IN THE EMPLOYMENT COURT
AUCKLAND

AC 62/06
AEC 65/01

IN THE MATTER OF	a claim for breach of contract
AND IN THE MATTER OF	an application to strike out pleadings
BETWEEN	MATTHEW SIMON CLARK Plaintiff
AND	NCR (NZ) CORPORATION Defendant

Hearing: 5 October 2006
(Heard at Auckland)

Appearances: Dale Smith, Counsel for Plaintiff
Peter Kiely, Counsel for Defendant

Judgment: 15 November 2006

JUDGMENT OF JUDGE ME PERKINS

Introduction

[1] The plaintiff, Mr Clark, commenced employment with the defendant, NCR, in November 1994 as a support analyst. He was later appointed to the position of sales executive. Under the sales executive position Mr Clark was entitled to remuneration based on incentive targets.

[2] Mr Clark resigned his employment on 1 May 1998. He claims he was not paid for incentive targets reached in the period of four months prior to termination of his employment. The proceedings he has commenced relate to that. The relief variously sought includes payment of money, interest, an account inquiry and costs.

[3] A preliminary issue has arisen under the Limitation Act 1950.

The plaintiff's pleadings

[4] The original statement of claim filed with the Court in October 2001 set out three heads of claim and damages. No cause is specified but it is clearly based on breach of contract.

[5] The plaintiff has delayed advancing his claim. Several case management conferences have been convened. These have resulted in the plaintiff filing an amended statement of claim on 16 June 2006. A *"Fourth Claim"* has now been added, which is based on estoppel.

[6] The fourth claim, which I perceive to be a second cause of action, is based upon the plaintiff's alleged reliance upon a letter of intent, a contract executed after he resigned employment, and a statement by his then supervisor. The representation by the supervisor is alleged to have promised payment of part or all of the sums claimed under the previous three claims. There is uncertainty as to remedies claimed under the fourth claim as no prayer for relief attaches to it. In addition a schedule is referred to in the body of the amended statement of claim but is not annexed. The plaintiff alleges that in reliance upon the statement by the supervisor he resigned his position. He alleges he acted to his detriment if he is not entitled to the payments, as he would have resigned at a later date if the representation was not made, thereby earning and receiving the incentive payments claimed.

The present application

[7] NCR has filed a statement of defence in response to the amended statement of claim. Specifically pleaded is expiration of the fourth claim by virtue of s4 of the Limitation Act 1950. NCR has applied for an order striking out the fourth claim. The grounds for the application are that the fourth claim is clearly untenable and cannot succeed, is frivolous and an abuse of process. NCR does not rely on any evidence in support of its application.

[8] A notice of opposition to the application has been filed by Mr Clark. The day prior to the hearing, counsel for the plaintiff filed an affidavit in support of the notice of opposition. Counsel for the defendant opposes the reading of this affidavit as it was filed out of time in breach of His Honour Chief Judge Colgan's directions. I heard argument on this issue in advance of the hearing of the defendant's application

and reserved my decision to be considered along with the strike-out application. I have decided to allow the affidavit to be read. For reasons advanced in this judgment I do not consider the affidavit alters my findings but has provided some useful background information.

[9] The application relies upon ss104(1)(h), 121 and 140(d) of the Employment Contracts Act 1991. The substantive proceedings have been commenced under that Act. Rules 186 and 187 of the High Court Rules and the inherent jurisdiction of the Court are also relied upon.

