case it was the device employed which amounted to concealment.

MR MCLELLAN KC:

They're separate points and they're dealt with separately in the judgment, so that the second issue –

WINKELMANN CJ:

Yes, as I just said.

MR MCLELLAN KC:

I'm sorry, I misunderstood your Honour.

WINKELMANN CJ:

Yes.

MR MCLELLAN KC:

Yes, that's correct. So on the second point, which is the device, the conspiracy really, between the electricity company, the solicitors, and the RAFA was to conceal the facts from the plaintiff, and at page 569 – I'm sorry page 570, which

is where I was in those notes of conversations, the suggestion was: "…that it might be appropriate if such donation were distributed to Mrs. Kitchen, tactfully, by such means as the R.A.F.A. should decide." That's a suggestion from the RAFA. "At the end of his note Mr O'Donnell recorded: 'Confidentially, it appears to me, that the West Kent Electricity Co. Ltd. may be thinking of helping Mrs Kitchen in this indirect way, without making any actual ex gratia payment which would probably in law be rather awkward.' Finally – and this is underlined: 'Mrs Kitchen must not know, of course, the originator of the donation…' The reference to secrecy is to be observed, and that, in fact, was how the matter was carried out."

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WINKELMANN CJ:

And it just happily happened to assist the solicitors in not being detected in their own wrong.

MR MCLELLAN KC:

So they couldn't be detected in their own wrong and they did the obvious thing to keep it secret, which was not to send the plaintiff a note of fee, which of course may have put her on enquiries to what they had been doing to achieve this result, and the conclusion at page 574 of Lord Evershed was: "Assuming, as I do, that the plaintiff was the appellants' client, she was entitled to rely upon them to look after her interests, and it was in breach of that confidence, as I think, that they did what they did…and concealed from her facts which would undoubtedly, if disclosed, have brought to light what her true rights against the appellants were."

And then just very quickly, Lord Justice Sellers' judgment agreeing with Lord Evershed at page 578, second paragraph: "He" – this is the articled clerk at the law firm, Mr Arditti – "failed to inform the plaintiff of the time-limit for the writ and the consequences of not issuing the writ and to obtain her instructions…It has been accepted by the appellants, and indeed, it is quite obvious, that the plaintiff would have insisted on a writ being issued and would have rejected advice to let the matter drop. Those are the acts of omission,

which gave rise to the claim against the appellants for negligence…but I do not find in them or in the circumstances surrounding them any evidence of fraudulent concealment." So that's the first point. And on the second point: "But, in October and November, 1946, there was an active concealment, a deliberate and intentional failure for some reason to disclose the offer of £100 made by the West Kent Co."

So again, as I have suggested when correctly understood in relation to *Beaman*, the facts of this case are of deliberate concealment of subjectively known facts. So that is just to provide that context to the –

WINKELMANN CJ:

Well I mean – so to get to your submission, your submission is that this is, that's a device, it's dishonesty, it's deliberate, it's not recklessness?

MR MCLELLAN KC:

It is not recklessness. That then takes me to continuing breach, which I can be I hope relatively brief on. So in the judgment which I will start with, the Court of Appeal's judgment. The relevant section starts at paragraph 80 –

WINKELMANN CJ:

So is this a new point of reply, or?

MR MCLELLAN KC:

No. I'm sorry, I said I was moving to the continuing breach.

WINKELMANN CJ:

Okay, sorry. I must've been stuck back on the case. Continuing breach.

MR MCLELLAN KC:

Continuing breach. And I support the Court of Appeal's reasoning in that section from paragraph 80 to paragraph 86, and the only point of difference between us is in relation to the loss on the sale of the property. That's the

$90,000 which I heard this morning is in fact the only advantage that the respondent says that it can get from succeeding on this alternative ground.

Our submissions are set out at paragraph 5.6 of the appellant's submissions on continuing breach, just – which at least has a half way helpful title, though overlong.

WINKELMANN CJ:

It is quite helpful though. It would've been even more helpful if it said Whangārei District Council, but it does give us an idea of what we're dealing with.

MR MCLELLAN KC:

And the relevant section, there doesn't seem to be any real difference between us on the legal principles. We deal with the lost value of the Knight Road property at paragraph 5.6 on page 14 and we say at (i) that while the loss crystallised in November 2009 within the limitation period, it wasn't the first property-related loss caused by Whangārei's breaches of duty, so it was not fresh. The first loss of that kind occurred in 2006 when WDC maintained that no LUC existed and his resource consent application was rejected. So the loss of value was finally quantified in 2009 when the property was sold, but Mr Daisley could've sued for that loss and quantified it by valuation evidence in 2006.

It is a little opaque as to the reasoning of the High Court for finding as it did on this sum of $90,000, and that can be found at paragraph 559 of the High Court's judgment where his Honour returned, "therefore, to the differential of $120,000 between the purchase price paid…in 2004 and the sale price five years later". And his Honour took a broad view, bore in mind "the undoubtedly debilitating effect on Mr Daisley's finances of having to fight the Council because of its negligent failure to discover the consent". The problems would have impeded his ability to focus on his business activities, and he ascribed 75% of the loss in value to the consequences of the Council's negligence. So he allowed damages of $90,000.

As we've said at (ii) in the written submissions on page 15, the $90,000 wasn't "distinct" from losses that had occurred before the limitation cut-off period. It was a further consequence of the lost profits and direct costs which started to accrue in 2006, and to use the language of the Court of Appeal in *Bowen,* the $90,000 was "consequential upon" the earlier losses, not "directly" from WC's wrongful act. So Mr Daisley sold the land to Ark Contractors to avoid a mortgagee sale. He pleaded that his inability to commercially operate the quarry due to the Council's negligence meant he lost "revenue streams that would have seen [him] avoid financial difficulties and financial trauma", and that he sold to Ark Contractors because there wasn't any "recourse" for achieving revenue from the property.

The High Court referred to the link between the $90,000 and the earlier fight with the Council because of its negligence, so in my submission that's clearly at least indirectly related to time-barred breaches and losses, the debilitating effects referred to in the section of the High Court judgement I've just adverted to, and also supported I say with – by the statement of claim itself, and if I just take you to that at paragraph 192: "In particular, if the plaintiffs had been unimpeded in the operation of the quarry and delivered mineral to the growing market place the plaintiff would have had opportunity to achieve the commercial potential of the quarry (at least to similar levels as the quarry was consented to by the Northland Regional Council), providing for commercial revenue streams that would have seen them avoid financial difficulties that occurred after 5 years of dispute with the first defendant."

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So that suggests that the genesis of this loss was the same as that for other financial losses claimed by Mr Daisley in the proceeding, and they had their, their source was deep into time-barred territory, and the other reference is 201 over the page in the fourth amended statement of claim: "The issue of the RMA abatement, infringement and enforcement notices was wholly responsible for the plaintiff having significantly constrained operation of the quarry from February 2005." So everything, in my submission, all the losses claimed,

including the property loss, have their source back in February 2005. So no fresh breach after the – in the limitation period, and no fresh distinct loss.

GLAZEBROOK J:

Is the argument rather that without the actions of the Council after the resource consent there wouldn't have been that loss?

MR MCLELLAN KC:

No because that would was within such a short period of the discovery of the consent that there can't be any bite that caused him, the damage was done prior to the limitation period in terms of –

GLAZEBROOK J:

Well not really because once the consent was found then there shouldn't have been a loss on the sale of the property. Isn't that the argument? Because the consent was there and should have allowed quarrying activity, but for the actions of the Council saying the consent didn't cover it.

MR MCLELLAN KC:

But as *Bowen* says, the question is whether it was at least indirectly the result of the earlier breaches and loss, and as the pleadings and his Honour's finding at 559 of the judgment, say it was because of the debilitating effects of the fight the enforcement action had been taken throughout the earlier time-barred period that was the cause of this loss, but in my submission it was the die was cast well before the discovery of the consent and Mr Daisley considered that he had no option but to sell.

GLAZEBROOK J:

And at a loss, which was predicated on the fact that the consent was not applicable, because there was still enforcement action outstanding.

MR MCLELLAN KC:

That's not –

GLAZEBROOK J:

So isn't the argument that if the Council had properly entered into negotiations after the consent was discovered, then either there wouldn't have been this loss at all because it might be that there could've been a renegotiation with the bank which was a finding of the Judge, or alternatively that loss wouldn't have been sustained because the purchasers were buying a property with no enforcement proceedings outstanding.

