IN THE COURT OF APPEAL OF NEW ZEALAND

CA773/2013
[2014] NZCA 184

BETWEEN	MALCOLM JAMES BEATTIE First Appellant
	ANTHONY JOSEPH REGAN Second Appellant
	CT NZ GROUP LIMITED (PREVIOUSLY KNOWN AS CARTAN GLOBAL LIMITED) Third Appellant
	PARNELL PARTNERS GROUP LIMITED Fourth Appellant
	CARTAN GLOBAL LLP Fifth Appellant
AND	PREMIER EVENTS GROUP LIMITED Respondent

Hearing:	12 March 2014 (further submissions received 17 March 2014)
Court:	Ellen France, French and Cooper JJ
Counsel:	J R Eichelbaum for Appellants Z G Kennedy and M D Pascariu for Respondent
Judgment:	16 May 2014 at 10 am

JUDGMENT OF THE COURT

A The appeal is dismissed.

B The appellants must pay the respondent costs for a standard appeal on a band A basis and usual disbursements.

REASONS OF THE COURT

(Given by Cooper J)

Introduction

[1] The appellants appeal against a judgment of Ellis J delivered on 22 October 2013, in which she declined their application to strike out claims brought against them by the respondent in the High Court, on the basis that they are an abuse of process.[1]

[2] Abuse of process was asserted on the basis that the claims advanced in the High Court had the same factual setting as is relied on in separate proceedings on foot in the Employment Court. The appellants claim that the same damages are sought, in the same amount, and that the claims are made by and against the same parties or their privies. The key contention is that the appellants are wrongly being vexed twice on the same facts. Mr Eichelbaum for the appellants contends that to allow the High Court proceeding to continue would be wrong in principle and contrary to authority. As part of his argument he relies on the fact that the Employment Court conducted a hearing on liability issues in May 2012.

[3] The respondent disagrees and says that Ellis J's judgment was correct. The principal issue for determination on appeal is whether the Judge erred in determining that the High Court proceeding was not an abuse of process, having regard to the claims made in the Employment Court.

[4] In order to put the rival arguments in context we will summarise the claims made in the Employment Court and High Court proceedings. We will then explain the reasons given by Ellis J for rejecting the appellants' application, before turning to the substance of the argument.

Background facts

[5] The parties accept that the relevant background facts were correctly set out in the High Court judgment and the following summary is based on what Ellis J found.

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[1] *Premier Events Group Ltd v Beattie* [2013] NZHC 2755.

[6] Premier Events Group Ltd (PEG) and BA Partners Ltd (BAP) are associated companies forming part of the Brand Advantage and Premier Group of companies (the Group). All the companies in the Group were controlled by Mr Robert Gill, and involved in the media, advertising, brand development and marketing industries. Prior to 2010 Mr Gill ran the Group. Ellis J found that he did so "effectively in partnership" with Mr Regan (the second appellant) who had a minority interest in a number of the companies in the Group.[2]

[7] PEG was incorporated in June 2003. It was 80 per cent owned by interests controlled by Mr Gill, and 20 per cent by interests controlled by Mr Regan. From the date of incorporation to December 2009 Mr Beattie (the first appellant) was a director of PEG; between June 2006 and his resignation on 20 January 2010, he was the managing director. Mr Gill became a director in November 2003 as did Mr Regan. Mr Regan was the chief operating officer of PEG from 2006 until his resignation in early 2010. He ceased to be a director on 1 April 2010.

[8] BAP was incorporated in July 2003. It too was 80 per cent owned by interests associated with Mr Gill and 20 per cent owned by Mr Regan's interests. Mr Regan was a director from August 2003 until 1 April 2010, and was its chief operating officer from 2006 until his resignation from that position in early 2010. BAP went into receivership in April 2011.

[9] Mr Regan and Mr Beattie both had a number of grievances arising from their period as directors and employees of the companies. After they left, Mr Gill found out that they had set up a business of their own, in competition with PEG and BAP. The third to fifth appellants are companies controlled by Messrs Beattie and Regan which are involved in their new business venture.

The statutory context

[10] A key consideration in the circumstances of this case is the exclusive jurisdiction conferred by the Employment Relations Act 2000 (the Act) on the Employment Relations Authority (the Authority) and the Employment Court to

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2 At [2].

decide disputes about matters related to alleged breaches of an employment agreement. It is appropriate to set out the relevant provisions at this point.

