



**THE COURT OF APPEAL**

Neutral Citation Number: [2015] IECA 226

**Appeal No. 2015/99**

**Finlay Geoghegan J.  
Peart J.  
Hogan J.**

**ELIZABETH ANNE O'DWYER**

**Plaintiff/Appellant**

**- AND -**

**THE DAUGHTERS OF CHARITY OF ST. VINCENT DE PAUL**

**Defendants/Respondents**

**AND**

**THE SISTERS OF OUR LADY OF CHARITY OF REFUGE**

**Defendants**

**AND**

**HEALTH SERVICE EXECUTIVE**

**Defendants**

**JUDGMENT of Mr. Justice Gerard Hogan delivered on the 21st day of October 2015**

1. This is an appeal brought by the plaintiff against the decision of Kearns P. striking out her claim against the first named defendant, the Daughters of Charity, on the grounds that they were statute-barred and also by reason of inordinate and inexcusable delay: see *EAO v. Daughters of Charity* [2015] IEHC 68. The plaintiff also seeks to adduce new evidence on this appeal. It is important to make clear that the plaintiff's claim against the second and third named defendants remains in being.
2. There is no doubt but that the plaintiff's life has been a very difficult one. She was born in 1947 and from the age of six was placed in the care of various institutions and industrial schools. In or about June 1968 the plaintiff contends that she was in the care of an institution operated by the second defendant located at High Park, Drumcondra, Dublin 9 when, while absent from the institution for a time, she was raped by a person unknown and became pregnant. Upon discovering that she was pregnant, the plaintiff claims that she was sent to reside at a so-called 'mother and baby home' known as St. Patrick's, Navan Road, Dublin 7. The plaintiff claims that this institution was managed and operated by the Daughters of Charity, a religious order.
3. The plaintiff gave birth to a son at St. James' Hospital on 2nd March 1969 and shortly thereafter returned to St. Patrick's. She alleges that she was separated from her son and was only allowed to see him for the purposes of feeding. She further claims that she was precluded from bonding with her son or developing any natural relationship with him.
4. The essence of her claim is that in May 1969 the plaintiff claims that the Daughters of Charity informed her that her son was being put up for adoption, a course of action to which she says that she was steadfastly opposed. The plaintiff further says that her son was taken from her at the beginning of July 1969 and that she was not afforded an opportunity to say goodbye. The plaintiff subsequently obtained documents under the Data Protection Acts after these proceedings had been commenced appeared to indicate that the plaintiff signed various relevant consent documents on the 5th May 1969 and the 1st October 1969.
5. After signing the first of the consent forms the plaintiff returned to the second defendant in Drumcondra where she continued working in the 'Magdalene laundries'. Some months later, the plaintiff maintains that she was presented with the final adoption papers and was informed by a Sister Columba that should she fail to sign them she would be "put out on the street". The plaintiff contends that due to the undue influence and duress she was placed under, she felt compelled to sign the adoption papers. The plaintiff subsequently left the institution in Drumcondra and went on to marry and have seven other children.
6. If the plaintiff's account is correct, then there is no doubt but that she led an extremely difficult life which was beset by tragedy. This is apparently borne out by a psychiatric report prepared by Dr. Mairead O'Leary. In that report Dr O'Leary states that the plaintiff was institutionalised in very harsh environments throughout her life until she was approximately twenty two years old and has limited insight into how appalling her life was. She had no freedom, was physically abused and frightened, and was forced to work very hard for no remuneration.
7. The plaintiff states that she feels deeply ashamed and embarrassed by the adoption of her first son and she thinks about him regularly. There is added poignancy in the fact that some time during 2008 the plaintiff, with the assistance of one of her children, set about trying to locate her son. She subsequently discovered that he had passed away in 2004.
8. The plaintiff commenced the present proceedings on 30th September 2013. She claimed damages for personal injury and psychological and mental distress arising from the negligence, breach of duty and breach of constitutional rights arising from the adoption of the plaintiff's son. She further pleaded that she was entitled to rely on ss. 71 and 72 of the Statute of Limitations 1957 as the defendants were guilty of conduct of a "fraudulent nature."
9. At the time of the institution of the plaintiff's claim, the relevant limitation period for a personal injury action was six years. It is not, I think, really disputed but that, subject to the question of whether the running of time should be postponed, the action is otherwise statute-barred. The first question, therefore, is whether there is any basis on which it could be said that there has been any concealed fraud (in the special sense in which that term is used in s. 71(1)(b) of the Statute of Limitations 1957) ("the 1957 Act") on the part of the first defendant such as would operate to take the present proceedings outside the scope of the limitation

period otherwise prescribed by the Statute of Limitation.