MR MCLELLAN KC:

Well in my submission the period of less than three months between the discovery of the consent on the 22nd of September 2009, and the final, the settlement of the sale of the property on the 2nd of December, doesn't bear that out, and nor does the High Court judgment make that suggestion, given the other more potent causative effects on Mr Daisley's decision to sell.

So at 112 of the High Court decision in the final sentence, after the negotiations that occurred between Mr Daisley's lawyers and the Council's lawyers: "It appears not much else was done after regarding the Environment Court proceedings, given that Mr Daisley was by then committed to the sale of the Knight Road property." And that is by November 2009.

KÓS J:

Do we have the sale agreement so we can date the commitment?

MR MCLELLAN KC:

I'll need to find that your Honour. Then fairly briefly on the conduct after the LUC was discovered, which is effectively a decision by the Council not to discontinue the proceedings at that time –

O'REGAN J:

Is this, you're on misfeasance now?

MR MCLELLAN KC:

No, this is still on the continuing breach point.

WINKELMANN CJ:

Okay, it'll cover some of the same ground I guess.

MR MCLELLAN KC:

Yes. It's a fairly short point that I make, which I can get out of the way before the adjournment. So I say that there was no fresh loss after the discovery of the consent. The consent had already been disclosed and it wasn't a breach of duty of care, that is the decision to continue the proceedings, as we'll see in the misfeasance section, and there couldn't be any arguable suggestion that when all the relevant facts were known to the Council, namely the discovery of the consent, that there was negligence in continuing the enforcement proceeding. So again –

WINKELMANN CJ:

What do you say to Mr MacRae's point that there was no basis for it when the abatement notices on which it was based had been withdrawn?

MR MCLELLAN KC:

So I think that the Council's position was, which they sought to negotiate with Mr Daisley, was that they would keep the enforcement proceedings on foot as a vehicle for staying before the Environment Court to work out the terms of the consent, which the evidence shows the Council was co-operative with Mr Daisley about achieving on similar conditions to those which he had suggested in 2006.

WINKELMANN CJ:

Did they also attempt to negotiate an enforcement order?

MR MCLELLAN KC:

Yes, but to include the variations to the consent.

WINKELMANN CJ:

Is that a full answer?

MR MCLELLAN KC:

Perhaps I can come back to that after the break and give you an answer you can rely on.

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

I asked what the conditions were the Council were trying to impose. Is that what you're going to come back to us after the break on?

MR MCLELLAN KC:

Yes, I'll do that. In fact I'll deal with that within the misfeasance because they are in our written misfeasance submissions so probably more convenient to deal with it that way.

WINKELMANN CJ:

Just on this point about the enforcement order, of course the trial Judge spent a long time going through all the evidence and his view, or we'll come to that in the misfeasance part, although you do seem to be covering exactly the misfeasance part at this point.

MR MCLELLAN KC:

Well there is an overlap because there was discussion about how continuing breach engaged –

WINKELMANN CJ:

Yes, and so you said that was a short point and to be dealt with after the break.

MR MCLELLAN KC:

That point has been dealt with.

WINKELMANN CJ:

So it's probably an appropriate time to take the luncheon adjournment then and we'll come back at 2.15.

MR MCLELLAN KC:

Thank you your Honour.

WINKELMANN CJ:

You won't be much longer then I take it?

MR MCLELLAN KC:

No, I've got to cover misfeasance and that's me out of the way.

WINKELMANN CJ:

Good, thank you.

COURT ADJOURNS: 12.58 PM

COURT RESUMES: 2.16 PM

WINKELMANN CJ:

Mr McLellan.

MR MCLELLAN KC:

I'll just start firstly in view of the way the argument has unfolded I said that I would be brief, I probably going to be a little longer than brief but I will do my best to be as economical as possible. The written submissions are quite full.

WINKELMANN CJ:

Are you onto misfeasance now?

MR MCLELLAN KC:

Misfeasance. I'll start by answering the three questions that I think are outstanding, starting with Justice Kós' question about the sale date and when settlement, that's paragraph 12 of the High Court judgment, and that is 29th of January 2010.

KÓS J:

So the sale contract was the December date?

MR MCLELLAN KC:

2nd of December was the agreement.

KÓS J:

Right.

MR MCLELLAN KC:

Settlement, 29th of January 2010. The conditions point raised by Justice Glazebrook, so probably the section of my written submissions that I'm going to spend most time on is from page 11, part 7 of the submissions, and that goes through each of the main sections, or main submissions as to why the Court of Appeal was correct in its liability finding on misfeasance, and while I will come back to the point in the sequence of the written submissions, the question about the conditions that Justice Glazebrook asked is dealt with from 7.19 and I'll come back to demonstrate by reference to the documents that the conditions that the Council proposed to Mr Daisley on the 29th of October 2009 were with some modifications proposed by Mr Casey and then by Ark after it settled the sale. There was no ultimate disagreement as to the conditions. So the modifications that were sought were included in the final conditions.

WINKELMANN CJ:

Can you just repeat that submission please?

MR MCLELLAN KC:

That the conditions that were ultimately agreed between the Council and Ark included all of the conditions that the Council had suggested, with a couple of modifications, and I think one addition. So we're talking about things like the number of blasts per day –

WINKELMANN CJ:

Council had suggested to Mr Daisley as part of their package deal on ending the enforcement proceedings?

1420

MR MCLELLAN KC:

Correct. Mr Casey responded, and then Ark took over the negotiations, and I think Ark added one additional condition to those, to the changes which Mr Casey had sought. So it was negotiated without – with adjustments but no fundamental disagreement.

Then your Honour the Chief Justice's questions related to paragraph 186 of the Court of Appeal's judgment and in particular I think to the sentence half way through that paragraph: "It even threatened in January 2010 to seek an interim order." And going back to my submissions, the documents relating to that are on page 16 of my submissions and footnote 98, and this letter from Thomson Wilson for the Council was sent on the 22nd of January 2010 and that followed a period of silence from Mr Casey's end. Mr Casey had – there is in the record a letter from Mr Casey earlier in January but it doesn't appear to have been received, and I'll take you to that in due course, but in any event in the third to last paragraph of that letter they were seeking a "meaningful response" by 25th of January. If they didn't get one then they would pursue either an amended form of enforcement order or seek a declaration "to determine the extent of your client's consent. We will advise the Court of our intention and discuss an appropriate timetable", but they "would like to think the matter could be resolved by agreement".

WINKELMANN CJ:

So what is the enforcement order they were seeking?

MR MCLELLAN KC:

So – well they didn't.

WINKELMANN CJ:

No, what is the enforcement order they were seeking at this point? Because at the moment they're pursuing enforcement proceedings that seek what?

MR MCLELLAN KC:

At this point the enforcement proceeding that would be sought would be in respect of the non-compliant operation of the quarry, so with the –

KÓS J:

Non-compliant with the consent?

MR MCLELLAN KC:

1998 consent.

WINKELMANN CJ:

Well is that right? Had they amended the enforcement order? Because the original enforcement order was in relation to the abatement notices, so –

MR MCLELLAN KC:

That's correct, which had been withdrawn of course by this point in time.

WINKELMANN CJ:

Yes, but had the enforcement proceedings been amended to reflect that fact?

MR MCLELLAN KC:

No, no, they hadn't. So there would be – this was signalling either a fresh enforcement order application or an amendment to the existing one that would be focusing on the non-compliance with the 1988 consent.

WINKELMANN CJ:

Yes.

MR MCLELLAN KC:

Or you will see that they were alternatively suggesting the possibility of an order for declaratory relief to determine the extent of the land use consent.

WINKELMANN CJ:

So what was the enforcement order they were trying to get Mr Daisley to consent to earlier, in the earlier correspondence as part of their package deal?

MR MCLELLAN KC:

So that would be – all they were using was the existing enforcement proceeding as a, as they called it, as a vehicle to get the amended consent conditions through.

WINKELMANN CJ:

So you're suggesting when they asked Mr Daisley to consent to an enforcement order, it was nothing but an – approving an amended condition, set of conditions?

MR MCLELLAN KC:

Correct –

WINKELMANN CJ:

Are you sure about that? Where's the evidence of that?

MR MCLELLAN KC:

I'll find –

WINKELMANN CJ:

So there's no – it would not have been him consenting to agreeing that he hadn't been in compliance or that he would comply in the future, it was simply to an amendment to consents.

MR MCLELLAN KC:

I will come back in more detail to the correspondence because you will see the back and forth between Mr Casey and Mr – and Thomson Wilson for the Council, but the intention was that there would be a negotiation over the terms of the final consent and then the proceeding would be brought to an end, but at this point of course the abatement notices had been withdrawn.

