IN THE EMPLOYMENT COURT
AUCKLAND

[2012] NZEmpC 189
ARC 30/10

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER OF	interlocutory applications on limitations issues
BETWEEN	ROBERT BURNS HAIG Plaintiff
AND	EDGEWATER DEVELOPERS LIMITED First Defendant
AND	CARRINGTON FARMS LIMITED Second Defendant
AND	PH II INCORPORATED Third Defendant

Hearing:	16-18 October 2012 (Heard at Auckland)
Counsel:	Wayne Peters and Joanna Welson, counsel for plaintiff Julian Miles QC and Josh McBride, counsel for defendants
Judgment:	8 November 2012

INTERLOCUTORY JUDGMENT NO 5 OF CHIEF JUDGE G L COLGAN

A The plaintiff's causes of action are struck out as having been brought in breach of the limitation period in s 142 Employment Relations Act 2000.

B The first defendant's counterclaims (except those causes of action in breach of contract for concealment of information) are struck out as having been brought in breach of the limitation period in s 142 Employment Relations Act 2000.

REASONS OF THE COURT

Introduction

[1] All parties say that the claims against them were issued out of time and, therefore, cannot be considered by the Court. Because it is important for parties to know what claims they must defend when they go to trial, these limitations questions have been dealt with as preliminary issues for reasons more fully set out in prior interlocutory judgments.[1]

[2] It has proved difficult at times to avoid hearing evidence about and examining the merits of the plaintiff's claims and the defendants' counterclaims. This judgment takes account of the pleadings supplemented by relevant evidence about dates when the events occurred where these are not referred to expressly in the pleadings.

[3] Counsel for Mr Haig elected not to call his evidence and that of another potential witness. Mr Peters, counsel for the plaintiff, relied on the evidence only of the plaintiff's wife which was, with respect, neutral and unhelpful. Mrs Haig was not cross-examined. The circumstances in which Mr Haig did not give evidence were as follows. On the morning of the second day of the hearing when he was scheduled to give his evidence, Mr Haig was absent from Court, indisposed. The conclusion of the balance of the defendants' case, which was presented first, gave counsel until the morning adjournment to determine what should be done about Mr Haig's evidence. Mr Peters did not take up the offer of an adjournment to allow Mr Haig's evidence to be taken at a later date and, after the morning adjournment, elected not to call the plaintiff.

[4] The other potential witness for the plaintiff not called was Frederick Rossetti. He is resident in the United States of America and was not brought to New Zealand to give evidence. Mr Peters's application that Mr Rossetti's evidence be taken by video conference call was made altogether too late for this to occur, even if it had

[1] [2012] NZEmpC 4; [2012] NZEmpC 87; [2012] NZEmpC 174; [2012] NZEmpC 180.

been allowed, and in these circumstances, Mr Peters also elected, on the second day of the hearing, not to have Mr Rossetti's evidence given to the Court.

[5] Despite the absences of these potential witnesses in the circumstances outlined, the Court has sufficient information from the pleadings and from the evidence-in-chief and cross-examination of Paul Kelly (for the defendant) to determine the limitations issues.

The statutory limitations provision

[6] The parties' causes of action are brought as claims at common law for breach of employment agreements or contracts and are agreed to be subject to s 142 of the Employment Relations Act 2000 (the Act). This provides:

> **142 Limitation period for actions other than personal grievances**
> No action may be commenced in the Authority or the court in relation to an employment relationship problem that is not a personal grievance more than 6 years after the date on which the cause of action arose.

[7] Section 142 of the Employment Relations Act 2000 (s 142 ERA) was new in the sense that it did not have a predecessor provision in the former Employment Contracts Act 1991 which was in force until 1 October 2000. Limitations issues affecting common law proceedings for breaches of employment contracts before that date were governed by the Limitation Act 1950.[2]

[8] Section 142 ERA deals with proceedings in the Employment Court (and the Employment Relations Authority) which are not personal grievances. These latter statutory causes of action have their own detailed limitation provisions contained in s 114 of the Act. Counsel agreed that their clients' causes of action are related to an employment relationship problem. An "employment relationship problem" was a

[2] See, for example, such cases as *Ogilvy & Mather (New Zealand) Ltd v Turner* [1993] 2 ERNZ 799 (CA) at 803 and *Bacon v New Zealand Post Ltd* [2003] 2 ERNZ 570. If, as I find, the plaintiff's causes of action accrued in the 1990s, there is an argument that the Limitation Act 1950 applies to those causes of action, despite the parties' acceptance that s 142 ERA applies. But given the material identity of the former Limitation Act provision and s 142, which provision applies makes no difference to the analysis of the plaintiff's causes of action.

novel description of issues introduced for the first time in New Zealand by the Act. The phrase is defined broadly in s 5 of the Act as meaning:

> **employment relationship problem** includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment

[9] So, too, do other specific causes of action under the Act have separate limitations provisions. Section 135(5) affects claims for penalties.

[10] Both ss 114 and 135(5) take account not only of the accrual of the cause of action but also the claimant's knowledge (actual or imputed) of that state of affairs, in fixing when the limitation period starts to run. Section 142 ERA does not have similar knowledge components and this will be a significant difference when it comes to interpreting and applying it to circumstances in which the parties have relied on actual or imputed knowledge and (in the case of the first defendant) fraudulent concealment of a cause of action by the plaintiff.

A knowledge/imputed knowledge test for limitations?

[11] This is relied on by the first defendant to support its assertion that it filed its counterclaims within the six year limitation period. Whether s 142 ERA can be said to include an additional implied provision of knowledge or imputed knowledge by the claimant is a matter of interpretation of that provision within the context of the Act. I will refer to this expanded test as an 'accrual plus knowledge' limitations test.

[12] Section 142 ERA was enacted in 2000 at a time when limitations generally in contract claims were governed by the Limitation Act 1950. There was then uncertainty whether s 4 of the 1950 Act (now repealed) included, in addition to subs (1), provision for limitations to begin to run from the point of ascertainment of the accrual of a cause of action by the claimant. Section 4(1) provided materially as follows:

> **4 Limitation of actions of contract and tort, and certain other actions**
>
> (1) Except as otherwise provided in this Act …, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of action accrued, that is to say,—
>
> (a) actions founded on simple contract or on tort:
>
> …

[13] Section 28 of the Limitation Act 1950 under the heading "*Fraud and mistake*" provided materially:

> **28 Postponement of limitation period in case of fraud or mistake**
>
> Where, in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) the action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) the right of action is concealed by the fraud of any such person as aforesaid;
>
> (c) the action is for relief from the consequences of a mistake,—
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:
>
> …

[14] Section 142 ERA is materially identical to s 4(1)(a) of the Limitation Act 1950. The ERA contains no equivalent provision to s 28 of the Limitation Act 1950.