[11] The Authority's exclusive jurisdiction is founded on ss 161(1)(a) and 161(1)(b) of the Act which provide:

> (1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including—
>
> (a) disputes about the interpretation, application, or operation of an employment agreement:
>
> (b) matters related to a breach of an employment agreement:

[12] In addition, s 161(3) of the Act provides:

> Except as provided in this Act, no court has jurisdiction in relation to any matter that, under subsection (1), is within the exclusive jurisdiction of the Authority.

[13] Similarly, s 187 of the Act confers exclusive jurisdiction on the Employment Court to hear and determine (relevantly, and amongst other things) matters removed to it under s 178.[3] Subsection (3) reinforces the exclusivity of the Court's jurisdiction in similar terms to s 161(3).

[14] The consequence of these provisions is that the High Court has no jurisdiction to make determinations about employment relationship problems including disputes arising out of the operation of employment agreements and their breach. Clearly, however, the High Court's jurisdiction remains in respect of any matters that are not within the Employment Court's jurisdiction.

[15] This jurisdictional divide is of fundamental significance for the issues presented by this appeal.

The Employment Court proceedings

[16] The proceedings currently in the Employment Court began as claims made in the Authority. On 29 March 2011, the Authority granted an application made by

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[3] Section 187(1)(e); see below at [16].

PEG and BAP that three claims made in the Authority be removed to the Employment Court under s 178 of the Act.[4]

[17] The first claim made was by Mr Beattie (the first appellant in this Court), on 18 May 2010. He alleged against PEG that it had made unauthorised reductions in his salary, manipulated accounts by removing substantial management fees to which he was entitled and attempted to deprive him of earnings and profits to be derived from a proposed business arrangement with Cartan Tours Inc (Cartan), a company incorporated in Illinois.

[18] The second claim made in the Authority was by Mr Regan. His claim, filed on 23 June 2010, was against BAP and PEG. The claim was for loss of wages, and compensation pursuant to s 123(1)(c)(i) of the Act for humiliation, loss of dignity and injury to feelings. Mr Regan also sought compensation under s 123(1)(c)(i) for attempting to remove a potential business arrangement from PEG and compensation for loss of a benefit for the "stripping out of assets" from companies in which Mr Regan has a 20 per cent shareholding.

[19] The third claim made in the Authority was by PEG and BAP on 13 July 2010. They claimed that Mr Beattie, Mr Regan and Ms Patricia Panapa had breached restraint of trade and confidentiality provisions set out in their employment agreements. A further, separate claim was made against Mr Beattie, alleging that he had breached his employee obligations of confidentiality and good faith.

[20] The claims were heard by the Employment Court over a period of 13 days, ending on 16 May 2012. By agreement, the hearing was confined to issues of liability. Regrettably, at the time the present appeal was argued, the Employment Court's decision remained reserved. Such a delay is unacceptable.

The High Court proceeding

[21] The High Court proceeding was commenced by PEG on 27 May 2010. Mr Beattie and Mr Regan were named as, respectively, the first and second

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[4] *Premier Events Group Ltd v Beattie* [2011] NZERA Auckland 122.

defendants. The third to fifth appellants (third to fifth defendants in the High Court) were companies established by Mr Beattie and Mr Regan. Cartan was named as the sixth defendant.

[22] PEG alleged that Messrs Beattie and Regan breached fiduciary duties that they owed to it as directors by:

(a) negotiating directly with PEG's clients to provide them with equivalent services;

(b) securing the termination of existing contractual arrangements between those clients and PEG; and

(c) establishing substitute contractual arrangements for their own benefit, or for the benefit of the third to fifth appellants.

[23] Further, PEG alleged that Mr Beattie and Mr Regan had negotiated with Cartan to ensure that the joint venture agreement which PEG was negotiating was not able to be further progressed, and to establish substitute contractual arrangements with Cartan for the 2012 Olympic games in the name of, and for their own benefit and that of the third and fifth appellants.

[24] There are also claims against the corporate appellants alleging misuse of confidential information and knowing receipt, and against all of the appellants alleging that they participated in an "unlawful means conspiracy".

[25] In one sense the detail of the High Court claims is immaterial. Mr Eichelbaum did not suggest that the claims made in that Court were claims within the exclusive jurisdiction of the Authority and the Employment Court, and therefore should not have been filed in the High Court because of the rules in ss 161 and 187 of the Act. His argument is rather that the High Court proceeding was an abuse of process because of the claims that had properly been made in the Employment Court, and the extent to which common factual issues will need to be resolved by both Courts.