So as the High Court or as I say at paragraph 7.8 of the – of my submissions, at 7.7 you can see the letter from Mr Barnsley withdrawing the abatement notices and cancelling the infringement fee. That's at 7.7, and then at 7.8 I say

that the abatement notice were two notices underpinning the application for enforcement orders. The notices were referred to and exhibited to his affidavit. As the Court of Appeal noted, and that's at paragraph 186 again, Mr Barnsley withdrew "the current abatement notice in his letter" and "it seems to have been assumed that Mr Daisley had no ongoing exposure". But as I say, I will come back so that you can actually see the correspondence going back and forth between the parties' lawyers so that you can understand what was – the process that they were consensually following.

WINKELMANN CJ:

So you're saying the High Court Judge was in error?

MR MCLELLAN KC:

In?

WINKELMANN CJ:

His factual finding?

MR MCLELLAN KC:

In finding that misfeasance flowed from –

WINKELMANN CJ:

Well in finding that there was any conduct which was a perpetuation following their discovery of the land consent?

MR MCLELLAN KC:

Correct. After the discovery of the land consent there was a – what I would describe as a relatively routine process involving the parties' lawyers and ultimately resulting in agreement with Ark after Mr Daisley effectively dropped out of the picture in January 2010.

WINKELMANN CJ:

All right.

MR MCLELLAN KC:

So if we – and I, as I say, I will come back to those documents that are footnoted in those paragraphs I've just taken you to. So to go back to the beginning and look at how this issue has reached this Court, firstly I support the reasons that are set out in the Court of Appeal's judgment at paragraphs 184 to 186 in particular of the judgment that the *Garrett* test is not proven on the facts of this case and that the High Court Judge was wrong to find misfeasance and to impose exemplary damages for the post-2009 events, but firstly the post-2009 conduct was not pleaded or argued in relation to misfeasance liability.

If I can just take you to the statement of claim which you have already gone to, but if I can take you back to paragraph 173. This is the pleading of misfeasance: "The First Defendant has accepted the land use consent was on record and available to be discovered at all material times." So the implication there is that we are talking solely about pre-discovery conduct. The named officers knew and did not disclose the existence of the consent or were wilfully blind to its existence, notwithstanding that knowledge elected to continue with the first defendant's course of enforcement action notwithstanding that such conduct was ultra vires, and then over the page: "Disregarded the obligations owed by each of them to exercise care and diligence to assure their reasonable belief…and the enforcement actions were fully substantiated."

So again going back to the chapeaux to paragraph 173, it's clear in my submission that that is a pleading relating solely to pre-discovery of the land use consent, and that is consistent with the pleading at paragraph 210 of the statement of claim that: "The Plaintiff did not discover the First Defendant's misfeasance until on or about 21 September 2009," which again indicates that the plaintiff's case was based solely on pre-discovery conduct.

ELLEN FRANCE J:

And sorry, paragraph 174?

1430

MR MCLELLAN KC:

Yes, I read the second sentence of that to depend on the full knowledge of the LUC file and the land use consent contained within it. So I take that to refer again to pre-discovery conduct rather than on, the full knowledge of the LUC file would not be relevant to the matters pleaded in 174 because of course they were now known to everyone. So I do take that to be a pleading relating to pre-discovery conduct.

WINKELMANN CJ:

Can you just pause for a moment thank you.

GLAZEBROOK J:

So exemplary damages, does it really matter whether it's misfeasance or not?

MR MCLELLAN KC:

Well it does again on a pleadings basis because exemplary damages are claimed only for the misfeasance cause of action, not for the negligence causes of action.

WINKELMANN CJ:

As I read 174 it's a very broad pleading which encompasses a lot. It's hard to read it down the way that you are saying.

MR MCLELLAN KC:

Well that's certainly how I read that second sentence, and of course the second sentence also refers to deliberate and positive conduct in issuing abatement notices, infringement notices, and enforcement action, which all occurred prior to the discovery of consent.

GLAZEBROOK J:

The ultra vires pleading, which is referred to in those other paragraphs, certainly did, it seems to me, encompass post-2009 activities, from memory.

WINKELMANN CJ:

And 176 Mr McLellan. You need to look at 176. I'm not sure whether this is going to be a win or loss for you on a pleading point is my point. I mean it is a complex pleading, there's no doubt about it, but it has got a lot in it.

MR MCLELLAN KC:

Yeas, I have to say I read that cause of action and the way that the case was run, including in the Court of Appeal, but it was very much based on the discovery of the consent. I do take your point about the somewhat omnibus nature of the statement of claim, but on the other hand that shouldn't be a problem because it's upon the defendant unless it pointedly makes an allegation about pre –

WINKELMANN CJ:

Now you say it was run that way in the Court of Appeal, but the Court of Appeal was dealing with Justice Toogood's judgment, which definitely relied upon the conduct after discovery, so how was it pursued in that way in the Court of Appeal?

MR MCLELLAN KC:

Indeed it did but in relation to damages. So the way it unfolded in the High Court I think was that it was pretty clearly based on the pre-discovery conduct, but the Judge made a finding, well an award of damages based on post-discovery conduct, so then once you take out, once you accept the Court of Appeal's judgment on liability for pre-discovery conduct, then the High Court shouldn't have made the finding that it did, and it shouldn't have awarded the damages that it did because there'd be nothing, there'd be no liability hooked to hang the damages on. So we're now left with the position that there's no challenge to the pre-discovery conduct, but the respondent wishes to reinstate the damages on a liability basis that wasn't argued or found by the first instance judge, and we say in our submissions that that's not an appropriate matter to bring before this Court without errors having been identified because there were no findings in the High Court on post-discovery misfeasance liability.

WINKELMANN CJ:

I must say I'm finding your points hard to follow Mr McLellan. Perhaps it's because it's the afternoon after two long days.

MR MCLELLAN KC:

Do you want me to do that again?

WINKELMANN CJ:

No.

GLAZEBROOK J:

Well perhaps explain why the paragraphs that are relied on by your friends, 383 or whatever it is, don't make findings about post-discovery conduct.

WINKELMANN CJ:

Yes.

GLAZEBROOK J:

Because they seem to me clearly to do so. The argument can only be they were wrong, that the Judge was wrong to make those findings because they weren't pleaded. Is that the submission?

WINKELMANN CJ:

I think it's much more complicated than that.

MR MCLELLAN KC:

I think – I'm sorry, what were your –

GLAZEBROOK J:

I mean I understand the submission that the damages are not referable to that, and we – but that's a different submission.

MR MCLELLAN KC:

Correct. That is my point, that the plea on appeal to reinstate the damages award is on a different basis to which it was put in the High Court. So the

High Court hasn't made a finding of misfeasance liability in relation to post-discovery conduct. It is confusing because the High Court appears to have made a damages award based on post-discovery conduct.

WINKELMANN CJ:

Can you just repeat that? The High Court did not make a finding as to what?

MR MCLELLAN KC:

As to damages, exemplary damages based on pre-discovery misfeasance liability.

KÓS J:

Just take us to where that is?

WINKELMANN CJ:

It hasn't made that finding?

MR MCLELLAN KC:

It has not made that finding.

WINKELMANN CJ:

But I don't understand…

GLAZEBROOK J:

Didn't they say no it wouldn't, it wouldn't say it was misfeasance just based on the pre-discovery but it did say it was misfeasance based on the post-discovery.

WINKELMANN CJ:

So what is your point. I think you're agreeing with that aren't you? Justice Toogood said – so you're not making yourself plain enough at least to a few of us.

ELLEN FRANCE J:

I understood what you were saying was there was no High Court finding on misfeasance liability based on post-discovery, but nonetheless a damages award was made reflecting post-discovery.

MR MCLELLAN KC:

Correct, exactly.

WINKELMANN CJ:

So what about the paragraph where the Judge says that the conduct after that date does cross that. You're saying that's not what? Because that's why I'm struggling with your submission, at 3-8 whatever it is, 3-4.

MR MCLELLAN KC:

So 342.

KÓS J:

"But the Council's response upon the discovery… the consent tips the balance, in my view, in favour of an award."

MR MCLELLAN KC:

In favour and an award but…

WINKELMANN CJ:

Well I mean…

KÓS J:

It must relate to the post-discovery.

MR MCLELLAN KC:

Post-discovery. An award of damages relating to post-discovery conduct.

KÓS J:

Yes.

MR MCLELLAN KC:

But my point is that there was no pleading of, in relation to post-discovery conduct, which we've –

WINKELMANN CJ:

Well that wasn't your point a moment ago. Your point a moment ago was that there no High Court finding.

