**IN THE EMPLOYMENT COURT**
**WELLINGTON**

**[2010] NZEMPC 10**
**WRC 8/09**

| | |
|---|---|
| IN THE MATTER OF | an application for orders setting aside findings, orders and directions relating to discovery |
| AND IN THE MATTER OF | a challenge to objection to disclosure |
| AND IN THE MATTER OF | an application by the defendant to adduce affidavit evidence |
| BETWEEN | LYNNE FRANCES SNOWDON<br>Plaintiff |
| AND | RADIO NEW ZEALAND LIMITED<br>Defendant |

Hearing: 24 September 2009
(Heard at Wellington)
Further submissions filed by the plaintiff on 25 September, 9 and 16 October, and 18 and 26 November 2009
By the defendant on 1 and 8 October, and 13, 20 and 25 November 2009

Appearances: Dr R A Moodie, counsel for the plaintiff
M F Quigg, counsel for the defendant

Judgment: 24 February 2010

---

**JUDGMENT OF JUDGE B S TRAVIS**

---

[1] The defendant has objected to the plaintiff's request that it disclose certain documents and the plaintiff has challenged that objection (`the disclosure challenge').

[2] The documents sought by the plaintiff are said to be relevant to this action, which I shall refer to as the `fraud proceedings', commenced by way of a statement

of claim filed on 17 March 2009. An amended statement of claim, filed on 17 June 2009, seeks orders setting aside "the findings, directions, orders and decisions (as the case may be) of Judge Coral Shaw in the proceedings WRC 17/04 and WRC 19/05" in her judgments dated 16 December 2005,[1] 27 March 2006 and 7 December 2006, which I shall refer to collectively as the `discovery judgments', on the grounds that they were obtained or procured by the defendant and/or its solicitors by fraud. Particulars of the fraud alleged are then provided. They relate to 5 discovered CD-ROMs purporting to contain "detailed management Profit & Loss reports covering Features Programming and Business Divisions for the period 1999/2000-2003/2004", also known as Category 4 documents.

[3] If these fraud proceedings are successful the ultimate relief sought in the amended statement of claim is the setting aside of all of the discovery judgments and for new orders to be made that the defendant provides comprehensive disclosure, as listed at paragraph 30 at page 64, of the amended statement of claim.

[4] The cumulative effect of the discovery judgments was that the defendant had complied with all of its disclosure obligations in the two substantive proceedings (WRC 17/04 and WRC 19/05), which relate to the plaintiff's personal grievances arising out of her employment with the defendant (which I shall refer to as `the grievance proceedings'). The success of the fraud proceedings depends upon the plaintiff establishing the fraud she has alleged. The authorities cited by both counsel state that fraud is an exception to the principle upholding the finality of judgments, encompassed in the doctrine of res judicata: see for example *Shannon v Shannon*[2] relied on by the plaintiff.

[5] If the plaintiff is successful in setting aside the discovery judgments the defendant will be compelled to disclose the documents the plaintiff is now seeking in this disclosure challenge. If the plaintiff's disclosure challenge is successful then, notwithstanding the earlier binding orders in the discovery judgments that the defendant has already complied with its disclosure obligations, the plaintiff will

[1] [2005] ERNZ 905.
[2] (2005) 17 PRNZ 587 (CA).

obtain disclosure of those documents without having to prove fraud in the substantive fraud proceedings.

## The defendant's application to adduce evidence

[6] In the course of the hearing of the disclosure challenge on 24 September 2009 I raised with counsel what appeared to me to be the underlying disclosure issue between the parties, which was whether the exercise undertaken by the defendant to change the format of the financial material it held, on what was described as the "SunSystem", into the 5 CD-ROMs, was undertaken for the purpose of concealing from the plaintiff the true position of the defendant's financial records. The disclosure issue has, for the last four years, prevented the grievance proceedings from being heard on their merits.