### **Relevant statutory provisions**

10. For this purpose the plaintiff relies on s. 71 of the 1957 Act. Section 71 relates to the postponement of a limitation period in cases of fraud and provides as follows –

- "(1) Where, in the case of an action for which a period of limitation is fixed by this Act, either:-
- (a) the action is based on 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,
- the period of limitation shall not begin to run until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it."

11. The provisions of the Adoption Act 1952 ("the 1952 Act") are also relevant in this context as this was the statutory provision which was in force at the time when the plaintiff's child was handed over for adoption in 1969. Section 14 of the 1952 Act deals with consents to adoption:

- "(1) An adoption order shall not be made without the consent of every person being the child's mother or guardian or having charge of or control over the child, unless the [Adoption] Board dispenses with any such consent in accordance with this section.
- (2) The Board may dispense with the consent of any person if the Board is satisfied that that person is incapable by reason of mental infirmity of giving consent or cannot be found.
- (3) The consent of a ward of court shall not be dispensed with except with the sanction of the Court.
- (4) A person may give consent to the making of an adoption order without knowing the identity of the applicant for the order.
- (5) A consent shall be given in writing in the prescribed form.
- (6) A consent may be withdrawn at any time before the making of an adoption order."

12. Section 15(1) of the 1952 Act provides so far as the mother's consent is concerned that:

- "(1) A consent shall not be valid unless it is given after the child has attained the age of six months and not earlier than three months before the application for adoption."

### **The decision of the High Court**

13. In his judgment Kearns P. found that the plaintiff's claim was statute-barred and that, in any event, he would have struck it out on the ground of inordinate and inexcusable delay. So far as the statute-barred point was concerned, Kearns P. stated:

"In her substantive claim the plaintiff alleges that her infant son was taken away from her and given up for adoption without her consent. The tragic details of the case as presented by the plaintiff are unfortunately not unique and bear resemblance to a number of well publicised cases which have in recent years caused the role of various State and religious institutions in the adoption process, as it operated in this country in the past, to be closely scrutinised. However, it is not the function of this Court at this stage to offer any view on the merits or veracity of the plaintiff's claim. The first matter which the Court must consider is whether or not the plaintiff's claim is barred by operation of the Statute of Limitations 1957 (as amended).

The plaintiff's claim was instituted some forty four years after the events complained of allegedly occurred and is, therefore, *prima facie* statute barred. However, counsel for the plaintiff seeks to rely on section 71 of the Statute in order to postpone the relevant limitation period. It is submitted that the first defendant concealed details of an informal system which operated in breach of the requirements of s. 15(1) of the Adoption Act 1952 in order to prematurely obtain consent from mothers for the adoption of their children. The plaintiff submits that the first defendant's role in this process only became known to the plaintiff through third party disclosures. Counsel for the defendant, on the other hand, submits that valid consent for the adoption was given to the Health Authority on the 1st October, 1969 and that this was within the terms of s. 15(1). Any consent documents purported to be relied upon by the plaintiff did not permit any adoption to occur and, in any event, were known to the plaintiff.

The Court is satisfied that an informal process operated in this case whereby the plaintiff, described on various documentation by the defendants as an 'illegitimate' mother, was asked to provide interim consent for the adoption of her child until such time as valid consent could be obtained pursuant to the requirements of the Adoption Act. I am also satisfied that in the plaintiff's case the first defendant was an active participant in this highly questionable process. However, it is clear that the plaintiff, who was an adult at the time these events occurred, was fully aware of all of the matters now complained of including the alleged undue influence and duress. She signed an 'interim' consent form in May 1969 and provided formal consent in October 1969. In my view there is no indication that the first defendant perpetrated a fraud or fraudulently concealed anything from the plaintiff such as would cause section 71 of the Statute to become operative. I am satisfied that, even had this system not been known to the plaintiff, with reasonable diligence the documents and details of the procedure now sought to be relied upon by the plaintiff could have become known to her before they were finally obtained from TULSA on the 13th November, 2014.

For that reason, I am satisfied that the plaintiff's claim was commenced out of time and is statute barred."