KÓS J:

The Chief Justice is right on that. Paragraph 342 seems to explain that proposition.

MR MCLELLAN KC:

Well, yes, this is under the heading of exemplary damages –

GLAZEBROOK J:

Did you just say that the Judge just says it merits an award rather than actual finding of misfeasance but I mean the whole point about the award was that it was based on misfeasance. Going back to the discussion at the beginning of *Garrett* et cetera.

MR MCLELLAN KC:

If we go back to the "Conclusion on misfeasance exemplary damages claim" which is at paragraph 335, his Honour held that: " I have found that the Council was negligent." Paragraph 336: "… no Council officer knew that the consent had been granted… given careful consideration… a sufficient degree of recklessness." At paragraph 339: "It would be wrong for me to be influenced by Mr Dailey's indignation."

KÓS J:

This is all pre-discovery?

MR MCLELLAN KC:

This is all pre-discovery. "The Council's conduct in the proceedings is best addressed in the context of costs… But in my view, the Council's approach to the litigation simply marks a continuation of its obstructive and uncompromising resistance to Mr Daisley's proper claims after the consent was found in September 2009."

1440

WINKELMANN CJ:

So they're talking about post-consent – he's talking about post-consent conduct at paragraph 340?

MR MCLELLAN KC:

Yes. Well perhaps I can't take the matter any further than that, but that in my submission the pre –

WINKELMANN CJ:

You're saying that's not a clear finding of breach?

MR MCLELLAN KC:

It's not a clear finding of misfeasance liability for post-discovery conduct, nor in my submission was it pleaded with sufficient clarify.

KÓS J:

While I can't accept your first proposition, your second I'll think about.

MR MCLELLAN KC:

Thank you, your Honour. That then takes me to the substance of the misfeasance point which again is dealt with – oh, I'm sorry.

GLAZEBROOK J:

In terms of pleading, if exemplary damages are pleaded in relation to misfeasance then there's no surprise to your client, is there, if in fact they're awarded in respect of the negligence claim, assuming that the requirement for

exemplary damages are met? Or do you say you have to absolutely plead everything or that's the end of it?

MR MCLELLAN KC:

Well these are tort claims for remedies, and that remedy was not pleaded in anything other than the misfeasance cause of action, so I say that there could be no award for exemplary damages for negligence, even allowing for the considerable difficulties that would lie in the path of such an award in negligence.

KÓS J:

That seems sound enough, but the – given the actual clear pleading on that, but the rest of it is so amorphously plead or pleaded that I suspect you're pretty much on notice that a claim is being made for exemplary damages in relation to bad behaviour generally and that fixes, can fix on the post-discovery conduct? I mean it's –

MR MCLELLAN KC:

Well that point I don't concede.

KÓS J:

I mean – no, but –

MR MCLELLAN KC:

But I understand the issue, but again I say that the defendant should not be the victim of a highly imprecise statement of claim. So that's really as far as I can take that point, I think.

KÓS J:

Right.

WINKELMANN CJ:

Many defendants are. Many defendants are, Mr McLellan, and you can ask for further and better particulars.

MR MCLELLAN KC:

Well I'm not sure that would've been a good idea.

WINKELMANN CJ:

Possibly not.

MR MCLELLAN KC:

But I wasn't involved. So going back to the substance of the misfeasance issue, as I said, I support the decision of the Court of Appeal. The main part of the decision is set out at paragraph 7.2 of my submissions, that important paragraph 186 where the Court summarised about half way through that paragraph why misfeasance or why damages for post-discovery conduct was not an option, because by that time in that period after discovery of the consent "…matters were in the hands of solicitors, not the Council officers, and resolution was complicated by Mr Daisley's understandable failure to give his counsel instructions after he yielded to his bank's pressure to sell the property… The new owner, Ark, then agreed to the enforcement proceeding remaining on hold while its resource consent application was processed". And so, as we will see, did Mr Casey on behalf of Mr Daisley prior to Mr Daisley stepping back and Ark stepping in.

WINKELMANN CJ:

Where are you at in your written submissions?

MR MCLELLAN KC:

That's in 7.2, that excerpt. Paragraph 186 of the Court of Appeal's judgment. So that summarises my position, respectfully adopting the Court of Appeal's decision on the point, and then at 7.3 I say that the Court of Appeal summary contradicts key features of Mr Daisley's, what I've described as new misfeasance claim, but we've had that discussion. WDC quickly withdrew the abatement and infringement notices and I'll come to that. So what I'm going to do is just to stop through the next sections by reference to the headings which are the summary of our argument, and with some detail to expand on those.

So the first one is that the Council acted appropriately in withdrawing the abatement and infringement notices in October 2009.

WINKELMANN CJ:

Where are the section headings. It's in your written submissions or…

MR MCLELLAN KC:

Correct. So I'm on page 12 and paragraph 7.5. So on the 22nd of September 2009 there's also a chronology attached to our submissions which may help, Mr Daisley swore an affidavit in opposition to the Council's enforcement action and that annexed the consent that had been discovered that day.

Then within a month the Council withdrew the abatement notices, that's at 7.7, and as I have already said, those notices that were then withdrawn were the only underpinning for the enforcement action, and I have already referred to the Court of Appeal noting that with those withdrawn it was assumed that Mr Daisley had no ongoing exposure.

Then we come to Mr Daisley agreeing to an initial adjournment to allow a factual investigation –

WINKELMANN CJ:

Can you take us through the documents?

MR MCLELLAN KC:

Yes, I'm intending to do that. So the first is at footnote 72.

WINKELMANN CJ:

Document number?

MR MCLELLAN KC:

It's 304.0101. So that's Thomson Wilson for the Council filing a memorandum of counsel, and if we go to that, this is a joint memorandum, it's signed by counsel solicitor, but paragraph 8 confirms that Mr Casey agreed to the terms.

WINKELMANN CJ:

You've jumped out, you've stepped over a step here haven't you? Because hasn't there been something that's occurred before this after discovery, which was the Council attempting to get Mr Daisley to agree to an interim enforcement order?

MR MCLELLAN KC:

Yes, you are right. That's at 7.9. 304.0…

GLAZEBROOK J:

Sorry I think I'm just lost in terms of where, which submissions of yours we're looking at.

MR MCLELLAN KC:

So paragraph 7.9.

WINKELMANN CJ:

We're looking at the ones, they're entitled submissions for the cross-respondent. 18 December. So what is the earlier document?

MR MCLELLAN KC:

So that's at 7.9, and it's footnoted at 71, and it's 304.0095, and that is an email from Mr Daisley's –

GLAZEBROOK J:

You're a bit away from the microphone, it won't be coming through on the transcript, thank you.

MR MCLELLAN KC:

So it's the 28th of September 2009, Thomson Wilson to Mr Daisley's solicitor. So they reviewed the affidavit that he filed on the 22nd of September. "… Council consider there is room to agree on the terms of the enforcement order… On that basis, I have arranged a meeting… hopeful that an agreed position could be reached in which case we could inform the Court… that the hearing time commencing 7 October 2009 is no longer required."

WINKELMANN CJ:

And at this point Mr Daisley has been told, has he, about the discovery of the –

MR MCLELLAN KC:

So that occurred on the 22nd of September and he filed an affidavit in this enforcement proceeding that same day, and it appears that there was a hearing set down for the 7th of October.

WINKELMANN CJ:

And what are the interim enforcement orders they're trying to get Mr Daisley to agree to?

1450

MR MCLELLAN KC:

Yes, as I understand it there was no detailed proposal, just that there would be an agreement that an interim enforcement order would be made.

WINKELMANN CJ:

Well it must have had a content. No one is going to be agreeing to an interim enforcement order without understanding what it is.

MR MCLELLAN KC:

Well, the way I read this correspondence is that that was what the discussion was to be about so they're proposing a meeting, I expect we will be better able to determine the position when we meet.

GLAZEBROOK J:

Well, can we go back to the 21st of December, sorry September, correspondence?

MR MCLELLAN KC:

So 22nd of September was when the LUC was discovered and Mr Daisley swore and filed an affidavit that day in the enforcement proceeding and then there follows this email on the 28th of September proposing a meeting.

WINKELMANN CJ:

So what are the letters of 21 September?

GLAZEBROOK J:

That's what I was asking if we could go back to because this is an answer in a vacuum at the moment.

MR MCLELLAN KC:

So there's nothing in the record so –

ELLEN FRANCE J:

I was going to say we don't have that one.

WINKELMANN CJ:

We've got his affidavit though, haven't we?