[7] The defendant had previously elected not to file any evidence for the hearing of the disclosure challenge and so advised the Court and the plaintiff's counsel in a telephone chambers conference on 28 July 2009. The defendant's position was that at this stage of the proceedings, although denying the allegations of fraud, it was not contending that the fraud proceedings ought to be struck out. The plaintiff was therefore entitled to the benefit of a presumption that she would be able to prove her allegations when the fraud proceedings came on for trial. As a result, no doubt, of my raising what I saw as the issue at the heart of the disclosure challenge with counsel, in what has turned out to be the forlorn hope of trying to finally dispose of the disclosure issues, the defendant apparently had a change of heart concerning the evidence it wants to have before the Court in relation to the disclosure challenge.

[8] On 8 October 2009 the defendant filed an application seeking orders that the Court grant leave that affidavits and other evidence filed in the grievance proceedings be used by the Court in the fraud proceedings. The grounds for the application included an assertion that the plaintiff was relying on affidavits filed in the grievance proceedings and in the Court of Appeal, without having sought and been granted formal leave to do so, and from which material Judge Shaw in the grievance proceedings had been able to make findings in her judgment of 7 December 2006 that she was satisfied that the plaintiff's request for relevant

disclosure had been fulfilled. It was not initially clear from the defendant's application whether these affidavits were sought by the defendant to be read in relation to the disclosure challenge.

[9] On 9 October counsel for the plaintiff filed a memorandum objecting to these affidavits being filed and sought leave to file a further memorandum in response. Such leave was granted by the Court on 12 October. On 16 October Mr Moodie filed a formal notice of opposition to the use of the affidavits and other evidence by the defendant. That notice of opposition was accompanied by a memorandum of counsel giving detailed submissions in opposition.

[10] Following a chambers conference on 30 October, counsel for the defendant was given the opportunity to file a memorandum in response. On 13 November the defendant filed a memorandum, which was accompanied by an affidavit dated 13 October 2009 from Wayne Euan Findley, senior accountant and business intelligence consultant, together with a further application by the defendant for orders to adduce further evidence. The affidavit of Mr Findley was said to be "in consideration of the Challenge to Objection to Disclosure dated 9 April 2009".

[11] I observed, in a minute dated 18 November, that the affidavit of Mr Findley had not previously been the subject of the application for an order that it be adduced in evidence and the plaintiff had had no opportunity to make submissions in relation to this affidavit.

[12] Mr Moodie filed a memorandum on the same day advising that the plaintiff objected to Mr Findley's evidence being introduced. Mr Quigg filed a further memorandum of counsel on 20 November in which he submitted that untested affidavit evidence could not be relied on at this stage, for a matter that requires determination at a substantive hearing.

[13] During the course of the hearing of the disclosure challenge, Mr Moodie suggested that special and exceptional circumstances existed, based on affidavit evidence, to overcome estoppel by res judicata. As a result the defendant continued to press for the opportunity to now admit further evidence. By a memorandum dated

25 November counsel for the defendant confirmed that the defendant was continuing to pursue its application to have the affidavit of Mr Findley read by the Court.

[14] Mr Moodie filed a further memorandum on 26 November advising that he was becoming increasingly confused by what appeared to be a further 180 degree reversal by the defendant in regard to its application to admit further evidence. Mr Moodie's memorandum was accompanied by a formal notice of opposition. Mr Moodie sought the opportunity, if the affidavit was to be admitted, of cross-examining all of the defendant's witnesses.

[15] By a minute dated 30 November I gave the parties until 2 December 2009 to advise whether they wished to be heard further in relation to the defendant's two opposed applications to adduce further evidence. If they did not, I advised that I would prepare and issue a judgment dealing with those applications and, depending upon the outcome, I would then be able to rule on the plaintiff's disclosure challenge. In the event the Court did not hear further from either counsel.

[16] As I have previously stated, the disclosure challenge proceeded on the basis of the current pleadings and on the assumption that the plaintiff will be able to prove her fraud allegations, which are strenuously denied by the defendant. With the exception of the material that has been put before the Court by the defendant in relation to the plaintiff's application to have disclosure supervised by what she describes as an independent expert, a cursory examination of the material the defendant wishes to place before the Court indicates that it is to respond to the issues raised in the substantive fraud proceedings. It would only be relevant to the disclosure challenge if I concluded that there were special circumstances existing at this point in time which would vitiate a plea of res judicata. For the reasons I will give, I am not satisfied that such special circumstances exist. I therefore consider the material the defendant wishes to put before the Court is irrelevant to the disclosure challenge.