14. While it was not strictly necessary for him to do so, Kearns P. also expressed the view that even if the action had not been statute-barred he would have dismissed the action on the grounds of undue delay. Even making all due allowances for the plaintiff's own difficult personal circumstances, Kearns P. concluded that the delay in commencing the proceedings was inordinate and inexcusable, *i.e.*, thus satisfying the first two limbs of the three tests prescribed by the Supreme Court *Primor plc v. Stokes Kennedy*

Crowley [1996] 2 I.R. 459. So far as the third element of the test was concerned, Kearns P. stated:

"Furthermore, as so much time has elapsed from the time these events occurred, and as various persons who would have been in a position to provide important evidence are now either deceased or likely to have a limited recollection of events, had it been required to do so the Court would have dismissed the claim on the balance of justice having regard to the first defendant's inability to defend the proceedings."

15. Before considering the plaintiff's appeal against this decision, it may be convenient first to deal with her application to admit further evidence. By notice of motion dated 25th June 2015 the plaintiff sought to leave pursuant to Ord. 86A, r.4 to admit new evidence.

#### **The application to admit new evidence**

16. Ord. 86A, r. 4 of the Rules of the Superior Courts 1986 (as amended) provides in relevant part that:

"Subject to the provisions of the Constitution and of statute:-

(a) the Court of Appeal has on appeal full discretionary power to receive further evidence on questions of fact, and may receive such evidence by oral examination in court, by affidavit, or by deposition taken before an examiner or commissioner,

(b) further evidence may be given without special leave on any appeal from an interlocutory judgment or order or in any case as to matters which have occurred after the date of the decision from which the appeal is brought,

(c) on any appeal from a final judgment or order, further evidence (save as to matters subsequent as mentioned in paragraph (b)) may be admitted on special grounds only, and only with the special leave of the Court of Appeal (obtained by application by motion on notice setting out the special grounds)..."

17. It is clear from the decision of the Supreme Court in *Minister for Agriculture, Food and Forestry v. Alte Leipziger Versicherung AG* [2000] IESC 13, [2000] 4 I.R. 32 that the judgment of Kearns P. was a final order. In *Alte Leipziger* the question was whether a decision of the High Court striking out proceedings for want of jurisdiction was an interlocutory order in that sense in which that term had been used in the (old) version of the Ord. 58 dealing with appeals from the High Court to the Supreme Court. A majority of the Supreme Court held that it was not an interlocutory order in this sense, with the consequence that special leave was required before fresh or new evidence could be admitted.

18. By a parity of reasoning it would have to be acknowledged that the order of Kearns P. was a final order in that sense. Adopting the language of Hardiman J. in *Alte Leipziger*, it can be said the decision of the High Court "finally disposes of a particular issue between the parties" inasmuch as Kearns P. held that the proceedings must be dismissed insofar as they were statute-barred. A further consequence of this conclusion is that the plaintiff is required to obtain the "special leave" of this Court before such new evidence can properly be adduced.

19. The test for the admission of new evidence pursuant to the special leave of the appellate court were set out by Finlay C.J. in *Murphy v. Minister for Defence* [1991] 2 I.R. 161, 164. In that case the Supreme Court held that the party wishing to adduce new evidence for this purpose must satisfy three tests. First, the evidence must have been in existence at the time of the trial and "must have been such that it could not have been obtained with reasonable diligence for use at the trial." Second, the evidence must be such that, if given, "it would probably have an important influence on the result of the case, even though it need not be decisive." Third, the new evidence must be apparently credible.

20. The new evidence sought to be adduced is a letter dated 26th September 1969 sent by St. Louise Adoption Society to the Sister in Charge at St. Patrick's Home. The letter recites that the plaintiff's son was discharged to the care of a named couple at a named address "with a view to adoption." The letter-writer continued:

"An Bord Uchtála has now requested the authority to have the form of consent to adoption completed by the child's mother in the manner prescribed by statute....Please have Form 4 completed by the child's mother as soon as possible."

21. In my judgment, the first and third limbs of the test have been readily satisfied in the present case. So far as the first limb is concerned, the uncontradicted evidence from the plaintiff's solicitor is that the letter was contained in a bundle of documents which another (named) solicitor found earlier this year unattended in the solicitor's writing room in the Four Courts. As the other solicitor was aware of the former's involvement in this case and as the bundle of documents related to these proceedings, the latter assumed that these papers were the property of the plaintiff's solicitor and forwarded the documents to him

22. The letter was obviously in existence at the time of the trial and it seems fair to assume that but for this chance discovery of the bundle of documents by the other solicitor who mistakenly assumed that the documents belonged to the plaintiff's solicitor the letter would never have come to light. In these circumstances, it can be said that the document would not have been available at the trial even with reasonable diligence.