MR MCLELLAN KC:

The affidavit is at 304.0001 and at paragraph 23 of that affidavit he enacts as the recently dis – the LUC discovered that day. So, that the next at least available correspondence is the letter I went to before, simply the filing letter to the Court attaching the joint memorandum, that's 304.0101, and you'll see from that that at paragraph 3 discussions had occurred through Mr Daisley's lawyer: "Mr Daisley has this morning," so this is the 2nd of October, "engaged Matthew Casey to represent him… preliminary instructions. (5) … a factual enquiry of the terms and circumstances…need to be completed. Once done,

both parties need to properly and fully consider their positions… The Court's invitation to assist the parties next week…is certainly appreciated. However, Mr Casey and I agree that until such time as the factual enquiry has been completed, the parties cannot meaningfully take the matter forward and indeed, the Council would not wish to do so. On the basis of the above, the parties respectfully request that the hearing… be vacated."

Following that Mr Casey, I'm at 7.11 of the submissions, Mr Casey sent a note following his discussion, this is 304.0099, so this is a note obtained on discovery from Mr Casey to a consultant in Mr Daisley's camp reporting on a call with the Council's lawyer, Mr Dawson: "We have agreed to vacate the hearing... His email also indicated to the Court an interim enforcement order was likely to be agreed. I have told Julian that my advice to you is that there is no proper basis for the making of any enforcement order, and that while the client may be prepared to enter into a voluntary agreement they will not consent to an order being made against them, when the foundation…seems to be entirely lacking." The second to last paragraph: "While Julian agrees that the discovery of the consent changes the basis of the Council's present application, he claims that there are still grounds for taking action… He talks of 'existing use rights' as at 1998. There needs to be some more factual enquiry before I can usefully comment. However the existence of a land-use consent trumps existing use rights… Julian has raised the prospect that the consent might have lapsed due to the cessation of the quarrying at some point… There is also the possibility that the consent might have lapsed if it was not actioned in the first instance. Both of these possibilities are ones the Council would need to prove –

KÓS J:

Well that's the point I raised earlier today. These rights could have lapsed. There is a potential contest about the status of the LUC.

MR MCLELLAN KC:

If they hadn't been, they lose them if they don't use them.

WINKELMANN CJ:

Or on another account, this is the Council looking around every crevice in their talkative things to find a reason why they can't allow Mr Daisley to have what he wants because there's a listing of different things there, isn't there, which is what the High Court Judge had in his mind?

MR MCLELLAN KC:

Well, firstly, the Council is taking advice from its lawyers, its lawyers and Mr Casey are saying we need time to investigate the position. The LUC is a 1988 consent that has just been discovered.

WINKELMANN CJ:

Well, Mr Casey's not really saying he needs time to investigate the position, he's saying that Council needs time to investigate the position.

MR MCLELLAN KC:

Well, they both said that in that memorandum that I took you to that they wanted time to investigate the position. Over the page: "This leaves the question of the consent being apparently unlimited. It is possible for the Council to apply for a declaration…but until they do there is no basis for asserting that limitations apply… Section 17 of course imposes a general duty to avoid, remedy or mitigate… Julian agrees that the proceeding as it currently stands is not one which can deliver to the Council the relief it seeks. He/Council has the voice of commencing a new proceeding or amending the current proceeding to include the types of relief referred to above. I expect that there will be the opportunity to engage with the Council before that reaches Court again." Then 7.12 –

GLAZEBROOK J:

I probably should tell you that that actually seems totally contrary to the position you're putting forward to me.

MR MCLELLAN KC:

Well, what I hope I have put forward to you is that the parties were moving forward, having just discovered the consent, they both sought time to

investigate the implications of the consent and they put off the hearing date to allow that to happen.

WINKELMANN CJ:

Well, it seems contrary to what you said to me before lunch as well, which was really everybody was in on this, that it should be put off so that they use the hearing process to have a consent, amended consent approved by the Court, which just does not seem to be what's going on here.

ELLEN FRANCE J:

Well, perhaps given the time we need to let Mr McLellan go through the material.

WINKELMANN CJ:

Move on, yes.

MR MCLELLAN KC:

So we then go forward to 7.12, the memorandum referred to at 7.12 is the same as that that was referred to at 7.10 so I've already taken you to that. That's where they agree that there should be further time. Over the page 7.13 they agree to the vacation of the hearing and then the next section is that the Council tried to consensually resolve the legal terms over the terms of the consent. 7.14 both sets of lawyers investigated the terms of the LUC. There wasn't complete consensus but they agreed that the LUC did not grant an unlimited right to the quarry and we see that in 7.15. We've summarised his advice as being, Mr Casey's advice that the LUC was not unconstrained and that's at 304.0105, and this again is Mr Casey's advice to his client through the consultant. Paragraph 10: "Before considering the next steps to be taken, I will need to be clear that the quarry operation is within the area indicated on the revised plan. Quarrying outside that area is probably not covered by the consent. 11. Subject to this, the consent is otherwise 'open ended'." That letter does not, of course, refer to the type of mineral to be extracted which the High Court accepted was a further constraint on the terms of the consent.

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Those were conveyed to Mr Casey in the next correspondence, which is at paragraph 7.16, and that's a letter from Thomson Wilson to Mr Casey of the 29th of October 2009 and at paragraph 3, sorry paragraph 2, refers to the mineral type and "Furthermore…showing the quarry pit notated 'quarry hard red brown' 20 metres inside the nor eastern boundary of the property… Council considers that the 1988 consent is, on its terms, limited to red brown rock in the approved quarry pit location."

At 7.17 I note that at paragraphs 98 and 99 of the High Court judgment the High Court concluded that that interpretation was right and in fourth line –

WINKELMANN CJ:
Of course that bit was difficult for Mr Daisley to know what those limitations were without the consent.

MR MCLELLAN KC:
Sure, but the point is that at this point with the discovery of the consent, it doesn't mean that he can carry on doing what he has been doing in the past which was –

WINKELMANN CJ:
Well, I just wanted – I only made that point to give the opportunity to comment on the fact we're talking about in the context of enforcement proceedings.

MR MCLELLAN KC:
Well, yes obviously when the enforcement proceeding was on foot and the consent was not known then no one could make that assessment, and in the fourth line the Court also decided that: "…the operation of the quarry was always susceptible to limitations that might be imposed by the Council upon a review to address environmental concerns." And given those limitations, the High Court said it was likely that the Council would have been entitled to issue an abatement notice and take enforcement proceedings in 2005 for breach of the terms of the consent had it been known.

The next section relates to the enforcement proceeding being –

GLAZEBROOK J:
Well, that's of course assuming that he would not have complied with the consent had he known about it but…

MR MCLELLAN KC:
Well, yes, well he had not been complying with the terms of the consent had –

GLAZEBROOK J:
Well no, because nobody knew about it and so…

MR MCLELLAN KC:
Correct.

GLAZEBROOK J:
You can't really have it both ways.

MR MCLELLAN KC:
No, but it's just saying that if he were to continue doing what he had done in the past, which was what he wanted to do, then he would be in breach of the 1988 consent now that it was known.

So the next section is the enforcement proceeding being kept alive as a vehicle for reaching an agreed position, and I've already taken you to the first document that's referenced in 7.18. That's the letter from Thomson Wilson. The High Court described that letter as a proposal by the Council of conditions allowing quarrying to continue. So I make the submission that far from seeking to prohibit quarrying, the Council was seeking to reach an agreed position to allow continued quarrying subject to conditions to address the current effects of the quarry.

WINKELMANN CJ:

Can you tell me as a matter of law do you get these consents? Is it available to use the enforcement proceedings to go through all the – short circuit the usual processes for amending a consent? Could that happen?

MR MCLELLAN KC:

I can't tell you the answer from my –

WINKELMANN CJ:

Well, isn't that an implicit assumption in the submission you're making?

MR MCLELLAN KC:

In relation to what the –

WINKELMANN CJ:

Because if the proceeding is kept on foot so they could be achieved?

MR MCLELLAN KC:

I will need to check whether there is a specific provision allowing such an order to be made.

So, the Council was seeking to reach an agreed position as to the current effects of the quarry and the Council's letter concluded by noting that further discussion was required regarding the appropriate legal mechanism to secure these conditions. So we see in the final sentence of that submission the Council expressed a preference to agree the terms of an enforcement order under the umbrella of the application currently before the Court so that does appear to be what the solicitors were envisaging as noted in…

WINKELMANN CJ:

Well that's an enforcement order, not a consent.

MR MCLELLAN KC:

Well, it would be an enforcement order by consent is the tenor of the correspondence from the Council.

WINKELMANN CJ:

Yes, we might be at cross-purposes.