[10] Dealing in turn with the sections relied upon (I shall deal with the High Court Rules later in this judgment), s104(1)(h) of the Employment Contracts Act 1991 provides:

> *…The Court shall have jurisdiction-*
>
> …
>
> *(h) Subject to subsection (2) of this section, to make in any proceedings founded on or relating to an employment contract any order that the High Court or a District Court may make under any enactment or rule of law relating to contracts:*
>
> …

[11] This raises the issue, of course, as to whether a cause based on equitable remedies such as estoppel is in any event within the jurisdiction of the Court. However, while the fourth claim in this case might not if separately and discretely pleaded come within jurisdiction, when it is combined with the relief sought for breach of contract as it is in this case, jurisdiction is preserved. In reaching this view I consider also that the cause is covered by ss104(1)(f) and (g) which read:

> *(f) To hear and determine any question connected with any employment contract which arises in the course of any proceedings properly brought before the Court:*
>
> *(g) To hear and determine any action founded on an employment contract:*

[12] As it turns out, by virtue of the manner in which the pleading has been argued before me, it is now uncertain that the plaintiff intends to regard the pleading as a separate cause. Nevertheless, in view of how closely the cause is argued and

connected to the contractual cause, I consider I have jurisdiction to deal with it. The question in issue is connected with an employment contract and founded on it.

[13] Section 121 deals with frivolous cases and reads:

> *The Court may at any time dismiss any matter before it which it thinks frivolous or trivial; and in any such case the order of the Court may be limited to an order on the party bringing the matter before the Court for payment of costs and expenses.*

This was argued very much as a secondary position by the defendant. The same considerations of limitation apply. In view of my findings there is no need to develop this argument further.

[14] Section 140(d) appears to be a general catch-all provision as to procedural issues arising during the course of proceedings. It is debatable whether it covers the power to strike out pleadings: *Dickson's Service Centre Ltd v Noel* [1998] 3 ERNZ 534.

Jurisdiction to strike out pleading

[15] The Employment Contracts Act 1991 contains no specific provision giving the Court jurisdiction to strike out a pleading before it. The Act contemplated that the Employment Court would promulgate its own procedural rules (s130 ECA). However, that never eventuated.

[16] Despite this the Employment Court, when governed by the Employment Contracts Act 1991, assumed in numerous cases a jurisdiction to deal with procedural pleading matters similar to that raised in the present case. In exercising that jurisdiction it referred to and adopted analogous High Court Rules and the principles applying to them. The jurisdiction to do so was confirmed specifically in *Lloyd v Museum of New Zealand Te Papa Tongarewa* [2002] 2 ERNZ 356, 358. This was a case arising under the Employment Relations Act 2000. By inference it dealt with the Court's jurisdiction under the previous legislation. That case referred in turn to the Court of Appeal's decision in *Auckland Regional Services Trust v Lark* [1994] 2 ERNZ 135 in which that Court clearly confirmed such jurisdiction of the Employment Court under the ECA when stating (p138, 139):

> *The purpose of joinder rules is to secure the determination of all disputes relating to the same subject-matter without the delay and expense of*

separate proceedings. The general test is whether the proposed party will be directly affected by any order which may be made in the proceedings and the general rule is that it is for the plaintiff to decide who he or she will sue and for any person named as defendant to take striking-out proceedings if it is considered by them that there is no arguable cause of action.

…

*It is well settled that the High Court has an inherent jurisdiction to set aside a consent order if the interests of justice require it but good ground must be established to warrant that course (*Huddersfield Banking Co Ltd v Henry Lister & Son Ltd *[1985] 2 Ch 273;* Waitemata CC v MacKenzie *[1988] 2 NZLR 242; and* Phillips v Phillips *(1993) 10 FRNZ 110). And the broad jurisdiction of the Employment Court under ss 104 and 140 must give it appropriate powers in respect of the processes of that Court.*

[17] It is unnecessary in view of this authority to resort to any inherent power. I therefore accept Mr Kiely's submission that I have jurisdiction to strike out the plaintiff's pleading. I further consider that in considering the application, I may refer to the very same principles adopted by the High Court under its Rules.

The principles to be applied

[18] As stated earlier, the appropriate High Court Rules are rr186 and 187 which provide, so far as is relevant to the present discussion, as follows:

186 Striking out pleading

Without prejudice to the inherent jurisdiction of the Court in that regard, where a pleading –

(a) Discloses no reasonable cause of action or defence or other case appropriate to the nature of the pleading; or

(b) Is likely to cause prejudice, embarrassment, or delay in the proceeding: or

(c) Is otherwise an abuse of the process of the Court,-

the Court may at any stage of the proceeding, on such terms as it thinks fit, order that the whole or any part of the pleading be struck out.

