IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA352/2022
[2024] NZCA 161

BETWEEN	WHANGAREI DISTRICT COUNCIL Appellant
AND	MALCOLM JAMES DAISLEY Respondent

Hearing:	11–12 October 2023 (further submissions received 13 December 2023)
Court:	Miller, Gilbert and Mallon JJ
Counsel:	D H McLellan KC, S O H Coad and P A Robertson for Appellants J A Farmer KC and D J MacRae for Respondent
Judgment:	15 May 2024 at 3 pm

JUDGMENT OF THE COURT

A The appeal is allowed in part. The finding that Whangarei District Council is liable for the misfeasance of its officers in public office is set aside, along with the award of exemplary damages.

B The appeal is otherwise dismissed.

C The Council must pay costs for a complex appeal on a band A basis, with provision for second counsel, and usual disbursements.

REASONS OF THE COURT

(Given by Miller J)

TABLE OF CONTENTS

Introduction

[1] Late in 2004 the respondent, Jimmy Daisley, bought a rural property at Knight Road, Ruatangata, near Whangārei. The property included a long-established quarry.

[2] In 1988 the Whangarei County Council issued a land use consent (1988 land use consent) to a lessee of the quarry.[1] It authorised quarrying on the site as a commercial use. The Council itself used rock from the quarry for roading purposes. But by 2004 the quarry was little used and land around it had been developed into lifestyle blocks.

---

[1] Local authorities, including the County Council, were later amalgamated to form the Whangarei District Council.

[3] The vendors either never knew of the 1988 land use consent or had forgotten about it by the time Mr Daisley bought the property. His lawyers obtained a Land Information Memorandum (LIM) from the Council in connection with the purchase. The LIM did not disclose the consent. A reasonable search of records that the Council is required by law to keep would have located it without difficulty.

[4] Mr Daisley knew the quarry had been worked commercially for many years and believed it enjoyed existing use rights. He prepared to work it. Neighbours complained to the Council.

[5] Officers from the Council's monitoring team issued abatement and infringement notices in attempts to stop Mr Daisley quarrying. He and the vendors responded that the quarrying was longstanding and asserted that the Council had authorised it. The officers did not search Council records to verify these claims. Rather, they insisted that the use was protected by neither a land use consent nor existing use rights. They persisted in this view for years. When the 1988 land use consent was discovered on 22 September 2009 the Council did not immediately withdraw enforcement action under way in the Environment Court.

[6] It is not now in dispute that the Council breached its duty of care by repeatedly failing, over a period of five years, to search its records in connection with its repeated enforcement efforts against Mr Daisley.

[7] The Council's actions prevented Mr Daisley from exploiting the quarry to its full potential. He was forced to sell the property. His losses comprised lost profits, loss in value of the property and, the costs of resisting enforcement action and unsuccessfully seeking to "regularise" his use by seeking a notified resource consent.

[8] On 14 August 2015, just within six years after the 1988 land use consent was discovered, Mr Daisley sued in negligence and misfeasance in public office.[2] He

---

[2] The six-year limitation period for tort actions under the since-repealed Limitation Act 1950 applies to this case as the act giving rise to the cause of action occurred before 1 January 2011: Limitation Act 1950, s 2A and Limitation Act 2010, s 59.

succeeded before Toogood J.[3] Most of the losses he recovered were incurred more than six years before he sued. He recovered them because Toogood J found that time did not begin to run for limitation purposes until 22 September 2009; alternatively, limitation was postponed until that date because the Council concealed the existence of the consent by fraud within the meaning of s 28 of the Limitation Act 1950. Compensatory damages of more than $4 million were awarded in negligence. Exemplary damages of $50,000 were awarded in the misfeasance cause of action.

[9] The Council appeals. It admits negligence but denies misfeasance. Issues common to both causes of action are when the limitation period commenced and whether the Council concealed the cause of action by fraud.

[10] The Council's stance is that its officers did not know of the 1988 land use consent. That being so, it says, its conduct lacked the quality of wilful or reckless wrongdoing that it maintains is necessary both to postpone limitation for fraudulent concealment, and for liability for misfeasance in public office. The case turns, as we see it, on whether Council officers were subjectively reckless as to the existence of existing use rights when they took enforcement action against Mr Daisley.

The narrative

[11] The Knight Road property was part of what had been a farm, located in an area which in recent decades has increasingly been given over to lifestyle blocks. It comprised 48ha. The quarry there has been worked since the mid-1960s to extract rock. The former owners, Barry and Glenise Drake, had allowed a series of contractors to operate the quarry commercially since 1982.

[12] The Drakes leased the quarry for a time to Henry and Charles Adams, trading as the Adams Brothers. In 1988 the Adams Brothers obtained the land use consent from the Council. It authorised the extraction of red brown rock on the property, specifying the site as a gully situated approximately 300m from Knight Road. The site

---

3 *Daisley v Whangarei District Council* [2022] NZHC 1372, (2022) 23 ELRNZ 839 [judgment under appeal].

was marked on a plan. The consent was open-ended, in that it did not fix a maximum quantity.

[13] Following the 1988 land use consent, the Council insisted over the objections of the Drakes on rating the quarry separately, levying rates on the basis that it was used commercially. Mr Drake's account was that after the Adams Brothers ceased to use the quarry (it seems he locked them out for some reason) it was used on a "casual, personal basis", with about 1,000 bank cubic metres (BCM) being quarried annually.[4] On this basis he sought to have the Council change the commercial rating designation, but it refused.

[14] Details of the 1988 land use consent were retained on a Council paper file for the property. The Council digitised its records in 1999. It did not create an electronic copy of the file, but the existence of a paper file was noted on its database and was apparent to any Council officer searching the electronic property record for a consent or for rating information.

[15] The Council itself was supplied with rock from the quarry. The evidence suggests that this happened in the 1980s.

[16] The Drakes evidently did not know of the 1988 land use consent. When negotiating the sale of the property to Mr Daisley in 2004, they told him that their use had not been challenged or prohibited at any time, that the Council had been rating the quarry separately for commercial mineral rates, and that the Council itself had used the quarry to extract rock for roading purposes.

[17] Mr Daisley's solicitor asked the Council for a LIM in connection with the purchase. The LIM stated, with respect to consent and permitted uses, that "[n]o information applicable to this property was found". We do not know who prepared and signed the LIM for the Council (but there is no evidence that it was any of the officers later involved in enforcement action). Mr Daisley did not inquire further. He assumed that existing use rights protected his intended use.

---

[4] This measurement refers to material in situ before excavation. The evidence invites the inference that quantities mentioned later in this judgment refer to excavated material, which is bulkier, but nothing turns on it.

[18] At the time Mr Daisley bought the property, quarrying of up to 500 BCM per annum was a permitted activity under the Whangārei Proposed District Plan. That would meet a farmer's own needs. But Mr Daisley wanted to extract material for use in his own earthworks contracting business and for sale to local farmers and other contractors. He planned to extract much more than 500 BCM per annum. The material would not be limited to brown rock. The quarry included what was described as blue rock, which may be a reference to greywacke, which he also intended to quarry. The price he paid for the property, $520,000, reflected his intended use.

[19] After the transaction settled on 24 December 2004 the Drakes began to remove a stockpile of previously-extracted rock which they had retained under the contract. That activity caused a neighbour to complain.

[20] The site was visited by Gary Barnsley, a monitoring officer in the Council's environmental services section. He issued a cease-and-desist letter on 4 February 2005, alleging that Mr Daisley had extracted more than 500 BCM without a resource consent or existing use right, and requiring that he cease quarrying until he had obtained a resource consent. At that time Mr Daisley had not begun to quarry rock. The letter erroneously attributed the stockpile to him as some of his machinery was on site.

[21] The Council followed the cease-and-desist letter with an abatement notice which Mr Barnsley and another Council officer, Andrew Lucas, served personally on 21 February 2005.[5] It directed that Mr Daisley cease quarrying material in excess of 500 BCM in any 12-month period. This document, like the letter of 4 February, asserted that the activity was being carried on without either a consent or existing use rights.

[22] Mr Daisley responded by letter of 28 February 2005 stating that:

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

---

5 Resource Management Act 1991, s 322.

He attached rates notices confirming that the quarry was rated as a commercial use.

[23] In a letter of 9 March 2005 Mr Daisley repeated these statements and contended that the use was an existing one which was protected under s 10 of the Resource Management Act 1991 (RMA) because it was lawfully established before the rule limiting quarrying to 500 BCM became operative and its effects remained similar in character, intensity and scale.

[24] On 4 March 2005 Mr Daisley applied for a resource consent. The Council rejected the application by letter that same day, on the grounds that the application was incomplete. Mr Daisley was told that he had to supply evidence that the quarry had been lawfully established and operated continuously. He produced a letter from Mr Drake stating that the quarry had been opened 35–40 years earlier and he had a list of named contractors that had used it since 1978, with output varying from 1,000 BCM to 20,000 BCM per annum.

[25] At a meeting on 12 May 2005, Kerry Grundy, leader of the Council's monitoring team, told Mr Daisley that the quarry did not enjoy existing use rights and he needed to obtain a resource consent.

[26] Between 15 November 2005 and 14 February 2006 the Council issued two abatement notices, one each to Mr Daisley personally and Daisley Contracting Ltd, requiring that he cease quarrying and four infringement notices alleging breaches of the abatement notices.[6] In evidence Mr Daisley denied that he had been extracting more than 500 BCM annually. We note that his position when dealing with the Council between 2005 and 2009 was slightly different; he initially denied quarrying anything, then maintained that he was quarrying for onsite use and the extent of the earthworks was explained by the need to undertake remediation work. Throughout that period neighbours complained of trucks carting rock away from the quarry. The Council's position was that the inspections showed he was exceeding 500 BCM and it was this

---

6 The original abatement notice, served on 21 February 2005, was withdrawn by the Council as it had been directed to the wrong property. The infringement notices were issued under s 343C of the Resource Management Act.

activity that led to the abatement and infringement notices.[7] It obtained a surveyors' estimate that at least 4,000m^3 had been quarried in the two years to 8 March 2006.

[27] On 24 March 2006 Mr Daisley again applied for resource consent, seeking permission to quarry 40,000m^3 of rock.[8] His application again relied on existing use rights. On 15 September 2006 the Council required that the application be publicly notified. (We note in passing that Toogood J found that loss commenced from this date, reasoning that the Council would not have put Mr Daisley to the expense of a notified application had it disclosed the 1988 land use consent.[9] This finding is not in dispute.) The resource consent application was opposed by a large number of neighbours and the Council itself. Council staff took the view that there was no land use consent and no existing use rights had been established.

[28] In 2006 the Council obtained information from the Department of Labour showing that "Drakes Quarry" had recorded tonnages extracted of as much as 11,334 tons per annum between 1975 and 1997. But a neighbour suggested to Council staff that the quarry known historically as Drakes Quarry had been located elsewhere in the District. The Council made an inquiry of Quotable Value, who had collected this information. It did not know but was prepared to accept that its records might have been inaccurate. Council officers did not consult Mr Daisley or Mr Drake when considering the neighbour's claim. In November 2006 they cancelled the commercial mineral rates assessment for the quarry.

[29] In February 2007 the resource consent application was declined after a hearing in which many neighbours appeared in opposition.[10] It proceeded on the express assumption that there was no existing consent. However, it did examine existing use rights. Mr Daisley was supported by Mr Drake and several others who were familiar with the quarry or had worked there. They deposed generally that it had been used

---

7 Council records state that seven visits were made to the site or Mr Daisley's business premises between 4 February 2005 and 4 October 2006, some to serve notices, some to investigate complaints, and some to gather evidence for enforcement purposes.

8 The application was initially for 40,000m^3 of rock and 10,000m^3 of allowance for the removal of overburden and relocation of topsoil, however this was revised at the resource consent hearing to only 30,000m^3 of rock, for a total of 40,000m^3 of material.

9 Judgment under appeal, above n 3, at [378].

10 Hearings are governed by ss 100–103B of the Resource Management Act.

commercially for more than 20 years to supply rock for the district. (We note in passing that one of them stated that during the 12 months preceding the hearing about 4,000m^3 had been quarried.) The Hearings Commissioner found that the actual scale of activities over the years was very difficult to establish but Mr Daisley did not claim that it exceeded 6,000m^3 annually, which was far short of the 40,000m^3 he wanted to extract.[11] In short, his intended use was not similar in intensity and scale to historic use. The Hearings Commissioner declined an invitation to confirm the extent of historic use, stating that Mr Daisley would need to seek an existing use certificate under s 139A of the RMA.

