IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2004 404 4037

BETWEEN	BLACKMOUNT FORESTS LIMITED First Plaintiff
AND	BRUNEL PEAK FORESTS LIMITED & ORS Second Plaintiffs
AND	TRINITY FOUNDATION (SERVICES NO 2) LIMITED First Defendant
AND	WRIGHTSON LIMITED Second Defendant

Hearing: 20 November 2008

Appearances: J Miles QC and S A Grant and J D Miles for Plaintiffs
M Ring QC and D H McLellan for Second Defendant

Judgment: 19 March 2009

JUDGMENT OF CHISHOLM J

A. Second defendant's application for review dismissed.

B. Costs to plaintiffs on 3C scale.

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Introduction

[1] This proceeding concerns a forestry venture in Southland. Although the proceeding has a relatively long history, this judgment concerns the narrow issue whether Associate Judge Faire was right to dismiss the second defendant's application to strike out the plaintiffs' causes of action in contract and tort.

[2] Three causes of action were pleaded by the plaintiffs against the second defendant: breach of the Fair Trading Act 1986; breach of contract; and negligence. The second defendant sought to have all three causes of action struck out on the basis that they were time-barred.

[3] Associate Judge Faire agreed that the Fair Trading Act cause of action was time-barred, and struck it out. But he declined to strike out the other two causes of action on the strength of s28(b) of the Limitation Act 1950:

> *"**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 …*
>
> …
>
> *(b) The right of action is concealed by the fraud of any such person as aforesaid*
>
> …
>
> *the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it …".*

The Associate Judge decided that there was an arguable case that non-disclosure by the second defendant had given rise to equitable fraud which, in terms of this provision, postponed the commencement of the limitation period.

[4] The second defendant seeks to have the Associate Judge's decision reviewed on two grounds: first, the Associate Judge incorrectly found that the plaintiffs had pleaded equitable fraud when, in substance, they had pleaded common law fraud; and, second, the Associate Judge was wrong to hold that wilfulness is not a separate element of equitable fraud under s28(b). If the second defendant's application for review is upheld the plaintiffs seek, by way of cross-review, to support the decision on other grounds.

Background

[5] On 19 November 1997 the plaintiffs entered into a conditional agreement with the first defendant (the Trinity agreement) pursuant to which land owned by the first defendant comprising 374 ha was to be used by the plaintiffs to establish and harvest a Douglas fir forest. Under the agreement the plaintiffs were to use the second defendant to carry out the required forestry services, including planting and management. There was also provision for the first defendant to procure a certificate from the second defendant identifying and measuring the area that was suitable for Douglas fir trees. The agreement was conditional upon due diligence by the plaintiffs.

[6] On 25 November 1997 the second defendant certified that 340 of the 374 hectares was suitable for planting in Douglas fir (the plantable hectares statement). The second defendant also advised the plaintiffs that the areas suitable for planting would have a site index of 34 metres (the site index statement), which is said to be a favourable indication of the potential growth of, and revenue from, the forest.

[7] In reliance upon the plantable hectares and site index statements the plaintiffs made the Trinity agreement unconditional and entered into a management agreement with the second defendant dated 27 November 1997 (the management agreement).

They also made payments under the Trinity agreement which were calculated in accordance with the plantable hectares statement.

[8] Initial planting of the Douglas fir trees was completed in 1998. Under the management agreement the second defendant was obliged to report to the plaintiffs on a quarterly basis. In broad terms the plaintiffs allege that until 2002 these reports indicated favourable growth of the forest and that any areas suffering mortality had been satisfactorily replaced with Douglas fir (this process is described as *"blanking"*). They contend that no major health or growth problems were reported and there was no suggestion that the plantable hectares and/or site index statements were inaccurate.

[9] The plaintiffs plead that on or about 30 August 2002 they discovered that the plantable hectares statement was incorrect and that only 270 ha was suitable for Douglas fir trees. They also plead that on or about 9 August 2006 they discovered that the site index statement was incorrect and that only 220 ha of Douglas fir trees could be expected to achieve the represented 34 metre index.

[10] Although proceedings were issued by the plaintiffs on 30 July 2004, it was not until the third amended statement of claim was filed on 11 August 2006 that the plaintiffs first pleaded breach of contract and/or negligence against the second defendant. Up to that time the plaintiffs' claim against the second defendant had been confined to the Fair Trading Act cause of action.

[11] With the exception of a claim for $3,742.45 and another for an unquantified (but small) amount, the second defendant pleaded in its statement of defence that the plaintiffs' causes of action in contract and tort were time-barred because they had been brought after the expiration of six years from the date on which the causes of action had accrued. (The second defendant had, of course, also pleaded a limitation defence in relation to the Fair Trading Act cause of action).