[17] I will not dismiss the defendant's applications for it may well be appropriate for that material to come in when dealing with the substantive fraud proceedings.

However, I will not take into account the defendant's affidavits at this stage. I now turn to consider the disclosure challenge.

## Plaintiff's submissions

[18] For present purposes, as I have stated, I accept that the plaintiff has established a prima facie case of fraud as alleged in her amended statement of claim and the affidavits filed in support. This would prevent the fraud proceedings being struck out if the defendant had made such an application. It is therefore not relevant to go through all the material contained in the plaintiff's submissions summarised under the heading "Particulars of the alleged fraud" in pages 2 to 27 or under the heading "Background of Statement Of Claim allegations research & analysis" in pages 27 to 29, which seek to show how that fraud is to be proved and where the discovery judgments allegedly went astray.

[19] The submissions on the disclosure processes at pages 29 to 40 of the plaintiff's outline of submissions, in summary, contend that the notice requiring disclosure was in proper form and the notice of objection to disclosure was invalid. The objection grounds asserted by the defendant were that the documents sought were not relevant or an abuse of process. Mr Moodie relied on reg 44(3) of the Employment Court Regulations 2000 which provides:

> (3) The only grounds upon which objections may be based are that the document or class of documents—
>
> (a) is or are subject to legal professional privilege; or
>
> (b) if disclosed, would tend to incriminate the objector; or
>
> (c) if disclosed, would be injurious to the public interest.

[20] Mr Moodie submitted that the defendant's objection was in breach of the defendant's duty, as a party to the proceedings, to comply with the tenure of the notice requiring disclosure and a breach of the defendant's and its solicitors' duties and obligations to make disclosure of all relevant documents. He submitted what the defendant had done in the fraud proceedings was what it had done in the grievance proceedings and that was to evade the disclosure of any documents by misusing the statutory provisions for objections to disclosure. He submitted that the defendant

and its solicitors had therefore abused the process of the Court and evaded their responsibilities, citing *Gilbert v Attorney-General*[3] in support.

[21] Mr Moodie also relied on the provisions of reg 42(3)(a) which requires the recipients of a notice to assemble in a convenient place all the relevant documents, citing *Airways Corporation of New Zealand Ltd v Postles.*[4]

[22] Mr Moodie referred to the very wide definition of relevance in reg 38 and contended that the documents being sought were clearly relevant because they amounted to proof of the recently discovered fraudulent alteration of documents prior to their disclosure. He set out the list of the documents the plaintiff required. He submitted these must all come from the original database and were required in the context of the allegations and denials contained in the pleadings and were necessary for the fair and effective resolution by the Court of the pleaded differences between the parties.

[23] Mr Moodie invited the Court to not follow the 16 December 2005 decision of Judge Shaw as the Judge's findings, that the original notice requiring disclosure was not strictly in accordance with the regulations and that the documentation sought was too wide and oppressive, were wrong.

[24] Mr Moodie submitted that it was essential for the maintenance of public confidence in the administration of justice that the serious allegations in the plaintiff's pleadings be resolved by the Court. He submitted the Court must examine and compare all of the documents and data discovered by the defendant against the data and documentation in its possession, custody or control at the time disclosure was made. He also sought, given the allegations of a history of fraud in the substantive proceedings, that any future disclosures of electronic data of the defendant be monitored by an expert representing the interests of the plaintiff. He suggested using Dr Joanna Gooch, the manager of the Information Technology Forensics Division of PPB Pty Melbourne, Victoria, Australia, as the appropriate person.

---

[3] [1998] 3 ERNZ 500.
[4] [2002] 1 ERNZ 71 (CA).