[30] A further six abatement notices (three each to Mr Daisley and Daisley Contracting Ltd) and two infringement notices followed between 3 October 2007 and 5 March 2009. Some were issued in response to frequent complaints from neighbours regarding continued activity at the quarry and numerous truck movements. During this process Mr Daisley's solicitor made official information requests for any information on the property that related to quarrying. It appears the first such request was made on 10 November 2007 and the last on 5 June 2008. The Council did not search its historic records before responding to these requests.

[31] On 31 July 2009 the Council applied to the Environment Court for an enforcement order, seeking to prohibit quarrying for a period of 12 months and thereafter limit it to 500 BCM per annum.[12] At about the same time Mr Daisley was directed by his bank to sell the property to repay indebtedness if he wished to avert a mortgagee's sale.

[32] Mr Barnsley swore an affidavit in support of the enforcement order. He asserted that Mr Daisley was not entitled to quarry more than 500 BCM per annum. He stated that "[f]rom time to time during the period of Council's investigations" Mr Daisley had asserted existing use rights but "he has failed to provide any proof of these rights". The basis of the claim "would appear to be that the previous owner of the property worked the quarry for some years, however that has never been

---

[11] Mr Drake stated that no figures had been kept but estimated that 3,000m^3 was quarried in the biggest year of operations. The evidence suggested that usage had varied considerably from year to year.

[12] Resource Management Act, s 314.

established" and it seemed improbable that such activity was on a similar scale to Mr Daisley's activities. In any event, he added, "it has never been established that the present scale of activity was ever lawfully established or has been continuous at that level, so any existing use rights claim may have been lost".

[33] The Council's enforcement proceeding led Mr Daisley's solicitor to ask the Council's planning section for historic records. The historic files were identified and retrieved from the archive. They were made available at the Council's offices on 22 September 2009. They contained the 1988 land use consent.

[34] By letter of 15 October 2010 Mr Barnsley withdrew the last abatement notice, which had been issued on 28 November 2008, and the subsequent infringement notices. That appears to have been his last involvement with the matter.

[35] The Council did not immediately withdraw the enforcement proceeding, seeking rather to use it as a vehicle to set conditions on Mr Daisley's use. The Council's solicitor suggested that there was "room to agree on the terms of the Enforcement Order to the satisfaction of all parties". Through his then counsel, Mr Casey KC, Mr Daisley took the position that while he might be prepared to enter into a voluntary agreement, he would not consent to an order being made against him when there appeared to be no basis for such order.

[36] The Council's solicitor responded by letter of 29 October 2009 that Mr Daisley's activities might be outside the terms of the 1988 land use consent because he had quarried blue rock and it appeared the site of the quarry was in a different location from that shown on the 1988 plan. It proposed a series of conditions under an "appropriate legal mechanism". The agreed maximum annual quantity would be 40,000m^3 — the quantity Mr Daisley had sought in 2006 — and truck movements would be limited to 50 per day.

[37] On 20 November 2009 Mr Casey suggested amendments, notably increasing truck movements to 100 per day, but negotiations did not progress. On 2 December 2009 Mr Daisley agreed to sell the property for $400,000. It was a distress sale; a mortgagee's auction was scheduled for the next day.

[38] The Council's solicitors, conscious of a need to report to the Environment Court, threatened on 22 January 2010 to proceed by way of an amended application for an enforcement order. It appears the rationale for the application would be that the quarry might not be on the originally approved site and Mr Daisley was quarrying blue rock as well as brown.

[39] Mr Casey was unable to get instructions from Mr Daisley, so he proposed that the application remain on hold until the property's ownership was resolved. The Council's solicitors agreed that the application for an enforcement order should remain on hold, on the basis that until the conditions were agreed there should be no quarrying. Should that not be agreed, the Council might pursue an interim order.

[40] The purchaser of the property, Ark Contractors Ltd, then instructed Mr Casey. Ark applied for an existing use certificate, which was granted, and a variation of the 1988 land use consent, which was granted on 30 May 2011 on a non-notified basis. It appears that Ark agreed to the enforcement proceeding against Mr Daisley remaining on hold in the interim. Quarrying ceased in the meantime, the Council insisting that a new consent was required to operate the quarry "beyond the 1988 consent or district plan limits".

[41] We understand that the consent was granted on a non-notified basis because the marginal effects on neighbours — that is, effects resulting from activity beyond that authorised by the 1988 land use consent — were minor. The activities authorised were the same as those Mr Daisley had wanted to undertake. Toogood J remarked that the stance of the Council officer who recommended the application be processed on a non-notified basis could hardly be in more distinct contrast to the view of the Council's officers when Mr Daisley applied for consent in 2006.[13]

[42] The Council withdrew its enforcement proceedings against Mr Daisley on 4 July 2011. Ark consented to this on the basis that it was the current owner of the land to which the proceeding related and Mr Daisley had no ongoing involvement. It appears that no one consulted Mr Daisley about it.

---

13 Judgment under appeal, above n 3, at [94].

[43] On 14 August 2015 Mr Daisley commenced this proceeding. He was just inside six years from 22 September 2009, the date on which the Council had disclosed the 1988 land use consent.

[44] The delay in issuing proceedings is explained by advice, given by his former lawyer, that he had no claim against the Council. The lawyer, Wayne Peters, was a party to the proceeding but settled with Mr Daisley before trial. We do not know the details of the settlement.[14] We have not been asked to revisit his findings on quantum. It is common ground that delay after 22 September 2009 cannot be laid at the door of the Council. On that date Mr Daisley knew the facts essential to his negligence cause of action, and had he sued at that time none of his losses could have been met with a limitation defence.

The claim

[45] The statement of claim pleaded the Council's statutory obligations under s 86 of the former Town and Country Planning Act 1977 and then s 35 of the RMA to keep records of resource consents and to monitor compliance with them, and the obligation under s 322(4) of the RMA not to serve an abatement notice without having reasonable grounds to believe the required circumstances existed.[15] It pleaded 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.

[46] The duty of care was said to have been breached in several ways:

(a) the Council gave no consideration or no adequate consideration to the evidence that a consent must have existed, including its own use of the quarry, or to the possibility that a consent might be found in its historical records;

---

[14] Toogood J also did not have this information, and thus was unable to make any order for reduction of costs payable by the Council: *Daisley v Whangarei District Council* [2022] NZHC 1671 at [64]–[70].

[15] We confine ourselves to the two causes of action that were made out.

(b) the Council knew or ought to have known that the quarry's operation was both consented and an existing use right;

(c) Council staff either failed to or elected not to conduct a complete check of the Council's records, and failed to consider circumstantial evidence of the consent; and

(d) the Council relied on inaccurate accounts given by neighbours who wanted to shut the quarry down.

[47] With respect to misfeasance, the claim pleaded that the Council, through four named members of its regulatory team, issued abatement and infringement notices in full knowledge of the existence of the 1988 land use consent; or, in the alternative, the officers wilfully elected not to properly ascertain whether the consent existed. The named officers were Mr Barnsley, Mr Lucas, Mr Grundy and Katie Hislop (a monitoring officer who had issued some abatement notices). It was said that they repeatedly:

(a) failed to give any, or adequate, consideration to whether the quarrying was lawful and longstanding;

(b) represented that information had been gathered and an investigation completed;

(c) publicly stated that the operation of the quarry was unconsented and unlawful;

(d) stated that there was no evidence to support a claim for an existing use right;

(e) took action to curtail Mr Daisley's commercial activities knowing of the consent or with reckless or wilful disregard regarding its existence; and

(f) sought to direct the outcome of Mr Daisley's resource consent applications by providing false information to Hearings Commissioners, providing support and confidential information to objectors, and cancelling the rates assessments for the quarry without consultation with Mr Daisley.

It was said that this course of conduct was malicious and blatantly disregarded the officials' obligations in the performance of their duties.

[48] The misfeasance cause of action also relied on the Council's corporate knowledge. The claim pleaded that the Council knew its records included the file which contained the 1988 land use consent, that rates were being collected for the quarry as a commercial mineral operation, and that the quarry had been operating since no later than 1988.

[49] The claim sought (in round numbers) $38 million, comprising lost revenue ($17 million after tax), interest, damages for diminution in value of the property ($5 million), damages for direct and consequential losses including costs incurred fighting abatement notices and resisting debt recovery claims ($870,000), and such other relief as the Court thought fit. Exemplary damages were sought under the misfeasance cause of action.

[50] The pleaded breaches of duty all concern events which occurred before 14 August 2009. The statement of claim pleads, under the heading "Continued Ultra Vires Action of First Defendant", that after disclosing the 1988 land use consent the Council "continued to pursue legal action", referring to the Environment Court proceeding commenced on 31 July 2009, but we interpret that as a pleading of continued injury and mala fides rather than a distinct breach of duty. 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 along with the last abatement and infringement notices.

The judgment below

The trial

[51] The evidence was heard in the High Court at Whangārei over three weeks beginning on 2 August 2021. Much of the hearing time was devoted to expert evidence, which we need not survey.

[52] Witnesses of fact were few. Mr Daisley gave evidence, as did his son Scott Daisley, who had run the operational side of their contracting business. Mr Daisley called Mr Drake and also Alfred Morris, who lived next door to the quarry and had worked at it while it was owned by Mr Drake. Mr Morris was employed by Mr Daisley to manage the quarry. He was evidently called to suggest that the Council's sudden resistance to the quarry was the product of friction between Mr Barnsley and Mr Daisley. Andrew Loader, a former inspector of quarries, gave expert valuation evidence but he had also visited the quarry several times a year between 1988 and 1995. He deposed that when he first visited the quarry it was being operated by the Council.

[53] The Council called three witnesses of fact. Two explained the Council's record-keeping system. The third produced records relating to the rating system and the 2006 decision to change the rates assessment. She had been employed by the Council only since 2017.

[54] None of the four officers named in the pleading were called, by either party. Mr Barnsley had left the Council's employ and was seemingly uncontactable. Mr Lucas was overseas and could not be compelled (we do not know whether any attempt was made to call him). Ms Hislop had been employed by the Council until 2018 (after the proceedings commenced) and communicated with the Council's lawyers about giving evidence. The Judge inferred from the Council's failure to call Ms Hislop that her evidence would not help its cause.[16] It is not clear why Mr Grundy was not called. The Judge had to base his findings about the knowledge and intentions

---

16 Judgment under appeal, above n 3, at [323].

of Council staff on inferences from the documentary record and accounts given by the plaintiff's witnesses of their interactions with the staff.

[55] Mr Daisley's evidence was that Mr Barnsley took against him from the start, likely because of previous dealings over another property. He accused Mr Barnsley of being vindictive and spiteful. We record that it appears that the service of the first abatement notice on 21 February 2005 swiftly became acrimonious, not helped by an apparent misunderstanding about where Council officers were to meet Mr Daisley. Afterwards Mr Barnsley reported Mr Daisley to Mr Grundy and the Police for abusive and threatening behaviour and Mr Grundy warned Mr Daisley that similar behaviour would not be tolerated in future.

The Judge's findings: negligence

[56] Toogood J found that that the Council owed Mr Daisley a duty to exercise reasonable care and skill in keeping records of resource consents available for inspection, in the provision of information about them, and in making reasonably diligent inquiries into their existence whenever that was in issue.[17] He found that the Council breached these duties continuously from November 2004 until September 2009. It did so by failing to keep a copy of the 1988 land use consent in its register of current files so as to make it reasonably available at the Council's principal office and by failing to conduct diligent searches on specified occasions: when issuing abatement notices; when dealing with Mr Daisley's resource consent applications; when taking enforcement action in the Environment Court; and "every time the Council provided Mr Daisley with an incorrect response to a request for information about the existence of a consent".[18]

[57] There is no challenge on appeal to the Judge's findings that the Council's statutory duties under ss 35 and 322 of the RMA may give rise to an actionable duty of care and there was a sufficiently proximate relationship between Mr Daisley, as

---

17 At [22].
18 At [23].

owner of the property, and the Council.[19] Nor are his findings that the Council was in breach of duty in dispute, except that the Council does not accept that its conduct should be characterised as a continuing breach. Counsel for the Council accepted in closing argument at trial that no Council officer had searched its archives for a consent. The Judge found that had the Council kept an adequate record of the 1988 land use consent reasonably available in its current records, Mr Barnsley would have had the means of ascertaining promptly that Mr Daisley was operating the quarry under an existing consent.[20] He further found that current records disclosed the existence of the historic file containing the consent.[21] The Council officer who received the September 2009 request for files used those records to report almost immediately that they had identified historic files which he then retrieved from the archives.