[12] In reply to the limitation defence concerning the contract cause of action the plaintiffs pleaded that the relevant period was 12 years because the contract (the management agreement) was a deed, or:

> *"In the alternative, s28(b) of the Limitation Act 1950 applies to extend the limitation period so that it commences from the date of discovery of the breaches, which was 31 August 2002 at the earliest, because the right of action in contract was concealed from Blackmount by Wrightson's fraud.*"

That pleading was supported by *"Particulars of Concealment"* to the effect that the second defendant had an express duty to report on a quarterly basis, knew that it was in breach of the contract, and concealed its breaches by not reporting them. Those particulars also alleged that the breaches were not reasonably discoverable until 31 August 2002 and that the proceeding would have been issued sooner if the second defendant had not concealed the plaintiffs' right of action against it.

[13] A similar reply relying on s28(b) of the Limitation Act was advanced in relation to the cause of action in negligence. And similar particulars of concealment were pleaded in support.

[14] These replies prompted the second defendant to request further particulars as to whether the plaintiffs were alleging that the concealment was *"wilful"* and, if so, the persons at Wrightsons who wilfully concealed those matters and the facts and circumstances relied on to support the state of mind of *"wilfulness"*. Initially the plaintiffs responded *"No"* to the first part of the question. But on 19 May 2008 they amended their response:

> *"Not in the sense that the term wilful is used when alleging common law fraud, but in the sense that the concealment was non-disclosure in circumstances where there was a duty to disclose the facts, so as to amount to equitable fraud for the purposes of s 28(b) of the Limitation Act 1950."*

Given that answer the plaintiffs did not consider that they were required to respond to the remaining questions.

[15] At the same time as they provided this amended response to the request for further particulars, the plaintiffs filed and served their fifth amended statement of claim which is the current pleading (there was no fourth amended statement of claim). This was a few days before the strike out application was heard by the Associate Judge.

[16] In their fifth amended statement of claim the plaintiffs allege that the second defendant breached its contract with them (the management agreement) in the following respects:

> *"29. It was … an implied term of the management agreement that the quarterly reports would contain an accurate report on the then current health and productivity of the forest.*
>
> *30. In breach of its obligations under the management agreement, Pine Plan [the second defendant]:*
>
> *(a) Failed to ensure that the site was appropriate for the planting of Douglas fir, specifically that the site was not prone to cold air ponding and that the site had adequate drainage;*
>
> *(b) Failed to establish a forest that will produce a final crop of high quality defect free trees;*
>
> *(c) Failed to inform Blackmount of the health and productivity issues affecting the forest in a timely fashion;*
>
> *Particulars*
>
> *Pine Plan provided quarterly reports on the forest to Blackmount. The quarterly reports painted a positive picture of the growth of the forest and did not alert Blackmount to the underlying problems before August 2001.*
>
> *(d) Failed to prune only trees with no defects or deformities."*

Loss and damage by way of wasted expenditure arising from the cost of establishing the forest, blanking, and pruning, is claimed.

[17] As to the cause of action in negligence, the plaintiffs plead in their fifth amended statement of claim that the second defendant owed them a duty of care and:

> *"34. Pine Plan breached its duty of care to Blackmount in that it:*
>
> *(a) Certified that 340 hectares of the land was suitable for planting in Douglas fir when only 220 hectares was suitable for planting in Douglas fir;*
>
> *(b) Planted the land with Douglas fir when the land was unsuitable for planting in Douglas fir;*
>
> *(c) Failed to establish a forest that will provide high quality defect free clearwood; and*

(d) Pruned trees in a manner not likely to produce defect free clearwood."

The loss and damage alleged to have arisen from the second defendant's negligence is similar to that relied on in relation to the contract cause of action.

Associate Judge's Decision

[18] After deciding that the Fair Trading Act cause of action had to be struck out, Associate Judge Faire addressed the contract cause of action. He rejected the plaintiffs' argument that the management agreement was a deed and concluded that the six year limitation period under s4(1)(a) of the Limitation Act applied. With the exception of the two minor claims for blanking and unnecessary pruning, the Judge decided that the contract cause of action had accrued more than six years before the third amended statement of claim was filed and that it was accordingly statute-barred unless s28(b) extended the commencement of the limitation period.