187 Filing of amended pleading

(1) Subject to subclauses (2) and (5), any party may at any time before trial file an amended pleading and serve a copy thereof on the other party or parties.

*(2) After **[**the setting down date for a proceeding**]**, an amended pleading may be filed only with the leave of the Court.*

(3) An amended pleading may introduce-

(a) A fresh cause of action which is not statute barred; or

(b) A fresh ground of defence,-

whether as an alternative or not.

> *(4)* *Subject to subclause (5), an amended pleading may introduce a fresh cause of action whether or not that cause of action has arisen since the filing of the statement of claim.*
>
> *(5)* *Where a cause of action has arisen since the filing of the statement of claim, that cause of action may be added only by the leave of the Court and shall, if that leave is granted, have effect from the date of the filing of the application for leave to introduce that cause of action.*
>
> …

[19] These rules of course have been the subject of numerous decisions in this Court as well as the courts of general civil jurisdiction. The principles to be adopted are well established. A Labour Court authority referred to by Mr Kiely in his submissions, *NZ (with exceptions) Shipwrights etc Union v NZ Amalgamated Engineering etc IUOW & Anor* [1989] 3 NZILR 284, in turn referred to a decision of the Court of Appeal in *Teletax Consultants Ltd v Williams* [1989] 1 NZLR 698 (CA). Mr Kiely set out a useful summary quoted from a well known portion of Chief Judge Goddard's decision in the abovementioned Labour Court decision at p289:

> *(1)* *The question to be assessed is whether it has been demonstrated that the case pleaded is so clearly untenable that it cannot possibly succeed.*
>
> *(2)* *The jurisdiction is to be exercised sparingly and only in a clear case where the Court is satisfied that it can reach a definite and certain conclusion.*
>
> *(3)* *It is not a valid criticism of an application to strike out that extensive and complex argument and even evidence is necessary to demonstrate that the case is clear enough for the Court to exercise its summary powers of striking out.*
>
> *(4)* *The Court will not strike out a proceeding if, on the way to doing so, it has to decide disputed questions of fact.*
>
> *(5)* *Even if jurisdiction exists and the absence of a tenable case is established, the Court has a residual discretion to decline the application if the justice of the case so requires, but that discretion will not often be exercised if the Court has been able to form a clear view of the case.*

[20] Another passage not quoted but containing an equally important principle, appears on p288 of Judge Goddard's decision:

> *For an application to strike out to succeed, it must be apparent that on the facts alleged there can be no possible legal basis for the proceeding or cause*

> *of action relied upon. The technique is to approach the application to strike out on the footing that the applicant or plaintiff will be able to prove at the hearing every material allegation of fact contained in the Statement of Claim. If, on that basis, there is a cause of action then there is no room for the exercise of the Court's jurisdiction to strike out the proceedings or the cause of action.*

[21] In dealing with an application to strike out a pleading, it is always appropriate to consider whether it might, if held defective, be rectified by an amended pleading: *Marshall Futures Ltd v Marshall* [1992] 1 NZLR 316. That is a consideration to be made in the present case.

Consideration of counsel's submissions

[22] The primary submission of the defendant is that the fourth claim introduces a fresh cause of action. As such, it has been added to the pleadings outside the six year limitation period. That defence has been pleaded and therefore the defendant is entitled to submit the pleading is untenable and cannot possibly succeed.

[23] In answer to the submissions of Ms Smith, counsel for the plaintiff, that the cause, if that is what it is, is equitable and not subject to limitation, Mr Kiely submitted that s4(9) of the Limitation Act 1950 applies. The six year limitation may be applied to the equitable cause by analogy.

[24] As ancillary arguments the defendant relies upon the power of the Court to dismiss frivolous cases (s121 Employment Contracts Act) and if laches applies, the plaintiff has failed to prosecute in a timely manner. It needs to be said of Mr Kiely's submission that he does not accept laches applies in the context of a legal claim in contract. However, he submitted if the plaintiff is intent on relying upon an equitable claim at this stage, then it is equally pertinent to argue that the equitable doctrine of laches may be applied to it.