MR MCLELLAN KC:

Now Mr Casey was not agreeing to that at that point.

WINKELMANN CJ:

No, but what I'm asking you is, could they use the enforcement proceedings to amend the existing land use consent which is what I understand –

MR MCLELLAN KC:

And that's what I will need to check for, your Honour, and then in terms of the proposed conditions, if we go firstly to 304.0116, this is the letter dated 29 October 2009 from the Council's solicitors. At paragraph 5: "… Council is prepared to 'regularise' your client's current activities…on the basis of the attached conditions." And the attached conditions are the attachment to that letter. So the Council was proposing eight conditions in addition to those in the 1988 consent and they included conditions as to the – this is set out at 7.19: "Volumes of material to be quarried, traffic movement, hours of operation, noise and vibration effects lasting." And I will come back to do a comparison with –

WINKELMANN CJ:

I suppose the only thing is that there is one interpretation of the facts you are going through which is that they are keeping the proceedings on foot as a stick over his head while they're trying to just agree amended conditions.

MR MCLELLAN KC:

That's not the interpretation that I suggest is the one that should be accepted.

WINKELMANN CJ:

And my analysis is that your argument rather depends on those proceedings needing to be on foot for the consent to be amended because otherwise it's just a negotiating position.

MR MCLELLAN KC:

Well, Mr Daisley at this point is not at risk with the existing proceedings because the abatement and infringement notices have been withdrawn so – but there is an existing proceeding in which the Court has, of course, offered its assistance to the parties to reach a final agreement. So, in my submission, it is a constructive process that's been agreed to by Mr Daisley's lawyer and we see consent to adjournments of the existing proceedings, no suggestion that they should be abandoned or that they should be struck out.

GLAZEBROOK J:

Well, the letter that you showed us that you said – that I said I didn't accept showed what you did say actually said explicitly that there was no basis for those enforcement proceedings.

MR MCLELLAN KC:

Correct, so I –

GLAZEBROOK J:

So they did say that. They might not have said get rid of them but they did say there was no basis for them.

MR MCLELLAN KC:

So I will come to the additional process momentarily on the consensual basis for extending the Court proceedings process.

WINKELMANN CJ:

Just one point of clarification, you said the Court offered its assistance, did you take us to a document? I may have missed that.

MR MCLELLAN KC:

Yes, I did and that was – I'll just –

WINKELMANN CJ:

Was it a minute or something?

MR MCLELLAN KC:

It was in either the – I think it was in the memorandum.

O'REGAN J:

The memorandum thanked the Court for its offer of assistance, yes.

MR MCLELLAN KC:

Thank you, your Honour.

O'REGAN J:

The combined memorandum of counsel.

MR MCLELLAN KC:

So those are the conditions that were proffered by the Council, that's at 7.19, and I'll come back to what happened next with the actual conditions, but at 7.20 there was an updated memorandum filed in the Environment Court seeking an extension of time for negotiations. It noted that: "… discussion is currently occurring between the parties" sorry this is at 304.0117 "in the hope that conditions can be agreed under which the quarry activities can continue." The memorandum recorded the parties were still discussing the legal mechanism for securing the conditions including the possibility of an agreed form of an enforcement order. In the meantime Council ask that its enforcement action be put on hold and an extension granted until 20 November 2009.

WINKELMANN CJ:

Well, this is getting me confused about what the agreed enforcement order is, so I think it is something I would seek assistance from and you may have to come back to us, file a memorandum or something like that about it.

ELLEN FRANCE J:

It does. There is reference in the Act to the ability to amend a resource consent via an enforcement order. I haven't looked at the detail of that but there does seem to be some reference to that.

WINKELMANN CJ:

What section is that?

1510

GLAZEBROOK J:

Although they are asking, and I'm sure absolutely reasonably, for the condition, if you're looking at the current, a current resource consent, but there weren't any of those conditions in the original one.

MR MCLELLAN KC:

Well, there were condition –

GLAZEBROOK J:

It was open-ended with the finding.

MR MCLELLAN KC:

As to volume but not as to the mineral to be extracted or the –

GLAZEBROOK J:

No, no, I understand –

WINKELMANN CJ:

Or the area.

GLAZEBROOK J:

But there was nothing about noise or time or anything whatsoever in the original condition, was there?

MR MCLELLAN KC:

Yes, so Mr Daisley – no, look, I'd better not just take –

WINKELMANN CJ:

It's okay you can file a memorandum Mr McLellan. I think it's probably significantly of sufficient importance for it to be – for us to be right about it so, well, it's always good to be right about things, but…

MR MCLELLAN KC:

So that takes us through to 7.21 of the submissions. So, we've got Mr Casey then replying to Council's lawyers agreeing, so this is at 304.0119, he's discussed the proposed conditions with his client who's advised that he is on the whole in agreement with the requirements, would like some amendments, increased traffic movements (b) would like three to four smaller blasts as opposed to one big blast and an amendment to condition 9, which I can't at the moment recall its significance. And it's this letter which doesn't appear to have been received by the Council's lawyers because you'll recall in January they wrote again to Mr Casey saying: "We're going to have to move this along and, if necessary, we'll issue fresh proceedings" and that was then followed by the 26 January letter from Mr Casey which I've already taken you to.

So then, of course, we have the High Court saying that around this time Mr Daisley has become committed to the sale of the property and not much more happens after this at least in relation to Mr Daisley. So we've got consent conditions proposed by the Council –

GLAZEBROOK J:

Around this time, what are you saying is around this time?

MR MCLELLAN KC:

I'll take you to the…

GLAZEBROOK J:

Well, just tell me what the date you're saying is around this time, 26th of January are you?

MR MCLELLAN KC:

No, this is 20th of November which is the letter referred to at 7.21.

GLAZEBROOK J:

Okay, thank you.

MR MCLELLAN KC:

The reference to the High Court comment on that is at 7.23. So not much else was done regarding the Environment Court action after the Council's October 2009 letter and we see a position coming back from Mr Casey which didn't take much issue with the proposed conditions and were indeed ultimately agreed with Ark, and then in terms of the process from there, 7.23, little progress is made between October and December, still not having received a response, we've seen all of that already, takes us into January and on the 26th of January 2010 Mr Casey responded and that's at paragraph 99, I'm sorry, footnote at 99, 304.0126, and discussion about sale of the property and 5: "I appreciate that there have been inquiries of your client Council regarding the consent status of the property" and 6: "I can understand the frustration experienced by your client" the Council "but the circumstances are out of the ordinary. I therefore respectfully suggest that we request a further two months to report to the Court." And thereafter we then move into the –

WINKELMANN CJ:

What date is this, January?

MR MCLELLAN KC:

That is the 26th of January 2010 at 7 –

WINKELMANN CJ:

I thought the sale had gone ahead earlier but…

MR MCLELLAN KC:

Yes, it had. So, it went through on the – no it went through on the 29th of – settled on the 29th of January.

WINKELMANN CJ:

Okay.

MR MCLELLAN KC:

Then from 7.24 we then move into the relationship between the Council and Ark as opposed to Mr Daisley, which is of no particular interest to us but I will give you the reference just so that you can see what the final conditions were. They are at paragraph 7.27 and they're footnoted at paragraph 109 and the consent conditions that were agreed, and indeed made by the Council in favour of by now Ark, were in largely similar terms to those which had been agreed between Mr Casey and there was one addition by Ark but that's irrelevant to these issues but, in my submission, this shows that what the Council put forward by way of conditions were shown to be reasonable by Mr Casey's own response. And just to wrap up this point the – in my submission the post-discovery conduct showed a reasonable lawyer-led process which was anything but within the *Garrett* principles. It was orthodox following the discovery of a consent which nobody knew about and it resulted in principal agreement quite quickly on the conditions of the new consent.

Those are my submissions.

WINKELMANN CJ:

Thank you, Mr McLellan. Mr Farmer, do you have anything to say by way of reply?

MR FARMER KC:

I'll reply on continuous breach fairly shortly and then my learned friend will deal with the misfeasance reply. The main point made by my learned friend is related to the question of whether or not the loss on sale as a new and distinct loss and his submission was that the loss of value occurred initially in 2006 when the Council dealt with the consent application that was made by Mr Daisley at that time and which was declined. Our reply to that is that if that is the position, then that loss of value would have been restored when the consent was discovered and, in fact, there are two propositions put by your

Honour Justice Glazebrook to my learned friend which we would respectfully adopt. The first was that once consent was found there shouldn't have been a loss, and I'd just add a gloss to that, that any loss, prior loss in value would have been restored once a consent was found.