[19] Then the Judge turned his attention to the cause of action in negligence. For the purposes of this cause of action he proceeded on the basis that the cause of action accrued in terms of s4(1)(a) when there had been a breach of duty and the plaintiffs had suffered damage. The Judge concluded that the plaintiffs sustained their first loss in 1997 when they committed themselves to the agreement with Trinity in reliance on the plantable hectares certificate. He rejected the plaintiffs' contention that this was a contingent liability and observed that a requirement to make payments in the future could not, of itself, alter the fact that damage had been sustained by the plaintiffs in 1997.

[20] Relying on *Davys Burton v Thom* [2008] 1 NZLR 193 (CA) the Judge reasoned that loss arising from negligent advice will generally accrue when the advice is acted upon even though the full extent of the loss might not become apparent until some later time. He reiterated that the plaintiffs' loss had occurred in 1997 when the earliest false certificate was given and payments were made. In his view, later failure of the trees could not of itself postpone the date when the plaintiffs' acquired rights were affected by the false statement because *"the value of the contract entered into was so obviously less having regard to the false statement about the plantable hectares"*. The Judge considered that this situation was

distinguishable from cases dealing with guarantees because in those cases there would be an intervening step (default of the borrower) before any liability attached.

[21] Finally, the Associate Judge turned his attention to the implications of s28(b) of the Act. After referring to *Inca Ltd v Autoscript (New Zealand) Ltd* [1979] 2 NZLR 700, he adopted the following key points from *Matai Industries v Jensen* [1989] 1 NZLR 525 at 536 for deciding whether there is equitable fraud by non disclosure:

> *"1. The circumstances must be shown to be such that the receiver had a duty of disclosure. If he had no such duty then the fact that he did not disclose does not avail the plaintiff.*
>
> *2. Having such a duty the failure to disclose must be wilful. One cannot conceal something of which he is unaware.*
>
> *3. For the concealment to be wilful the receiver must be shown to have known the essential facts constituting the cause of action. It is after all the right of the action which must be concealed by the fraud of the defendant."*

Associate Judge Faire concluded that in this case the issue revolved around the third point, with Mr Ring QC (for the second defendant) arguing that there had to be wilfulness in the sense of deliberately intending to conceal and Mr Miles QC arguing that only a failure to disclose when there was a duty to do so is required.

[22] The Judge accepted Mr Miles' argument. He reasoned:

> *"[73] The problem identified by both counsel is in the use of the word **wilful** and what it qualifies. Some specific propositions can be recorded:*
>
> *a) The discussion concerns the passive non-disclosure situation. That is a situation where nothing is done, said or planned;*
>
> *b) The party described by the receiver of the cause of action must know all facts and be aware that they constitute a cause of action against the receiver. Without that knowledge the receiver's actions cannot be described as wilful or, for that matter, a concealment of the position; and*
>
> *c) The receiver must have a duty to disclose. If there is no duty to disclose then there can be no basis for a claim of equitable fraud in the passive non-disclosure situation.*
>
> *[74] … Wilfulness does not impute a third qualifying condition. It is a consequence of the second and third propositions, that is, knowledge of the facts which establish the cause of*

> *action and the duty to disclose. It follows from those two propositions that the non-disclosure can only be wilful. There is no need to find a deliberate intention to conceal the facts. Unless it is viewed on the above basis, there would seem, in reality, to be no distinction between common law and equitable fraud."*

According to the Associate Judge the second defendant's conduct could be characterised as a "*classic passive non-disclosure situation*". That is, while the defendant knew a substantial portion of the land was unsuitable for Douglas fir it continued to incorrectly describe the growth of the trees as satisfactory and recommended replanting in Douglas fir in areas where the trees had failed without disclosing that those areas were unsuitable.

[23] So the Judge found there was an arguable case for equitable fraud under s28(b) and declined to strike out the causes of action against the second defendant in contract and tort.

Issues

[24] The two grounds of review relied on by the second defendant have already been summarised in [4]. The plaintiffs' cross application will only need to be considered if the second defendant's application succeeds. In that cross application the plaintiffs seek to support the Associate Judge's decision on the basis that the cause of action in negligence was not barred by s4(1)(a) of the Limitation Act because the plaintiffs' loss was a *wholly contingent loss* which depended on whether or not the trees in the unsuitable areas survived. The plaintiffs maintain that this situation arose within the six year limitation period.

[25] Returning to the second defendant's application for review, it is not disputed that s28(b) of the Limitation Act covers both fraud at common law and equitable fraud. Nor is it disputed that common law fraud involves *actual* fraud in the sense of intentional dishonesty or deceit. This application revolves around the concept of equitable fraud in the context of s28(b) and its application in this case.

Second Defendant's Argument In Support Of Application For Review

[26] According to the second defendant equitable fraud by way of passive non-disclosure involves four separate and distinct elements:

(a) a duty of disclosure;

(b) knowledge of all the facts constituting the right of action;

(c) non-disclosure;

(d) *"wilfulness"* in the sense of an intention, by virtue of the omission, to conceal the right of action.