[25] So far as the issue of overall justice is concerned, Mr Kiely submitted that the strike-out is in the interests of justice. In support of this argument, he raised the following four matters:

> a. *The delay is extreme, being in excess of eight years. This is not a case of a short delay in which case the interests of justice may weigh against a striking out.*

b. *The delay is not due to the availability [of] new evidence; the plaintiff's counsel has accepted that the facts of which the Fourth Claim is based have been known virtually from the outset.*

c. *The plaintiff has not prosecuted his claim with any efficiency.*

d. *At no stage has the plaintiff indicated that any further particulars were being sought of the defendant's pleading. Indeed, even at the most recent call over, counsel for the plaintiff confirmed that there were no outstanding interlocutory matters.*

[26] In support of the opposition to the strike-out application the submissions, some in the alternative, of Ms Smith on behalf of the plaintiff can be summarised as follows:

(a) The pleading does not endeavour to introduce a new cause but is in reality a form of reply to the statement of defence.

(b) The cause or, rather, the reply arises from the defendant's denial that the sales in question are to be included in the plaintiff's remuneration.

(c) The response by way of pleading in estoppel simply formalises the position between the parties, which had been the subject of correspondence between them soon after resignation. (Hence the application for leave to adduce evidence by affidavit).

(d) This is further confirmed by the fact that the fourth claim contains no prayer for relief or remedy.

(e) Estoppel is in any event by its nature a defence.

(f) If it is pleaded as a cause of action, the cause is equitable and limitation does not apply. The analogy principle in s4(9) of the Act does not apply as there is insufficient similarity between the estoppel pleaded and the causes in the contract.

(g) There is no authority where an analogy of the kind argued by the defendant between estoppel and contract has been drawn.

(h) The analogy rule is not a strict application in any event, which leaves the Court with a discretion to be exercised in this case in the interests of justice in favour of the pleading being allowed to remain.

(i) Again as a matter of overall justice, if the plaintiff were prevented from raising estoppel it would suffer serious prejudice whereas the defendant would not if the pleading remained.

[27] It needs to be said, of course, that if it is to be argued that there is insufficient similarity between the estoppel pleaded and the causes in contract, then I am left in a somewhat awkward position in that the Court may not have jurisdiction to deal with a separate cause based on estoppel. This is by virtue of the fact that, as I have already discussed, its jurisdiction is, with certain statutory exceptions, limited to that founded on an employment contract. However, I have already held, the equitable cause is intrinsically linked with the contractual claims and therein lies resolution of the dispute on limitation.

Limitation – equity following law

[28] This issue first arose from the speech of Lord Westbury in *Knox v Gye* (1872) LR 5 HL 656 (HL) 674:

> *[W]here the remedy in Equity is correspondent to the remedy at Law, and the latter is subject to a limit in point of time by the Statute of Limitations, a Court of Equity acts by analogy to the statute, and imposes on the remedy it affords the same limitation.*

[29] The rule enunciated by Lord Westbury has been preserved by s4(9) of the Limitation Act 1950:

> *This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any provision thereof may be applied by the Court by analogy in like manner as the corresponding enactment repealed or amended by this Act, or ceasing to have effect by virtue of this Act, has heretofore been applied.*

