IN THE EMPLOYMENT COURT
WELLINGTON

WC 19A/08
WRC 27/08

IN THE MATTER OF	an application for a compliance order
AND IN THE MATTER OF	an application by the defendant for an order striking out the plaintiff's statement of claim
BETWEEN	LYNNE FRANCES SNOWDON Plaintiff
AND	RADIO NEW ZEALAND LIMITED Defendant

Hearing: 12 November 2008
(Heard at Wellington)

Appearances: R A Moodie, Counsel for Plaintiff
M F Quigg and J Bates, Counsel for Defendant

Judgment: 11 December 2008

REASONS FOR ORAL JUDGMENT OF JUDGE B S TRAVIS

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[1] In my oral judgment of 12 November 2008 (WC 19/08) I struck out the plaintiff's compliance proceedings. My reasons for so doing may be summarised as follows:

a) The orders the plaintiff alleged in her statement of claim that the defendant had not complied with, and for which she sought compliance, were the subject of a judgment of the Court which held that they had been complied with. The issues had therefore already

been determined by the Court and were subject to the doctrine of *res judicata*;

b) The notice requiring disclosure, which the plaintiff claimed in these proceedings had not been complied with by the defendant, had been invalidated by a judgment of the Court upholding the defendant's objection to it. This judgment had been the subject of an unsuccessful application by the plaintiff for leave to appeal to the Court of Appeal. The issue was therefore determined between the parties and was subject to *res judicata*;

c) The statement of claim alleged that the defendant had been guilty of fraud and that this vitiated the previous orders and judgments of the Court and should cause them to be set aside, yet the compliance proceedings required the Court to order compliance with those very orders the plaintiff was alleging were invalid;

d) The plaintiff had chosen entirely the wrong proceedings to achieve the results she desired;

e) For all these reasons the plaintiff's proceedings were an abuse of the processes of the Court, embarrassing to the defendant, had caused, and would continue to cause, delay in disposing of the substantive proceedings and were therefore struck out.

The plaintiff's pleadings

[2] Paragraph 1 of the plaintiff's statement of claim in these proceedings stated that the plaintiff sought from the Employment Court the following orders:

(a) *That the defendant comply with the order, determination, direction or requirement of Her Honour Judge Shaw in her decision dated 16th December 2005, (and the 27th March 2006 and 7th December 2006) that the defendant must disclose* all documents in categories

1 to 4…" *in the proceedings WRC 17/04 and WRC 19/05. (@ paragraph 77).*
(Section 139 Employment Relations Act 2000).

(b) *That the defendant comply with the requirements of the Employment Court Regulations 2000 and/or the Notice Requiring Disclosure of the plaintiff served on the defendant dated 7th September 2004 and in particular that the respondent list, disclose and assemble for inspection all documents in it's* possession custody or control relevant to any disputed matter in the proceeding *WRC 17/04 and WRC 19/04 including, but not limited to -*

…

[3] Then followed 12 categories of documentation, much of which had already been disclosed by the defendant and inspected by the plaintiff and her agents, and which formed the basis of voluminous affidavits filed in support of these compliance proceedings. The plaintiff also sought full costs she had incurred subsequent to 7 September 2004 in achieving compliance by the defendant with its discovery obligations, including solicitor/client costs and the costs of forensic accountants and information technology consultants. The plaintiff's statement of claim then invited the Court to strike out the defendant's statement of defence in the substantive proceedings unless there was full compliance within 21 days of the making of the orders she had applied for in the statement of claim. Finally, the statement of claim sought the costs of and incidental to this application.

[4] As part of the particulars of her statement of claim the plaintiff alleged the defendant had not disclosed particular documents, as directed by Judge Shaw in her decision dated 16 December 2005, in the proceedings WRC 17/04 and WRC 19/05, reported as *Snowdon v Radio New Zealand Ltd* [2005] ERNZ 905. The statement of claim then took issue with the way in which disclosure was made by the defendant and alleged the defendant had been involved in a course of conduct prior to and during the course of the substantive proceedings that was calculated and/or intended to conceal covert funding arrangements, financial mismanagement by the board and executives of the defendant and false allegations of financial and resource

mismanagement made against the plaintiff. It then claimed that the defendant had been involved in a deceptive and dishonest course of conduct prior to and during the course of the disclosure process that was calculated and/or intended to, and did, seriously mislead the plaintiff and the Court. For further particulars the statement of claim referred to an annexure, described as *"Append 1"*, which contained 35 pages purporting to summarise the affidavit evidence of David Stuart Vance, Andrew William McMillan and Stephen Paul Foris, filed in support of the proceedings, which were then expressly relied on as providing the particulars to support the very serious allegations the statement of claim made.