[58] The Judge found that the Council was in breach of duty when responding to the 2004 request for a LIM.[22] It was also in breach of duty when Mr Barnsley issued the first abatement notice (and the subsequent abatement notices).[23] That was so because it would have been apparent to Mr Barnsley that the quarry had been substantially worked over a significant time period and he must have known — or at least, a reasonable inquiry would have shown — that the quarry was rated as a commercial operation.[24] Further there was no evidence that Mr Barnsley undertook any inquiries of Mr Daisley or Mr Drake, or checked any Council records, before issuing the first abatement notice.[25]

[59] The Judge next found that Mr Barnsley was given information about historic use of the quarry in response to the abatement notice. He found, and it is not now in dispute, that the Council received Mr Drake's letter of 25 February 2005 saying that the quarry had been used commercially and that information alone should have alerted

---

19 At [183] and [185]. At [172] the Judge cited *Marlborough District Council v Altimarloch Joint Venture Ltd* [2021] NZSC 11, [2012] 2 NZLR 726, in which the Supreme Court held that a territorial authority is under a duty of care when providing information in a Land Information Memorandum.

20 Judgment under appeal, above n 3, at [190].

21 At [203].

22 At [214].

23 At [226].

24 At [221].

25 At [222].

Mr Barnsley to the likelihood that the Adams Brothers had consent to exceed the 500 BCM limit.[26]

[60] With respect to quarrying activities on site, Toogood J noted that from time to time Mr Daisley had claimed to Council officers that quarrying was being undertaken only to comply with Regional Council requirements, but those excuses were not supported by the evidence.[27] We take this to be a finding that Mr Daisley was quarrying more than 500 BCM per annum, as the Council suspected, and but for the 1988 land use consent he would have been in breach of the District Plan.

[61] Although the Council acted negligently when issuing the LIM, when issuing the February 2005 abatement notice and when insisting on a resource consent being sought in 2005, the Judge found that the cause of action was not complete until 2006, when Mr Daisley applied for a resource consent on a notified basis. That forced Mr Daisley to incur the costs of a notified hearing.[28]

The Judge's findings: misfeasance

[62] Having found the Council liable in negligence, the Judge treated the misfeasance cause of action as a vehicle for the exemplary damages claim.

[63] Dealing with the facts about the state of mind of Council officers, the Judge first dismissed a submission that the existence of the 1988 land use consent was not obvious or readily ascertainable. He found rather that Council officers mistakenly presumed Mr Daisley had the burden of proving that the consent existed and that mistake led them "to conclude that they were not required to look for it."[29]

[64] The Judge then addressed Mr Daisley's contention that Council officers knew of the 1988 land use consent and acted with malice towards him. In support of that contention Mr Daisley claimed that Council officers provided false information to the Hearings Commissioner, supported objectors, and tried to circumvent existing rights

---

26 At [227].
27 At [105].
28 At [237].
29 At [292].

by unilaterally cancelling the rates assessment.[30] The Judge noted that there was tension between Mr Barnsley and Mr Daisley. The Council officers were sympathetic to objectors. And no apology was forthcoming for their repeated misleading statements about the consent status of the property.[31] Against that, Mr Daisley had been verbally abusive to Council staff, he had persisted with quarrying regardless of abatement notices, and there was some evidence of the Council responding helpfully on occasions.[32] The only officers against whom there might be an arguable inference of personal antagonism were Mr Barnsley and Mr Lucas.[33] The Judge did not make such a finding. He concluded rather that the evidence of tension with Mr Daisley did not sufficiently establish that they knew about the 1988 land use consent and deliberately withheld knowledge of its existence.[34]

[65] It was not in dispute that the Council had corporate knowledge of the consent; it had issued the consent, used the quarry itself, and rated the quarry as a commercial enterprise.[35] However, the Judge held that this could not sustain a finding of malice or reprehensible conduct justifying an award of exemplary damages.[36]

[66] The misfeasance cause of action accordingly turned on the question of recklessness. Mr Daisley submitted that Council officers were determined to prevent quarrying regardless of circumstances pointing to a consent or existing use rights.[37] The Judge was invited to draw an adverse inference from the Council's failure to call Mr Barnsley, Mr Lucas or Mis Hislop, relying on *Ithaca (Custodians) Ltd v Perry Corp*.[38] He was not prepared to draw such inference for the first two witnesses, since Mr Barnsley's whereabouts were unknown and Mr Lucas was overseas.[39] An inference might be drawn from the failure to call Ms Hislop but it went no further than showing that she was not in a position to give evidence helpful to the Council.[40]

---

30 At [300].
31 At [302].
32 At [302]–[304].
33 At [304].
34 At [307].
35 At [310].
36 At [312].
37 At [316].
38 At [318], citing *Ithaca (Custodians) Ltd v Perry Corp* [2003] 2 NZLR 216 (HC) at [216]; and *Ithaca (Custodians) Ltd v Perry Corp* [2004] 1 NZLR 731 (CA) at [150]–[154] per Gault P, Blanchard, Anderson and Glazebrook JJ.
39 Judgment under appeal, above n 3, at [321].
40 At [323].

[67] The Judge turned to the Council officers' persistent belief that it was for Mr Daisley to prove the consent. He held that they were wrong in law, but he did not find that they formed that view in bad faith.[41] He found that they were sympathetic to neighbours who complained about Mr Daisley, and Mr Barnsley and Mr Lucas were not motivated to assist him.[42] He also found that the Council had practised "obstructive and uncompromising resistance" to Mr Daisley's proper claims after the 1988 land use consent was found in 2009.[43]

[68] The Judge concluded that the Council's conduct amounted to misfeasance requiring additional censure.[44] Its conduct before the 1988 land use consent was discovered was reckless but not malicious and fell short of the threshold for exemplary damages. What tipped the scales was its stubbornly obstructive attitude after the consent was discovered in September 2009, failing even to apologise for what it had put Mr Daisley through.[45] He added that had the Council embraced Mr Daisley's plans in October 2009 to operate the quarry in the same way that it did Ark's in 2011, Mr Daisley may have been able to persuade his bank to hold off the mortgagee's sale.[46]

The Judge's findings: limitation

[69] The Judge held that the limitation defence failed because the cause of action accrued on a continuing basis from the time the Council opposed the 2006 resource consent application until the discovery of the 1988 land use consent in September 2009.[47] That was so because the Council was continuously in breach of its duties and Mr Daisley suffered continuing losses. That approach was justified as a matter of policy because the Council controls the records and landowners rely on it to comply with its duty to keep them reasonably available.[48] He concluded that:[49]

> [378] I am satisfied that the Council was continuously in breach of its duties regarding information about the consent from the time it issued the erroneous LIM in November 2004 until the discovery of the 1988 [land use consent] in

41 At [329]–[330].
42 At [334].
43 At [340].
44 At [341].
45 At [342].
46 At [343].
47 At [378].
48 At [379].
49 Footnote omitted.

> September 2009. I am also satisfied that Mr Daisley suffered continuing damage or loss from September 2006 when the Council required him to notify his 2006 resource consent application until the Council withdrew the enforcement proceedings in the Environment Court in July 2011. Viewing the breaches and the losses in that way, it is not necessary to apply a reasonable discovery approach to make a finding of when the cause of action accrued. Applying conventional principles as explained by Richardson J in *Williams*, it accrued on a continuing basis from the time the Council opposed the 2006 resource consent application until the discovery of the 1988 [land use consent] in September 2009.

[70] In case he might have been wrong about that, the Judge considered whether the cause of action had been concealed by fraud within the meaning of s 28(b) of the Limitation Act 1950. He had accepted that no Council officer knew of the existence of the 1988 land use consent, finding it likely that a cursory search was taken when Mr Daisley sought a LIM in 2004 and never revisited. So the question was whether there had been equitable fraud.[50] The Judge held, following *Wrightson Ltd v Blackmount Forests Ltd*, that wilfulness requires knowledge of relevant facts and a decision not to disclose them.[51] As we explain later, he appears to have accepted that Council officers did not wilfully conceal the 1988 land use consent.

[71] The Judge recognised that recklessness may also amount to fraudulent concealment.[52] He found that the Council officers were reckless.[53] Their conduct could not reasonably be described as an honest blunder, for they had evidence of the historic quarrying that had taken place, in the form of the quarry itself, Mr Drake's account of it being worked over time, the levying of commercial mineral rates on the quarry, and the reference to mineral interests on the title to the property.[54] They were reckless in assuming that Mr Daisley had to prove the existence of the consent. It would be wrong to allow the Council to benefit from expiry of the limitation period when it was responsible for Mr Daisley's ignorance of the true position.[55]

---

50 At [384].
51 At [389]–[390], citing *Wrightson Ltd v Blackmount Forests Ltd* [2010] NZCA 631 at [47].
52 Judgment under appeal, above n 3, at [394], citing *King v Victor Parsons & Co (A Firm)* [1973] 1 WLR 29 (CA) at 33.
53 Judgment under appeal, above n 3, at [396].
54 At [397].
55 At [399].

[72] Toogood J accordingly concluded that the Council fraudulently concealed the existence of the cause of action until 22 September 2009.[56] We examine his findings more closely at [153]–[162] below.

Damages

[73] The damages awarded comprised $4,089,622 for loss of profits, $90,000 for loss in value of the property on forced sale, $50,000 for direct costs (incurred in connection with the Council's enforcement activities), interest, and exemplary damages of $50,000.[57] We need not survey the Judge's findings on quantum, but it is necessary to record his findings about the nature and timing of Mr Daisley's losses.

[74] So far as loss of profits were concerned, Toogood J rejected Mr Daisley's far more ambitious claim for reasons we need not survey.[58] He took the scale of activity permitted in 2011 as his baseline, and reasoned that Mr Daisley would have been able to operate on a limited basis only until he would have obtained a resource consent in 2005, partly because the 1988 land use consent was confined to brown rock ("probably" justifying the first abatement notice) and partly because it would have taken time to get the quarry into full production.[59] (That is why the Judge found that Mr Daisley's losses began when he was required to incur the costs of seeking a resource consent on a notified basis.) The Judge accepted that Mr Daisley would have quarried the site for a 12-year span from 2006.[60] It is noteworthy that the Judge found the actual quarrying conducted between 2005 and 2009 was "at best, sporadic and of limited scope".[61] Presumably for that reason, he did not discount the claim for loss of profits for any commercial quarrying since 2004.

[75] Turning to damages for loss in value of the land, the Judge accepted Mr Daisley's claim that he sold the property on the basis that there was no resource

---

56 At [400].
57 At [566].
58 See [494]–[550]. We note that the Judge discounted his calculations by 35 per cent for "contingencies and risk" to arrive at the figure of $4,089,622.
59 At [500]–[501].
60 At [411].
61 At [495].

consent and was clearly right to claim that the value was discounted by nearly 25 per cent because he had to sell to avert a mortgagee's sale.[62]

[76] Mr Daisley's claim for $237,896.46 for direct costs incurred as a result of the Council's negligence was discounted for want of adequate proof, but the Judge accepted that he would have incurred costs directly related to the need to respond to abatement and infringement notices and the enforcement proceeding in the Environment Court. Some of his legal and consultancy costs for his resource consent applications would have been attributable to the Council's negligence. The $50,000 award was an estimate which the Judge described as a conservative appraisal.[63]

[77] We note that some of these losses were incurred after 14 August 2009.[64] Some of them were of the same kind as losses occurred before that date; that is true of lost profits and also for costs of resisting enforcement action commenced before that date. The loss in value of the property was realised after that date.

Limitation: the issues

[78] The first issue is whether the Judge was correct that time did not begin to run until the 1988 land use consent was disclosed in September 2009 because the Council's duty of care was breached continuously throughout, and Mr Daisley's losses were continuous.

[79] The second issue is whether the Council fraudulently concealed the existence of the 1988 land use consent until 22 September 2009.

Continuing cause of action

[80] Mr McLellan KC submitted, for the Council, that the Judge misunderstood the authorities. Where a tort is actionable on proof of damage the doctrine of continuing breach extends time only where a repeated tortious wrong produces new damage after

---

62 At [555].
63 At [562]–[563].
64 Any date earlier than 14 August 2009 falls outside the six-year limitation period, as the proceedings were initiated on 14 August 2015.

the limitation date.[65] In this case there was no fresh damage after 14 August 2009. All the damage was the product of breaches of duty before that date.

[81] Mr Farmer KC, for Mr Daisley, responded that the Judge correctly found that the duty, its breach and the resultant loss were all continuous from 2006 and it would be artificial to treat each action or inaction by the Council as a separate breach. The focal point is the continued negligence of the Council in failing to conduct more than a cursory search of its records, while pursuing over a long period of time an ultimately successful attempt to put Mr Daisley out of business.

[82] In our view, the Judge erred when he held that the doctrine of continuing breach allowed Mr Daisley to recover losses that were incurred before 14 August 2009 and resulted from breaches of duty that occurred before that date.