[26] We can therefore proceed on the basis that the claims made in the High Court are in respect of causes of action that can only be advanced in that Court.

The High Court judgment

[27] Ellis J rejected the strike-out application for two reasons. First, while she acknowledged there can be an abuse of process where a party is vexed twice in the same matter, that could not apply in this case because of what she described as the "parallel, mutually exclusive, jurisdictions" of the High Court and the Employment Court.[5] She held that because of the separate jurisdictions of those Courts, PEG was unable to bring all of its claims in one proceeding. She said:[6]

> The Employment Court has exclusive jurisdiction to determine matters relating to "employment relationship problems" and so those claims by PEG against Messrs Beattie and Regan that stem from their employment cannot be brought in this Court. Equally, PEG's tortious claims (which involve other parties) and its claims for breach of directors' duties cannot be brought in the Employment Court. PEG cannot be required to elect to pursue only half of its potential claims simply by dint of the fact that the complexity of the relationships between the parties engage the jurisdictions of two different Courts.

[28] Secondly, she accepted that where the same facts support rights to different remedies against the same defendant there cannot be double recovery, and that PEG could not recover the same damages in both the Employment Court and the High Court. However, it was premature to put the appellants to "any kind of 'election'" prior to the release of the Employment Court's decision.[7]

[29] The Judge observed:

> [22] In practical terms what this means is that:
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> (a) If PEG's damages/compensation claim succeeds in the Employment Court it would not be able to pursue its claims for the same damages in this Court.
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> (b) If PEG's damages claim partly or wholly fails in the Employment Court it will, most likely, be able to pursue its different causes of action in this Court. The extent to which it is able to do so, and the extent which it can revisit some

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5 At [18].
6 At [18].
7 At [21].

> matters, will of course depend (inter alia) on the operation of any relevant estoppels arising from the Employment Court decision. A determination of the parameters of any such estoppels may not necessarily be straightforward.

[30] Consequently, there was no basis for striking out the proceeding at this stage. However, she considered that it would be wrong for the High Court proceeding to go to trial in the absence of a decision of the Employment Court. Accordingly, she made an order staying the proceeding pending release of that Court's decision.

The appeal

[31] The appeal is advanced on two main grounds.

[32] First, Mr Eichelbaum submits that the Judge was wrong to conclude that the separate jurisdiction of the Employment Court justified a departure from the rule that a defendant cannot be vexed twice for the same cause, which he traced to the judgment in *Henderson v Henderson*,[8] a decision that has been applied in numerous subsequent decisions.

[33] He submitted that the proceedings in the Employment Court and the High Court concerned the same factual matrix and in essence arose out of events surrounding the departure of Mr Beattie and Mr Regan from PEG. The claims involved the same business loss, involved claims for approximately the same amounts of money, the same clients and the same time frame of January to March 2010. Further, the parties or their privies were the same. A second trial based on the same facts and between the same parties or their privies could not lawfully take place, particularly when recovery of the same business loss is sought.

[34] Mr Eichelbaum submitted that the authorities were "entirely against" the proposition that the matter could be re-litigated if the respondent were unsuccessful in the Employment Court.[9] He submitted that the issue presented by the present case was the same as where a plaintiff has been unsuccessful in a contract claim and

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8 *Henderson v Henderson* (1843) 3 Hare 100, 67 ER 313 (Ch).

9 Including *New Brunswick Railway Co v British and French Trust Corp Ltd* [1939] AC 1 (HL); *Republic of India v India Steamship Co Ltd* [1993] AC 410 (HL); and *Hills v Co-operative Wholesale Society Ltd* [1940] 2 KB 435 (CA). We have not thought it necessary to refer to all of the cases on which Mr Eichelbaum relied.

attempted to pursue a second cause of action in tort based on the same business loss. He relied on observations of Brennan J in *Port of Melbourne Authority v Anshun Pty Ltd*:[10]

> …a plaintiff who recovers a judgment for damages in assumpsit is precluded from recovering a judgment for damages in tort arising out of the same facts (per Lord Atkin in *United Australia Ltd. v. Barclays Bank Ltd*); a principal who recovers a judgment for damages in fraud against his bribed agent is precluded from recovering a judgment in the amount of the bribe as moneys had and received to his use (*Mahesan v. Malaysia Housing Society*); and a party whose goods have been wrongfully seized and who recovers in replevin, is precluded from recovering a judgment for damages in trespass to goods (*Gibbs v. Cruikshank*).