23. The third limb is also satisfied since the letter is obviously authentic and inherently credible.

24. So far as the second requirement is concerned, it is not clear that the letter "would probably have an important influence on the result of the case . . ." Indeed, there is every reason to believe that it would not do so if only by reason of the fact the first named defendant's application to dismiss the plaintiff's claim must be determined, as was done by Kearns P., upon the claim as actually pleaded by her. At hearing of the appeal before this Court it was submitted that the additional letter showed the continuing involvement of the first named defendant in the adoption process even after the plaintiff had left St. Patrick's home. The claim as pleaded, however, against the first named defendant (and the other defendants) at paras. 10 and 11 of the statement of claim includes claims for breach of duty in allegedly forcing the plaintiff to give up her son for adoption without proper consultation or informed consent. Kearns P. determined the application to strike out the proceedings upon the assumption that the plaintiff would be able to show – as she pleaded in the statement of claim – that the first named defendant "was an active participant in this highly questionable process".

25. It is true that the letter in question referred to the requests for interim consent which formed part of the adoptive process. Taken at face value this would indeed tend to support the plaintiff's contention that the first named defendant was actively involved in the adoption process, even after the plaintiff had left St. Patrick's home. It must nonetheless be recalled that – as I have just stated –

Kearns P. had *already proceeded upon that particular assumption* for the purposes of his judgment. In this context, therefore, the letter adds nothing new since, at best from the plaintiff's perspective, it would simply help to prove a fact which the courts have already assumed in her favour for the purposes of determining whether the proceedings are statute-barred.

26. Nevertheless, given the particularly unfortunate circumstances of the plaintiff and in order that she may be reassured that the Court has taken all matters which she has now put before the Court into account, I propose, as an exceptional measure, to treat this letter as part of the relevant evidence for the purpose of determining this appeal.

#### **Whether the action is statute-barred**

27. There is no doubt but that as the proceedings were commenced some forty four years after the events complained of this action for personal injuries and breach of constitutional rights *is prima facie* statute-barred. The real question is whether it can be said that the present case can be brought within the concealed fraud exception provided for in s. 71 of the 1957 Act.

28. In his judgment Kearns P. found that there was ample evidence to suggest that the first named defendant was actively involved in what he described as the "highly questionable process" of obtaining an interim consent from the mothers of new born infants pending the execution of the formal consent.

29. The Oireachtas had clearly stipulated the circumstances in which a mother could give consent by providing in s. 15 of the Adoption Act 1952:

"A consent shall not be valid unless it is given after the child has attained the age of six months and not earlier than three months before the application for adoption."

30. This was an important and vital legislative safeguard which was designed to ensure that the consent of the mother was freely given and that a decision of this kind – with life changing implications for both the mother and the child – was not taken in the immediate aftermath of labour and delivery. For the purposes of this appeal I will assume that if the matter ever came to trial that the plaintiff would be able to demonstrate that the consent requirements contained in s. 15 of the 1952 Act were either invalidly circumvented or otherwise not met and that such gave rise to a cause of action whether in negligence, breach of duty or breach of constitutional rights.

#### **Concealed fraud**

31. While the plaintiff accordingly knew of the underlying facts (*i.e.*, she was being required to give an interim consent to the adoption), she maintains that she was unaware that this practice of giving advance consent to an adoption was unlawful or that no proper consent had been given. In effect, therefore, her case is that those involved in the adoption process impliedly represented to her that what was happening was routine, regular and lawful when, viewed objectively, they ought to have realised that the practice was totally irregular and unlawful.

32. Does failure to address the legal rights of the plaintiff in the manner thus alleged amount to concealed fraud such as would postpone the running of time for the purposes of s. 71 of the 1957 Act? Section 71(1)(b) of the 1957 Act provides:

"Where in the case of an action for which a period of limitation is fixed by this Act...

(a) the right of action is concealed by the fraud of the defendant or his agent...

the period of limitation shall not begin to run until the plaintiff has discovered fraud or could with reasonable diligence have discovered it."