[83] As the United Kingdom Supreme Court explained in *Jalla v Shell International Trading and Shipping Co Ltd*, a continuing cause of action is one which arises from the repetition of acts or omissions of the same kind.[66] That was a claim in private nuisance, which is actionable on the happening of loss, but the Court held that nuisance is in principle no different from any other tort or civil wrong in this respect.[67] 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.[68] The cause of action does not continue merely because loss from the original wrong continues to accrue within the limitation period.[69]

[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

---

65 See, for example, *T v H* [1995] 3 NZLR 37 (CA) at 40–41 per Cooke P.

66 *Jalla v Shell International Trading and Shipping Co Ltd* [2023] UKSC 16, [2023] 2 WLR 1085 at [26].

67 At [31].

68 At [26].

69 In *Jalla v Shell* there had been an oil spill of several hours' duration which happened outside the limitation period. The plaintiffs contended that the nuisance was a continuing one because the oil had never been cleaned up and they continued to experience undue interference with the use and enjoyment of their land. The Supreme Court at [37] held that the cause of action was complete once the oil had affected the plaintiffs' land. Thereafter there was no repeated activity or state of affairs for which the defendants were responsible. It could not be the case that the limitation period re-started until the damage was remediated.

committed more than six years earlier and notwithstanding that the loss suffered within the limitation period is of the same kind.[70] But damages cannot be recovered for occurrences of the wrong that happened more than six years before the claim was commenced.[71] That is a corollary of the rule that successive actions lie for each successive accrual of damage.[72] 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 not sue for profits lost or costs incurred earlier as a result of breaches between 2004 and 14 August 2009.

[85] 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.

[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. Nor did the particulars of misfeasance extend to anything done after 14 August 2009.

[87] 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

---

70 Stephen Todd "Discharge of Liability" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) 1537 at 1562.

71 At 1563; and *Jalla v Shell*, above n 66, at [32].

72 Bill Aitken "Remedies" in Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) 1481 at [24.2.2].

which is complete on the happening of loss, where they are sufficiently distinct from losses suffered outside the limitation period.[73] 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.

[88] 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.

Concealment by fraud under the 1950 Act

[89] Section 28 of the Limitation Act 1950 provides:[74]

> **28 Postponement of limitation period in case of fraud or mistake**
>
> Where, in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) the action is for relief from the consequences of a mistake,—
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:
>
> Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which—
>
> (d) in the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud

---

[73] *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA) at 424, citing RFV Heuston *Salmond on the Law of Torts* (16th ed, Sweet & Maxwell, London, 1973) at 606–607.

[74] Now repealed but still applicable in this case: Limitation Act 1950, s 2A.

> and did not at the time of the purchase know or have reason to believe that any fraud had been committed; or
>
> (e) in the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

[90] It has been common ground throughout that for purposes of subs (b), "fraud" includes wilful or reckless concealment of a cause of action,[75] but for reasons explained at [137] below we have found it necessary to examine that question.

[91] The fraud must be that of "the defendant or his agent".[76] It is not in dispute that the Council officers involved were its agents for present purposes.

Submissions

[92] With respect to wilful concealment, Mr McLellan accepted that the Judge correctly identified the three elements: a special relationship between the parties that creates a duty to disclose the facts comprising the cause of action; knowledge of those facts; and failure to disclose them, creating the inference that non-disclosure was wilful and thus unconscionable.[77]

[93] Counsel submitted that wilful non-disclosure is the touchstone for equitable fraud. The epithet "wilful" is attached where the defendant has knowledge both of the facts and of the duty to disclose them. He submitted that negligence claims generally are not amenable to an equitable fraud analysis since negligence by definition consists of a failure to take care, which is unlikely to be a knowing wrong. Concealment is deliberate when the defendant discovered the mistake and failed to disclose it. A negligent defendant who has not discovered their mistake does not conceal the right of action.

[94] Counsel further submitted that objective or corporate knowledge is not sufficient. Equitable fraud requires that someone within the Council subjectively knew of the relevant facts and knew the Council was under a duty to disclose those

---

75 See judgment under appeal, above n 3, at [389] and [399]–[400].
76 Limitation Act 1950, s 28(a) and (b).
77 Judgment under appeal, above n 3 at [387]–[389].

facts. The Judge erred by adopting corporate knowledge as the test; that amounted to saying that negligent non-disclosure of the existence of the 1988 land use consent amounted to equitable fraud. Counsel emphasised that the Judge found on the facts that none of the Council officers involved actually knew of the 1988 land use consent.[78]

[95] Mr McLellan accepted that "fraud" in s 28(b) extends to reckless concealment of a cause of action, but only because recklessness is also subjective. The defendant must subjectively appreciate that their conduct may well be wrongful. In addition, it must be objectively unreasonable to take that risk by failing to disclose. Counsel submitted that the Judge appears to have found the Council acted recklessly by assuming that it was for Mr Daisley to prove the existence of the consent and, as a result, failing to undertake a comprehensive search. If so, the Judge was in error, because in the circumstances of this case it was necessary to show that a Council officer subjectively appreciated that the consent might exist in the Council's files and, knowing that, failed to look for it. The Judge failed to address the subjective state of mind of any of the Council officers. Rather, his reasoning was "redolent of objective recklessness".

[96] Counsel also argued that the Judge erred by attaching the requirement for recklessness to the wrong element. Toogood J found that the Council was on notice that an historic consent may have existed and acted recklessly by mistakenly reasoning that Mr Daisley was obliged to prove that fact. Mr McLellan argued that this was to attach recklessness to the exercise of the Council's statutory enforcement powers rather than to its knowledge of the facts comprising the cause of action.

[97] In summary, Mr McLellan contended that at minimum Mr Daisley must show that someone within the Council subjectively knew a land use consent might well exist in the Council's files and chose not to look for it. He emphasised that the Judge made no finding of fact to that effect.

[98] Mr Farmer argued that this is a case of wilful, or at least reckless, non-disclosure. The Council, qua Council, did have the requisite knowledge of the

---

78 At [307].

relevant facts and of the duty to disclose them. Its conduct was reckless. Council officers undertook no more than a cursory investigation of the records. Inability to establish actual knowledge of the 1988 land use consent is not fatal. Counsel emphasised that this was an exercise in enforcement by the Council, which was obliged to prove its claim that Mr Daisley was quarrying unlawfully. Council officers could not issue an abatement notice without first forming the belief on reasonable grounds that an abatement notice was warranted. Instead they took the view that Mr Daisley must prove his actions were lawful, in circumstances where the evidence was in the Council's sole possession.

Limitation policy

[99] The standard account of limitation statutes is that they serve three purposes.[79] The first is that defendants should be able to rest secure in the reasonable expectation that they will not be held to account for ancient obligations.[80] For this reason the original limitation statute in English law, the Statute of Limitations 1623,[81] was described as a statute of repose.[82] The second is that claims should not be decided on evidence that has become stale through the passage of time.[83] The third is that plaintiffs should pursue their claims with reasonable diligence.[84]

[100] These rationales offer an incomplete account of limitation statutes which bar remedies on the effluxion of a period of time fixed according not to the facts or the parties' circumstances but to the elements of the cause of action. They focus on the immediate parties. They would justify use of a standard under which fairness and accuracy of fact-finding are balanced on a case-by-case basis in a manner akin to the equitable defence of laches. By providing that "actions founded on simple contract or on tort" "shall not be brought after the expiration of 6 years from the date on which

---

79 *G D Searle & Co v Gunn* [1996] 2 NZLR 129 (CA) at 131.

80 At 131; and *M (K) v M (H)* [1992] 3 SCR 6 at 29 per La Forest, Gonthier, Cory and Iacobucci JJ.

81 Limitation Act 1623 (Eng) 21 Jac I c 16 [Statute of Limitations]. Earlier statutes, including the Statute of Merton 1235/6 (Eng) 20 Hen III c 8, prohibited some claims after a period of time, but it appears the Statute of Limitations was the first general limitations statute in English law. The date of enactment of the Statute of Merton is affected by the reforms made in the Calendar (New Style) Act 1750 (GB) 24 Geo II c 23 so dual-dating is adopted.

82 *M (K) v M (H),* above n 80, at 29 per La Forest, Gonthier, Cory and Iacobucci JJ citing *Doe on the demise of Count Duroure v Jones* (1791) 4 TR 300, 100 ER 1031 (KB); and *A'Court v Cross* (1825) 3 Bing 329, 130 ER 540 (Comm Pleas).

83 *G D Searle & Co v Gunn*, above n 79, at 131.

84 At 131.

the cause of action accrued",[85] the Limitation Act 1950 instead adopts a rule which bars claims regardless of both their substantive merit and a court's capacity to try them fairly as between the parties. The benefits of the fixed period are presumed to outweigh the injustice that it may cause from time to time.[86]

[101] That this was the drafter's objective is confirmed by the report of the Law Revision Committee that led to the Limitation Act 1939 (UK),[87] the relevant provisions of which were adopted in the 1950 New Zealand legislation.[88] The Committee reasoned that a discretionary standard would present difficulty for courts and would be uncertain in operation.[89] A reasonable discoverability standard was also rejected, the Committee reasoning that it would confine limitation to cases in which the plaintiff had been dilatory, contrary to the objective of putting an end to stale claims whatever the cause of delay, and would engender uncertainty.[90]

[102] The benefits of a fixed period include the efficient operation of insurance markets and markets for professional services. In *Canada Square Operations Ltd v Potter*, the United Kingdom Supreme Court pointed out that indefinite exposure to stale claims has a potentially drastic cost for defendants whose work necessarily involves the taking of risks.[91] Another benefit rests on the reasonable assumption that the alternative to fixed limitation periods would not be the indefinite survival of claims but a statutory regime allowing courts to halt those which are stale, or some in which equity favours the defendant, on a case-by-case basis. The adjudication of claims about staleness and reasons for delay requires factual inquires which extend to the

---

85 Limitation Act 1950, s 4(1)(a).

86 It is not possible to know how many claims would have been brought had they not been barred by a fixed limitation period. In 1988 the Law Commission surveyed High Court registries and concluded that while most cases are brought reasonably promptly, some are filed at the end of the applicable limitation period: Law Commission *Limitation Defences in Civil Proceedings* (NZLC R6, 1988) at [104].

87 Law Revision Committee *Fifth Interim Report (Statutes of Limitation)* (Cmd 5334, December 1936); and Limitation Act 1939 (UK) 2 & 3 Geo VI c 21. The United Kingdom Supreme Court in *Canada Square Operations Ltd v Potter* [2023] UKSC 41, [2023] 3 WLR 963 [*Canada Square* (SC)] at [39] confirms that the Law Revision Committee's report formed the foundation for the 1939 Act.

88 Law Commission, above n 86, at [32] and [41].

89 Law Revision Committee, above n 87, at 11.

90 At 12.

91 *Canada Square* (SC), above n 87, at [152]. See also Law Commission, above n 86, at [108] and [286]–[291], in which the Commission found that open-ended liability would adversely affect the availability and cost of liability insurance, citing George L Priest "The Current Insurance Crisis and Modern Tort Law" (1987) 96 Yale LJ 1521.

substantive merits of the claim and can be a costly exercise for parties and a time-consuming one for courts. Mahon J may have been guilty of overstatement when he opined in *Inca Ltd v Autoscript (New Zealand) Ltd* that courts of equity historically disclaimed a discretionary jurisdiction to extend limitation periods because it would turn courts into "despotic tribunals",[92] but it is true that outcomes might sometimes be difficult to predict. For that reason, and because limitation defeats good claims as well as bad, a discretionary regime could encourage defendants to put delay in issue, perhaps even in cases which would be in time under a fixed-period regime. Seen in this light, fixed limitation periods serve a public interest in timely and effective adjudication. They also ensure that cases are decided according to the legal mores of the era in which the wrong was done.[93]

[103] The 1950 Act mitigates injustice by extending limitation periods in certain circumstances, notably where the plaintiff is under a disability, the action is based on the fraud of the defendant, the right of action is concealed by the fraud of the defendant or their agent, or the action is for relief from the consequences of a mistake.[94] In such cases it is not reasonable to expect the plaintiff to have acted before they ceased to be under a disability, or before they knew of the fraud or mistake or could with reasonable diligence have learned of it. And a defendant who has fraudulently concealed the cause of action has no right to repose, for they have only themselves to blame for not being sued in time.[95] Cases in which a defendant is said to have concealed the claim warrant an inquiry into the causes of delay, both in the interests of justice in the instant case and to limit incentives to conceal claims in other cases. So long as defendants acted unconscionably and plaintiffs are not too readily granted an extension, such inquiries do not confront legislative policy behind the fixed period.

Concealment by fraud

[104] The Statute of Limitations 1623 was passed "for quieting of mens estates, and avoiding of suits".[96] It prescribed that certain claims must be sued or brought within

---

92 *Inca Ltd v Autoscript (New Zealand) Ltd* [1979] 2 NZLR 700 (SC) at 710.