[35] Mr Eichelbaum also relied on other authorities which he claimed establish that it is impermissible to "attempt double recovery".[11]

[36] The second strand of Mr Eichelbaum's submissions was based on the principle of election. Mr Eichelbaum submitted that a plaintiff seeking compensation twice for the same business loss retained a right of election but only up until the point that it seeks judgment. In the present case, he contended that the respondent "brought the … Employment litigation … to judgment" by asking that judgment on liability be entered in its favour. The appellants had altered their position in reliance upon the respondent's election by engaging in a 13 day trial in the Employment Court, which they otherwise would not have had to do.

[37] In putting the matter this way, Mr Eichelbaum was echoing language used by Lord Atkin in *United Australia Ltd v Barclays Bank Ltd*:[12]

> I therefore think that on a question of alternative remedies no question of election arises until one or other claim has been brought to judgment. Up to that stage the plaintiff may pursue both remedies together, or pursuing one may amend and pursue the other: but he can take judgment only for the one, and his cause of action on both will then be merged in the one.

[38] For the respondent, Mr Kennedy emphasised that *Henderson v Henderson* and subsequent cases which have applied it were based on abuse of process. They

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10 *Port of Melbourne Authority v Anshun Pty Ltd* (1981) 147 CLR 589 at 612 (footnotes omitted).

11 *Personal Representatives of Tang Man Sit v Capacious Investments Ltd* [1996] 1 AC 514 (PC); *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1 (HL).

12 *United Australia*, above n 11, at 30.

showed that it can be an abuse of process to raise in a subsequent proceeding matters which could and should have been litigated in earlier proceedings. Referring to this Court's decision in *Commissioner of Inland Revenue v Bhanabhai*[13]and the decision of the House of Lords in *Johnson v Gore Wood & Co (a firm)*[14] he submitted that the relevant principle to be applied is that a party could not bring a later claim when that claim "properly belonged" to the earlier litigation which had determined related issues between the parties.

[39] He submitted that the issues between the parties extended well beyond those which the Employment Court has jurisdiction to determine. In the circumstances, the respondent had no choice but to bring proceedings in the High Court insofar as the claims were based on causes of action that the Employment Court had no jurisdiction to determine.

[40] He acknowledged that the election of alternative remedies achieved the important objective of preventing double recovery. However, he submitted that as a general principle an election could be deferred until the conclusion of a trial. At that point, the plaintiff can elect the remedy sought and the court will subsequently enter judgment. A plaintiff is not required to make the election at the time proceedings are issued. In this respect, Mr Kennedy submitted that Ellis J was correct to find that PEG was entitled to defer the election until after the Employment Court decision on liability was released and a more informed decision could be made. Even then, a decision on liability alone[15] would not prevent PEG from pursuing its separate claims in the High Court, as no remedies would have been sought or granted by the Employment Court at that stage.

Discussion

[41] As was observed in *Lai v Chamberlains* a decision of a court can generally only be challenged by an appeal to a superior court.[16] The public policy objectives of fairness to litigants and the need to bring an end to litigation are achieved by the rules of res judicata. Those rules prevent a party to a final judgement challenging in

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13 *Commissioner of Inland Revenue v Bhanabhai* [2007] 2 NZLR 478 (CA).
14 *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 (HL).
15 As noted above, the Employment Court hearing was limited to issues of liability.
16 *Lai v Chamberlains* [2006] NZSC 70, [2007] 2 NZLR 7 at [58].

a subsequent proceeding matters that have already been determined. As was said by Lord Blackburn in *Lockyer v Ferryman*:[17]

> The object of the rule of *res judicata* is always put upon two grounds – the one public policy, that it is in the interest of the State that there should be an end of litigation, and the other, the hardship on the individual, that he should be vexed twice for the same cause.

[42] In *Shiels v Blakeley* this Court, after approving Lord Blackburn's dictum, explained the two different kinds of estoppel that may arise:[18]

> In one branch of the law of res judicata the cause of action put in suit in the first proceeding passes into judgment so as no longer to have an independent existence. There is both a merger of the cause of action in the judgment and a cause of action estoppel. While in the case of what is commonly called issue estoppel a particular matter of fact or law in issue in the second proceeding is held to have been decided by the prior judgment but may or may not be determinative of the second proceeding.

[43] A third kind of case is often traced to the judgment of Sir James Wigram VC in *Henderson v Henderson* the case relied on by Mr Eichelbaum. In a well-known passage, the Judge said:[19]

> In trying this question, I believe I state the rule of the Court correctly, when I say that, where a given matter becomes the subject of litigation in, and of adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.