[25] In supplementary submissions dealing with where various items of evidence in support of the fraud claim are to be found, the particularised allegations of fraud in the amended statement of claim are cross-referenced to the affidavit evidence upon which they are based. Mr Moodie submitted that these allegations were substantially more than vexatious, frivolous or unsustained allegations of fraud and the evidence of the new facts was so extensive that it is probable that the fraud action will succeed. He submitted that the burden on the plaintiff at this point of time was to have filed sufficient evidence to establish a prima facie case citing *Shannon* and *Paper Reclaim Ltd v Aotearoa International Ltd.*[5] He submitted the plaintiff had discharged that burden for the purposes of this interlocutory application. Mr Moodie also submitted that this provided an answer to the defendant's claim of estoppel.

[26] Mr Moodie's supplementary submissions took issue with submissions from counsel for the defendant in opposition and it is convenient to outline the defendant's submissions first.

## The defendant's submissions

[27] Mr Quigg's prime submission was that, because the Court has ruled on the issue of disclosure in the discovery judgments, no other documents are discoverable and the notice requiring disclosure is an abuse of process because it seeks to go behind the previous discovery judgments.

[28] Further, Mr Quigg submitted that the plaintiff, when alleging fraud, is not entitled to "fish" for further evidence to support the allegations of fraud already made. It was also an abuse of process for the plaintiff to seek interlocutory disclosure of the financial records that form part of the ultimate relief in the fraud proceedings, before the allegations of fraud have been tested. Mr Quigg submitted that the fraud proceedings are a satellite of the substantive grievance proceedings.

[29] Mr Quigg submitted that special considerations apply to proceedings alleging fraud that seek to vitiate judgments, because that fraud "if strictly proved" vitiates

[5] HC, Auckland, CIV 2004/404/4728, 14 February 2005.

judgments which are otherwise res judicata. He cited Lord Denning in *Lazarus Estates v Beasley*[6] who stated that, "fraud unravels everything".

*[30]* Because of the importance of the sanctity and finality of judgments and to avoid the prospect of proliferation of judgments, Mr Quigg submitted the person alleging fraud faces a high threshold both in terms of pleadings and proof by available evidence. The reasons for this, he submitted, were best explained in *The Ampthill Peerage*[7] where Lord Wilberforce, after stressing the importance of the essential principle that requires limits to be placed on the rights of citizens to open or reopen disputes, stated:

> For a policy of closure to be compatible with justice, it must be attended with safeguards: so the law allows appeals: so the law, exceptionally, allows appeals out of time: *so the law still more exceptionally allows judgments to be attacked on the ground of fraud*: so limitation periods may, exceptionally, be extended. But these are exceptions to a general rule of high public importance, and as all the cases show, *they are reserved for rare and limited cases, where the facts justifying them can be strictly proved*. (emphasis added)

[31] Mr Quigg referred to cases which stayed or dismissed allegations of fraud which were not fully particularised. He accepted that is not the situation in the present case. This is not an application to strike out the plaintiff's proceedings and I have already concluded that, for present purposes, the plaintiff has established a prima facie case.

[32] Mr Quigg also submitted that special considerations apply in respect to applications for discovery in contested proceedings seeking to reopen settled disputes. He submitted the authorities have established that, when filing such a proceeding, a plaintiff must already have a sufficient evidential foundation to bring the action in the first place and the proceeding must not want for further evidence. He submitted that the authorities establish that discovery should not be available to "bolster" the allegations, citing the *Paper Reclaim* case. That was a case alleging fraud and attempting to set aside a previous judgment concerning a damages claim in

---

[6] [1956] 1 QB 702 at 712.
[7] [1977] AC 547 at 569 (HL).

which the Court, in setting out the legal principles that apply to attempts to impeach a judgment on the ground of fraud, stated:[8]

> There is no room for a provisional or equivocal claim, based on suspicion, to be bolstered by fishing expeditions through the problematical process of interrogatories and discovery.

[33] Mr Quigg's primary submission was that, until the previous discovery judgments which categorically confirmed that the defendant had disclosed all relevant financial or other documents are set aside, the defendant is entitled to the benefit of the orders made, by virtue of issue estoppel.