[15] Real and significant doubts about the existence of an accrual plus knowledge or imputed knowledge test under the 1950 Act were resolved by the judgment of the Supreme Court in *Murray v Morel & Co Ltd.*[3] By a majority (Gault J dissenting), the Supreme Court concluded that there was no general principle of law that a cause of action did not accrue for limitations purposes until the elements were discovered or were reasonably discoverable by the claimant if they had accrued more than six years before proceedings were issued. Because of its material identity to the relevant Limitation Act 1950 provisions, the same interpretative conclusion must therefore be reached in respect of s 142 ERA.

[16] The judgments of the Supreme Court in *Murray* prompted Parliament to enact the Limitation Act 2010 which provided for an accrual plus knowledge test in

[3] [2007] NZSC 27, [2007] 3 NZLR 721.

some circumstances.[4] It is, however, common ground that the Limitation Act 2010 does not apply to the plaintiff's claims which were issued before it came into effect or even to the defendants' counterclaims which, although filed in 2011 after the Limitation Act 2010 had come into force, were filed in respect of causes of action that were said to have accrued under the regime of s 142 ERA.

[17] I conclude, therefore, that irrespective of the knowledge or imputed knowledge of the claimants, the causes of action for all claims in this proceeding accrued when the elements necessary for prosecuting them came into existence. They then had the period of six years to issue those proceedings in the Employment Relations Authority. The decision of these preliminary issues is made upon the assumption that the pleaded causes of action and counterclaims (supplemented where necessary by evidence to elucidate them) will be capable of proof at trial. The applications to strike out causes of action on limitations' grounds will be determined accordingly.

Relevant factual background

[18] The following is taken from the parties' latest statements of claim and counterclaim supplemented, where appropriate, by evidence necessary to determine these limitations questions.

[19] The first and second defendants, Edgewater Developers Limited (EDL) and Carrington Farms Limited (CFL), are New Zealand companies. In 1996 their shares were all held by the third defendant, PH II Incorporated (PH II), a United States legal entity, which was the corporate vehicle for the business activities of its owner, Paul Kelly.

[20] In order to develop and sell parts of a Northland resort development known colloquially as "Carrington", PH II purchased EDL and CFL. EDL was the corporate vehicle by which residential sections, a golf course and a country club, were to be developed and, in the case of the sections, sold. CFL was to own and

[4] Limitation Act 2010, s 14.

manage a working farm, vineyard, and winery which were to be part of the development.

[21] In April 1996 EDL engaged Mr Haig as its Chief Executive Officer to be based in New Zealand. The essential terms of his employment contract are set out in a letter of 2 April 1996 under the combined letterheads of PH II and EDL, written and signed by Jeffrey Gaynor, who was the Chairman of Directors of EDL. In Mr Gaynor's letter of 2 April 1996, there was brief mention of one element of Mr Haig's remuneration package, shareholdings in EDL and CFL. That mention was cryptic: "… as previously discussed, you will be offered an equity investment interest equivalent to 15%."

[22] By letter dated 4 June 1996, Mr Kelly wrote to Mr Haig on PH II letterhead, signing himself as "President" of that company, setting out more detail of the offer of the equity investment referred in the 2 April 1996 letter. Mr Kelly did so effectively as the owner of EDL via PH II, and as EDL's agent. There is no disagreement between the parties that, together, the letters of 2 April and 4 June 1996 set out the express shareholding terms of Mr Haig's 1996 employment contract.

[23] The material parts of Mr Kelly's letter of 4 June 1996 are important to the determination of these issues and I set them out as follows:

> Jeff's letter [Mr Gaynor's letter of 2 April 1996] pretty well covers the basic terms of your employment, including salary and benefits. The letter also mentions that you will be offered an equity investment interest equivalent to 15%. This 15% interest applies to both Carrington Farms, Ltd. and Edgewater Developers, Ltd. As agreed, you will pay the same price for 10% of your equity interest as PH II has paid, i.e., the same proportional purchase price, plus related closing costs (legal fees, filing fees, etc.). The other 5% equity interest will be awarded to you as an incentive based upon your agreement to oversee the New Zealand project for a period of at least three years. While your 5% equity interest will automatically vest in full three years from the date of the start of your employment, you will also be entitled to your share of any distributions made by either Carrington Farms, Ltd. or Edgewater Developers, Ltd. during your employment prior to the end of the three-year vesting period. In other words, as an employee in good standing, you will be entitled to your [pro rata] share of any distributions made by either company from the date of your employment. The payment for your 10% interest is due, but we will keep it open for the remainder of this year without any interest charge to you. If there is any amount outstanding at the end of this year, we will establish a fair interest rate, to be payable going forward on the unpaid balance.

[24] Important aspects of these elements of Mr Haig's reward package were therefore as follows:

- As regards the 10 per cent shareholdings in each of EDL and CFL, Mr Haig was to pay for these the same price as PH II had paid for those shares including what were described as "closing costs", effectively the fees and disbursements incurred in purchasing the shares.

- Payment for these 10 per cent shareholdings by Mr Haig was due in June 1996 but he had the balance of that calendar year within which to do so without incurring any interest charges or other penalty.

- If there was any amount of the purchase price outstanding at the end of the 1996 year, the parties would establish a fair interest rate to be paid by Mr Haig on the unpaid balance.

- There was, therefore, no specified date by which the purchase price had to be paid for these shareholdings although it was expected that this would be by the end of 1996 and the arrangements provided incentives for that.

- As regards the five per cent shareholdings in the companies, which the parties described as Mr Haig's "sweat equity", this was a reward or incentive for his efforts in establishing the development, in some respects (but not all) akin to a traditional bonus payment for performance.

- Mr Haig's entitlement to five per cent of the shareholdings of EDL and CFL was to vest automatically after he had been employed overseeing the project for a period of at least three years.

- Added to the five per cent "sweat equity" shareholding would be an entitlement to a share of any distributions made by either of the

companies during that three year period so long as Mr Haig was "an employee in good standing".

[25] Mr Haig claims, and the defendants agree, that he was employed only by EDL. He was a director of CFL at relevant times but he has not claimed in his statement of claim to be an employee of that company and there is no suggestion at all that he was an employee of PH II or any other relevant entity. The defendants have admitted his employment by EDL but have asserted that he was not an employee of the other companies.

[26] Although it is probable, in terms of New Zealand employment law, that Mr Haig became an employee of EDL in early April 1996, there is no doubt that he had that status by mid-July 1996. For the purposes of determining limitations, that is the most advantageous date for him which I will use for the purpose of this judgment.