On the second defendant's analysis the elements of *knowledge* under (b) and *wilfulness* under (d) are the same regardless of whether the reliance on s28(b) is based on common law or equitable fraud.

[27] In support of its contention that knowledge and wilfulness are separate elements the second defendant relies on *Inca Ltd v Autoscript (New Zealand) Ltd* [1979] 2 NZLR 700; *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525; and *Sze v Fletcher Residential Ltd & Phillips Fox* (High Court, Auckland Registry, CIV 2006-404-6731, 25 February 2008, Associate Judge Abbott).

[28] With reference to the first ground of review the second defendant claims that the Associate Judge erred when he categorised this case as a *"classic case of passive non-disclosure"*. In fact, submitted Mr Ring, the plaintiffs' reliance on s28(b) is based on *positive conduct* arising from alleged misstatements in the quarterly reports. According to the second defendant the plaintiffs are actually alleging that the second defendant dishonestly made false statements with an intention to deceive, which constitutes common law fraud, not equitable fraud by way of omission. Given that the plaintiffs have expressly disavowed any intention to conceal, Mr Ring submitted that there is no tenable basis in law for the plaintiffs to rely on s28(b).

[29] If that ground of review fails the second defendant invokes its second ground of review, namely, that the Judge was wrong to hold that *"wilfulness"* is not a separate element of equitable fraud under s28(b). This argument was developed along these lines: equitable fraud by passive non-disclosure requires a *deliberate decision* not to disclose; in situations where there is an absence of knowledge, inadvertence, negligence or inability, the necessary intention to conceal (wilfulness) will not be present; again by disavowing any intention to conceal the plaintiffs have destroyed any tenable basis for s28(b) to be invoked.

[30] Mr Ring claimed there was sufficient material before the Court for it to safely allow the review and strike out the causes of action in contract and tort. He suggested that the s28(b) issue effectively revolves around the quarterly reports, all of which are in writing, and that no additional *"factual matrix"* is required.

Plaintiffs' Response

[31] The plaintiffs believe that the second defendant has misconceived the doctrine of equitable fraud. They note that it does not require actual deceit or dishonesty and they consider that the second defendant has misconstrued the comments in *Inca* and *Matai* about equitable fraud having to be *"wilful"*. On their analysis an omission will be wilful if there is non-disclosure with knowledge of the facts giving rise to a cause of action under circumstances where there is a duty to disclose. Thus, instead of relying on an intention to conceal, equitable fraud arises when there is a failure to speak in circumstances where there is a duty to do so.

[32] According to the plaintiffs Associate Judge Faire correctly found that they had not pleaded common law fraud but rather passive non-disclosure by the second defendant as to the true state of the forest. Mr Miles confirmed that the plaintiffs were not saying that the second defendant set out to deliberately deceive the plaintiffs.

[33] Mr Miles explained the plaintiffs' case in this way: between 1997 and 2002 the second defendant failed to disclose its negligence; as a consequence the plaintiffs were unaware that Douglas fir could not be established on large parts of the

land until April 2002; thus there had been fraudulent concealment by the second defendant in terms of s28(b); if the true state of the suitability of the land and the forest's growth had been disclosed to them, the plaintiffs would have been able to bring proceedings against the second defendant within the s4(1)(a) limitation period.

[34] The fine distinction between a positive misrepresentation and a failure to disclose information was emphasised by Mr Miles. He reminded the Court that determination of such issues requires witnesses and evidence and that a strike out application should fail if there are significant factual issues, which is the case here.

Equitable Fraud In The Context Of s28(b): New Zealand Cases

[35] In *Inca Ltd v Autoscript* Mahon J carefully analysed the concept of equitable fraud in the context of s28(b). The defendant in that case had contended that its counterclaim was not barred by s4(1) of the Limitation Act because there had been fraudulent concealment by the plaintiff of discounts that it alleged should have been offered to it in terms of its contracts with the plaintiff.

[36] After reviewing the English authorities Mahon J concluded at 710 that the equitable principles of fraudulent concealment of a right of action, in so far as they apply to non-disclosure amounting to fraud in equity, were all well settled long before the enactment of s26(b) of the Limitation Act 1939 (UK), which was in similar terms as s28(b) of the New Zealand Act. He said those principles were limited to circumstances where a common law or equitable duty of disclosure existed and mere *"unconscionable"* conduct, unrelated to a duty of disclosure, was insufficient. The Judge indicated that those principles had been crystallised in statutory form by s28(b).