[30] The issue is not without debate between common law countries particularly where drawing the analogy between tortious claims and claims to breach of fiduciary duty in the context of damages for sexual abuse. For instance, the Supreme Court of Canada has been more reticent about application by analogy between tort and breach

of fiduciary duty claims: *K (M) v H (M)* (1992) 96 DLR (4th) 289 (SCC). In New Zealand the point has been the subject of consideration over recent times, particularly when dealing with breach of fiduciary duty claims in the context of sexual abuse cases. There has been some disagreement between the Judges of our own Court of Appeal. This is particularly demonstrated by the dissenting judgment of Thomas J in *M v H* (1999) 18 FRNZ 359. Thomas J gave a judgment concurring with the majority in *S v G* [1995] 3 NZLR 681 but in that case also reasoned his decision more in accord with the Supreme Court of Canada than the other majority Judges and certainly the majority in *M v H*. Those cases involved difficult philosophical and moral issues for the Court as did the case before the Supreme Court of Canada. However, the following statement from the decision of Gault J in *M v H*, in dealing with the limitation issues arising between common law tortious remedies and breach of fiduciary duty set a threshold beneath which issues involving purely commercial considerations can be more easily resolved:

> *[11] The arguments against the availability of limitation defences in claims seeking redress for child sexual abuse where the destructive consequences impact over a lifetime were forcefully assembled by La Forest J in* M v M *and need not be repeated. But it is not for the Courts to rewrite the law of limitation to meet the needs of this particular type of claim. Distortion of existing causes of action and disregard for the existing law of limitation cannot be justified. Even bearing in mind the need for care with cases where the acts of abuse are to be disputed, the desirability of an appropriate sui generis cause of action with an approach to limitation sensitive to the nature of such claims is patent. The added trauma involved in establishing the entitlement to sue, if such actions are to be available, surely is to be avoided.*
>
> *[12] Until changes are made by the Legislature we must proceed in a principled away, as we endeavoured to do in* S v G. *That was the approach taken by Doogue J in the judgment under appeal.*

[31] If a strict line on limitation is taken when treating breach of fiduciary duty as analogous to tort with difficult issues such as were before the Court of Appeal in these cases, then even more so can it be argued that the analogy applies between contract and estoppel in the case now before me.

[32] Two decisions involving similar considerations are the relatively more recent decision of *Simpson v Elliott* unreported, Paterson J, High Court, Auckland, 14 March 2001, CP 54/99 and *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525. The starting points adopted by Paterson J in *Simpson* and Tipping J in *Matai Industries* as

to the proper application of s4(9) were the statements in the texts. In both decisions the following passage from *Spry on Equitable Remedies* (3rd ed, 1984) was discussed:

> *Hence it must be seen first whether there is a special statutory provision that affects directly, whether expressly or by implication, the particular equitable right that is in question. But even if there is not such provision, the court may decide that the material equitable right is so similar to legal rights to which a limitation period is applicable that that limitation period should be applied to it also. In this latter case the limitation period is said to be applied by analogy, and the principles that govern cases of this kind are that if there is a sufficiently close similarity between the exclusive equitable right in question and legal rights to which the statutory provision applies a court of equity will ordinarily act upon it by analogy but that it will so act only if there is nothing in the particular circumstances of the case that renders it unjust to do so. What is regarded by courts of equity as a sufficiently close similarity for this purpose involves a question of degree, and reference must be made to the relevant authorities. The basis of these principles is that, in the absence of special circumstances rendering this position unjust, the relevant equitable rules should accord with comparable legal rules.*

[33] Similar statements from *Halsbury's Laws of England* (4th ed) para 1485 were used by Tipping J in *Matai Industries.* The passage he applied reads:

> *In certain cases the Limitation Act 1939 applies expressly to equitable claims, as in the case of equitable claims to land; and a court of equity, of course, acts in obedience to the statutes, and applies, in regard to such claims, the express bar of the statute. Moreover, when claims are made in equity which are not, as regards equitable proceedings, the subject of any express statutory bar, but the equitable proceedings correspond to a remedy at law in respect of the same matter which is subject to a statutory bar, a court of equity, in the absence of fraud or other special circumstances, adopts, by way of analogy, the same limitation for the equitable claim.*

[34] In *Simpson,* after analysing the nature of the concurrent causes, Paterson J held that the equitable cause did not have a sufficiently close similarity to any tortious cause to allow the Court to apply s4(9) of the Limitation Act. He therefore upheld the Master's earlier decision in that case not to strike out the statement of claim. That case involved similar thorny issues to those which caused such dissension in *M v H*. However, in reaching the decision that there was insufficient nexus to apply the analogy, Paterson J deferred until trial the need to delve into the more difficult considerations before the Court in *M v H, S v G* and *K(M) v H(M)* as to when the cause accrued or whether the cause was in any event available.