[34] Mr Quigg also submitted that, in terms of the regulations, the documents being sought were not "relevant" to the present fraud proceedings in that the defendant has provided its accounting database (the Category 4 documents) in suitable formats and the Court has already held that to be so. He relied on the threshold requirement of relevance in the object provisions in reg 37 which states:

> **37 Object**
>
> The object of regulations 40 to 52 is to ensure that, where appropriate, each party to proceedings in the court has access to the relevant documents of the other parties to those proceedings, it being recognised that, while such access is usually necessary for the fair and effective resolution of differences between parties to employment relationships, *there are circumstances in which such access is unnecessary or undesirable or both*. (emphasis added)

[35] Mr Quigg cited the following passage from *Brookers Employment Law* (EC 37.04):

> **EC 37.04 "Unnecessary or undesirable or both"**
>
> It is suggested that in the following categories, access to another party's documents may be regarded as "unnecessary or undesirable or both":
>
> (a) Where documents are not relevant on any of the tests of relevance listed in reg 38;
> (b) Where an objection can properly be made on any of the grounds referred to in reg 44(3); and
> (c) Where the Court exercises its discretion, either on an application under reg 47 or another separate application, to prevent what it regards as unnecessary or undesirable disclosure, for example,

[8] At para [18].

> where disclosure is being sought in an oppressive manner: *Matthes v NZ Post Ltd (No 1)* [1992] 3 ERNZ 145, 150 per Travis J; or where the time and expense involved in providing access greatly outweighs any benefit: *Ross v Wellington Free Ambulance Service* [1999] 2 ERNZ 325, 330.

[36] Mr Quigg submitted that the defendant was entitled to respond as it did in the 16 December 2005 judgment at para [60] that the documents having already been disclosed in sufficient form, what was being sought by the plaintiff was not relevant. He observed that leave to appeal against that decision was refused by the Court of Appeal in *Snowdon v Radio NZ Ltd*.[9]

[37] Mr Quigg analysed the earlier decisions in some detail and submitted that there were no further relevant documents.

[38] As to the second ground of opposition, the abuse of process, he submitted that under s 186 of the Employment Relations Act 2000 the Employment Court is established with "all the powers inherent in a court of record". A court of record has an inherent power to control its own procedure and to protect its processes from abuse.[10] He therefore submitted that the notice seeking further discovery should be treated as a nullity, or, in terms of reg 37, as unnecessary, undesirable or both.

[39] In this context Mr Quigg repeated his earlier submission that there should not be a fishing expedition, citing the *Paper Reclaim* case. He observed that the reasoning in that case applies with greater force in the present context, given that the ultimate relief in the fraud proceedings is to challenge the findings of the defendant's compliance with discovery. He argued that the plaintiff was seeking further orders that more discovery be given by a backdoor approach, before the issue of fraud has been established on a sufficient evidential foundation. He submitted that the defendant would be able to establish that the allegations of fraud were baseless and culpably false but at significant cost to the defendant which the defendant will seek to recover from the plaintiff.

---

[9] CA 28/06, 23 June 2006.
[10] *Connelly v Director of Public Prosecutions* [1964] AC1245, [1964] 2 WLR 1145; [1964] 2 All ER 401 (HL).

[40] Mr Quigg submitted that the substantive proceedings have been delayed unconscionably by what he described as a series of futile attempts to revisit Court rulings, including the compliance proceedings, subsequently struck out as an abuse of process.[11] an application to recuse a Judge, which was ultimately abandoned, and now a successful application for leave to the Court of Appeal to appeal a costs award which flowed from that abandonment.[12] He submitted that, to use the words of Chief Justice Roberts in a different context: "enough is enough".[13]

[41] Mr Quigg submitted that the current fraud proceedings require the plaintiff to put forward her evidence in support and not to be permitted to fish for further evidence to support those allegations. He submitted that neither this proceeding nor the substantive proceedings should be delayed any further.

## The plaintiff's supplementary submissions

[42] Mr Moodie commenced his supplementary submissions by objecting to the failure of the defendant to refer to res judicata, and its associated doctrine of issue estoppel, or estoppel per rem judicata, as grounds for its objection to disclose the documents. The plaintiff requested that her objection to res judicata and issue estoppel being raised at this late stage, without being stated as grounds for objection to disclosure, be placed on the record of these proceedings. They are so recorded.