[37] At 711 Mahon J expressed the view that the limitation defence would be barred for the appropriate period under s28(b):

> *"… either where there is dishonest concealment of the cause of action, equivalent to common law fraud, or where there is non-disclosure occurring in such circumstances as to amount to equitable fraud.* ***In either case the concealment must be wilful****. The defendant must know all the facts which together constitute the cause of action. For that reason, with great respect, I would have decided Moore v Russell Going Ltd the other way. The defendant was unaware that his negligence had damaged the plaintiffs. He could not, in my view, have*

> *wilfully concealed a right of action which he did not know existed. But however that may be, passive non-disclosure as opposed to active dishonest concealment of a known wrong, cannot amount to a "fraudulent concealment" unless there is a duty of disclosure created either by fiduciary status or by a special condition, express or implied, in the relevant contract or relationship."* (Emphasis added)

Amongst other things, the second defendant relies on the emphasised sentence to support its proposition that wilfulness is an essential and separate component of equitable fraud. The plaintiffs rely on the wider context to support their argument to the contrary.

[38] Having accepted that the contracts between the parties entitled the defendant to the wholesale discount, Mahon J decided that the quantum of that discount and any variation to it would necessarily be matters within the exclusive knowledge of the plaintiff. He concluded that a special duty of disclosure was "*inherent*" in the contract between the plaintiff and defendant company and that this duty of disclosure had not been complied with. It therefore followed, said Mahon J, that the defendant's rights of action for breach of contract were concealed by fraud within the meaning of s28(b): see 712.

[39] Before commenting on that decision it is appropriate to make brief reference to *Moore v Russell Going Ltd* (High Court, Auckland Registry, A951/75, 7 September 1977, Barker J) which Mahon J believed had been wrongly decided. In that case the defendant architect had searched a local authority's records and satisfied himself as to the true boundary of a property. More than six years after a new building had been built inside the supposed boundary line it was discovered that the line did not in fact represent the true boundary and that the building encroached on an adjoining property. The defendant relied on s4(1) of the Limitation Act. In response the plaintiffs contended that s28(b) applied. Barker J considered that the contract of retainer created a special relationship, that the defendant should have disclosed to the plaintiff the inadequacy of its inquiries, and that it would be unconscionable to allow the defendant to take advantage of the statutory defence under the Limitation Act.

[40] Now I return to *Inca.* I agree with Mr Miles that the reference to "*wilful*" in the passage quoted from that decision at [37] above needs to be construed in context.

Having stated that the concealment must be *"wilful"* (which I accept generally indicates an intentional act or omission), Mahon J then explained what he meant by that word in the context of equitable fraud. First, a defendant must know all the facts constituting the cause of action. If the defendant did not know all the facts the concealment could not be wilful. In other words, Mahon J was linking wilfulness and knowledge. Second, there had to be a duty to disclose.

[41] Further insight into the Judge's use of the word *"wilful"* can be gained from his analysis of the facts. First, he accepted that the discounts in issue were necessarily matters within the exclusive knowledge of the plaintiff. Second, he implied a term that the plaintiff would keep the plaintiff accurately informed of its wholesale discount rates. Third, he accepted that it was inherent from the supply contracts that the defendant had a special duty of disclosure which had been breached. Finally, he considered that it followed from those matters that the defendant's rights of action for breach of contract had been concealed by fraud within the meaning of s28(b). Significantly he did not find it necessary to consider as a separate issue whether the plaintiff's concealment was *"wilful"*.

[42] Before leaving *Inca* I should say something about Mahon J's view that *Moore* had been wrongly decided. I agree with him. In my view the facts in that case vividly illustrate the importance of the requirement that before there can be equitable fraud engaging s28(b) the defendant must know all the facts giving rise to the plaintiffs' right of action. The defendant architect in that case did not know that the true boundary was not disclosed by the local authority's records. It was not enough to say that his inquiries were inadequate. Unless he had actual knowledge of all the facts the allegation of equitable fraud could not get off the ground.

[43] Ten years after *Inca* was decided the issue of fraudulent concealment in the context of s28(b) came before this Court again in *Matai Industries Ltd v Jensen.* In that case the plaintiff alleged that a receiver had acted in breach of a duty of care owed to creditors by selling assets at under value. The defendant claimed that the various causes of action were statute-barred. While not asserting actual fraud, the plaintiff claimed that it had, on the evidence, an arguable case that the receiver was guilty of equitable fraud by non-disclosure in terms of s28(b).