[27] In July 1998 Mr Kelly confirmed, in a letter intended to be used by Mr Haig in support of his application for New Zealand citizenship, that Mr Haig "… has a 15% equity interest in both Carrington Farms Ltd. and Edgewater Developers Ltd." At the same time, Mr Kelly as agent for EDL, attempted to persuade Mr Haig to agree to a variation of the shareholding arrangements, probably because, after more than two years, Mr Haig had not yet paid for his 10 per cent shareholdings. However, Mr Haig did not agree to this variation by executing a form of 'Demand Promissory Note' that Mr Kelly prepared and sent to him. Mr Kelly's proposal was that the promissory note would have permitted Mr Haig:

> … to become immediately the equity owner of record of 10% of the shares of Edgewater Developers and Carrington Farms which, together with the 5% "sweat equity" interest you are receiving, will equal 15% of the equity of the combined enterprises.

[28] The form of promissory note would have bound Mr Haig to pay to PH II the amount of US$197,536.18 for his 10 per cent (equity) shareholding interests in EDL and CFL. The proposed note was to bear interest at the rate of nine per cent per year from its execution until payment was made in full. Mr Kelly wished the arrangement to be governed by the laws of the State of Connecticut in the United States of America.

[29] For reasons that need not be explored for limitations purposes, Mr Haig did not execute the promissory note, so that the 1996 terms and conditions of his shareholding reward arrangements remained in effect.

[30] About a month later, in August 1998, Mr Kelly made another attempt to change those shareholding interest arrangements with Mr Haig. The parties' disagreement as to who instigated these proposed changes, and why, is not necessary to address or resolve for limitations purposes. By a handwritten facsimile cover sheet under PH II letterhead, Mr Kelly advised Mr Haig on 17 August 1998 that he proposed to send him a new agreement which would be with PH II and would operate until August 2001.

[31] The formal proposal came in the form of a letter dated 24 August 1998 under PH II letterhead and to which Mr Kelly invited Mr Haig to agree by affixing the latter's signature. There were a number of changes proposed by Mr Kelly to affect Mr Haig's shareholding entitlements.

[32] First, his 10 per cent equity interests were to be in United States companies named Edgewater Corp. and Carrington Holdings, Inc. which, by then, had been formed to sit in the corporate structure between PH II, EDL and CFL, and whose only functions were to hold all of the shares in EDL and CFL, a function previously undertaken by PH II. Again it is unnecessary for the purpose of this limitations judgment to set out the reasons for that change. It is sufficient to note that Mr Kelly's proposal was that there would be a 10 per cent shareholding in two United States companies rather than in their two New Zealand namesakes.

[33] Next, Mr Kelly proposed that the previous entitlements to 10 per cent shareholdings would henceforth be "an option, expiring August 24, 2001" to acquire 10 per cent of the shares of each of the United States companies. The price of the option would be $1 and Mr Kelly's letter of 24 August 1998 set out a formula for establishing the "strike price". This was said to eliminate the interest being payable by Mr Haig to acquire these equity interests and it was said this would save him a significant amount of interest payable to PH II to finance his equity interests before actually paying for them.

[34] At this time Mr Kelly also proposed changes to the five per cent "sweat equity" interests. These would also include that they were to be in the United States companies Edgewater Corp. and Carrington Holdings, Inc. The previous automatic entitlement to these shareholdings in the New Zealand companies would also be changed to a perpetual $1 option to acquire these shareholdings at the value paid by PH II and again there were further detailed formulae for the calculation of a purchase price for what had previously been solely a reward for service.

[35] Yet again it is unnecessary to recite the other detail of Mr Kelly's proposal because Mr Haig declined to agree to these variations by not signing and returning the 24 August 1998 letter which, if signed, would have signified his agreement to those changes.

[36] Less than a year later was the third anniversary of the commencement of Mr Haig's employment with EDL. At the plaintiff's request, because of his concerns about the tax implications of share vesting which was shortly to take place, at least so far as the five per cent entitlement was concerned, Mr Kelly sent Mr Haig another draft agreement dated 1 July 1999 which had already been signed by Mr Kelly. Mr Kelly's handwritten fax cover sheet invited Mr Haig to make some additions to the new draft agreement about his intention to remain as resident manager of the complex. Because the form of proposed agreement was on the letterhead of a new US company (PH II Enterprises, Inc.), Mr Kelly's cover sheet explained that this was a wholly owned subsidiary of PH II and, as owner of the American Edgewater and Carrington companies which, in turn, held shares in the New Zealand companies, was effectively the holder of the combined New Zealand investments. At that time in mid-1999, Mr Kelly had recently established PH II Enterprises, Inc. and inserted this between PH II and the American Edgewater and Carrington companies for investment and taxation reasons.

[37] What the parties know as the "letter agreement" of 1 July 1999 is important and so I set out its relevant contents as follows:

> This letter agreement will confirm our mutual understanding that effective July 1, 1999, you will have an option to acquire from PH II Enterprises, Inc., for a total aggregate purchase price of US$1.00, 10 shares of common stock of Edgewater Corp. and 10 shares of common stock of Carrington Holdings,

> Inc., representing 5% of the 200 issued and outstanding common shares of Edgewater Corp. and Carrington Holdings, Inc., respectively, as of July 1, 1999. This option will be valid for exercise at any time during the period from the effective date, July 1, 1999, through June 30, 2049. This option is also assignable by you at any time to any members of your family who may be designated your heirs and/or beneficiaries.
>
> In addition, effective as of the date of this letter agreement, and for the period ending June 30, 2009, you will have the right to acquire from PH II Enterprises, Inc. 20 shares of common stock of Edgewater Corp. and 20 shares of common stock of Carrington Holdings, Inc., from PH II Enterprises, Inc., for a total aggregate purchase price of US$223,300.00. The foregoing common stock share amounts represent 10% of the 200 issued and outstanding shares of common stock of Edgewater Corp. and Carrington Holdings, Inc., respectively, of July 1, 1999. This option is assignable at any time during the option period to your designated heirs and/or beneficiaries.
>
> This letter agreement represents the full extent of the understanding between PH II Enterprises, Inc., and all of its affiliates, including PH II, Inc. and Paul K. Kelly, and Robert B. Haig in regard to the potential equity participation of Mr. Haig in common stock ownership of Edgewater Corp, and Carrington Holdings, Inc. In addition, this letter agreement supersedes any previous understandings by the aforementioned respective parties in regard to this subject matter. This agreement is subject to the laws of the State of Connecticut.
>
> If the foregoing accurately reflects our mutual understanding, please sign one copy of this letter and return it to me and retain the other signed copy for your files.

[38] Mr Haig signed this "letter agreement" under the words "Agreed and Accepted" and above his printed name, and returned it to Mr Kelly on or about 1 July 1999.

[39] Mr Haig now asserts that he was unaware of the change of the corporate entities in which he would receive a shareholding from EDL and CFL to their American namesakes, Edgewater Corp. and Carrington Holdings, Inc. As well as can be ascertained from a statement of claim that is less than clear in this regard, it also appears that the plaintiff's alternative argument is that he was misled into agreeing to the proposal set out in the 1 July 1999 "letter agreement" by various misrepresentations made to him by Mr Kelly. There is, however, no detail of such misrepresentations that can be discerned from the statement of claim.