[43] I reject that objection. Issues of res judicata and issue estoppel, related as they are to the more general plea of abuse of proceedings, are so fundamental to the administration of justice that the Court must deal with them, regardless of whether they were pleaded at the outset.

[44] Mr Moodie then submitted that res judicata, based on cause of action estoppel, was clearly not open to the defendant in these proceedings, because the issues in the substantive proceedings and the fraud proceedings are not precisely the

---

[11] *Snowdon v Radio New Zealand Ltd* [2008] ERNZ 527.
[12] [2009] NZCA 557.
[13] *Federal Election Commission v Wisconsin Right to Life Inc* 551 US (2007).

same; citing *Shiels v Blakeley*[14] and *Joseph Lynch Land Co Ltd v Lynch.*[15] He submitted that the only basis upon which res judicata can arise between the three proceedings, that is to say the two substantive grievance proceedings and the fraud proceedings, is issue estoppel, discussed in *Talyancich v Index Developments Ltd*[16] and *Lynch*'s case, and this was not previously pleaded.

[45] Mr Moodie referred to the Court of Appeal decision in *Shannon* which establishes that fraud is an affirmative answer to estoppel by res judicata, and the two articles of D M Gordon cited in that case. These are also cited with approval in the decision of Kirby P in *Wentworth v Rodgers (No 5)*[17] which sets out the requirements of such fraud actions. He submitted that the facts as pleaded and the affidavit evidence in support, establish a prima facie case, which I have already found.

[46] He then submitted that not only would fraud be a complete answer to issue estoppel, but issue estoppel itself was not inflexible and there are special and exceptional circumstances that give rise to that doctrine not applying, citing *Arnold v National Westminster Bank Plc (No.1).*[18] He submitted that the newly discovered material raises serious questions about the correctness of the earlier decisions relating to discovery and that the issues now raised will inevitably prove decisive in the, as yet, unheard substantive grievance proceedings. From all of this material he submitted that estoppels must be applied to work justice and not injustice and, unless the special and exceptional circumstances of this case are applied to these interim disclosure applications, a serious miscarriage of justice is likely to occur at the substantive hearing. A further factor of significance, he submitted, was that issues and questions determined in interlocutory proceedings do not necessarily give rise to issue estoppel, citing the *Lynch* case. He also submitted there is a responsibility on a party and counsel to disclose evidence of fraud pre-trial.

---

[14] [1986] 2 NZLR 262 (CA).
[15] [1995] 1 NZLR 37; (1994) 7 PRNZ 605 (CA).
[16] [1992] 3 NZLR 28; (1992) 4 PRNZ 509 (CA).
[17] (1986) 6 NSWLR 534.
[18] [1991] 2 AC 93, (HL).

[47] He contended that the defendant's submission that because the res judicata discovery in the fraud proceedings is not available until the discovery judgments are set aside, cannot be sustained and no authority was cited by the defendant in support, because there is none. He referred to the *Peruvian Guano*[19] discovery obligation, as codified in modified form in the regulations, which applies to all proceedings in the courts, including the present fraud proceedings. He submitted *Shannon* confirmed that evidence which is in existence and reasonably discoverable at the time of a hearing must be disclosed using due diligence even in fraud proceedings, including electronic records, citing *SP Bates and Associates Ltd v Woolworths (New Zealand) Ltd.*[20]

[48] Further he submitted that the argument that disclosure was not relevant because the documents have already been discovered, cannot be sustained. Finally he submitted that the fraud proceedings had not been pursued for the purpose of delay.

[49] Mr Moodie advised that it would be obvious from the history of these proceedings and Ms Snowdon's attempts to obtain full, fair and proper disclosure in the grievance proceedings, that she intends to leave no stone unturned to get to the truth of what occurred during her employment with the defendant between 1999 and 2003. He contended that the strength of the plaintiff's evidence is now such that, unless the taint of fraud which her evidence establishes is refuted by the direct inspection of the relevant documentation, this will likely result in further appeals to the higher Courts of Justice and, should it become necessary, the Court of Parliament. Rather than being engaged in an abusive process as alleged by the defendant, the plaintiff and her counsel and advisors are, he submitted, by the fraud proceedings, discharging their obligations to the Court by the very process that has been specifically identified and spelled out by the courts as appropriate to that purpose.