[44] After making extensive reference to *Inca* Tipping J commented at 536 that the key points in relation to the plaintiff's allegation of equitable fraud by non-disclosure were:

> *"(1) The circumstances must be shown to be such that the receiver had a duty of disclosure. If he had no such duty then the fact that he did not disclose does not avail the plaintiff.*
>
> *(2) Having such duty* ***the failure to disclose must be wilful****. One cannot conceal something of which one is unaware.*
>
> *(3) For the concealment to be wilful the receiver must be shown to have known the essential facts constituting the cause of action. It is after all the right of action which must be concealed by the fraud of the defendant."* (Emphasis added)

Again the second defendant relies on the emphasised words while the plaintiffs rely on the wider context.

[45] In the end result Tipping J was not satisfied that there was any duty of disclosure by virtue of a fiduciary relationship, and this was sufficient to resolve the strike out application. Nevertheless, at 538 he went on to consider, obiter, what the position would have been if there had been a duty of disclosure:

> *"Mr Atkinson contended that the fact that Mr Jensen may not have realised that he was committing the tort of negligence did not prevent him from having a duty to disclose the facts from which the tort would have become apparent. As was emphasised by Mahon J the concealment must be wilful. The defendant must know of the facts which together constitute the cause of action. For present purposes that means Mr Jensen must be shown to have known first that he had been negligent, and secondly that such negligence had caused the company loss. As Mahon J observed, a defendant cannot wilfully conceal a right of action which he does not know existed."*

Tipping J said that he had looked for any evidence from which it might reasonably be said that the plaintiff had an arguable case that the defendants, knowing the relevant facts which constituted the cause of action, wilfully concealed them. He concluded that there was no evidentiary basis for such a finding.

[46] Once again it is important to construe Tipping J's references to *"wilful"* in context. Starting with the Judge's second key point quoted in [44] above, it can be seen that, like Mahon J in *Inca*, he has linked the word *"wilful"* to the proposition that a person cannot conceal something of which the person is unaware. Then Tipping J proceeded in the third key point to explain that for the concealment to be

wilful there must be knowledge of the essential facts constituting the cause of action. Again this echoes Mahon J's comments in *Inca.* There is no suggestion that *"wilfulness"* is an additional stand-alone requirement.

[47] That theme continues when Tipping J considers what the position would have been if there had been a duty of disclosure: see his remarks quoted at [45] above. Immediately after stating that the concealment must be wilful, the Judge reiterates that the defendant must know all the facts, thereby equating wilfulness with knowledge. And he repeats at the end of the quoted paragraph that a defendant cannot wilfully conceal a right of action which he does not know existed.

[48] It should also be added that Tipping J's comments about a cause of action in negligence do not sit comfortably with the second defendant's argument, summarised at [29] above, to the effect that in situations where there is *"absence of knowledge, inadvertence, negligence or inability, the necessary intention to conceal … will not be present"*. While absence of knowledge will destroy any chance of s28(b) being engaged, that will not necessarily be the case where negligence has been pleaded. Provided a defendant can be shown to have known that he had been negligent and that the negligence had caused loss, s28(b) could be engaged without the plaintiff having to prove an intention to conceal.

[49] The final New Zealand case is *Sze v Fletcher Residential Ltd & Phillips Fox* in which Associate Judge Abbott also considered the interface between knowledge and wilfulness. This claim arose out of a contract for the building of a house which was completed in 1996. In 2005 the plaintiff discovered that a compliance certificate had never been obtained and could no longer be achieved. She alleged that Phillips Fox, who had acted for her on the building contract, had negligently failed to alert her to the fact that the building contract did not require the builder to provide a code compliance certificate and to advise her that she needed to obtain one.

[50] Phillips Fox applied to strike out the plaintiff's claim on the basis that the claim was statute-barred by s4(1)(a) of the Limitation Act. In response the plaintiff argued that the facts pleaded amounted to equitable fraud in terms of s28(b).

[51] Associate Judge Abbott reviewed *Inca* and *Matai*. Interestingly when reviewing the key points of Tipping J in *Matai* quoted at [44], Judge Abbott interpreted the second key point as:

> *"(b) The failure to disclose was wilful (which required that it had to be something of which one was aware),"*

In other words, the Associate Judge understood that Tipping J was saying that the concept of wilfulness and knowledge were inter-linked, which coincides with the conclusion that I have already reached.