[44] That statement of the law was referred to by this Court in *Commissioner of Inland Revenue v Bhanabhai* where reference was also made to the discussion of *Henderson v Henderson* in *Johnson v Gore Wood & Co (a firm)*.[20] For present

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17 *Lockyer v Ferryman* (1877) 2 App Cas 519 (HL) at 530.
18 *Shiels v Blakeley* [1986] 2 NZLR 262 (CA) at 266.
19 At 114–115.
20 *Bhanabhai*, above n 13, at [59]–[61].

purposes, it is sufficient if we repeat Lord Bingham's observations in *Johnson*, which were quoted by this Court in *Bhanabhai*:[21]

> … *Henderson v Henderson* abuse of process, as now understood, although separate and distinct from cause of action estoppel and issue estoppel, has much in common with them. The underlying public interest is the same: that there should be finality in litigation and that a party should not be twice vexed in the same matter. This public interest is reinforced by the current emphasis on efficiency and economy in the conduct of litigation, in the interests of the parties and the public as a whole. The bringing of a claim or the raising of a defence in later proceedings may, without more, amount to abuse if the court is satisfied (the onus being on the party alleging abuse) that the claim or defence should have been raised in the earlier proceedings if it was to be raised at all. I would not accept that it is necessary, before abuse may be found, to identify any additional element such as a collateral attack on a previous decision or some dishonesty, but where those elements are present the later proceedings will be much more obviously abusive, and there will rarely be a finding of abuse unless the later proceeding involves what the court regards as unjust harassment of a party. It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been, so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before.

[45] Thus it is an abuse of process to commence a proceeding, although not estopped by the principles of either cause of action estoppel or issue estoppel, where the plaintiff seeks to rely on issues or facts which could and ought to have been raised in a previous proceeding.

[46] Reference can also be made to *Brisbane City Council v Attorney-General for Queensland* in which the Privy Council emphasised that the rule in *Henderson v Henderson* is based on abuse of process and should only be applied when the facts are such as to amount to an abuse; otherwise there is a danger that a plaintiff will be prevented from advancing "a genuine subject of litigation".[22]

[47] In *Lai v Chamberlains* it was necessary to discuss abuse of process in the context of arguments about the preservation of the immunity of barristers from suit. Elias CJ (who wrote also for Gault and Keith JJ) referred to the judgments of both

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21 *Johnson*, above n 14, at [60].

22 *Brisbane City Council v Attorney-General for Queensland* [1979] AC 411 (PC) at 425.

Lord Bingham and Lord Millett in *Johnson v Gore Wood & Co (a firm)* in the following passage:[23]

> Lord Bingham considered that what constitutes abuse is a "broad, merits-based judgment", incapable of capture in hard and fast rules of determination and not limited to further litigation between the same parties or their privies. Lord Millett in the same case thought it "primarily an ancillary and salutary principle" which prevents res judicata and issue estoppel being "deliberately or inadvertently circumvented".

[48] Applying the principles established by these authorities to the circumstances of the present case we consider that Ellis J was correct to reject the strike-out application. Given the statutory context and the creation of an exclusive Employment Court jurisdiction, a party who has claims within the jurisdiction of that Court as well as claims that fall within the jurisdiction of the High Court will not in our view abuse the process of either Court by commencing an appropriate claim in each. There is no deliberate or inadvertent attempt to circumvent the rules of res judicata.

[49] The Act creates a potential for overlap where the different kinds of claim are based on the same or similar facts. But the fact that there are existing claims in the Employment Court does not make the commencement of a proceeding in the High Court an abuse of process. None of the cases to which Mr Eichelbaum referred would justify that conclusion. Moreover, acceding to that proposition could clearly result in a party being prevented from advancing "a genuine subject of litigation", the danger against which the Privy Council warned in *Brisbane City Council v Attorney-General for Queensland.*

[50] In this case, we see no reason to doubt that the proper application of the principles of issue estoppel can appropriately accommodate the need to ensure that relevant issues are not litigated twice. Since the causes of action in the Employment Court and the High Court are different, cause of action estoppels cannot arise. However, it may well be that the decision of the Employment Court on the liability issues will contain determinations that, properly analysed, give rise to an issue estoppel, preventing the relitigation of the issue determined in the High Court. As a

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[23] At [62] (footnotes omitted).

consequence the Employment Court decision might affect the outcome of causes of action in the High Court proceeding that are dependent on the issue determined by the Employment Court. But the extent or significance of any issue estoppel cannot be determined in advance of the Employment Court's decision.