KÓS J:
That's a capital loss?

MR FARMER KC:
Yes.

KÓS J:
Yes.

MR FARMER KC:
Yes, and then the second proposition that your Honour put to my learned friend was that, if the Council had properly entered into negotiations after discovery, there would have been, could well have been negotiations with the bank and again no loss and that opportunity to have negotiations with the bank was denied to Mr Daisley by virtue of the position, the attitude that the Council took after the discovery had – the consent had been discovered.

So, effectively what we say was that the Council prevented restoration of any loss of value at an earlier time by the position that it took in maintaining as an issue the validity of the consent in terms of its – the ability of Mr Daisley to rely on it to continue the operation, or to resume the operation of the quarry, and in that sense we submit that the Court of Appeal was correct to say that the loss on sale was a fresh and distinct loss caused by the Council's post-discovery conduct.

So those are the submissions in reply on the continuous breach.
1520

WINKELMANN CJ:

Thank you, Mr Farmer. Mr MacRae?

MR MACRAE:

Thank you. Just some brief submissions in reply in relation to the misfeasance matter and I'm just conscious of time so I don't think I need to take you to the documents. We've seen most of them already.

Just firstly on the pleadings point, it's really just to – we look at the misfeasance pleading and just to emphasise that we do – Mr Daisley does rely on the ultra vires pleading, just to re-emphasise that fact which is at paragraph 123 and 127 and I think it's clear from that pleading that we are talking about post-discovery conduct.

The second point is in relation to the application for enforcement action. The application was on the basis that – well that the orders sought under the application were, just turning over the page, that all mineral extraction shall cease immediately, no further mineral extraction shall be permitted and so that – so up until the sale of the property those were the orders sought. There weren't any amendments to those orders, notwithstanding there appeared to be without prejudice communications between the lawyers, those – that was the application made by the Council at the time. That was on foot and so I don't think it can be said that because the Council withdrew the abatement notices Mr Daisley was free to just commence operating the quarry on his own free will on the basis that he had a consent. He also had an enforcement proceedings against him. So, although it was right for the Council to withdraw the abatement notices, the application or the enforcement action was also on the basis that there was no consent so it wasn't just limited to an abatement notice.

O'REGAN J:

What do you say in response to Mr McLellan's submission that it was a vehicle to try and agree an outcome?

MR MACRAE:

Well, it was an inappropriate vehicle because it didn't –

O'REGAN J:

Yes, but it doesn't matter, does it, because we're talking about misfeasance. If the parties had agreed that that was the vehicle, whether it was good, bad or indifferent, it would mean that they weren't acting in a way that could be characterised as misfeasance.

MR MACRAE:

Well, the first couple of responses to that question, your Honour. First of all, I don't think – I think that based on that email that we read earlier on the 2nd of October, which was very shortly after discovery of the consent, Mr Casey made it very clear to the Council's lawyer that his advice to Mr Daisley was there was no basis for the enforcement action, and while the client may be prepared to enter into voluntary agreement, they will not consent to an order being made against them when the foundation for such an order seems to be entirely lacking. So, really Mr Casey made his point very clear right from the outset, he –

O'REGAN J:

Well, yes, but then he entered into negotiations about the conditions.

MR MACRAE:

Yes, Sir. I don't think he had a choice because although –

O'REGAN J:

Mr Casey is a QC expert in planning law. He would have known very well what the position was.

MR MACRAE:

Well, I don't – well, as I said earlier in my submissions, it would be nice to have received a letter from a lawyer acting for Mr Daisley putting the Council on

notice that what they were doing was wrong. We don't have that but that doesn't excuse the Council's action for continuing –

O'REGAN J:

Well, we seem to have completely amicable correspondence between the lawyers about how to resolve the situation to allow the quarrying to continue.

MR MACRAE:

Well, that amicable arrangement between the lawyer doesn't help Mr Daisley one iota when it comes to –

O'REGAN J:

But it shows the Council is not acting in a way that you could call misfeasance.

MR MACRAE:

Well, the test is, the test is the reckless indifference to their acting within their lawful authority and the test is reckless indifferences to the consequences for Mr Daisley. So although the lawyers might have been dealing in what's preferred to as a reasonable lawyer-led process, well it appears to be on a without prejudice basis. In the meantime Mr Daisley can't operate his quarry, the bank's knocking on the door and Mr Daisley doesn't have any option but to sell it at a forced rate.

O'REGAN J:

Well did Mr Daisley tell the bank that he now had a land use consent?

MR MACRAE:

Well I don't know about that but –

O'REGAN J:

Well shouldn't we know that?

MR MACRAE:

Well, I don't think that – I think that the sale proceeded and that comes back to my point, I don't think it can be reasonably said that Mr Daisley could have just taken it upon himself to go out and mine notwithstanding the –

O'REGAN J:

No, but he could have gone to the bank and said: "Look the problem's solved, I've got a consent."

MR MACRAE:

I don't think the problem was solved, your Honour. I think that's the problem because what was hanging over them –

O'REGAN J:

Well, you had the Council saying you can keep quarrying if you comply with these conditions, which is what Ark did a few months later, so why was the problem not solved?

MR MACRAE:

Well there was no agreement in place, your Honour. I think there was a proposal being put forward –

O'REGAN J:

Well there was agreement though, I mean, because Mr Casey had come back and said he agreed with them.

WINKELMANN CJ:

I think there is a suggestion in that email from Mr Casey that the Council wasn't accepting that the consent applied.

MR MACRAE:

I'm sorry, say that again, your Honour?

WINKELMANN CJ:

There was – the Council was suggesting that the consent may have expired.

MR MACRAE:

Yes, yes, well that's a separate issue with respect. I think that the Council did certainly raise issues with the scope of the consent and whether or not it had expired but I think the key, I think the key point here is we've got the enforcement proceeding on the basis that there's no consent and then the consent's discovered. So, I think if we are looking at the Council's action in relation to the enforcement proceeding, the Council ought to have at the very least sought an amendment to the enforcement action because in the meantime – on the basis that a consent has been found.

KÓS J:

Well no one seemed to suggest that to the Council.

MR MACRAE:

Well that's – against that's –

KÓS J:

Least of all Mr Casey.

MR MACRAE:

Well, again, I mean in terms of the test under *Garrett* it's not for Mr Daisley to tell the Council what to do. It's the Council's conduct we're looking at here and although –

KÓS J:

Yes, but I mean you have to measure that in the context and the context here is this Council raises some legitimate questions. It's entitled to say: "Well we found this land use consent but we need to check that it's still valid, applicable." It doesn't allow certain things that you want to do, where's the overbearing behaviour that's emblematic of misfeasance?

MR MACRAE:

Maintaining the enforcement action which then resulted in Mr Daisley losing the opportunity to –

KÓS J:

Well, you keep saying that, but we don't seem to have evidence of the negotiations with the bank, we don't have any evidence of communication to the bank.

MR MACRAE:

I'm not saying that there were communications, it's the loss of opportunity. The Court recognise –

KÓS J:

Well I mean, you know, if you want damages –

O'REGAN J:

But why was the opportunity lost?

MR MACRAE:

Well the –

O'REGAN J:

What was stopping him going to the bank saying that we've now found a consent?

MR MACRAE:

Well I don't – the enforcement proceeding for a start. I think that the –

O'REGAN J:

But that didn't stop him talking to his bank.

MR MACRAE:

Well I think what actually happened is the property was sold for a reduced 25% discount so that reflected the fact –

O'REGAN J:

Yes, but that was his decision, not the Council's. He could easily have gone to the bank and said: "Look, there's now a reasonable prospect of me being able

to run this quarry property so hold off." I mean surely we need to know that that's what he would have done and he was deprived of the ability to do that. Why was he deprived of the ability to do that? Why didn't he just write to the bank?

MR MACRAE:

I think with –

O'REGAN J:

Or did he write to the bank?

WINKELMANN CJ:

I think your response is simply this is exemplary damages claim –

O'REGAN J:

How do we know he didn't write to the bank?

MR MACRAE:

Well, again, I think that's right that what we're really focusing on is the Council, the elements of *Garrett* are on the Council's action and whether or not it warrants an award of exemplary damages. And so I think the counterfactuals about what Mr Daisley could not or would not have done I don't think is relevant to focusing on what the Council did. So, what we have is we've got an extensive – we've got a number of – four years where, and I'm not wanting to reverse everything we've been through, but we've got four years of the Council denying the existence of the consent and then we've got the enforcement proceedings on the basis that there is no consent and an abatement notice has been issued to prevent any mining, then we've got the discovery of the consent but in the context of what's led to that, the Council were put on notice of their prior wrong and there can be no doubt about that, that they were negligent, and so instead of immediately – this is the tipping the balance point that Justice Toogood latched onto, instead of immediately taking steps to withdraw the enforcement action, which had no relevance, which became redundant

because – and particularly withdrawing the abatement notices. So the foundation – I mean they did the right thing.