[52] Then the Associate Judge turned his attention to an English decision, *Williams v Fanshaw Porter & Hazelhurst (a firm)* [2004] 2 All ER 616, in which the Court of Appeal had emphasised that s32(1)(b) of the Limitation Act 1980 (UK) requires the relevant fact to be *"deliberately concealed"*. Associate Judge Abbott went on to say:

> *"[46] Although counsel for Ms Sze sought to place some significance on the fact that the English section referred to deliberate concealment rather than just concealment, nothing turns on that in my view. Inca v Autoscript and Matai Industries v Jensen both make it clear that the concealment must be wilful. This implies knowledge of the material fact and a deliberate decision not to disclose it (or perhaps a conscious decision to ignore it)."*

Not surprisingly the second defendant relies on this passage and also on the Associate Judge's later finding that there was nothing in the pleadings or evidence to indicate that Phillips Fox had made a *"conscious decision"* not to report to Ms Sze about the absence of the code compliance certificate. For their part the plaintiffs contend that the Associate Judge's approach was wrong in law.

[53] In my view the Associate Judge's impression that there is no significance in the difference in wording between s32(1)(b) of the UK Act and s28(b) of the NZ Act is flawed. Section 32(1)(b) postpones the commencement of the limitation period where *"any fact relevant to the plaintiff's right of action has been deliberately concealed from him by the defendant;"*. In *Cave v Robinson Jarvis & Rolf (a firm)* [2002] 2 All ER 641 (HL) Lord Millett observed at [23] that Parliament had substituted *"deliberate concealment"* for *"concealed fraud"* and that they were different concepts.

[54] Judging from his reasoning Associate Judge Abbott's conclusion that there had to be knowledge *plus* a deliberate decision not to disclose was largely influenced by *Williams.* However, in my view the difference between the New Zealand and United Kingdom sections effectively renders *Williams* irrelevant when it comes to construing the New Zealand section. Moreover, by including the additional element the Associate Judge has, in my view, added a gloss to *Inca* and *Matai* that is not justified by either of those decisions or, for that matter, his interpretation of *Matai* quoted at [51] above.

[55] To the extent that *Sze* purports to add a deliberate decision not to disclose as an additional element for equitable fraud in the context of s28(b), I respectfully decline to follow that decision.

Equitable Fraud In The Context Of s28(b): Conclusions

[56] For reasons already given it seems to me that that the two leading cases on the topic, *Inca* and *Matai,* support the conclusion that the prerequisites to equitable fraud in the context of s28(b) are:

(1) Circumstances giving rise to a duty of disclosure.

(2) A failure to disclose.

(3) "*Wilfulness*" in the sense that the person under the duty to disclose must know the essential facts constituting the cause of action.

I do not accept that those cases are authority for the proposition that a deliberate decision not to disclose constitutes a fourth requirement.

[57] Courts of equity developed the equitable doctrine of concealed fraud to supplement common law fraud which is comparatively narrow in its application: *Nocton v Ashburton* [1914] AC 932 at 951 – 954. They are distinct doctrines. The three prerequisites mentioned in the previous paragraph were formulated to ensure that the equitable purpose of the doctrine could be achieved. It is inherent in those three requirements that a person under a duty to disclose, who knows or should know

from the information in his or her possession that disclosure should be made, has failed to disclose. Concealment from a plaintiff of a right of action is the inevitable outcome. Under those circumstances it would be unconscionable for a defendant to take advantage of the limitation period while his concealment continues.

[58] As far as I can see no texts support the second defendant's proposition that a deliberate decision not to disclose is an additional requirement of equitable fraud. Cope in *Constructive Trusts* (1992) states at 81-82:

> *"The term "fraud" was used in the Court of Chancery to describe what fell short of deceit but which involved a breach of duty to which equity would impose a sanction. It was unnecessary to prove an actual intention to cheat.*
>
> *The fault of the "delinquent" in the eyes of equity occurs when a person misconceives the extent of the obligations which a court imposes upon her or him and violates, albeit "innocently", because of her or his ignorance, an obligation which the person must be taken by the court to have known."*

Equity and Trusts in New Zealand (2003) at 572 also states that equitable fraud "…. *does not require actual deception or dishonesty – that is, wrongdoing*". And at 963 that text comments that it is important to appreciate that for the doctrine of concealed fraud under s28 to operate there need not be deceit as such, but there must be something unconscionable on the part of the defendant.

[59] Given equity's interpretation of the concept of fraud it is difficult to see why a deliberate intention not to disclose should be added as a separate essential element of the doctrine. In an equitable context the fraudulent conduct arises from the failure of the fully informed defendant to discharge his or her duty to reveal information. And that concept enables the purpose of s28(b) - to postpone the operation of the limitation period where the right of action has been concealed by the defendant's fraud – to be achieved. Introduction of the additional element advocated by the second defendant is unnecessary and inappropriate.