[40] Without deciding this issue of liability which will focus on the status and effect of the 1 July 1999 letter, Mr Haig would face significant difficulties, in all the

circumstances, in establishing that he did not agree to and accept Mr Kelly's proposals on a freely informed basis. That is not least because subsequent correspondence from Mr Haig to Mr Kelly requests fulfilment of entitlements in the US companies pursuant to the 1 July 1999 "letter agreement" and generally proceeds on the plaintiff's apparent understanding that its provisions governed his entitlements to shareholdings after that date.

[41] Mr Haig did not take up any shareholdings in any of the companies during the further six years or so of his employment after 1 July 1999 and there is no need to examine dealings between the parties over that period relating to those entitlements for the purposes of determining limitations.

[42] I move now to the counterclaims. In 2003 EDL began to sell residential sections that it owned in the Carrington development. The following are the first defendant's allegations contained in its counterclaim against Mr Haig in respect of which it is largely unnecessary to add evidential information because the pleading sets out more clearly the detail necessary to determine Mr Haig's limitations' defence.

[43] Mr Haig's particular responsibilities in relation to these sales are said to have included:

- determining the current market value of the sections;
- setting the prices at which they would be marketed for sale at a level that accorded with the sections' market value;
- identifying and instructing competent and honest real estate agents to market the sections; and
- ensuring that the best possible price was obtained for the sections.

[44] Mr Haig is said to have engaged Dennis Chan of the Mount Roskill branch of the real estate agency Barfoot & Thompson to market and sell the sections. The first

defendant says that Mr Chan was a dishonest agent who procured the sales of sections to his own friends and associates for less than their market value.

[45] The first defendant says that on 9 October 2003, it instructed Mr Haig to obtain the approval of Mr Kelly as a director of the first defendant to the execution of any sale and purchase agreements for these sections. The first defendant says that in breach of this instruction, and on or about 10 October 2003, Mr Haig (on behalf of EDL) executed an agreement for sale and purchase of 22 separate sections in what was known as the "Virtues subdivision". The first defendant claims that the total undervalue of the 22 simultaneous sales amounted to approximately $2.9 million.

[46] In "late 2003" the first defendant claims that Mr Haig, with the assistance of Mr Chan, produced a schedule of sale prices for other residential sections owned by EDL in another subdivision known as "Bay Heights". It says that Mr Haig presented this schedule of sale prices to EDL for approval on the basis that it represented the current market value of those sections and that the company approved the sale schedule in reliance upon Mr Haig's representation that the prices for the sections were his best estimate of their current value. EDL says that it instructed Mr Haig to sell the properties at or above the scheduled prices but with a discretion to discount the scheduled price by up to 10 per cent if this was necessary to achieve a sale.

[47] Again "in late 2003" EDL says that Mr Chan, engaged by Mr Haig to market the Bay Heights sections, procured a number of purchasers including Mr Chan's friends and associates to whom sections were sold at prices which ranged between 14 per cent and 62 per cent below those scheduled prices.

[48] Finally in this regard, the first defendant says that one other section (known as "Lot 71") was not included by Mr Haig in the price schedule so that EDL was unaware of its existence, although it was sold below value with the other sections.

[49] EDL says that Mr Haig recommended the purchases to it as being the best offers available and the sale and purchase agreements in those terms were signed on behalf of the first defendant on or about 13 November 2003.

[50] EDL claims that Mr Haig knew, at all material times, that Mr Chan was brokering sales to his friends and associates, that these sales were transacted at levels significantly below the properties' true market value, that Lot 71 was not included in the price schedule, and that Mr Chan's friends and associates intended to (and did) resell their properties within a short time and at substantial profits.

[51] EDL claims that, in breach of his obligation to inform his employer of these matters, Mr Haig then nevertheless fraudulently concealed them from it.

[52] The third head of counterclaim relates to the alleged unlawful assignment by Mr Haig of EDL's maintenance contracts on sections sold by it. It alleges that the titles to its residential sections contained covenants which provided that the purchasers would pay an annual maintenance fee of at least $500 (plus GST) to EDL for so long as each section remained unoccupied or unbuilt on. This fee was for grass cutting and rubbish collection on such sections and was to be paid by the purchaser within 30 days of receiving an invoice from EDL.

[53] The first defendant claims that in about March 2003, Mr Haig purported to assign EDL's benefits and obligations under the maintenance covenants to Mr Chan and a business partner, Tony Moore. EDL says that in breach of his obligation to inform his employer of the assignment, Mr Haig failed to do so and then concealed that fact from it. It says it did not authorise the assignment of the maintenance covenants and would not have done so if it had been asked to.

[54] EDL claims that it was not until 24 August 2005 that it discovered these breaches by Mr Haig. In an accrual plus knowledge limitations test, EDL would have had until 25 August 2011 to have brought its counterclaim and therefore did so within time.

[55] The foregoing are said to be breaches by Mr Haig of his implied obligations of fidelity, trust and confidence, and to use reasonable skill and care in his employment. The breaches are said to have been knowingly and fraudulently concealed by Mr Haig from EDL, itself a breach of his obligations of fidelity and trust and the requirement to disclose such business matters to his employer.

[56] EDL says that its complete discovery of the plaintiff's breaches did not occur until 2006 when it became aware that some of the purchasers of the sections were friends and associates of Mr Chan who purchased the sections substantially below market value and then on sold these at significant profits within short timeframes.

[57] EDL seeks damages for its losses attributable to these alleged breaches by the plaintiff with amounts to be quantified more precisely before trial, interest, and costs.

The judgment of the Court of Appeal

[58] Because the plaintiff relies on this to support his position, it is appropriate here to consider the relevant parts of the judgment of the Court of Appeal in *Haig v Edgewater Developers Limited.*[5] That was an appeal against a summary judgment for the defendants in the High Court and which turned also on questions of forum non conveniens. The employment issues were, counsel advised me, identified for the first time in the course of argument in the Court of Appeal. They were both unnecessary for the determination of the appeal and, apparently, not argued comprehensively so that references to them in the judgment of the Court of Appeal are in the nature of observations or obiter dicta.

[59] These matters were addressed at [52] and following of the Court of Appeal judgment. Relevant passages include the following:

> [52] In the 2 April 1996 agreement, it was said that there would be an offer of equity in the New Zealand venture. It is difficult to see this being as other than a term of employment of Mr Haig and thus as creating an obligation on Edgewater Developers Ltd as Mr Haig's employer at the least to ensure that the offer was made, even if it was envisaged that the actual offer would be made by another party. It was thus part of an employment agreement over which the New Zealand courts clearly have jurisdiction.
> …
> [54] It is not clear in what capacity PH II Inc wrote the 4 June 1996 agreement but, as the 2 April 1996 agreement was on its letterhead, it is possible that it was written as agent of Edgewater Developers Ltd or in some sense as a guarantor. If it was writing as a principal, then PH II Inc may well have been in some measure a subsidiary employer of Mr Haig. Whatever the position, the 4 June 1996 agreement cannot be separated from the employment agreement and the offer of the equity interest cannot be characterised as other than a term of an employment agreement, …

[5] [2009] NZCA 390, (2009) 7 NZELR 14.