33. It is clear from the authorities and, not least, the historical development of the law in the period leading up to the enactment of the Statute of Limitations in 1957 that the phrase "concealed by the fraud of..." does not refer to fraud in the common law sense of the term or, indeed, that it is not even necessary to establish any moral turpitude in order to establish fraud within the section. Prior to the enactment of the Judicature Acts equity and common law had different rules for concealed fraud. At common law, time ran from the date of the wrongful act unless the concealment itself was a wrongful act. The position in equity was different in that time only ran from the date on which the concealed wrong was discovered.

34. Section 28(11) of the Supreme Court of Judicature (Ireland) Act 1877 provided that in the case of conflict as between law and equity the equitable rule should prevail. In one of early post-Judicature Acts decisions the English Court of Appeal held that in actions where there were concurrent remedies at law and in equity, the effect of the corresponding section (s. 24(4)) contained in the (English) Supreme Court of Judicature Act 1873 was that the equitable rule should prevail: see *Gibbs v. Guild* (1882) 9 Q.B.D. 59.

35. Over time, however, the courts applied the equitable rule as to fraudulent concealment to purely common law actions: see, *e.g.*, *Oelkers v. Ellis* [1914] 2 K.B. 139, *Lynn v. Bamber* [1930] 2 K.B. 72, *Legh v. Legh* (1930) 143 L.T. 151 and *Brunyate*, "Fraud and the Statutes of Limitations" (1930) 4 Camb. L.J. 174: see generally the helpful analysis of this issue found in the judgment of La Forest J. in *M(K.) v. M(H.)* [1992] 3 S.C.R. 6. When, therefore, the British Parliament enacted the Limitation Act 1939, the reference in s. 26(b) of that Act to concealed fraud was a reference to the equitable understanding of concealed fraud which, by that stage, had already become established in the English courts, irrespective of whether the cause of action at issue was at common law or equitable in origin. This historical understanding must, accordingly, inform the interpretation of the corresponding (and substantially identical) provisions of s. 71 of the 1957 Act.

36. The leading authority on the meaning of fraudulent concealment is *Kitchen v. Royal Air Forces Association* [1958] 1 W.L.R. 563, 572-573 where Lord Evershed, M.R. stated:

"It is now clear . . . that the word "fraud" in s. 26(b) of the Limitation Act, 1939, is by no means limited to common law fraud or deceit. Equally, it is clear, having regard to the decision in *Beaman v. A.R.T.S. Ltd.* [1949] 1 All E.R. 465, 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 two hundred 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."

37. In *King v. Victor Parsons & Co.* [1973] 1 W.L.R. 29, 33-34 Lord Denning M.R. observed that:

"The word 'fraud' here 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 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.... 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 wrongdoing 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* [1949] 1 KB 550, 565-566. 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 least 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* [1958] 1 W.L.R. 563. 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" (emphasis added)."

38. The judgment of Lord Evershed M.R. in *Kitchen* demonstrates that the concealment of facts which, if disclosed, would have brought to light a cause of action may, also amount to a concealment by fraud. That case concerned a claim by a client against a solicitor and the English Court of Appeal concluded that the solicitor concealed facts from the plaintiff which, if disclosed, would have brought to light her true rights against the appellant's solicitors. The Court held that this amounted to concealment by fraud within the meaning of the English Limitations Act 1939.

39. Counsel for the plaintiff referred us to the more recent formulation by Stratton L.J. in the Alberta Court of Appeal, Canada in *Photinopoulos v. Photinopoulos* 54 D.L.R. (4th) 372, where, having referred to the earlier English authorities, the judge stated:

"Those cases show that 'fraud' is not used in the common law sense. It is used in the equitable sense to denote conduct by the defendant or its agent such that it would be 'against conscience' for him to avail himself of the lapse of time. The section applies whenever the conduct of the defendant or his agent has been such as to hide from the plaintiff the existence of his right of action, in such circumstances as it would be inequitable to allow the defendant to rely on the lapse of time as a bar to the claim."

40. These authorities (with the exception of *Photinopoulos*) were referred to and applied by Carroll J. in this jurisdiction in *Morgan v. Park Developments* [1983] I.L.R.M. 156.

41. In the light of the authorities, it is clear, therefore, that for s. 71(1)(b) of the 1957 Act to apply, there must be concealment either of wrongful conduct which gives rise to the cause of action or a failure by the defendant or his agent to disclose facts known only to the defendant which, if disclosed, would found a cause of action such that it would be inequitable to permit the defendant to rely upon the Statute of Limitations.