[5] The defendant immediately applied to strike out the statement of claim and was therefore not required to file a statement of defence. The defendant has been at pains to point out, however, that the allegations contained in the statement of claim were false, imprecisely pleaded, unsupported by any evidence and would be vigorously defended.

Strike out principles

[6] In support of the strike out application, Mr Quigg cited *Woud v Department of Corrections* [2007] ERNZ 284 which confirmed the Employment Court's jurisdiction to strike out proceedings under regulation 6 of the Employment Court Regulations 2000 and High Court Rule 186.

[7] High Court Rule 186 provides:

> ***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.*

[8] Mr Moodie did not take issue with the Court's strike out jurisdiction, citing *Clark v NCR (NZ) Corporation* [2006] ERNZ 401, which contains a useful summary from the Labour Court judgment *NZ (with exceptions) Shipwrights Union v NZ Amalgamated Engineering IUOW* (1989) ERNZ Sel Cas 516; [1989] 3 NZILR 284, of the applicable principles as follows:

> *(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.*

[9] Mr Moodie also stressed the following important principle from the *Shipwrights* case which was cited in *Clark*:

> *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.* (see para [20] *Clark*)

[10] The Court must also consider whether defective pleadings may be rectified by amended pleadings: *Marshall Futures Ltd (In Liq) v Marshall* [1992] 1 NZLR 316; (1991) 3 PRNZ 200 (HC).

[11] In his 46-page outline of submissions Mr Moodie advised that before the compliance application was set down for hearing it was the intention of the plaintiff to make amendments to the statement of claim presently before the Court. The intended amendments were set out in draft form as an appendix to his submissions. They alleged that the defendant has not disclosed certain relevant documents which were said to have been ordered to have been disclosed in the judgments of Judge Shaw issued on 16 December 2005 and 7 December 2006 (WC 4A/06). These proposed amendments would not have resolved the inherent difficulties in the statement of claim with the doctrine of *res judicata* which led to me to strike out the proceedings.

The defendant's submissions

[12] The defendant's strike out application proceeded on four main grounds. The first was that the Court was not vested with the power to grant the orders sought by the plaintiff in paragraph 1(b) of her statement of claim under s139 of the Employment Relations Act 2000 or by any regulations relied on by the plaintiff. On this basis it was asserted that paragraph 1(b) did not disclose a reasonable cause of action and that this was a proper ground to strike out a proceeding: *Edwards v Wellington Regional Council* [1999] 1 ERNZ 472 (CA).

[13] The second ground, as an alternative, was that the Court had previously held, by the judgment dated 16 December 2005, that the defendant's notice of objection to the plaintiff's notice requiring disclosure should be upheld and the Court of Appeal, by its judgment on 23 June 2006, dismissed the plaintiff's application for leave. On this basis it was submitted the matters were *res judicata* and the pursuit of the relief sought under paragraph 1(b) of the statement of claim was an attempt to re-litigate matters already decided and therefore an abuse of process.

[14] As to paragraph 1(a) of the compliance proceeding, the defendant relied on the judgment of the Employment Court dated 7 December 2006 as finally determining the plaintiff's request for all relevant documentation. This judgment determined that the disclosure previously ordered by the Court had been fulfilled and therefore the pursuit of the orders in paragraph 1(a) by the plaintiff was an abuse of process.

[15] Finally, it was submitted that the plaintiff's compliance proceeding was causing further delay and prejudice to the defendant which wished to have the substantive proceedings determined.