---

[19] *Compagnie Financière et Commerciale du Pacifique v Peruvian Guano Co.,* (1882) 11 QBD 55.
[20] HC, Auckland, CL 15/02, 15 November 2002.

## Conclusion

[50] The difficulty with Mr Moodie's argument is that, if it is accepted, then the fraud proceedings will have been determined by this interlocutory application in the plaintiff's favour in that the discovery judgments will have been set aside. The fraud proceedings are ancillary to the substantive proceedings and, as Mr Moodie submitted, essential in the plaintiff's view to properly determine those proceedings. As the discovery judgments given in the grievance proceedings stand until set aside on proof of fraud, I must accept Mr Quigg's submissions that the interlocutory disclosure sought by the plaintiff cannot be permitted at this stage.

[51] I accept Mr Quigg's submission that because of the discovery judgments the documents now sought in the fraud proceedings are not relevant, as defined in the regulations, because full disclosure has already taken place according to binding decisions of this Court. Further, I consider that the circumstances fall within the specific ground contained in reg 44(3)(c) because, if they are disclosed at this stage, they would be injurious to the public interest in the sanctity of judicial decisions which are binding on the parties.

[52] The public interest in preserving the sanctity and finality of judgments and avoiding proliferation of judgments is stressed in the cases cited above by counsel. There is a public interest in the finality of litigation. Proof of fraud is one of the few exceptions. At this stage, fraud has not been proven and, as was said by Harrison J in *Paper Reclaim*, at paragraph [18]: "There is no room for a provisional or equivocal claim, based on suspicion, to be bolstered by fishing expeditions through the problematical process of interrogatories and discovery." Mr Quigg correctly submitted that is even more apposite in the present case where the very nature of the fraud proceedings and the remedy ultimately sought is to set aside the discovery judgments, a process which cannot be short circuited by unproven allegations at an interlocutory stage. To allow disclosure of the very documents which are at the heart of these fraud proceedings at this stage would be oppressive and an abuse of process. If the disputed allegations of fraud are proven at trial then the plaintiff will have obtained disclosure of the documents she seeks and the discovery judgments which have barred that disclosure will have been set aside.

[53] I am not persuaded that there are special and exceptional circumstances in this case which prevent issue estoppel arising at this interlocutory stage. Mr Moodie relied on the House of Lords decision in *Arnold* which allows for the reopening of an earlier judgment which would otherwise be barred by estoppel. It deals with the nature of special circumstances which may have arisen since the earlier judgment. My reading of the judgments in the *Arnold* case, however, permit the reopening of the earlier judgment when the special circumstances have been proven. The case does not deal with the situation such as the present where there have been allegations and affidavits in support which disclose a prima facie case at a point of time when the strength of that case and the proof of those allegations have not been tested. As I have stated, if the plaintiff is successful in the fraud proceedings this will have resulted in the setting aside of the discovery judgments but at this stage the material the plaintiff has put before the Court has yet to be tested and falls short of actual proof. I accept Mr Moodie's submissions that the newly discovered material raises serious questions which will need to be tried, but until that trial takes place the discovery judgments of Judge Shaw must stand as the final disposition of the disclosure issues between the parties.

[54] This conclusion is consistent with the object provisions in reg 37 that while access to documents is usually necessary for the fair and effective resolution of differences between parties to employment relationships, there are circumstances in which such access is unnecessary or undesirable or both. I consider the present application is an example of this because the plaintiff is trying to avoid the finality of the discovery judgments without having to provide strict proof of fraud.

[55] I also accept Mr Quigg's submission that the matter could be dealt with under s186 of the Employment Relations Act which gives the Court power to control its own procedure and to not allow an abuse of process. To grant the plaintiff the disclosure she seeks at this stage, while there are still extant binding discovery judgments saying that disclosure is complete, would be an abuse of process, unless and until those judgments are set aside for fraud.

[56] The plaintiff's challenge to the defendant's objection to disclosure is dismissed and costs are reserved.

B S Travis
Judge

Judgment signed at 12 noon on 24 February 2010