93 Law Commission, above n 86, at [106], citing Alberta Law Reform Institute *Limitations* (Report No 55, December 1989) at 19.

94 Limitation Act 1950, ss 24 and 28(a), (b) and (c).

95 *Cave v Robinson Jarvis & Rolf (a firm)* [2002] UKHL 18, [2003] 1 AC 384 at [8] per Lord Millett.

96 Statute of Limitations, preamble. Quotations amended to be in sentence case.

fixed limitation periods which ran from the time after the "cause of such actions or suit".[97] It extended the limitation period where the person entitled to the action was at the time of accrual within the age of twenty-one years, "*feme covert*, *non compos mentis*, imprisoned or beyond the seas".[98] The statute contained no provision for extension through the defendant's concealment of the cause of action.

[105] Courts of law and equity responded to this deficiency by permitting extension in cases of fraud, as the Supreme Court of Canada explained in *M (K) v M (H)*:[99]

> Historically, both common law and equity took account of fraudulent concealment when applying limitation periods. If the plaintiff was unaware of his cause of action owing to the wrong of the defendant, both courts would refuse to allow a limitations defence.

[106] The Court went on:[100]

> In both courts, the basis for injecting fraudulent concealment into the limitations analysis was the underlying jurisdiction over fraud claimed by both common law and chancery. Fraud was more central to equity's jurisdiction … Not surprisingly then, equity developed fraud well beyond its common law parameters. Inevitably, fraudulent concealment in equity came to be considerably broader in scope than its common law equivalent.

[107] Following the fusion of law and equity under the Supreme Court of Judicature Act 1873 (UK), the equitable doctrine of fraud was eventually adopted in all cases.[101] The law of fraudulent concealment was then codified in the Limitation Act 1939 (UK), which the New Zealand legislature adopted in the 1950 statute.[102]

The unconscionability standard for fraudulent concealment

[108] In its 1949 judgment *Beaman v ARTS Ltd*, the English Court of Appeal held that concealment by fraud under the then-recent 1939 Act must have the same meaning that it had acquired under earlier legislation and in equity, namely that the conscience

---

97 Section 3.

98 Section 2.

99 *M (K) v M (H)*, above n 80, at 51 per La Forest, Gonthier, Cory and Iacobucci JJ. Courts of equity appear to have acted on the principle that equity does not follow the law where it would be unjust to do so, and on that basis declined to apply the statute: John Brunyate "Fraud and the Statute of Limitations" (1931) 4 CLJ 174 at 178.

100 *M (K) v M (H)*, above n 80, at 51–52 per La Forest, Gonthier, Cory and Iacobucci JJ.

101 Supreme Court of Judicature Act 1873 (UK) 36 & 37 Vict c 66, s 24; and *M (K) v M (H)*, above n 80, at 53 per La Forest, Gonthier, Cory and Iacobucci JJ.

102 Limitation Act 1939 (UK), s 24(b); and Limitation Act 1950, s 28(b).

of the defendant was so affected as to justify loss of the limitation defence.[103] The trial Judge had held that fraudulent concealment under the 1939 Act required "some dishonesty, some element of moral turpitude".[104] The Court of Appeal disagreed, reasoning that the legislature would have spoken more clearly had it intended to exclude conduct that equity would have treated as fraudulent.[105]

[109] In *Kitchen v Royal Air Force Assoc*, Lord Evershed MR explained that:[106]

> … it is now clear that the word "fraud" in [s 26(b) of the Limitation Act 1939 (UK)], is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v ARTS Ltd* that no degree of moral turpitude is necessary to establish fraud within the section. What is covered by equitable fraud is a matter which Lord Hardwicke did not attempt to define 200 years ago, and I certainly shall not attempt to do so now, but it is, I think, clear that the phrase covers conduct which, having regard to some special relationship between the two parties concerned, is an unconscionable thing for the one to do towards the other.

[110] That is also the position in Canadian law.[107] In *M (K) v M (H)*, the majority held that "'fraud' in this context is to be given a broad meaning, and is not confined to the traditional parameters of the common law action".[108] It has since been held by the Supreme Court of Canada in *Pioneer Corp v Godfrey* that there need not be a special relationship or a duty to disclose; the court inquires "not into the relationship within which the conduct occurred, but into the unconscionability of the conduct itself".[109]

Wilful concealment

[111] Deliberate concealment of a fact or circumstance known to the defendant may amount to fraudulent concealment.[110] As just explained, it is not necessary to show

---

103 *Beaman v ARTS Ltd* [1949] 1 KB 550 (CA) [*Beaman* (CA)] at 559 per Lord Greene MR and 567 per Somervell LJ, the latter citing *Re McCallum* [1901] 1 Ch 143 (CA) at 150 per Lord Alverstone CJ, 155 per Rigby LJ and 159 and 163 per Vaughan Williams LJ. See also *Booth v Earl of Warrington* (1714) 4 Bro PC 163, 2 ER 111 (HL); and *Hovenden v Lord Annesley* (1806) 2 Sch & Lef 607 at 634, 9 RR 119 at 121–122.

104 *Beaman v ARTS Ltd* [1948] 2 All ER 89 (KB) [*Beaman* (KB)] at 94.

105 *Beaman* (CA), above n 103, at 567 per Somervell LJ.

106 *Kitchen v Royal Air Force Assoc* [1958] 1 WLR 563 (CA) at 572–573 (footnote omitted).

107 *Guerin v R* [1984] 2 SCR 335 at 390 per Dickson, Beetz, Chouinard and Lamer JJ; and *M (K) v M (H)*, above n 80, at 57 per La Forest, Gonthier, Cory and Iacobucci JJ.

108 *M (K) v M (H)*, above n 80, at 63 per La Forest, Gonthier, Cory and Iacobucci JJ.

109 *Pioneer Corp v Godfrey* 2019 SCC 42, [2019] 3 SCR 295 at [54] per Wagner CJ, Abella, Moldaver, Karakatsanis, Gascon, Brown, Rowe and Martin JJ (emphasis omitted).

110 *M (K) v M (H)*, above n 80, at 57 per La Forest, Gonthier, Cory and Iacobucci JJ citing *Halsbury's Laws of England* (4th ed, 1979) vol 28 Limitation of Actions at [919].

that the defendant was subjectively dishonest. It is enough that their conduct was unconscionable.

[112] In *Wrightson Ltd v Blackmount Forests Ltd*, a decision of this Court, the plaintiff had bought land from a third party after obtaining a certificate from Wrightson to the effect that the land was suitable for planting a Douglas fir forest.[111] The plaintiff was required to appoint Wrightson to manage the forest. Years later it discovered that much of the land was unsuitable. It was arguable that people within Wrightson knew the relevant facts and knew Wrightson was under a duty to disclose them. Wrightson pleaded limitation in an action in contract and in negligence, and it moved to strike out the claim on the ground that the plaintiff could not rely on s 28(b) of the Limitation Act 1950. It argued that Blackmount must plead that someone in Wrightson deliberately concealed the true position, either by active concealment or by deliberate passive non-disclosure.[112]

[113] This Court accepted, following *Inca v Autoscript* and *Matai Industries Ltd v Jensen*, that wilful non-disclosure requires that the defendant knew the essential facts comprising the cause of action, for one cannot wilfully conceal something of which one is unaware.[113] It held that a decision not to disclose despite knowledge of those matters will almost always be wilful:[114]

> 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 of s 28(b) is not on whether or not the non-disclosure is wilful. The focus is on knowledge of relevant facts and on knowledge of a duty to disclose them. If, despite such knowledge, the defendant decides not to disclose the facts, then almost always that decision will be worthy of the epithet "wilful". But that is *a consequence* of those other factors, not the driver. [*Inca v Autoscript* and *Matai Industries v Jensen*] say that "the concealment must be wilful" but that is no more than a shorthand way of expressing the factual elements we have been discussing. If they are established, then the concealment will indeed be wilful.

---

111 *Wrightson Ltd v Blackmount Forests Ltd*, above n 51.

112 At [7].

113 At [54]–[59] citing *Inca v Autoscript*, above n 92, at 711; and *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525 (HC) at 536.

114 *Wrightson v Blackmount Forests*, above n 51, at [47] (emphasis in original).

Subjective recklessness

[114] When responding to limitation defences under the 1950 Act, New Zealand courts followed English authorities under the 1939 Act,[115] absent some good reason to depart from them.[116] As we explain below, those cases have been taken to establish that recklessness may amount to fraudulent concealment. The issue appears not to have arisen directly in New Zealand. The leading cases on fraudulent concealment, *Inca v Autoscript*, *Matai Industries v Jensen* and *Wrightson v Blackmount Forests*, all concerned wilful non-disclosure, not recklessness.

[115] It is necessary to define recklessness. In New Zealand law the term ordinarily means that the defendant took a risk in circumstances in which they knew there was a real possibility of harm and it was unreasonable, in the circumstances known to the defendant, to take that risk.[117] This is the familiar meaning that ordinarily suffices for culpability in the criminal law. As it was succinctly put by Tipping J in *Taylor v Police*, the law requires a conscious appreciation of the risk and a deliberate decision to run it.[118] We will call this subjective recklessness to distinguish it from a careless failure to give any thought to a risk that the defendant did not foresee but ought to have done.[119]

[116] 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.[120] Equity may treat the failure to disclose as deliberate, but the person is at least subjectively reckless.

---

115 See, for example, *Inca v Autoscript*, above n 92.

116 The leading example of departure from the English approach concerns latent defects in buildings, in which this Court delayed the accrual of a cause of action in negligence by treating the plaintiff's loss as economic in nature, such that the loss is not realised until discovery of the defect. The Court signalled this development in *Askin v Knox* [1989] 1 NZLR 248 (CA) at 255 and gave effect to it in *Invercargill City Council v Hamlin* [1994] 3 NZLR 513 (CA) at 523–524 per Cooke P, 528 per Richardson J, 533 per Casey J and 534 per Gault J, affirmed by the Privy Council in *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 (PC) at 526–527.

117 *Cameron v R* [2017] NZSC 89, [2018] 1 NZLR 161 at [73]. See also Simon France "A reckless approach to liability" (1988) 18 VUWLR 141 at 147–153.

118 *Taylor v Police* (1990) 6 CRNZ 470 (HC) at 471.

119 *Commissioner of Police of the Metropolis v Caldwell* [1982] AC 341 (HL) at 354 per Lord Diplock.

120 France, above n 117, at 146.

[117] Because the decision to run the risk must have been unreasonable in the circumstances as the defendant understood them to be, subjective recklessness admits the possibility of lawful justification.

English cases dealing with the 1939 Act

[118] Until the very recent decision of the United Kingdom Supreme Court in *Canada Square*, it appears to have been settled law in England that subjective recklessness, as we have defined it, sufficed for fraudulent concealment under the 1939 Act.[121] The leading authority for that proposition was the judgment of the Court of Appeal in *Beaman v ARTS*.

[119] The facts as recounted by the trial Judge, Denning J, were as follows.[122] The plaintiff deposited five packages with the defendant firm in London in 1935, intending that they later be sent to her in Turkey. One package was sent but she asked the defendants to hold the others after new Turkish regulations prevented their importation. Three years passed without delivery instructions. The defendants wrote asking if she wanted to insure the goods, advising that she would need to declare any valuable items. She did not insure them but advised that she intended to return to England. When war broke out, she asked if the goods could be sent to her in Athens. The defendants sent her the necessary forms, but Italy's entry into the war closed the Mediterranean to shipping, and communications became practically impossible. The defendants did not receive letters that she wrote, and thereafter she made no further enquiry, thinking the goods may have been destroyed by bombing, until she returned to England in 1946.

[120] Until 1940 the defendant stored the goods at their own depot, but the war caused them to give up the lease. They left the goods with Thomas Cook and Son Ltd, incurring storage charges. The defendants' business was Italian-owned and when Italy entered the war it became vested in the Custodian of Enemy Property. The managing clerk was called up for service and wanted to wind up the business. Outstanding storage charges were owed to the defendants and to Thomas Cook, and there was every

---

121 *King v Victor Parsons*, above n 52, at 34 per Lord Denning MR.
122 *Beaman* (KB), above n 104, at 90–91.

reason to think the war might go on for years. The clerk consulted his superior and they decided to examine the packages to see if they were so valuable as to justify continued storage. Finding the contents worthless, in their opinion, they donated them to the Salvation Army, though the clerk kept one empty suitcase for his own use. The outstanding charges were cancelled. They did not attempt to tell the plaintiff what they had done.