[16] Mr Quigg's submissions dealt first with paragraph 1(b) of the statement of claim, which sought an order that the defendant comply with the Employment Court Regulations 2000 and/or the notice requiring disclosure. He contended that the Court was not vested with power under s139 of the Employment Relations Act 2000 to grant the relief sought. This section empowers the Court to order compliance where any person has not observed or complied with any provision of Part 8 of the Act, dealing with strikes and lockouts, or any order, determination, direction or requirement made or given under the Act by the Court. Mr Moodie relied on regulation 52 which provides:

> ***52 Consequence of failure to comply***
>
> *(1) If any party who is required by any of these regulations, or by any notice given or order made under the authority of any such provision, to disclose any documents, or to produce any documents for the purpose of inspection, fails to comply with any provision of that regulation or with that order, as the case may be, then, without prejudice to the power of the Court to make compliance orders, the Court may make such order as it thinks just.*
>
> *(2) The orders that may be made under subclause (1) include, if default is made by an applicant, an order that the proceeding or action be adjourned pending compliance or, in the event of repeated defaults, dismissed.*

> *(3) The Court may refuse to receive in evidence any documents tendered by a party who is in default under subclause (1).*

[17] Regulation 52 is used to deal with non-compliance with disclosure in the course of a substantive proceeding. I am not aware of it having ever been used as a basis for separate compliance proceedings, as in the present case. Further, it only deals with situations where there has been non-compliance with either a notice requiring disclosure or a Court order made under the regulations. As Mr Quigg demonstrated, the plaintiff's notice has been set aside by an order of the Court, further disclosure was ordered by the Court and there is a subsequent judgment finding that the defendant has complied with its disclosure obligations.

[18] Mr Quigg then dealt with paragraph 1(a) of the statement of claim. He contended the present compliance proceedings were an attempt to re-litigate previous judgments of this Court and of the Court of Appeal. He observed that this was not the first attempt by the plaintiff to revisit the Court's previous rulings, and cited paragraphs in the Court's judgment of 7 December 2006. He submitted that the law does not allow successive attempts to re-litigate matters already decided by a Court, citing as examples *Ongley v Brdjanovic* [1975] 2 NZLR 242 and a line of English authorities including *Hunter v Chief Constable of West Midlands Police* [1982] AC 529; [1981] 3 All ER 727 (HL).

[19] Mr Quigg closely analysed the earlier decisions of this Court dealing with the present parties. He cited from the judgment of the Court of 7 December 2006, which had considered whether the defendant had complied with the Court's earlier orders for disclosure, in the context of an application for further and better disclosure. Judge Shaw had held:

> *[67] I am satisfied that the requests for relevant information made by the plaintiff and previously ordered by the Court have been fulfilled.*

[20] Mr Quigg cited from the *Woud* case where I had applied the doctrine of *res judicata* and had cited *New Brunswick Railway Co v British and French Trust Corporation Ltd* [1939] AC 1 (HL) per Lord Maugham L.C, at pages 19-20:

> *…The doctrine of estoppel is one founded on considerations of justice and good sense. If an issue has been distinctly raised and decided in an action, in which both parties are represented, it is unjust and unreasonable to permit the same issue to be litigated afresh between the same parties or persons claiming under them; . . .*

[21] Mr Moodie's submissions acknowledged that the process of disclosure had resulted in a number of orders and decisions of the Employment Court and the Court of Appeal. In relation to one of the main complaints made on behalf of the plaintiff concerning the provision of data on CD ROMs Mr Moodie, in his submission, stated:

> *21: Complaints to Her Honour Judge Shaw that the five CD ROMS were an indecipherable electronic dump were met with the response from the Court that the defendants had complied with the direction to discover the data and if it couldn't be read that was the plaintiff's problems (See eg paras 46, 52, 53, 58, 61 of Her Honour's 7th December 2006 decision).*

[22] Mr Moodie then attempted to rely on what he claimed was new information that had come to light as a result of the investigation of the CD ROMs. This he contended entitled the plaintiff to further and better discovery. He cited from Judge Shaw's decision of 7 December 2006 in which she held at para [38]: "*The obligation of discovery is a continuing one and in the circumstances such as this where fresh information has come to light it would be unfair and inappropriate to rely on the previous decisions which did not have the benefit of this information.*"

[23] If this allegation is correct, and assuming for the present purposes of the strike out application that it is so, then the plaintiff's proper course of action was to apply for further and better discovery on the basis of this new information. Instead the plaintiff was seeking compliance with orders already made and with a disclosure notice that the Court had already set aside.

[24] Mr Quigg accepted that, in an appropriate case, such a course would be open to a party who could demonstrate that the other party has not complied with its obligations to make full disclosure. This is not the course adopted by the plaintiff in the current proceedings.