[35] Tipping J's analysis in *Matai Industries* is set out at p544 in the following paragraphs:

> *It is apparent from an examination of Matai's statement of claim that its second cause of action against the receiver, the equitable cause of action based on breach of fiduciary duty, is exactly coincident with part of the first cause of action at law in respect of the negligent conduct of the receivership. For example, in para 40 of the statement of claim the plaintiff repeats paras 1 to 18 inter alia and in para 43 the allegation is that the losses included are the very same losses which are said to have been caused by the negligent conduct by the receiver of the receivership. No specific money sum is claimed on this equitable cause of action but an inquiry as to damages. That is identical to the relief sought on the first cause of action against the receiver.*
>
> *Although the point was not made for the plaintiff it might have been possible to contend that the actual content of the duty asserted in the second cause of action is different from that asserted in the first. In the first the receiver is accused of negligence in his conduct in a number of ways. In the second the duty is said to have been not to permit the conduct of the receivership to be directed, dictated or influenced by the other defendants.*
>
> *In view of the way however in which the essential allegations are framed and the exact identity of the loss claimed on both causes of action, albeit that further losses are encompassed in the second cause of action, this seems to me to be a case where in substance the plaintiff is endeavouring to put the same essential allegations on two different bases, one at law in negligence and the other in equity by asserting breaches of fiduciary duty. He who seeks equity must do equity and it would seem to me to be highly inequitable that with this degree of correspondence a plaintiff in equity could circumvent the barring of his cause of action at law.*
>
> *As Mr Forbes acknowledged, any limitation defence by analogy in equity must be subject to questions of concealment by fraud and the overall assessment of the Court of the equities of the situation. …*

[36] Tipping J then went on to consider the application of the doctrine of laches even though not required to do so. He held that whereas to fully consider the issue it should be reserved until after trial, he doubted whether the strike-out could have succeeded under the general doctrine of laches. This is a different approach from that adopted in the following passage from *S v G* (p681):

> *In neither of these cases did any question of limitation arise so the fact that the cause of action in negligence might be barred by the Limitation Act whereas the equitable claim for breach of fiduciary duty might not was not adverted to (*cf Nocton v Lord Ashburton *[1914] AC 932, 957). However where the pleaded claims are really alternatives in respect of essentially the same conduct there is much to be said for the long-established analogy whereby equity follows the law which was preserved in s 4(9). This was the view expressed by Tipping J in* Matai Industries Ltd v Jensen *[1989] 1 NZLR*

> *525, 542-545 and was assumed in the argument in this Court in* Official Assignee of Collier v Creighton *[1993] 2 NZLR 534, 538. In the present case, even applying that analogy, if the claim in negligence is not barred the same will apply to the claim for breach of fiduciary duty. Further, if the analogy is not employed, the result frequently will be no different because of the application of the equitable doctrine of laches.*

In dealing with sexual abuse cases there may be higher thresholds before the analogy principle in limitation will be applied. The doctrine of laches may therefore become more pertinent. Even before getting to that stage, those cases also had to deal with the very difficult issue of exactly when the cause of action arose in any event.

Conclusion

[37] Applying all of these principles and approaches to the present case, it is clear that the fourth claim in estoppel is so closely connected to the contractual cause or claims that the limitation by analogy should apply. The pleading itself is expressly an alternative to the contractual causes. It is pleaded as a cause of action and could not be interpreted as a reply in its present format. Indeed it is pleaded as not being relied upon unless the contractual causes fail. No separate remedies are pleaded. So identical relief as the other claims is sought. In tone and format the estoppel pleading looks more like allegations of potential variation to the contract itself, particularly in respect of the alleged letter of intent and subsequently executed contract. It is not specified but possible that the letter of intent is the same letter referred to in paragraph 6 of the amended statement of claim.