[60] Associate Judge Faire considered that if a deliberate intention to conceal facts is an essential requirement of equitable fraud then there would appear, in reality, to be no distinction between common law and equitable fraud. In response to this proposition Mr Ring submitted:

> *"6.27 … This is … plainly wrong. There is a clear distinction between active/positive conduct, and omission despite a duty to act. This is the same as the distinction recognised between misfeasance and nonfeasance, and between misstatement and non-disclosure in insurance law.*
>
> *6.28 Moreover, on the Associate Judge's analysis, the elements of active concealment would then be different to those for passive non-disclosure. The former would require knowledge of the facts + positive misstatement + intention to conceal. However, the latter would only require knowledge of the facts + non-disclosure despite a duty to disclose – without any regard for the reason for the non-disclosure.*
>
> *6.29 There is no sensible basis to insist on intention in respect of false statements, but to allow postponement in the case of unintentional non-disclosure (Cave v Robinson Jarvis & Rolf (a firm) at para [27], p.648/d … Preserving legal liability for mere inadvertent non-disclosure would be contrary to the underlying philosophy of enforcing equitable obligations."*

While I have doubts about whether the distinction between common law and equitable fraud would necessarily be totally destroyed if the defendant's argument prevailed, it would certainly blur the distinction and, in my view, unnecessarily so.

[61] It is beyond argument that the elements of common law fraud, which involves active dishonesty or deceit, are different from those of equitable fraud. Whereas intention is critical to common law fraud, that is not the case for equitable fraud. While the UK legislature decided in 1980 that deliberate concealment should be a prerequisite for s32(1)(b), the UK equivalent of s28(b), that step has not been taken in New Zealand. Consequently it is enough in New Zealand if a defendant (1) fails to disclose, (2) when under a duty to do so, and (3) with knowledge of all the facts constituting the right of action. The underlying philosophy is that in that situation the defendant should have spoken out.

[62] For those reasons I agree with Associate Judge Faire's conclusion that a deliberate intention to conceal facts is not an additional requirement of equitable fraud in the context of s28(b). The only qualification is that in paragraph [73] (b) of his decision (which is quoted in [22] above) the Judge appears to have proceeded on the basis that the defendant must not only know all the facts, but also be aware that they constitute a cause of action against the defendant. However, my understanding is that knowledge of all the facts constituting the cause of action is sufficient.

First Ground Of Review

[63] In *Murray v Morel & Co Ltd* [2007] 3 NZLR 721 (SC) Tipping J outlined the approach that should be adopted in a situation like this where a plaintiff is opposing a strike out application on the strength of s28(b):

> *"[34] In the end the Judge must assess whether, in such a case, the plaintiff has presented enough by way of pleadings and particulars (and evidence, if the plaintiff elects to produce evidence), to persuade the Court that what might have looked like a claim which was clearly subject to a statute bar is not, after all, to be viewed in that way, because of a fairly arguable claim for extension or postponement. If the plaintiff demonstrates that to be so, the Court cannot say that the plaintiff's claim is frivolous, vexatious or an abuse of process. The plaintiff must, however, produce something by way of pleadings, particulars and, if so advised, evidence, in order to give an air of reality to the contention that the plaintiff is entitled to an extension or postponement which will bring the claim back within time. A plaintiff cannot, as in this case, simply make an unsupported assertion in submissions that s 28 applies. A pleading of fraud should, of course, be made only if it is responsible to do so."*

After the hearing was completed counsel for the plaintiffs also drew my attention to the recent Supreme Court decision in *Couch v Attorney General* [2008] 3 NZLR 725.

[64] Associate Judge Faire rejected the second defendant's proposition that the plaintiffs were relying on common law fraud and not equitable fraud. In doing so he specifically turned his mind to the second defendant's contention that reliance on the quarterly reports meant that the concealment issue revolved around positive conduct rather than passive non-disclosure. I am satisfied that the Associate Judge's rejection of the second defendant's argument was in conformity with the approach indicated in *Murray*.

[65] In their current pleadings the plaintiffs expressly disavow common law fraud and state that they are relying on equitable fraud for the purposes of s28(b): see [14] above. And the affidavit evidence on behalf of the plaintiffs provided ample foundation for the Associate Judge to be satisfied that there was a fairly arguable claim for extension that would bring the claim back into time. This is not an issue that could be resolved in a vacuum on the basis of the quarterly reports alone.

Second Ground Of Review

[66] Given my conclusion that wilfulness is not a separate component of equitable fraud this ground of review cannot succeed.

Outcome

[67] The second defendant's application for review is dismissed. Under those circumstances it is not necessary to consider the plaintiffs' application for cross-review. The plaintiffs are entitled to costs on the 3C scale. There will be no certificate for second counsel.

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