[51] Mr Eichelbaum placed particular emphasis on the decision in *Hills v Co-operative Wholesale Society Ltd*[24] and at one stage submitted that it was on all fours with the present case. We disagree. In that case the appellant had commenced a proceeding in the High Court claiming damages against the respondents, who were his employers, for personal injuries caused by the alleged negligence of other employees in the workplace. He commenced a second proceeding in the County Court under the Employers' Liability Act 1880 (UK) 43 & 44 Vict c 42 claiming damages for his injuries. The Court of Appeal considered that the facts alleged in the County Court claim were the same of those alleged in the statement of claim in the High Court, "in all material respects".[25]

[52] The County Court claim was for the maximum amount available under the statute. The money was paid into Court and later "taken out" by the appellant. The respondents then argued that in the circumstances the appellant was debarred from claiming any sum in the High Court action. That claim was upheld in the High Court and in the Court of Appeal. However, it is clear that the decision turned on the fact that the causes of action in each Court were identical. Thus, Sir Wilfrid Greene MR said:[26]

> In my opinion there can be no question as to the identity of the cause of action. The action in the High Court is an action claiming damages for personal injury caused by the defendants' negligence. The action in the county court is an action for damages for personal injury caused by the defendants' negligence.

[53] Plainly that is not this case, where the causes of action relied on in the High Court and the Employment Court are different and indeed ss 161 and 187 of the Act effectively require that they be different. Mr Eichelbaum referred to cases where "cause of action" was defined as "the act on the part of the defendant that gives the

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24 *Hills v Co-operative Wholesale Society Ltd*, above n 9.
25 At 438.
26 At 439–440.

plaintiff the cause of complaint",[27] and submitted that the same acts were relied on in the proceedings in each Court. However, to give just one example, the existence of a fiduciary duty owed as a director obviously involves establishing different facts from a claim based on a breach of a restraint of trade provision in an employment contract, even if many of the relevant facts will be common to both claims. The simple point is that here the causes of action in the two Courts are not the same; breach of a contract of employment is not the same cause of action as breach of fiduciary duty. This may be contrasted with *Hills,* where the causes of action were both in negligence.

[54] Neither *Hills* nor any of the other cases relied on by Mr Eichelbaum involved the situation that arises here where in order to advance claims recognised by law the respondent was obliged by statute to commence its claims in two different Courts.

[55] Nor do we consider that the fact that there has been a hearing in the Employment Court means that the respondent has elected that forum to the exclusion of the High Court, or is attempting to achieve "double recovery". The suggestion is premature. We do not consider that the liability hearing in the Employment Court constituted bringing the claim to "judgment" in the sense contemplated in *United Australia.*[28] Rather, that case is authority for the proposition that separate causes of action may be advanced at the same time and based on the same facts. In this case, it is the statute that requires that to happen in two separate Courts. But it is only at the point when the respondent seeks entry of judgment that an issue of double recovery could arise. As was observed in *Tang Man Sit*:[29]

> Faced with alternative and inconsistent remedies a plaintiff must choose, or elect, between them. He cannot have both. The basic principle governing when a plaintiff must make his choice is simple and clear. He is required to choose when, but not before, judgment is given in his favour and the judge is asked to make orders against the defendant.

[56] If the respondent succeeds in the Employment Court on liability issues, it would still be necessary to deal with the issue of remedy. And the implications of

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[27] *Dillon v MacDonald* (1902) 21 NZLR 375 (CA) at 391 applying *Jackson v Spittall* (1870) LR 5 CP 542 (Comm Pleas).

[28] *United Australia*, above n 11.

[29] *Tang Man Sit*, above n 11, at 521.

seeking remedies in that Court would then need to be weighed in respect of any overlap with the High Court claim. Once again, until the outcome of the Employment Court proceeding is known we do not see how any issue of election or double recovery can arise.

[57] In the meantime, the stay ordered by Ellis J in the High Court will prevent any unnecessary duplication of processes in relation to the evidence that may ultimately need to be called in the High Court.

Result

[58] The appeal is dismissed.

[59] The respondent is entitled to costs to be calculated as for a standard appeal on a band A basis and usual disbursements.

Solicitors:
Franklin Law, Pukekohe for Appellants
Minter Ellison Rudd Watts, Auckland for Respondent