> [55] Given the involvement of PH II Inc in the employment arrangements between Mr Haig and Edgewater Developers Ltd …, it is clear that PH II Inc is a necessary or proper party to a proceeding properly brought against the New Zealand employer, Edgewater Developers Limited. …
>
> [56] We move now to the 1 July 1999 agreement. As the 4 June 1996 agreement must be seen as part and parcel of the employment relationship, the 1 July 1999 agreement, if indeed it is valid, must have varied the employment agreement.
> …
> [58] With regard to Mr Haig's contention that the 1 July 1999 agreement is unenforceable, we note that parties to an employment agreement are, under s 4 of the Employment Relations Act 2000, subject to an obligation of good faith. Issues of possible breaches of good faith may thus arise, as well as the issue of mistake and possible deceit with regard to the 1 July 1999 agreement. It may even be that the choice of law provision in the 1 July 1999 agreement would not be upheld as a matter of public policy if in fact its effect would be to remove the good faith in employment obligation if the law of Connecticut is applied.
> …

[60] After these observations, the Court of Appeal concluded that it was clear that the New Zealand Courts had jurisdiction, determining the *forum non conveniens* appeal. Then at [60] it held:

> [60] There is a further jurisdictional point, however. If our analysis above is correct, then the claim relates to an employment agreement. If that is so, the claim should have been started in the Employment Relations Authority. The Employment Relations Authority and/or Court would have exclusive jurisdiction to interpret the agreement if that is so: s 214 Employment Relations Act. We do note, however, that Mr Billington acknowledged that the High Court proceedings could be stayed while any matters within the exclusive jurisdiction of the Employment Relations Authority and/or Court were dealt with.

[61] In addressing the summary judgment appeal, the Court of Appeal also referred to the employment aspects of the case at [66] as follows:

> [66] The respondents argue, however, that the summary judgment application was still appropriately granted. In their submission, the New Zealand companies are not parties to the 4 June 1996 agreement and thus are not parties to the agreement relating to Mr Haig's equity share. We do not accept this submission. While the New Zealand companies were not parties to the 4 June 1996 agreement directly, Edgewater Developers Limited is a party to the 2 April 1996 agreement and the two letters are clearly tied together. There is no doubt that it was involved with the employment relationship, although it is unclear whether that was as agent, co-contractor, principal or guarantor. Further, Edgewater Developers Ltd promised in its 2 April 1996 agreement, that an equity share would be offered.

> [67] We accept that the 2 April 1996 agreement does not say that Edgewater Developers Ltd will issue shares but there is no question that it could have fulfilled its obligations in respect of the offer of equity noted in that letter, either by issuing the shares or by arranging with its shareholders to provide them to Mr Haig. The involvement of PH II Inc may well merely have been to assure Mr Haig that the ultimate parent agreed to that occurring and would ensure that the shares were either issued by the New Zealand companies or that they were provided in some other manner to Mr Haig. It is certainly arguable that Edgewater Developers Ltd remains liable under the 2 April 1996 agreement to pay damages if the shares are not provided.
>
> [68] While there is no formal written evidence of any employment relationship with Carrington Farms Ltd, it seems common ground that Mr Haig was the manager of the whole New Zealand venture, including that part owned by Carrington Farms Ltd. Discovery may show that there was an employment relationship between Mr Haig and Carrington Farms Ltd, through the course of dealing (for example apportionment of salary expense between the two New Zealand entities) and thus a direct obligation on Carrington Farms Ltd that mirrored that of Edgewater Developers Ltd.

[62] And again at [69], in rejecting the submission that summary judgment should have been entered against Mr Haig, the Court of Appeal stated:

> [69] … There is no doubt that it [PH II Inc] was involved with the employment relationship, although it is unclear whether that was as agent, co-contractor, principal or guarantor. The 2 April 1996 agreement was on its letterhead and it was the author of the second related 4 June 1996 agreement.

[63] As already noted, Mr Haig issued proceedings in the High Court at Whangarei in June 2006. The defendants obtained a summary judgment against him on 1 August 2008 but the Court of Appeal allowed his appeal in a judgment issued on 7 September 2009 and remitted those proceedings to the High Court. Counsel told me that, apparently for the first time, one of the members of the Court of Appeal (Baragwanath J) raised in argument the issue whether Mr Haig's proceedings were ones in connection with an employment relationship and therefore within the exclusive jurisdiction of the Employment Relations Authority at first instance.

[64] The parties appear to have accepted, or at least acquiesced in, that proposition (which is repeated in the judgment of the Court of Appeal) because the High Court proceedings were subsequently stayed and Mr Haig issued fresh proceedings in the Employment Relations Authority on 4 November 2009.

[65] It was not, however, until 24 June 2011, after the Employment Relations Authority's proceedings had been removed to this Court, that EDL first counterclaimed against Mr Haig. In these circumstances, the plaintiff's claim to strike out the counterclaims against him must be decided on the basis that those proceedings were brought first on 24 June 2011.

Strike-out of plaintiff's claims to shareholdings

[66] Mr Peters identified two legal scenarios upon which these limitations questions are founded. First, he postulated that the 1996 employment agreement between Mr Haig and EDL (the terms of which are set out in the letters of 2 April and 4 June of that year) continues to be a binding agreement which was not superseded before Mr Haig's employment ended in 2005.

[67] Alternatively, Mr Peters theorised that the 1 July 1999 "letter agreement" represents either an enforceable variation to the 1996 agreement or is a new agreement which, from that date, superseded the 1996 agreement and provided for different entitlements to different shareholdings in different legal entities located in a different jurisdiction.

[68] Under the first scenario, Mr Peters had two sub-scenarios. First he submitted that the causes of action accrued in 2005 or 2008 in either of which cases Mr Haig's proceedings issued in the Employment Relations Authority in 2009 were within time. Counsel also submitted that the third defendant, PH II, has been correctly included in the claim for breach of an employment agreement in reliance on the judgment of the Court of Appeal in this case. Mr Peters submitted that the Court of Appeal found that PH II was either a guarantor and/or the agent of the New Zealand companies. In these circumstances, Mr Peters submitted that the share obligations to Mr Haig remain with the original New Zealand companies (EDL and CFL) and the third defendant, PH II.

[69] Mr Peters's second sub-categorisation of the first position was that Mr Haig's causes of action have not even yet accrued so that there can be no question at

all of limitations affecting, let alone barring, his proceedings. I will address subsequently that novel and startling submission.