[121] The plaintiff sued in conversion rather than contract, apparently because the terms of the bailment agreement were unhelpful to her.[123] No point was taken about that. She deposed that the goods included specific items which were very valuable.[124] Denning J noted the absence of any supporting evidence for that claim. He found the defendants' managing clerk an honest and reliable witness.[125] As noted at [108] above, he held that under the 1939 Act fraudulent concealment required moral turpitude and found on the facts that the defendants had acted honestly and reasonably.[126] He accepted their explanation for disposing of the goods, recalling the fraught atmosphere of 1940 and the risk of bombing, noting the ongoing storage charges and the apparent lack of value, and accepting that the defendants did not know whether nor when they might hear from the plaintiff.

[122] The Court of Appeal established, as noted earlier, that moral turpitude was not required.[127] It found that the defendants had fraudulently concealed the cause of action by making no attempt to tell the plaintiff what they had done with her goods.[128] Lord Greene MR firmly rejected the defendants' justification, stating that throughout the war vast quantities of chattels had been placed in the safe custody of bailees and kept faithfully in places exposed to danger.[129] Denning J had not referred to the important commercial interest of the defendants, who were anxious to close their business and embarrassed by their storage of the plaintiff's chattels with Thomas Cook:[130]

---

123 At 91–92.
124 At 91.
125 At 94.
126 At 94–95.
127 *Beaman* (CA), above n 103, at 569 per Somervell LJ.
128 At 562 per Lord Greene MR, 569–570 per Somervell LJ and 571 per Singleton LJ.
129 At 561.
130 At 561.

> If indeed they formed the opinion that it would be beneficial to the plaintiff as well as to themselves [to dispose of the goods], that belief was entertained with a recklessness which I can only attribute to self-deception on their part. They would no doubt be shocked to hear their conduct described as fraudulent. That is, however, quite immaterial. … 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. It is goodness of motive that the learned judge ascribes to the defendants, and this seems to me to be the best that can be said for them on any view.

[123] Lord Greene went on to find that the defendants acted recklessly in several respects: they assumed communication was impossible, they assumed the plaintiff had not troubled about her goods, they formed the opinion that the goods were valueless without getting a valuation, and they disregarded the fact that the absence of value could not excuse breach of their obligations to the plaintiff.[131]

[124] Somervell LJ acknowledged the trial Judge's findings of fact and accepted that the defendants' servants "may have thought that the plaintiff might never come to claim these goods or that after the war they might be of no value to her, or of less value than the storage charges".[132] But if necessary he would have been prepared to find there had been moral turpitude; "any reasonable person directing himself to the facts as known would have realized that the defendants had no right to give away the plaintiff's goods and that it was dishonest to do so".[133]

[125] Singleton LJ did not accept the trial Judge's finding that the defendants had acted honestly when they disposed of the goods. He found that they acted for their own purposes entirely and the reason why they did not tell her what they had done was that they did not wish her to know.[134]

[126] In *Kitchen v Royal Air Force Assoc*, which we cited at [109] above, a firm of solicitors allowed time to run out without getting any instructions from the plaintiff regarding a wrongful death action.[135] Her husband, a member of the Royal Air Force Association, was electrocuted by a defect in the control panel of an electric cooker installed by the local electricity company. She consulted the Association, which sent

---

131 At 562 and 565–566.
132 At 569.
133 At 569.
134 At 571.
135 *Kitchen v Royal Air Force Assoc*, above n 106.

particulars of her claim to the solicitors. Having allowed time to run out, the solicitors approached the electricity company for an ex-gratia payment, which was declined on the ground that it might amount to an admission of liability. But after the plaintiff herself wrote to the company its solicitors telephoned her solicitors advising that the company would make a donation of £100 to the Association if satisfied that it would be applied for her benefit. The payment was made on condition that the plaintiff must not be told that it came from the company. It appears that this this condition was suggested by the solicitors, who thereafter concealed the source from the plaintiff.

[127] Lord Evershed MR noted that the trial Judge acquitted the solicitors of deliberately acquiescing in the scheme to protect themselves.[136] But he observed that a necessary consequence of concealing the source of the payment was a concealment also of the real effect of their having thrown away the plaintiff's fatal accident claim. The solicitors must have realised this had they given any thought to the matter.[137] He held that the conduct of the solicitors was reckless in the sense in which Lord Greene had used that term in *Beaman v ARTS*.[138] Parker LJ concurred in Lord Evershed's reasoning.[139] Sellers LJ appears to have found the concealment deliberate.[140]

[128] *King v Victor Parsons & Co (A Firm)* is a 1972 judgment, again of the English Court of Appeal, in which Lord Denning, then Master of the Rolls, found that developers recklessly disregarded their obligations to a purchaser of a house they built on a former tip by ignoring an architect's advice to use reinforced foundations.[141] Lord Denning MR summarised the law in an oft-cited passage:[142]

> The word "fraud" [in s 26(b) of the Limitation Act 1939 (UK)] is not used in the common law sense. It is used in the equitable sense to denote conduct by the defendant or his agent such that it would be "against conscience" for him to avail himself of the lapse of time. The cases show that, if a man knowingly

---

136 At 571.
137 At 572.
138 At 574.
139 At 576.
140 At 579.
141 *King v Victor Parsons*, above n 52, at 35. Megaw LJ and Brabin J decided the appeal on the basis that the defendant actually knew all relevant facts, namely that the site had been used as a tip and was unsuitable to build on, and so were guilty of fraudulent concealment.
142 At 33–34 (citations and emphasis omitted), citing *Bulli Coal Mining Co v Osborne* [1899] AC 351 (PC); *Applegate v Moss* [1971] 1 QB 406 (CA); *Beaman* (CA), above n 103, at 565–566 per Lord Greene MR; and *Kitchen v Royal Air Force Assoc*, above n 106.

> commits a wrong (such as digging underground another man's coal); or a breach of contract (such as putting in bad foundations to a house), in such circumstances that it is unlikely to be found out for many a long day, he cannot rely on the Statute of Limitations as a bar to the claim: see *Bulli Coal Mining Co v Osborne* and *Applegate v Moss*. 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. He did the wrong or committed the breach secretly. By saying nothing he keeps it secret. He conceals the right of action. He conceals it by "fraud" as those words have been interpreted in the cases. To this word "knowingly" there must be added "recklessly": see *Beaman v ARTS Ltd*. Like the man who turns a blind eye. He is aware that what he is doing may well be a wrong, or a breach of contract, but he takes the risk of it being so. He refrains from further inquiry lest it should prove to be correct: and says nothing about it. The court will not allow him to get away with conduct of that kind. It may be that he has no dishonest motive: but that does not matter. He has kept the plaintiff out of the knowledge of his right of action: and that is enough: see *Kitchen v Royal Air Force Association*. If the defendant was, however, quite unaware that he was committing a wrong or a breach of contract, it would be different. So if by an honest blunder he unwittingly commits a wrong (by digging another man's coal), or a breach of contract (by putting in an insufficient foundation) then he could avail himself of the Statute of Limitations.

[129] Lord Denning found that the defendants were reckless because they knew there was a risk of subsidence and took a chance on it by not taking the precautions they had been advised to take.[143] Megaw LJ found that it was a case of actual knowledge wilfully concealed because the defendants knew they had constructed foundations which differed from those which they had been told were necessary.[144] Brabin LJ also classified it as a case of actual knowledge and appeared to find that actual knowledge of the risk of subsidence was sufficient.[145] The differences in opinion are accounted for by differing views of the material fact or circumstance concealed. For Lord Denning it was the risk of future subsidence, which was not known to a certainty.[146] For Megaw LJ it was the certain knowledge that the foundations built were not those which the defendants had been advised to build to avoid the risk of subsidence.[147]

---

143 *King v Victor Parsons*, above n 52, at 35.
144 At 38.
145 At 41–42.
146 At 35.
147 At 38.

[130] In *Potter v Canada Square Operations Ltd*, the plaintiff had taken payment protection insurance in connection with a loan from the defendant, who did not tell her that the actual premium that it paid to the insurer was £182.50 and the balance of the £3,834 she was paying was a commission which the defendant retained.[148] Contracts of this kind were later found to be unfair under consumer credit legislation. The proceeding was brought out of time and the defendant pleaded limitation under the Limitation Act 1980 (UK). In a considered departure from former legislation, which had been found troublesome, that Act does not extend time for fraudulent concealment of a cause of action.[149] It extends time for deliberate concealment of relevant facts.[150] The deliberate commission of a breach of duty in circumstances in which it is unlikely to be discovered for some time is deemed to amount to deliberate concealment.[151]

[131] The defendant was found to have deliberately concealed the existence and amount of the commission.[152] But the English Court of Appeal also held that subjective recklessness could amount to deliberate concealment.[153] The United Kingdom Supreme Court disagreed, holding that concealment is deliberate where concealment was the intended result and recklessness could not suffice.[154]

[132] The case is relevant for our purposes because the Supreme Court addressed authorities under the 1939 Act, albeit without deciding whether they were wrong. The Court explained that it surveyed them not because they informed interpretation of the 1980 Act, but to respond to the arguments of counsel and the judgment of the Court of Appeal.[155]

[133] Lord Reed P, who delivered the judgment of the Court, observed that in *Beaman v ARTS*, Lord Greene did not define what he meant by recklessness or explain

---

148 *Potter v Canada Square Operations Ltd* [2021] EWCA Civ 339, [2022] QB 1 [*Canada Square* (CA)].
149 Andrew McGee *Limitation Periods* (9th ed, Sweet & Maxwell, London, 2022) at [20.019].
150 Limitation Act 1980 (UK), s 32(1)(b).
151 Section 32(2).
152 *Canada Square* (CA), above n 148, at [161] per Rose LJ and [172] per Males LJ.
153 At [137] per Rose LJ and [200] per Males LJ.
154 *Canada Square* (SC), above n 87, at [108].
155 At [35].

the relevance of recklessness to his analysis, and he noted that the other Judges did not speak of recklessness.[156] He drew attention to Lord Greene's language:[157]

> [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, Denning J 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 that 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 which was weighing with the defendants was … the desire to obtain the commercial benefit of disembarrassing themselves of an obligation which would impede the closing down of the business". That fact "explains … the recklessness with which they formed their conclusions". They "recklessly … assumed … that the plaintiff had not troubled about her goods, and that large storage charges had mounted up and would continue to mount up which the plaintiff would be unable to pay"; and they recklessly formed the opinion that the goods were valueless", which even if true "they *must have known* … could afford no justification for disregarding their obligations". All this they did "when they *must have known* that the plaintiff … would be relying on them to be faithful to their trust".

[134] Lord Reed P concluded that:[158]

> [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, following *Bulli Coal Mining Co v Osborne*. 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. It appears that he was going through the evidence which led Denning J to accept that the defendants had acted with an honest motive, and explaining why he rejected that conclusion. But he also made it clear that an honest motive did not matter in any event, as had earlier been decided in *In re McCallum*, 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

---

156 At [43].

157 Citations omitted, emphasis and alterations in original. Lord Reed P quotes *Beaman* (CA), above n 103, at 561–562 and 564–566 per Lord Greene MR.

158 Citations omitted. Lord Reed P cites *Bulli Coal Mining Co v Osborne*, above n 2; *Re McCallum*, above n 3; and quotes *Beaman* (CA), above n 103, at 561 per Lord Greene MR.

> because it is committed with a good motive". It also appears that what Lord Greene MR meant by "recklessness" went beyond taking a risk in circumstances in which a reasonable person would not have taken the risk. The language used by Lord Greene MR is suggestive of conscious wrongdoing, or at least wilful blindness.

[135] The Supreme Court also referred to *King v Victor Parsons*.[159] Lord Reed P accepted that the developers' conduct in that case was no doubt reckless, but he observed that Lord Denning appeared to equate recklessness with wilful blindness, which equity sometimes treats as tantamount to actual knowledge.[160] The developers' conduct was also a conscious breach of contract.

[136] The Supreme Court concluded its discussion of the 1939 Act authorities by citing *Tito v Waddell (No 2)*, a 1977 judgment of the Chancery Division in which Sir Robert Megarry C observed that as the authorities stood it could be said "that in the ordinary use of language not only does 'fraud' not mean 'fraud' but also 'concealed' does not mean 'concealed,' since any unconscionable failure to reveal is enough".[161]

Subjective recklessness under the 1950 Act

[137] We have explained that it was common ground before us that subjective recklessness, as we have defined it, may amount to fraudulent concealment under the 1950 Act. But while the United Kingdom Supreme Court did not need to decide in *Canada Square* whether *Beaman v ARTS* was a case of recklessness, the Court plainly did doubt whether Lord Greene MR found the defendants' conduct dishonest or merely reckless and it expressed reservations about Lord Denning MR's finding of recklessness in *King v Victor Parsons*.[162] The question whether subjective recklessness suffices is one of law. Counsel have filed brief memoranda, and the outcome in this case turns on it. We must form our own view.