42. I agree with Kearns P. that the evidence before the High Court does not establish that there was concealment by or on behalf of the first named defendant of the wrongful conduct alleged against it in relation to the cause of action pleaded. There is equally no evidence that the first named defendant failed to disclose relevant facts known only to it which, if disclosed, would have founded the cause of action pleaded. Nothing in the letter of the 26th September, 1969 (which, exceptionally, I have decided to admit as additional evidence on this appeal) changes this view. The facts giving rise to the plaintiff's cause of action pleaded against the first named defendant were known to her at the time they occurred.

43. Counsel for the plaintiff submitted that the first defendant was in a relationship with the plaintiff such that it gave rise to fiduciary obligations (albeit not expressly pleaded) to inform her of her statutory and other legal rights. He further submitted that the first defendant's failure to inform her of the fact that the procedures allegedly followed by them (and others) in relation to the adoption of her son were in breach of her legal rights constitutes concealment by fraud for the purposes of s. 71 of the Act of 1957. Counsel, nevertheless, cited no authority in support of the proposition that a failure by a defendant positively to inform a plaintiff that the former's conduct was in breach of the latter's legal rights amounts to a concealment of a right of action by fraud within the meaning of s. 71(1)(b) of the 1957 Act.

44. Whilst the failure to inform the plaintiff of her rights under the Adoptions Acts may well have amounted to a breach of duty and, therefore, to give rise to a cause of action, it is not concealment by fraud of the plaintiff's cause of action against the first defendant for breach of the alleged duty in the sense I have just described. There was no concealment either of actions taken by or on behalf of the first defendant or of facts known only to it which if disclosed would demonstrate the existence of a cause of action.

45. In many ways the plaintiff's real complaint was that at the time she did not realise that what was being done at the time was illegal and that no one in authority took any steps to ensure that she was made aware of her legal entitlements. This, however, does not amount to concealed fraud in the sense in which that term is used in s. 71(1)(b) of the 1957 Act, as a failure to disclose the illegality or potential illegality of actions *openly taken* cannot be considered in itself to amount to the concealment of a right of action: see to this effect the comments of Lord Evershed M.R. in *Kitchen* [1957] 1 W.L.R. 563, 570.

46. It would, of course, be different were the conduct in question to be furtive or surreptitious, such as was found to be the case in *Bulli Coal Mining Co. v. Osborne* [1899] A.C. 351, a case where the defendant had taken coal over a long period by means of "a wilful and secret underground trespass." Different considerations also arise where the defendant commits an intentional tort (such as conversion) and fails to disclose these facts to the plaintiff. An example here is supplied by *Beaman v. ARTS Ltd.* [1949] 1 K.B. 650, a case where, at the onset of the Second World War, the plaintiff had deposited goods for safekeeping with the defendants. In the course of the war the defendants disposed of the goods and converted to them to their own use. They nevertheless had failed to inform the plaintiff that they had wrongly disposed of the goods even though they knew that she was abroad for the duration of the war.

47. It is clear, therefore, the fraud must either consist of *conduct* which is concealed from the plaintiff or of the failure to disclose the existence of facts known only to the defendant which, if disclosed, would found a cause of action. In the present case, the plaintiff knew that she was being asked to give an informal consent to the adoption and that the child was less than six months old at the time it was given up for adoption in July 1969. The plaintiff was thus aware of all the critical facts necessary to found the cause of action. It is equally true that the first named defendant did not disclose that their conduct was or might have been illegal, but, for the reasons just stated, this in itself does not amount to fraudulent concealment within the meaning of s. 71(1) of the 1957 Act.

**Conclusions**

48. It is accordingly clear that the plaintiff's claim is statute-barred as against the first defendant. Since in this respect this claim is thereby doomed to fail, it follows, therefore, that I would uphold the decision of Kearns P. to dismiss the plaintiff's claim against the first defendant. In these circumstances it is unnecessary to consider the further part of his judgment relating to delay.

49. No one who has heard the plaintiff's narrative in this case could be other than deeply moved by the poignant and tragic facts which this appeal discloses. The appeal must nonetheless be dealt with in accordance with law and since the action as against the first defendant is so plainly statute-barred, I must therefore dismiss the appeal.