[70] For limitations purposes, the essence of Mr Haig's claims is set out at para 44 of his first amended statement of claim dated 8 September 2010. His allegations are of breach of his employment agreement with EDL. In this pleading, Mr Haig does not claim to have been employed by the second or third defendants, CFL and PH II respectively. He claims to have held the position of Managing Director of CFL but does not assert that he was in an employment relationship with that company.[6] As for the plaintiff's relationship in law with the third defendant, PH II, Mr Haig's claim is that, at best, PH II being the parent company and controller of the first and second defendants, was their agent, co-ordinator, principal or guarantor. In this, he has adopted the suggestions of the Court of Appeal about Mr Haig's relationship with PH II. It is also common ground that Mr Kelly was effectively the owner and controller of all of these companies and, as it was described at the hearing, "called the shots" for them.

[71] I agree with the defendants' submission that the plaintiff's claim asserts clearly only one employment relationship, that between Mr Haig and EDL. Although a document entitled "Reply to Positive Allegations and Affirmative Defence" (filed by Mr Haig's solicitors on 27 June 2012) claims that Mr Haig had "employment relationships" with all three defendants, that is not the same thing as identifying his employer or even employers. This "Reply" has no status as a pleading under the Employment Court Regulations 2000. It had not been allowed in the Court's timetabling arrangements then in effect.

[72] Mr Haig asserts that the terms and conditions of his employment relevant to his shareholding claims were contained in the two letters (already set out) written to him by PH II's Mr Kelly on 2 April and 4 June 1996. Aside from the contents of these two letters, it appears that there was no compendious written employment contract. For the purposes of this decision, the relevant terms and conditions of his employment, contained in those two 1996 letters, are two shareholding provisions. Together, Mr Haig says these entitled him to receive a 15 per cent shareholding in

[6] Paragraph 3 of the plaintiff's first amended statement of claim.

the first and second defendant companies but which shareholdings the defendants failed or refused to provide him with, in breach of his employment contract.

[73] Mr Haig's claim is, first, for the "sweat equity" shareholding, the plaintiff having fulfilled the conditions for its award being three years' employment with the first defendant. The 1996 agreement shows that he became entitled to this five per cent shareholding in each of the first and second defendant companies in mid-July 1999, that is on the third anniversary of the commencement of his employment by the first defendant.

[74] It follows, therefore, that Mr Haig's cause of action for breach by the defendants of his contractual entitlement to a five per cent equity interest in the first and second defendant companies, accrued upon the defendants' failure or refusal to provide him with this shareholding, as it was obliged contractually to do, as from mid-July 1999.

[75] This cause of action therefore accrued substantially more than six years before his proceedings were issued in the Employment Relations Authority. Even if it might have been said that they were issued when the ill-fated proceedings were filed in the High Court in 2006 (but which I conclude were a nullity to the extent that they may have included claims for breach of an employment contract), those proceedings also would have been filed out of time, in that case by about 10 months.

[76] Second, turning to the 10 per cent shareholding in EDL and CFL claim, Mr Haig alleges that he was entitled contractually to an option to purchase a 10 per cent shareholding in each of the first and second defendants. That was to be for the same price as PH II paid originally for the shares held by it indirectly in those two companies plus what were referred to as "related closing costs", being legal fees associated with the purchase of the shareholdings and other related disbursements.

[77] It may well be, as the defendants say, that the true nature of that 1996 entitlement was not to an option to purchase shares but, following the wording of PH II's letter to Mr Haig of 4 June 1996 upon which the plaintiff relies, that he would "be offered an equity investment interest equivalent to 15%" (including the "sweat

equity"). I have already set out at [24] the payment conditions for the 10 per cent shareholding in each of the companies.

[78] The letter of 1 July 1999 exhibited the defendants' intention to be bound by its terms and, therefore, not by the relevantly different terms and conditions of the 1996 employment agreement. They are very different agreements in many respects. First, the 1 July 1996 agreement limits the period for acquisition of the shares to one ending on 30 June 2009. Next, the entitlement to purchase shares from the employer was altered by the defendants to be a purchase from a new United States corporate entity, PH II Enterprises, Inc. Next, the contractually agreed shareholdings were altered to "20 shares of common stock of Edgewater Corp. and 20 shares of common stock of Carrington Holdings, Inc". These were the new US corporate entities. Next, the plaintiff imposed a purchase price for the shares of US$223,300. Penultimately, the shareholding was valued at the date of 1 July 1999, whereas the 1996 employment contract did not so fix the date of the share valuation. Finally, the new agreement was to be subject to the laws of the State of Connecticut in the United States of America. The 1996 employment agreement contained no such provision and, as the Court of Appeal has determined previously in the High Court proceedings between these parties, was subject to the law of New Zealand.

[79] The plaintiff's amended statement of claim relies solely on the 1996 employment agreement and on Mr Haig's claims to shareholdings in the first and second defendants.

[80] So far as the 10 per cent shareholdings are concerned, from 1 July 1999 and irrespective of whether Mr Haig did or did not agree to a revised shareholding reward regime, the defendants regarded him as so bound and, therefore, disentitled thereafter to the benefits to shareholdings contained in the 1996 agreement. Because the defendants did not provide him with this shareholding before 1 July 1999, Mr Haig lost the opportunity to purchase the shares on the 1996 terms. The defendants were therefore in breach of the 1996 agreement from that date, 1 July 1999, at the latest.

[81] Even if, therefore, the plaintiff is correct that he did not enter into a 1 July 1999 agreement in substitution for the 1996 agreement, the defendants were in breach of that earlier agreement by asserting that their own liability to a shareholding by Mr Haig was on very different terms and conditions as from 1 July 1999. Breach causative of loss in respect of these claims also accrued on or about 1 July 1999 so that this claim was brought in breach of s 142 ERA as well.

[82] For completeness, I need, however, to address Mr Haig's alternative contentions of accrual in 2005 or 2008.

[83] Mr Peters was faced with the strong argument (that I have now upheld) that his client's claim to shareholdings in EDL and CFL can only have arisen under the 1996 employment agreement, and that the parties, by entering into the 1 July 1999 agreement, must be taken to have done so in substitution for the relevant provisions of the 1996 agreement. Counsel was therefore driven to argue that Mr Haig's causes of action under the 1996 agreement did not accrue until 2005 at the earliest, and more probably in 2008. If correct, these accrual dates would mean that the plaintiff's proceedings lodged in the Employment Relations Authority in 2009 were within time.

[84] The plaintiff asserts first that it was not until 2005 that he was advised by the defendants that "the shares" were valueless, so that his cause of action did not accrue until then. Alternatively, Mr Haig claims that in 2008 (more than three years after his employment concluded), he purported to claim entitlement to the shareholdings, the defendants' refusal of which brought about the claims' accrual.

