

N2LR

**NOT  
RECOMMENDED**

IN THE HIGH COURT OF NEW ZEALAND  
AUCKLAND REGISTRY

A. NO. 402/81

BETWEEN G. HIRST

Plaintiff

A N D BANK OF NEW ZEALAND

First Defendant

A N D R. ELCOAT and T. ELCOAT

Second Defendants

A N D J.A. HIRST

Third Defendant

Hearing: September 18, 1987.

Counsel: Mr. Bowen for Plaintiff  
Mr. Lee for Second Defendants

Judgment: 24 SEP 1987

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JUDGMENT OF MASTER GAMBRILL

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The Plaintiff seeks to amend its Second Amended Statement of Claim by adding the following words: "...and/or in breach of their fiduciary duties to the Plaintiff". This is in addition to the breach of care by the Second Defendants already pleaded.

There was no appearance on behalf of the First and Third Defendants, but the Second Defendants opposed the application on the basis that it added a new cause of action which would be statute barred. The matter has been set down for trial and is on the medium priority list.

The applicant is required to satisfy me that the amendment is necessary in order to do justice between him and the Defendants.

It therefore seems I have to decide whether the amendment creates a fresh cause of action. If so, it appears it would not be permissible to amend because it would be statute barred. If it does not create a fresh cause of action, whether it is just for the amendment to be made.

The amendment sought arises out of the same facts and obligations, if any, of the Second Defendants to the Plaintiff. In the recent Court of Appeal decision Day v. Mead C.A. 90/86, judgment of 31st July 1987, it is clear in the judgment of Cooke, P. that as stated at page 18 "the fiduciary duty arises as a result of the contract". A contract has been pleaded and it therefore appears to me that the pleading of the fiduciary duty does not introduce another cause of action. I also refer to the statement of Cooke, P. on page 15:

"Whether or not there are reported cases in which compensation for breach of a fiduciary obligation has been assessed on the footing that the plaintiff should accept some share of the responsibility, there appears to be no solid reason for denying jurisdiction to follow that obviously just course, especially now that law and equity have mingled or are interacting."

I also note the decision of Somers, J. in the same case on page 15, referring to the judgment of Nocton v. Lord Ashburton [1914] A.C., 932, "There may give rise to an implied contract at law or to a fiduciary obligation in equity (955)." At page 16:

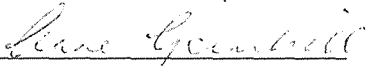
"I am disposed to think that the equitable and common law obligations as to disclosure, use of confidential information, and want of care discernible in the cases are now but particular instances of duties imposed by reason of the circumstances in which each party stands to the other and that while the particular remedy for breach of duty may depend upon the way the case has developed, equity and the law are set upon the same course."

In line with the spirit of this decision, I believe that the amendment does not introduce a statute barred cause of action, but amplifies a pleading already made. It is also proper for the justice of the case for this relationship to be pleaded.

3.

The Amended Statement of Claim must be filed and served within 7 days of the date of this decision. The Defendants are required to plead to the Amended Statement of Claim within 10 days of the date of service upon them.

The Plaintiff must accept the responsibility for the costs of filing and seeking the right to serve an Amended Statement of Claim. I allow costs of \$150.00 to be paid to the Second Defendants on his appearance here.

  
MASTER A.G.S. GAMBRILL

Solicitors:

Bowen Roche & Hill, Auckland, for Plaintiff  
Butler White & Hanna, Auckland, for Second Defendants