---

159 *King v Victor Parsons*, above n 52.

160 *Canada Square* (SC), above n 87, at [48] citing *King v Victor Parsons*, above n 52, at 33–35, 37–38 and 42 per Lord Denning MR.

161 At [49], citing *Tito v Waddell (No 2)* [1977] Ch 106 at 245.

162 *Canada Square* (SC), above n 87, at [45] and [48].

[138] We record that careless concealment, without more, has never been sufficient to amount to fraud for purposes of s 28(b) of the 1950 Act.[163] On the view we take of this case, we need not revisit the authorities on that point. We confine ourselves to subjective recklessness.

[139] 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".[164] Singleton LJ evidently saw it as a case of dishonesty.[165] But when the judgments are read with those of Denning J at first instance, 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 after 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.[166] 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.[167] 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.

[140] Subjective recklessness was held sufficient in law, following *Beaman v ARTS*, and found on the facts by Lord Evershed MR in *Kitchen v Royal Air Force Assoc* and by Lord Denning MR in *King v Victor Parsons*.[168] The other members of the

---

163 *Cave v Robinson Jarvis & Rolf*, above n 95, at [41] per Lord Scott citing *Kitchen v Royal Air Force Assoc*, above n 106; and *King v Victor Parsons*, above n 52, at 34.

164 *Beaman* (CA), above n 103, at 565.

165 At 571 per Singleton LJ.

166 At 569 per Somervell LJ and 572 per Singleton LJ.

167 At 565.

168 *Kitchen v Royal Air Force Assoc*, above n 106, at 574; and *King v Victor Parsons*, above 52, at 35.

Court of Appeal in each case did not address the question whether recklessness sufficed.

[141] We think it plain that subjective recklessness may amount to unconscionable conduct, through the combination of actual knowledge of a fact or circumstance and the exercise of choice about its concealment. The question, as we see it, is whether a subjective recklessness standard for fraudulent concealment is contrary to the policy of the 1950 Act, which as we have explained at [102] above also pursues a wider public interest in timely and effective adjudication.

[142] In *Canada Square*, the Supreme Court rejected a recklessness standard partly because it might mean that professionals facing negligence claims may be placed in a position where they could make out a limitation defence only by succeeding on the merits.[169] That possibility arose because, as we have explained, the 1980 Act provides that a deliberate breach of duty in circumstances in which it is unlikely to be discovered for some time amounts to deliberate concealment. The deeming language makes it imperative to distinguish between deliberate breaches and those which are merely careless, as Lord Millett explained in his speech in *Cave v Robinson Jarvis & Rolf (a firm)*.[170]

[143] The defendant in *Canada Square* was under no obligation to disclose the commission and its initial failure to do so was contemporaneous with the wrong. At that time such arrangements had not yet been condemned as unfair contracts. So recklessness would have to attach to the (admittedly sophisticated) defendant's appreciation that it risked committing a legal wrong by charging a commission so grossly disproportionate to the premium. The Court of Appeal held that recklessness required that the defendant must recognise a "real risk" that its conduct would amount to a legal wrong in circumstances where it was not reasonable to take that risk.[171]

[144] The Supreme Court found this standard over-inclusive because it could extend time when the defendant knew only of a mere risk of liability to the plaintiff. It would

---

169 *Canada Square* (SC), above n 87, at [151]–[152].
170 *Cave v Robinson Jarvis & Rolf*, above n 95, at [25]–[27].
171 *Canada Square* (CA), above n 148, at [136] per Rose LJ.

capture professionals whose work involves the assessment or taking of risk and may be found liable in negligence, which is not an intentional tort.[172] Lord Reed P cited examples, originally supplied by Lord Millett in *Cave v Robinson Jarvis & Rolf*, of surgeons and lawyers, for whom there is always a risk of liability in negligence.[173] The recklessness test would have drastic implications for insurance markets because liability would subsist for an indefinite period. Only to a degree could the additional element of objective unreasonableness mitigate the risk of over-inclusiveness.

[145] We agree that an allegation of subjectively reckless concealment may raise difficult questions about the extent to which the defendant must appreciate the significance of the fact or circumstance for the plaintiff's rights. Where the fact or circumstance concerns a risk of something happening, questions will also arise about the degree of risk which is sufficient. These are questions which must be answered on the facts of each case. It is also true that the act of concealment sometimes happens with the wrong, as in Lord Millett's example of the surgeon who leaves a swab in the patient's abdomen,[174] potentially making it more difficult to disentangle liability and limitation.

[146] However, questions about sufficiency of the defendant's knowledge of the wrong are not peculiar to recklessness. They also arise when the defendant is accused of wilfully concealing a fact or circumstance. In either case, questions of justification or excuse may also arise. In such cases the limitation defence must ordinarily be made out at trial, but it can be done without also prevailing on the merits.[175]

[147] The need for case-by-case inquiries into the defendant's knowledge is not sufficient reason to exclude subjective recklessness unless such inquiries will happen regularly enough, or affect an entire class of cases, to require a more restrictive standard. The wrong and its concealment are conceptually distinct, with concealment always involving an inquiry into the defendant's knowledge of the fact or circumstance, the concealment itself and the explanation for concealment.

---

172 *Canada Square* (SC), above n 87, at [152].
173 At [151]–[152] citing *Cave v Robinson Jarvis & Rolf*, above n 95, at [15].
174 *Cave v Robinson Jarvis & Rolf*, above n 95, at [27].
175 Limitation is ordinarily a trial issue in New Zealand practice; only in a clear case can the defendant have the claim struck out or obtain summary judgment.

The paradigm case involves a separate act of concealment happening after the wrong was done and the cause of action arose. Finally, knowledge of the significance of a fact or circumstance need not extend to knowledge that the defendant's actions are likely to trigger liability in law. It may suffice that the defendant knows of an undisclosed connection between something they have done and a loss suffered by the plaintiff.

[148] So, for example, in *Beaman v ARTS*, *Kitchen v Royal Air Force Assoc* and *King v Victor Parsons*, the act of concealment occurred after the wrong had been done and after loss had been suffered (or, in *King v Victor Parsons*, was known to be likely). 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.

[149] For these reasons, we are not persuaded that a subjective recklessness standard is over-inclusive under the 1950 Act. Equitable fraud remains the touchstone,[176] 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.[177]

Deliberate or reckless concealment in this case

[150] The context is supplied by the Council's attempts to limit Mr Daisley to quarrying no more than 500 BCM annually on the site on the ground that he had no

---

[176] And whereas the much-amended English legislation no longer speaks of concealment by fraud, New Zealand's Limitation Act 2010 still speaks of the plaintiff not knowing material facts "because of fraud" by or on behalf of the defendant: s 48(1). "Fraud" is defined in s 4 as including dishonest or fraudulent concealment.

[177] *Murray v Morel & Co Ltd* [2007] NZSC 27, [2007] 3 NZLR 721 at [34] per Tipping J.

lawful authority to do so.[178] The Council did so by issuing abatement notices and infringement notices and eventually, in 2009, seeking an enforcement order in the Environment Court. As noted above, an abatement notice must not be issued unless the enforcement officer has reasonable grounds for believing that there are grounds for doing so.[179] In an application for an enforcement order the onus is on the Council,[180] and an order must not be made if the person is acting in accordance with a resource consent and the adverse effects in respect of which the order is sought were recognised when the consent was granted.[181]

[151] 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.

[152] Existing use rights could also supply a full or partial defence to enforcement action. They might sustain damages in negligence as well, depending on the extent of those rights and Mr Daisley's quarrying pursuant to them, although it is not suggested that historic use had approached the quantity that might be quarried under the 1988 land use consent. Mr Daisley did invoke existing use rights in his negligence claim. He pleaded that the Council knew of existing use rights which justified his activity but consistently denied their existence and was in breach of a duty of care by doing so. But he did not plead that the Council concealed the existence of those rights from him, or that a diligent search would have disclosed something about existing use rights that he did not already know from Mr Drake.

The Judge's findings

[153] We return to the Judge's findings to examine them more closely.

---

178 As noted, Mr Daisley did not sue in respect of the inaccurate LIM issued when he purchased the property.
179 Resource Management Act, s 322(4).
180 *Marlborough District Council v New Zealand Rail Ltd* [1995] NZRMA 357 (PT) at 369–370.
181 Resource Management Act, s 314(2).

[154] Toogood J was not persuaded that any Council officer actually knew the 1988 land use consent existed until it was found in 2009.[182] There was not sufficient evidence that any of Mr Barnsley, Mr Lucas and Ms Hislop knew about it and deliberately withheld knowledge of it.

[155] However, he found that they were "wilfully blind" to the prospect that a consent existed:

> [331] The persistent view of the Council's officers that it was for Mr Daisley to prove the existence of a resource consent leads me to infer that the Council's officers were wilfully blind to the prospect that a consent existed and did not undertake a diligent search of the Council's records before issuing the first or any subsequent abatement notice.

[156] 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":

> [385] It seems to be likely that the Council officer or officers who responded to Mr Daisley's application for a LIM in November 2004 conducted a cursory search of the current Council files related to the Knight Road property and did not find any record of the consent. I take that view even though I have held that a diligent inquiry would have enabled the Council's officers to identify the existence of the archived hard copy if they had searched the database record with inquiring minds, if necessary with the assistance of someone knowledgeable in the intricacies of the database.
>
> [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.

[157] The Judge held that the failure to disclose the 1988 land use consent must be wilful, citing *Matai Industries v Jensen* and *Wrightson v Blackmount Forests*.[183] But he then rejected a submission for the Council that it would be an extension of the concept of fraudulent concealment to apply it to circumstances where the defendant ought to have known of the relevant facts but did not. He reasoned that in this case

---

182 Judgment under appeal, above n 3, at [307].

183 At [389], citing *Matai Industries v* Jensen, above n 113, at 538; and Wrightson *v Blackmount Forests*, above n 51, at [47].

the Council controlled the records and knowledge of the 1988 land use consent must be imputed to it:

> [393] … A distinguishing feature of this case is that the Council controlled the records and the information that gave rise to the cause of action. 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 imputed to the Council (as the entity being sued), even if individual Council officers did not have actual knowledge of it.

[158] The Judge then accepted, by reference to *King v Victor Parsons* and *Beaman v ARTS*, that recklessness may amount to fraudulent concealment. He found that language used in *Beaman* applied to the Council's conduct; its officers "recklessly and without taking the least trouble to verify the facts" assumed there was no resource consent.[184] It did not matter that the Council had no dishonest motive; Mr Daisley relied on them to search its records and they should have made a reasonable inquiry. Referring to passages quoted from *King v Victor Parsons* and *Beaman*, the Judge said:[185]

> [396] Some of these comments may be applied to the Council's conduct dealing with Mr Daisley. To adopt the Court's statement just quoted, the Council's officers "recklessly and without taking the least trouble to verify the facts assumed (what was false and on a simple examination of the records would have been shown to be false)" that there was no resource consent. Mr Daisley relied on the Council to undertake a proper search of the Council records. It does not matter that the Council had no "dishonest motive"; the Council should have made a reasonable inquiry of its own records in which proof of the consent lay, as the Council now concedes.

[159] The Judge found further that the error could not be described as an honest blunder. Evidence of historic use, including quarrying by the Council itself, required more than a cursory search of the records:[186]

---

184 Judgment under appeal, above n 3, at [394]–[396], quoting *Beaman* (CA), above n 103, at 565 per Lord Greene MR.

185 Judgment under appeal, above n 3, at 396, citing *Beaman* (CA), above n 103, at 565 per Lord Greene MR; and *King v Victor Parsons*, above n 52, at 34 per Lord Denning MR (footnote omitted).

186 Footnotes omitted.

> [397] The Council's conduct cannot reasonably be described as an "honest blunder" or mere misfiling. Several indicators were available to the Council in the evidence of the historic quarrying activity that had taken place. That required a diligent officer to do more than merely undertake a cursory search of the Council's current files. As I have observed above:
>
> (a) it would have been apparent that the quarry had been substantially worked over a significant period of time;
>
> (b) Mr Drake had provided the Council with an account of the use of the quarry over time, not only by his father but by the Adams brothers and other users;
>
> (c) the Council was levying mineral rates on the property, evidence that for rating purposes at least it was considered that the owner of the land was receiving a benefit from the sale or use or working or extraction of minerals; and
>
> (d) the title to the property referred specifically to the mineral interests.

[160] The Judge reasoned that it was the Council's negligence and its recklessness in assuming Mr Daisley had to prove the consent existed that caused the records to be withheld.[187] He added that it would be wrong to allow the Council to benefit from the expiry of the limitation period when it was responsible for keeping Mr Daisley in ignorance:[188]

> I find, therefore, that the Council was reckless as to the existence of the 1988 [land use consent] when it undertook little more than a cursory investigation of its records.