[85] As to Mr Haig's claim that his cause of action accrued in 2005 when he says that he was informed that the shares in the American holding companies had negative book values,[7] I conclude this is misconceived. The advice did not relate to defendants in this proceeding. I agree with counsel for the defendants that although Mr Haig says that the advice concerned the value of shares in 2005, this could only have related to the US companies' shares. Any claim arising from this advice could

[7] See email from Mr Kelly to Mr Haig of 9 June 2005.

only be against the two American Edgewater and Carrington companies (and against PH II Enterprises) but none of those companies is a defendant to this claim.

[86] In any event, discovery of the extent of a loss rather than the occurrence of the loss per se, is not an essential element of the cause of action enabling proceedings to be brought and accrual of the cause of action is not dependent on it. The plaintiff's causes of action did not accrue in 2005.

[87] Alternatively, the plaintiff says that his cause of action accrued in 2008. In this regard he relies on documents 24 and 25 in the common bundle. These are, first, a letter dated 25 August 2008 (written more than three years after the conclusion of his employment) purporting to advise PH II Enterprises, Inc. of the exercise by the plaintiff of an option to purchase from it:

> … ten (10) shares of common stock of Edgewater Corp. and ten (10) shares of common stock of Carrington Holdings, Inc., representing five percent (5%) of the issued and outstanding common shares of each of those companies, in accordance with the letter agreement between PH II Enterprises, Inc. and me dated July 1, 1999.

[88] The response from Mr Kelly was on the letterhead of Edgewater Capital Corp. and Carrington Capital Corp. dated 28 August 2008 refusing Mr Haig's demand.

[89] In final submissions, Mr Peters conceded that Mr Haig's requests of the defendants for the transfer to him of his shareholdings were requests for shareholdings not in the New Zealand first and second defendant companies but in the similarly named US entities which are not the subject of the plaintiff's claims in this proceeding.

[90] It must follow, therefore, that the refusal of a request for shareholdings in other entities on very different terms and conditions (those set out in the 1 July 1999 "letter agreement") could not have been the accrual of the cause of action for breach of contract under the 1996 agreement upon which the plaintiff's proceeding relies. Mr Haig's causes of action did not accrue in 2008.

[91] Finally, as noted in [69], Mr Peters argued that the cause of action has not yet accrued, at least in respect of the 10 per cent shareholdings, because no demand (let alone a refusal in response) has yet been made by Mr Haig for his shareholdings in EDL and CFL, the first and second defendants.

[92] The fallacy of this assertion is clear, if only because of the absurdity of issuing proceedings in 2009 for breach in reliance upon a contract which the plaintiff says, even now more than three years later, has not yet been breached. More fundamentally, however, I conclude that it is not essential to the occurrence of a breach that Mr Haig must have made a formal demand to the shareholdings and this must have been refused by EDL, his employer. Mr Haig's claim to damages for breaches that have, by this alternative account, not yet occurred, does not amount to accrual of his causes of action relied on in his pleadings.

[93] For the foregoing reasons, the alleged breaches of contract relating to the plaintiff's shareholding claims accrued in mid-1999, more than 6 years before he issued his proceedings. I find for the defendants on this issue, that is that the plaintiff's breach of contract causes of action accrued in mid-1999 so that his claims were brought in breach of s 142 ERA.

[94] In his final submissions to the Court (para 10 of the synopsis) Mr Peters sought leave to amend the pleadings if the Court concluded that the 1 July 1999 letter represented a binding variation to the employment agreement. No information about alternative pleadings or a draft amended statement of claim were, however, provided and the matter was otherwise left without more at the conclusion of the hearing. It is difficult to see how amendments to pleadings could deal with this problem for the plaintiff. Any claim made in reliance on the 1 July 1999 agreement would, for example, have to be against different entities. *Forum non conveniens* questions may well arise again, given that the 1 July 1999 "letter agreement" purports to be governed by the law of Connecticut (although this would not determine necessarily the forum question), and none of the defendants would be New Zealand entities. It is very doubtful whether the amendments Mr Peters alluded to would truly be amendments to current proceedings rather than fresh proceedings.

But ultimately, counsel did not advance further what was no more than a suggestion about amendment.

Strike-out of the plaintiff's s 4 (good faith) obligations cause of action

[95] This is the remaining cause of action brought by the plaintiff. I accept the defendants' argument that it is misconceived and barred by s 142 ERA for the following reasons.

[96] It relies on a breach by the defendants of the statutory obligation to act in good faith in an employment relationship and more particularly under s 4(1) of the Act.

[97] Paragraph 40 of the plaintiff's first amended statement of claim of 8 September 2010 asserts that the terms of the parties' employment agreement included "an implied duty of good faith dealings pursuant to s 4 of the Act". This is a reference to s 4 of the Employment Relations Act 2000. It is not possible, however, for the employment agreement entered into in 1996 to have contained an implied duty of good faith based on a statutory requirement that did not come into effect until 2 October 2000. Of course it may be possible for such terms to have been applicable to the 1996 contract to the extent that it continued in force beyond 1 October 2000 as it did, although only from that date to its cessation in July 2005. However, the employment contract provisions being sued on relate to shareholding entitlements which, so far as EDL, CFL and PH II were concerned, ended on 1 July 1999 when EDL committed itself to provide Mr Haig with other shareholdings but before s 4 came into force.

[98] Mr Haig's attempt to realise his claims to shareholdings in EDL and CFL by alleging that they were the subject of breaches of s 4 obligations, must likewise fail.

The first defendant's counterclaim

[99] Mr Haig's limitations defence is to the first defendant's counterclaim against him, set out at paras 46 and following of the second amended statement of defence and counterclaim filed on 2 June 2011. EDL alleges that its causes of action, being

the plaintiff's breaches of his employment contract, accrued on or about 10 October 2003,[8] 13 November 2003 and in about March 2003[9] but are not out of time because s 142 ERA is subject to a fraudulent concealment exception.

[100] EDL's alternative is that its causes of action only accrued in July/August 2005 when Mr Kelly discovered Mr Haig had been selling sections too cheaply and had assigned the maintenance contract to a third party causing loss to EDL.

[101] EDL's counterclaims allege breaches of his employment agreement by Mr Haig and consequential monetary losses to the defendants. EDL claims that it purchased two pieces of subdivided or subdivisible land and that one of Mr Haig's duties as its Chief Executive was to oversee the development and sale of these residential subdivisions. The defendants say that, in that role, Mr Haig was subject to an implied term of his employment agreement that he would act with loyalty and fidelity and in the best interests of the first defendant at all times. Independently, EDL says he was subject to implied terms of trust and confidence, and an implied obligation to use reasonable skill and care in the performance of his role. The first defendant says that the plaintiff breached these obligations in the ways outlined above at [42]-[57].