[25] Mr Moodie then relied on the allegations of fraud contained in the plaintiff's statement of claim and contended that this fraud had vitiated the disclosure process and the Court hearings already held in the substantive proceedings. He submitted that there was no need for the plaintiff to pursue any action to recall, set aside or rehear any of the Court's earlier judgments, as Mr Quigg had suggested, because fraud cancelled everything. He relied on *Lazarus Estates Ltd v Beasley* [1956] 1 All ER 341 where the Court of Appeal held that a tenant was entitled to raise a defence, outside the statutory prescribed time limit, that a tenancy repair declaration was fraudulent. Denning LJ stated:

> *The landlords argued before us that the declaration could not be challenged in the civil courts at all, even though it was false and fraudulent, and that the landlords can recover and keep the increased rent even though it was obtained by fraud. If this argument is correct, the landlords would profit greatly from their fraud. The increase in rent would pay the fine many times over. I cannot accede to this argument for a moment. No court in this land will allow a person to keep an advantage which he has obtained by fraud. No judgment of a court, no order of a Minister, can be allowed to stand if it has been obtained by fraud. Fraud unravels everything. The court is careful not to find fraud unless it is distinctly pleaded and proved; but once it is proved it vitiates judgments, contracts and all transactions whatsoever…* (p345)

[26] Mr Moodie submitted that this statement of Denning LJ applied to the present case where, he alleged, the defendant had obtained a number of favourable decisions as a result of a covert course of conduct, which included the alteration of discovered material, to conceal its conduct from this Court, the Court of Appeal and the plaintiff. He submitted that in such circumstances the defendant cannot enjoy the benefit of the favourable interlocutory and appeal decisions of this Court or of the Court of Appeal respectively, when those decisions resulted from the defendant's fraud on the discovery processes of this Court.

[27] As Mr Quigg fulsomely acknowledged, and I entirely agree, fraud does unravel everything. However, the plaintiff's difficulty is that the present proceedings seek compliance with the existing orders of the Court and do not seek to

have them set aside on the basis of fraud. If, as I must assume for the purposes of the strike out application only, the plaintiff is successful in proving the serious allegations she has made in her statement of claim, it could have the effect of setting aside the orders which are the very orders that the plaintiff seeks to have the defendant comply with in the present proceedings. When set out in this manner it is obvious that the plaintiff has adopted the wrong proceedings in order to achieve the ends she seeks.

[28] As Mr Quigg submitted, in the absence of a proper proceeding seeking orders setting aside the Court's judgment which affirmed that the defendant had complied with the Court's earlier disclosure orders, those findings of the Court must stand and the defendant is entitled to rely upon them under the doctrine of *res judicata*. They represent final judicial decisions by a Court having jurisdiction to determine the same issue between the parties the plaintiff now seeks to re-litigate. That determination is deemed conclusively to be correct as between the parties, unless or until upset by an appeal or in proceedings brought to challenge the particular orders.

[29] On the assumption that the allegations contained in the statement of claim would be able to be proven at trial, the causes of action are so clearly untenable that they cannot possibly succeed. This is a case in which the strike out jurisdiction should be used to avoid further delays and abuse of the processes of the Court. For all these reasons I struck out the plaintiff's present proceedings and awarded costs in favour of the defendant.

[30] I made interim suppression orders in my oral judgment on 12 November. I accepted Mr Moodie's submission that the strike out application was heard in open Court and that I should not make any orders suppressing the matters canvassed that day, orally, by counsel. I have considered the nature of the orders that should be continued in force. Mr Moodie submitted that the pleadings and affidavits in the proceedings which have been struck out contained serious allegations and ought to be allowed to be aired in public or before Parliament.

[31] Mr Quigg submitted that, because of the successful strike out application, of necessity those allegations cannot now be formally responded to by the defendant as

these proceedings have come to an end. In these circumstances it would not be appropriate for the serious allegations contained in them to be published. Mr Quigg observed in his submissions that the plaintiff's allegations have also been made in relation to non-parties, as well as the defendant. These persons do not have the opportunity of addressing them in any effective manner as the proceedings have now been struck out.

[32] I accept Mr Quigg's submission. I have reached the conclusion that, apart from those paragraphs in the statement of claim which I have previously allowed to be searched, inspected and copied and therefore published, as contained in my minute of 7 November 2008, all other material on the Court file relating to the current struck out proceedings should be the subject of a permanent suppression order preventing them from being inspected, copied or published. This extends to all pleadings, memoranda and submissions. These orders remain in force until further order of a Judge of this Court, after giving counsel for the parties the opportunity to be heard.

B S Travis
Judge

Judgment signed at 3.30pm on 11 December 2008