[38] Estoppel may now be pleaded as a separate cause: *Gold Star Insurance Company Ltd v Gaunt* [1998] 3 NZLR 80 (CA).

[39] I am not prepared to accept that simply because there is no authority where the analogy has been drawn between estoppel and contract that I am precluded from doing so in this case. It is true that in all the cases I have referred to, the analogy has been considered between tortious remedies and equitable relief for breach of fiduciary duty. However, there are many authorities where the analogy has been drawn between various causes including contract: see Meagher, Gummow & Lehane's *Equity Doctrine & Remedies* (4th ed) pp1015-1017. To limit s4(9) in that way would be to unjustifiably limit its application in principle.

[40] I accept that the matter is discretionary and overall issues of justice are applicable. The exercise of the discretion and principles of overall justice form part of the exercise of balancing the matter between the interests of plaintiff and defendant. In this case the delay on the plaintiff's part is substantial. I have decided to allow the affidavit of Suzanne Carol Sumner to be read but in my view it does not advance the plaintiff's position. It discloses that the correspondence, which might justify estoppel as a cause, was well known and available long before any limitation period expired. If anything, it confirms that the plaintiff simply sat on his rights in pleading it. Without being too critical, it seems to me that the cause in estoppel now raised was open and should have been pleaded as a primary cause even at the time the proceedings were first commenced. In this case consideration of overall justice favours the defendant. The limitation rule applying to breach of contract should by analogy be adopted in respect of the equitable claim in estoppel.

[41] For these reasons I hold that the fourth claim in its present form cannot possibly succeed as it is barred by limitation. That is not to say that it never would have been available to the plaintiff. It is just that it is no longer available after this period of time. Like the situation in *Matai Industries* (but unlike *S v G)* and for similar reasons to that case the alternative argument of laches would be unlikely to avail the defendant in this case although Mr Kiely, I appreciate, was careful to submit that he did not rely upon the doctrine in any event.

The Pohlen evidence

[42] Dealing then with the plaintiff's submission that the pleading is not really a separate cause but a reply to the defendant's denial that the contract encompasses entitlement to the sums claimed, it is of course not pleaded in this form. However, even if it were, it seems to me that it would have been an attempt nevertheless to introduce an additional basis of claim under estoppel through the back door. However it may be pleaded, it is an attempt to elevate the statements of the supervisor, Paul Pohlen, into an enforceable alternative to the cause based in contract. I cannot see how any amendment could rectify this problem.

[43] As I have indicated, the pleading under the fourth claim has the trappings more in the form of a variation of contract than estoppel. Simply altering the pleading so that it is one of reply or attempting to argue estoppel as a shield rather than a sword,

does not advance the position. This is not to say that Mr Pohlen's statements are rendered irrelevant. However, the relevance of Mr Pohlen's evidence must be assessed on the basis of how it can be confined within the remaining causes based strictly on interpretation and breach of contract rather than being relied upon separately to form a cause in estoppel. It may well be that Mr Pohlen's evidence casts light on the ambit of the contract. However, that will be for the trial Judge to decide in the context of the entire evidence.

Disposition

[44] In any event the fourth claim is struck out. Having considered the matter, I go further and rule that for the same reasons any attempt to simply redraft the estoppel pleading by way of reply would meet the same fate. As I have already indicated, that would simply be a back door method in this case of introducing an expired separate base of cause from the strictly contractual causes. Any attempt to elevate the alleged representations of the supervisor into a discrete cause separate from the contractual cause however the pleading is drafted cannot now be tenable. What the plaintiff is left with is having to rely solely on the other claims as encompassing entitlements to the relief specifically pleaded.

[45] These proceedings are now ready for trial. Counsel are to submit memoranda containing estimates of days required and proposals for pre-trial timetabling.

Costs

[46] Insofar as costs are concerned I adopt Mr Kiely's submission that costs should be reserved pending the outcome of the substantive proceedings.

ME Perkins
Judge

Judgment signed at 10 am on Wednesday, 15 November 2006

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