[161] The Judge also made findings about the knowledge and state of mind of the Council officers earlier in his judgment, when dealing with exemplary damages. He found that:

> (a) They disregarded evidence of an existing use consent:
>
> > [333] I infer that the Council's officers were sympathetic and responsive to the complaints made by the owners of the neighbouring properties. The objections to Mr Daisley's 2006 resource consent application were endorsed by the Council. In those circumstances, the Council officers assumed from Mr Drake's failure to mention any existing consent that one did not exist. In taking that view, however, they must have disregarded the contrary inference from:

---

187 Judgment under appeal, above n 3, at [399].
188 At [399].

(a) the obvious evidence in the appearance of the quarry that substantial quarrying activity had been undertaken over a significant period of time;

(b) Mr Drake's evidence of the extent and duration of quarrying activity on the property;

(c) the reference to mining interests on the title; and

(d) the mineral rates assessment which the Council had imposed and from which it benefited over a substantial period.

(b) They took an obstructive and uncompromising approach, which persisted even after the Council discovered the land use consent:

> [340] 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. I have made the point earlier that the Council treated Ark's application for a resource consent in 2011 in a way that both recognised the validity of the 1988 [land use consent] and facilitated a relatively straightforward application for variations to the terms of the consent that met legitimate environmental concerns. By contrast, the Council's approach to Mr Daisley after the 1988 [land use consent] was discovered by Ms Currie and Mr Shortland was to continue to maintain that the consent was invalid and pursue its enforcement proceedings in the Environment Court for a further 21 months. In that time, of course, the Council facilitated the granting of Ark's request for varied conditions based on Mr Daisley's proposals.

(c) They were not malicious, but they recklessly assumed the consent did not exist:

> [342] Although I have held that no Council officer knew that the 1988 [land use consent] had been granted; that 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.

[162] As noted earlier at [148], the duty of care added nothing to the Council's statutory obligations to keep records and disclose them on request. The Council accepts the Judge's finding that no search was made before it began enforcement action in 2005 or at any time from then until September 2009.

Analysis of the Judge's reasons

[163] We have noted that none of the Council officers involved gave evidence. Little weight can be attached to Mr Daisley's own evidence about their hostile attitude towards him, given contemporaneous evidence that he threatened them and fobbed them off by claiming inaccurately that he was quarrying only for onsite purposes such as remediation. Findings about the officers' knowledge must be drawn from the contemporaneous documentary record. As an appeal court we are not at the disadvantage we would be where such findings depend on credibility assessments made by the trial Judge. We are in no worse position than was Toogood J when it comes to making findings on that basis.

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

[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.[190] In our view this reasoning adds nothing to his finding that Council officers acted recklessly.

---

[189] It is clear in the cases that evidence the party who allegedly was fraudulent simply possessed the required information is insufficient: see, for example, *Wrightson v Blackmount Forests*, above n 51.

[190] Judgment under appeal, above n 3, at [331].

[166] Turning to recklessness, we have drawn the Judge's findings from several parts of his judgment. As Mr McLellan submitted, his reasons are notable for the absence of an express finding of subjective knowledge that a land use consent existed or might well be found in the Council files. As we interpret his reasons, the Judge's conclusion that the Council officers were reckless rested on five considerations:

(a) the need for proper inquiries when the Council was seeking to curtail Mr Daisley's activities on the ground that he was working the quarry unlawfully;

(b) the officers' knowledge both that any record of a land use consent would be found in Council files and that Mr Daisley depended on them to verify whether a consent existed or not;

(c) 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);

(d) the officers' knowledge of circumstances pointing to historic commercial use of the quarry; and

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

[167] Some of these reasons cannot sustain a finding of subjective recklessness. The first two amount only to a finding that a duty of care existed, which provides relevant context but is not sufficient. The fifth highlights the fact that Mr Daisley's loss was not reasonably discoverable before September 2009, but it is settled law that the 1950 Act did not permit an extension of time on that ground.[191]

[168] With respect to the third reason, Mr McLellan argued that recklessness could not be found in the officers' evidently sincere belief that Mr Daisley must prove the

---

[191] *Murray v Morel*, above n 177, at [2] per Blanchard J, [38], [69] and [74] per Tipping J, [101]–[102] per McGrath J and [142] and [148] per Henry J.

existence of the 1988 land use consent. In our view, the significance of this evidence is that it shows the officers attempted at the time to justify their failure to check Council records in the knowledge that records might disclose a land use consent or evidence of existing use rights. It is evidence that they knew of and consciously took that risk, mistakenly relying on a justification which, as the Council now accepts, was not available in law.

[169] The fourth reason — the officers' subjective knowledge of historic use — may evidence recklessness. We speak of "historic use" because, as we have explained at [152], the subjective knowledge required for recklessness need not be confined to the existence of a land use consent. The Council wanted to restrict quarrying to no more than 500 BCM annually and existing use rights might have authorised more than that. If Council officers realised that the use might be an existing one and appreciated that evidence of it might be found on Council files, it might be reckless not to check. Of course, failure to do so need not amount to concealment, or cause loss, if present and past owners of the land were also aware of such rights. And as it happens, when the files were searched in 2009 they evidently disclosed no more than Mr Daisley already knew about existing use of the quarry. But the point being made here is that failure to search Council records for evidence of an existing use that was said to be known to the Council might evidence recklessness with respect to legal authority to quarry more than the annual quantity of 500BCM to which the Council wanted to restrict Mr Daisley.

[170] It must have been obvious to Mr Barnsley, on his site visit on 4 February 2005, that the use was longstanding and reasonably extensive. Mr Daisley responded to the abatement notice by saying that the quarry had been in use for more than three decades and claiming that it was hard to believe the Council had never granted a consent to the previous owners. He also pointed out that the Council rated the quarry as a commercial use. And he expressly claimed that the quarry enjoyed existing use rights. Mr Drake confirmed the historic use by a number of named contractors. Mr Morris also confirmed before the Hearings Commissioner that rock had been quarried in commercial quantities over many years.

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

[172] The next question is whether, in the face of that information, it was reasonable for the officers not to search Council records before taking or continuing enforcement action.

[173] To recap, the Council now accepts that none of its officers searched any Council records for a consent or existing use rights at any time between November 2004, when the LIM was issued, and 25 January 2008, when the Council responded (without finding the 1988 land use consent) to the first official information request from Mr Daisley's solicitors. But it seems unlikely that they wholly ignored the possibility that the use was authorised. Mr Barnsley's letter of 4 February 2005 was written not long after the LIM had been prepared. In that letter he took it as given that no resource consent existed. Like Toogood J, we think the most likely explanation, and the one most favourable to the Council, is that he knew of the LIM and assumed that it excluded a land use consent.

[174] There may be circumstances in which Council officers might reasonably rely on a recent search of the records undertaken for another purpose, but which ought to have identified the 1988 land use consent. 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.

[175] We find that the failure to search was unreasonable in circumstances known to the officers, for several reasons. First, the LIM did not go very far. It was issued in connection with the purchase of the property, not any specific use. It did not state that the Council records contained no land use consent, only that no information applicable to the property had been found. That language indicates that the search may not have

been a thorough one. Nothing about the LIM suggested that the person who prepared it paid attention to the minerals classification or the quarry's separate rating as a commercial use.

[176] Second, the actions of Council officers between February 2005 and September 2009 had a very different purpose. They were aimed at putting a stop to Mr Daisley's activity. They rested on the positive assertion that there existed neither a land use consent nor an existing use right. Enforcement began with abatement notices, which Council officers could not issue without first satisfying themselves that they had reasonable grounds for believing Mr Daisley's use was unauthorised.

[177] Third, the officers' actions resulted in them receiving information which they could not assume was known to the person who prepared the LIM; there was a quarry on the site, the use was longstanding, the Council had recognised the commercial nature of the use, and the owner asserted that a consent must exist; alternatively, that the quarrying was protected under the RMA as an existing use.

[178] 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. It follows that time did not run for limitation purposes until the consent was disclosed on 22 September 2009.

Misfeasance in public office

[179] We have summarised Toogood J's findings at [62]–[68] above. As explained there, his findings of fact, most of which we have set out at [153]–[162] above, dealt with misfeasance and exemplary damages together. He concluded that the officers did not act maliciously and their recklessness in relation to the 1988 land use consent and enforcement action generally did not warrant an award of exemplary damages. What tipped the scale was the Council's continued persistence on discovery of the consent.[192]

---

[192] Judgment under appeal, above n 3, at [342].

[180] Following the judgment of this Court in *Garrett v Attorney-General*, the Judge held that the tort of misfeasance in public office is committed by an official who commits a knowing breach of duty in the further knowledge that the plaintiff is likely to suffer harm as a result, and knowledge includes recklessness "in the sense of believing or suspecting the position and going ahead anyway without ascertaining the position as a reasonable and honest person would do"[193] Before us counsel agreed that the Judge correctly directed himself in law.

[181] Mr McLellan argued that the Judge's findings on equitable fraud cannot simply be repurposed for the misfeasance claim. We agree. Misfeasance requires that the official knew their conduct was in breach of duty. Knowledge may be established by showing that the official was recklessly indifferent to the limits of their authority and the consequences for the plaintiff. As Blanchard J explained for the Court in *Garrett*, misfeasance is an intentional tort which has at its base conscious disregard for the interests of those affected by official decisions.[194]

[182] In this case it is not in dispute that the Council officers held public office.[195] The relevant exercise of public office is the pursuit of abatement and infringement notices and the bringing of enforcement proceedings in the Environment Court. Counsel approached the appeal on the basis that because Mr Daisley's use was authorised by the 1988 land use consent the Council officers' actions were in breach of duty, and because our decision does not turn on it, we are content to adopt that assumption.[196]

[183] 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.[197] Mr Farmer argued that recklessness was established by the Council's failures to keep the 1988 land use consent reasonably available when it archived the paper file, to

---

193 At [279], quoting *Garrett v Attorney-General* [1997] 2 NZLR 332 (CA) at 344.
194 *Garrett v Attorney-General*, above n 193, at 349–350.
195 *F v Wirral Metropolitan Borough Council* [1991] Fam 69 (CA) at 111 per Gibson LJ.
196 As noted earlier, at [151], the 1988 land use consent offered a complete or near-complete defence to enforcement action. It was open-ended as to quantity, although confined to brown rock, and there may have been scope for controls relating to matters such as truck movements on public roads.
197 Judgment under appeal, above n 3, at [342].

diligently search for the consent, and to acknowledge the evidence of existing use. We do not agree. The first of these items is too remote to amount to subjective recklessness with respect to Mr Daisley, and there is in any event no evidence about the knowledge of Council staff responsible for archiving at the time. 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.

[184] 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 and because the necessary element of deliberate wrongdoing or subjective recklessness was absent.[198]

[185] We make two further points for completeness. First, even if the Council officers were subjectively reckless to the limits of their authority, we do not see this as a case in which an additional award was necessary to sanction the Council, having regard to the substantial award of compensatory damages.

[186] Second, we think the Judge attached too much significance to the Council's failure to withdraw the enforcement proceeding after it disclosed the 1988 land use consent. In his view this behaviour tipped the scales in favour of exemplary damages.[199] We agree with him that the Council did not immediately withdraw and apologise, as it manifestly ought to have done. It had done Mr Daisley a considerable wrong which could not be put down to simple inadvertence. It risked adding insult to injury by keeping the proceeding on foot. It even threatened in January 2010 to seek an interim order. But by that time 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. It was his counsel who pragmatically proposed that the Council's application remain on hold until ownership was resolved. The new owner, Ark, then agreed to the enforcement proceeding remaining on hold while its resource consent application was processed. That was not Ark's decision to make, but Mr Barnsley had

---

198 *Couch v Attorney-General* [2010] NZSC 27, [2010] 3 NZLR 149 at [178] per Tipping J.
199 Judgment under appeal, above n 3, at [342].

withdrawn the current abatement notice in his letter of 15 October 2009 and it seems to have been assumed that Mr Daisley had no ongoing exposure. The point of keeping the proceeding on foot was only to ensure that quarrying would not continue in the interim, and Mr Daisley no longer had any interest in working the quarry.

Disposition

[187] The appeal is allowed in part. The finding that the Council is liable for the misfeasance of its officers in public office is set aside, along with the award of exemplary damages.

[188] The appeal is otherwise dismissed.

[189] Costs should follow the result. Although the appeal has been allowed in part, the appeal was about limitation and Mr Daisley has succeeded on that issue. We have upheld the substantial award of damages in negligence. The Council must pay costs for a complex appeal on a band A basis, with provision for second counsel and usual disbursements.

Solicitors:
Heaney & Partners, Auckland for Appellant
Morgan Coakle, Auckland for Respondent