1530

O'REGAN J:

But they did withdraw the abatement notice?

MR MACRAE:

They did. They did the right thing in withdrawing the abatement –

O'REGAN J:

So there was no basis for the enforcement action anymore?

MR MACRAE:

That's my point, your Honour.

O'REGAN J:

Well, that's what I mean. So a well advised person, and which Mr Daisley was because he had Mr Casey as his counsel, would know that.

MR MACRAE:

Well, again, I think what you're talking about is you're just looking at Mr Daisley's position and what he may have thought and what he may have done but what we're actually focusing on is the Council's actions here.

O'REGAN J:

Yes, but if the Council's actions didn't actually – if they were part of an ongoing correspondence between lawyers and everybody knew the subtext was no one was trying to stop him quarrying, what's wrong with what they did?

MR MACRAE:

Well, I wouldn't quite agree with that point, your Honour, because the enforcement proceedings essentially did prevent him from quarrying.

O'REGAN J:
No, they didn't.

MR MACRAE:
Well that was my point –

O'REGAN J:
The Council had written and said: "You can keep quarrying on these conditions" and Mr Casey came back and said: "Yes, that's fine" so what was to stop him quarrying?

GLAZEBROOK J:
I didn't actually see a letter that said you can keep quarrying on these conditions.

KÓS J:
Well an enforcement action doesn't prevent you from an act anyway.

MR MACRAE:
Well –

KÓS J:
It's you proceed at peril but…

MR MACRAE:
Well that is the question, that is should –

GLAZEBROOK J:
Well, they were talking about an interim enforcement order.

MR MACRAE:
That is the question, would it have been reasonable for Mr Daley just to proceed – Mr Daisley to – that consent is being found, I can just get on and, again, we're not focusing on – because Mr Daisley may have done that for a number of reasons. He may have been given advice not to do that because it

would be in breach of the order currently before the Court and it potentially would, I'm speculating now, but potentially would prejudice his ability to be able to – there are a number of, there are a number of reasons and we can only speculate on that and that's why I think the focus really does need to come back to the Council's actions here and the test under *Garrett* in that it's a reckless indifference as to the consequences for Mr Daisley and that's really the point is that they, that their position, it seems, that their position both before and after the discovery of the consent was much the same and so they didn't effectively, other than without prejudice communications between lawyers, didn't really do anything for Mr Daisley at all.

KÓS J:

So it seems that your argument is really that, on receipt of the land use consent, the Council should have immediately said to Mr Daisley: "Be our guest, start quarrying," that's your argument, isn't it?

MR MACRAE:

That is – we wouldn't be – we're talking about exemplary damages, they've done that. Another option would be that you did actually submit a consent, you've spent a lot of money on that back in 2006, let's – we'll withdraw the enforcement action because there's no basis for that, and I take your Honour's point about whether or not that can be done within the frames, but I think that that is beside the point. I think that really they could have – one reasonable approach from the Council, and again wouldn't attract an award of misfeasance for exemplary damages if they would have said: "You've got the consent, we have some issues about the scope, you've applied for a resource consent before, let's get on and grant that consent for you so you can get on with it."

KÓS J:

Isn't that in substance what they were doing?

MR MACRAE:

Say again, sorry?

KÓS J:

Isn't in substance that exactly what they were doing?

MR MACRAE:

Well, no because he couldn't – he wasn't in a position to mine and that comes back to the point I made before because of the enforcement action. He's effectively prevented from the position taken by the Council not withdrawing the enforcement action.

WINKELMANN CJ:

When you say he was effectively prevented, why was he prevented by the enforcement action? I mean there was no interim order preventing him mining or quarrying, was there?

MR MACRAE:

Well the enforcement order was on the – well the orders, yes –

WINKELMANN CJ:

Well the abatement notices had been withdrawn?

MR MACRAE:

Yes, so, yes, I mean the point is that, yes, ought to Mr Daisley just got on with just mining and taking his chances as –

WINKELMANN CJ:

Well possibly – you would say possibly not given that the Council had notified that they thought the consent itself may no longer be valid?

MR MACRAE:

That may be one reason. It may be advice to say: "Look you've got these enforcement proceedings on foot, don't do anything" but the point is that it didn't help Mr Daisley when it came to trying to negotiate a way out of it with the bank.

O'REGAN J:

Well you say that but we've got no evidence of that.

GLAZEBROOK J:

Well there is a finding in the High Court, such as it is, of an opportunity, a lost opportunity.

MR MACRAE:

An opportunity and that's the, that was –

O'REGAN J:

But how did the High Court Judge know there wasn't an opportunity?

MR MACRAE:

I think the High Court Judge was saying there would have been an opportunity, their conducts –

O'REGAN J:

But how do we know that he didn't talk to the bank?

MR MACRAE:

Well, again, I think what we're talking about is misfeasance and the actions of the Council because, of course, the Council don't need to – they don't need to intend to cause harm or damage to Mr Daisley, they just have to be recklessly indifferent to that, and so maintaining the enforcement order was a reckless indifference to the consequences so you don't –

O'REGAN J:

Well that doesn't respond to Mr McLellan's argument, does it, that in fact it was the complete opposite? I mean you assert that but we've just had an hour of submission from your opponent saying that that wasn't what it was at all.

MR MACRAE:

I'm sorry, your Honour –

O'REGAN J:

And this is your reply to it, is that your reply is just that assertion.

MR MACRAE:

My reply to the documents and the without prejudice exchanges is that they initially started with a conversation, really the first – it was instigated by a conversation between Mr Daisley's lawyer and the Council's lawyer saying that there was no basis for the enforcement action and that it ought to be withdrawn and that's the advice that the lawyer is giving Mr Daisley on that. So the Council didn't take heed of that, they kicked it on foot and what led was some communications that commenced before the sale of the property and then continued for a period afterwards. No agreement was reached and I'm just simply saying that I don't think Mr Daisley should be prejudiced by the fact that his lawyer was trying to co-operate with the Council, presumably an invested interest with Mr Daisley but in the overall result but Council's action between discovery of the consent and the sale of the property nothing was agreed and –

O'REGAN J:

Yes, but I mean his lawyer never asked them to withdraw it, did he?

MR MACRAE:

Well that's the point I made earlier. It would be nice if we had a letter saying this is inappropriate but what I'm saying in terms of the –

O'REGAN J:

He was a QC, I mean he wasn't a novice. If he thought that the enforcement proceeding really was a threat to Mr Daisley, he would have asked him to withdraw it.

MR MACRAE:

Well I don't think, with respect, your Honour, I don't think that's too relevant to the Council's conduct.

WINKELMANN CJ:

Mr MacRae, when the enforcement proceedings were ultimately resolved, did that involve – entail Ark or how were they ultimately resolved?

MR MACRAE:

They were ultimately resolved. They were – the communication I referred to earlier just in 2011 the enforcement proceedings were withdrawn, as I understand it, when the application for consent was granted. I think it was that way round.

WINKELMANN CJ:

And that was granted outside the context of the proceedings?

MR MACRAE:

Yes, it was.

GLAZEBROOK J:

So it was a fresh application for consent was it or not the 2006 one?

MR MACRAE:

It was a fresh application. It was dealt completely outside the enforcement proceedings, yes, because of course the –

KÓS J:

So it was a 127 application for variation of the existing consent?

MR MACRAE:

Yes, yes, which was a different process altogether. Those are my submissions in reply.

WINKELMANN CJ:

Thank you, Mr MacRae. Any further questions? No. Well thank you counsel for your submissions. We will reserve our decision but before we do I think Mr McLellan you were going to file a note just saying, clarifying that point regarding the role of the Court in approving a consent but Justice France may have found the answer for you.

MR MCLELLAN KC:

Perhaps if we have leave to file a memorandum within a week.

WINKELMANN CJ:

All right, you have leave to file, but no more than two pages, and for Mr Daisley's reply, no more than two pages, and perhaps if you could file your memorandum by next Wednesday.

MR MCLELLAN KC:

Yes, happy with that, your Honour.

WINKELMANN CJ:

And Mr Farmer by the Wednesday following.

MR FARMER KC:

Yes, your Honour.

WINKELMANN CJ:

Thank you counsel. We'll retire.

COURT ADJOURNS: 3.40 PM