[102] The first defendant asserts that it only became aware of the breaches of his employment agreement by Mr Haig as a result of a series of events including:

- Mr Haig's cessation of employment with the first defendant in July 2005;

- receipt of information by the first defendant in July 2005 that the price schedules substantially undervalued the properties; and

- receipt of information by Mr Moore on 24 August 2005 and what it says was "the first defendant's discovery in 2006" that some of the purchasers were friends and/or associates of Mr Chan who had purchased their

[8] See para 58 of the defendants' second amended statement of defence and counterclaim.
[9] See para 78 of the defendants' second amended statement of defence and counterclaim.

sections below market value and then sold them at significant profits in short timeframes.

[103] The defendants first filed their counterclaims against Mr Haig on 2 June 2011. These can therefore only include causes of action that accrued after 2 June 2005. Mr Haig's employment ceased on 10 July 2005. There can have been no relevant ongoing employment contract obligations by Mr Haig to EDL after that date. It follows, therefore, that actionable breaches of his employment agreement by Mr Haig relied upon in its claims for damages by the first defendant, must have accrued in the period of about five weeks between 2 June 2005 and 10 July 2005.

[104] Consistently with my decision that s 142 ERA is not an accrual plus knowledge limitation provision, I do not accept the defendants' alternate argument that their cause of action against Mr Haig did not accrue until Mr Kelly's discovery of Mr Haig's 2003 impugned acts and omissions in 2005 or 2006.

[105] However, EDL says that by categorising these concealments as knowing and fraudulent, equitable principle (codified in the Limitation Act) means that a person who knowingly commits a wrong in such circumstances as to make it likely that actions or omissions will not be discovered, cannot rely on a limitations defence to bar the claim.

[106] EDL relies as authority for this proposition of law on the judgment of the High Court of Australia in *Hawkins v Clayton* in which Deane J held:[10]

> It seems to me, however, that the preferable approach is to recognize that it could not have been the legislative intent that the effect of provisions such as s. 14(1) of the *Limitation Act* should be that a cause of action for a wrongful act should be barred by lapse of time during a period in which the wrongful act itself effectively precluded the bringing of proceedings. On that approach, the reference in s. 14(1) of the Act to the cause of action first accruing should be construed as excluding any period during which the wrongful act itself effectively precluded the institution of proceedings.

[107] This approach was approved by the New Zealand Court of Appeal in *S v G*,[11] but this must now be in doubt after the Supreme Court's judgment in *Murray*. Mr

[10] (1988) 164 CLR 539 (HCA) at 591.
[11] [1995] 3 NZLR 681 (CA) at 688.

McBride, in final submissions, referred me to the judgment of the High Court in *Walkers Nurseries Ltd v Carlile Darling*[12] (decided after *Murray*) in which Frater J rejected an argument that the *Hawkins* approach should be applied in a claim for negligence against solicitors, concluding that if the reasonable discoverability test could be not be applied, relying on *Murray*, then *Hawkins* could not be applied either.[13] Mr McBride sought to distinguish *Walkers Nurseries* because this is not a claim in negligence. *Walkers Nurseries* must, however, now be seen as a correct statement of the law in New Zealand in light of *Murray.* *Hawkins* is not applicable in this jurisdiction. So the fact of wrongful act/concealment of it precluded the bringing of proceedings does not assist the first defendant because of *Murray*. The judgment of the Supreme Court concludes that accrual is not about knowledge but the factual question when the cause of action arose. If the Act contained a provision like s 28 of the former Limitation Act which postponed limitation in cases of fraudulent concealment then that may have assisted the defendants. But the Act does not contain such an amelioration of the effect of s 142 and I do not imply one in light of the plain meaning of s 142 ERA and the *Murray* decision.

[108] The first defendant's claims in respect of the alleged breaches relating to the sales of residential properties, were not filed until June 2011, that is substantially more than six years after the cause of action arose. If more is required, Mr Kelly accepted in evidence that the first defendant elected not to bring these claims against Mr Haig in the hope that matters between the parties could be resolved amicably and only brought them by way of counterclaim filed for the first time in mid-2011 when the first defendant concluded that such a resolution of the issues between the parties could not be achieved.

[109] These breach of contract claims by the first defendant relating to section sales were therefore brought out of time and must be dismissed.

[110] EDL's 2006 discovery of on-sales information (the profits made on resales by the purchasers of sections from EDL) were not relevant factors for accrual, even for an accrual plus knowledge test. That information goes to the quantum of loss, not

[12] HC Auckland CIV-1994-441-57, 28 June 2007.
[13] At [60].

liability or the fact of loss. Put another way, all of the constituents necessary to issue breach of contract proceedings existed and were known to the first defendant by November 2003 by its own account. Its six year limitation period began to run from that date.

[111] Different considerations apply, however, to the allegations of breach by concealment referred to above. That is said to be a continuing cause of action which had ceased only with the end of Mr Haig's employment in July 2005.

[112] Except for the allegations of breach by concealment of wrongdoings, all of the other causes of action of EDL in its statement of counterclaim accrued more than six years before that claim was issued on 2 June 2011 and must, therefore be dismissed. It will be only the breach by concealment of wrongdoings, but not the original wrongdoings themselves, that EDL will be entitled to prosecute against Mr Haig. Just what might be the loss to EDL attributable to the concealment but not to the wrongdoing that was concealed, and therefore the measure of any damages for that loss, may be an interesting and challenging question.

An observation on limitations

[113] If s 142 ERA was intended to parallel the now-repealed s 4, Limitation Act 1950 when the former was enacted in 2000, the subsequent judgment of the Supreme Court in *Murray* and Parliament's enactment of the Limitation Act 2010 containing some accrual plus knowledge tests for limitations, means that s 142 is now out of step with limitations provisions elsewhere. That is so, even more pertinently, when ss 114 and 135(5) of the same Act relating to other causes of action arising out of employment relationships are considered. If that is so, I commend to Parliament a reconsideration of the s 142 anomaly.

Where to from here?

[114] None of the plaintiff's claims has survived and only some of the first defendant's counterclaims. When all matters were in issue, the Court had directed a separate trial on liability, largely because of the defendants' contention that the status

and effect of the 1 July 1999 "letter agreement" would determine the plaintiff's claims one way or the other. That position has now changed because the plaintiff's causes of action have been struck out. The only matters to go to trial are those elements of the first defendant's counterclaims that have survived. In these circumstances, it is appropriate to revisit the directions earlier given because any trial on issues of both liability and damages will now be more confined than originally anticipated.

[115] In these circumstances, the Registrar should now arrange a further telephone directions conference with counsel for the parties.

[116] I also reiterate the offer that was extended to the parties in the course of the hearing on limitations last month. The Judge who chaired the earlier judicial settlement conference, which did not resolve these issues, is available to resume that conference if the parties still wish to attempt to settle their proceedings as now modified by this judgment. If that invitation is to be taken up, counsel should approach the Registrar.

[117] I reserve costs on the limitations strike-out applications, noting that all parties have achieved a degree of success on these although, in the case of Mr Haig, this was not absolute.

GL Colgan
Chief Judge

Judgment signed at 9 am on Thursday 8 November 2012