NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL LIST

2/8

CL.121/89

NOT RECOMMENDED

1366

BETWEEN	ALLAN GRAEME BELL	
	First Plaintiff	
AND	GRAEME BELL & ASSOCIATES LIMITED	
	Second Plaintiff	
AND	JOHN HOLLAND PROPERTIES (NEW ZEALAND) LIMITED	
	First Defendant	
AND	JOHN HOLLAND PROPERTIES PTY LIMITED	
	Second Defendant	
AND	PENNANT HOLDINGS LIMITED	
	Third Defendant	
AND	NEW ZEALAND RAILWAYS CORPORATION	
	Fourth Defendant	

Hearing: 12 July 1991

Counsel: P.W.G. Ahern for Plaintiff
C. R. Gwyn for Fourth Defendant

Judgment: 12 July 1991

ORAL JUDGMENT OF WYLIE, J.

This is an application by the fourth defendant under r.186 and the inherent jurisdiction of the Court to strike out the third, fifth and sixth causes of action pleaded against it in the plaintiff's first amended statement of claim.

The case is not a simple one and the amended statement of claim now runs to 42 pages, but in essence so far as the fourth defendant, the Railways Corporation, is concerned the plaintiffs allege that as property consultants they had a contract with the Railways Corporation to formulate a development proposal for the Auckland Railway Station site as a hotel and, if the plaintiff's proposal were acceptable, for the Railways Corporation to give the plaintiffs an opportunity to participate in the development itself. The plaintiffs allege that they then joined with the first, second and third defendants as joint venturers. A proposal was put for both a hotel development and a combined hotel/casino development, but those proposals were rejected by the Railways Corporation which subsequently entered into a joint venture arrangement with the first and third defendants and another party, from which the plaintiffs were excluded, but which continued to use aspects of the plaintiffs proposals.

The plaintiffs raise various causes of action against the Railways Corporation which I list in order:

First cause of action - Breach of Contract
Second cause of action - Inducement to the second and third defendants to break their contract with the plaintiffs
Third cause of action - Estoppel
Fourth cause of action - Conversion of intellectual property

Fifth cause of action - Injurious reliance or unjust enrichment

Sixth cause of action - Breach of s.9 of the Fair Trading Act

The principles relating to the striking out of causes of action are well established and need no repetition. I merely repeat the well established basic approach, that the jurisdiction to strike out is to be exercised sparingly and that for the purpose of such an application the pleadings are to be taken as capable of proof.

In relation to the third cause of action, estoppel, the fourth defendant through counsel, argued first that there was an inconsistency between the plaintiffs' pleading in this cause of action and their pleading in respect of the first cause of action against Railways for breach of contract. This arises from the estoppel pleading that the Railways Corporation is estopped from asserting that it had validly terminated the alleged contract in March 1989, whereas in an earlier cause of action the plaintiffs purported by the statement of claim itself to cancel the contract. The argument was that by this pleading the plaintiff had elected to affirm the existence of the contract but then to cancel it, but at the same to deny Railways the right to treat it as cancelled. I do not regard these two pleadings as inconsistent or either one of them as amounting to an election. I think while the pleading may well need some tidying up the purport of the third cause of action is a

denial by the plaintiff that the Railways Corporation was entitled to terminate the contract in March 1989 and yet to continue to take benefits under it. That is not inconsistent with the plaintiffs' purported cancellation by the statement of claim. However, the second attack on that cause of action is, I think, of more substance. In truth the so-called cause of action is not in my opinion a cause of action at all. It is a positive response to the defendant's defence that the contract had been validly terminated at an earlier date and in my opinion the matter should have been dealt with in that way. It is pointless to clutter up the statement of claim with an allegedly separate cause of action in estoppel. Miss Gwyn, for the Railways Corporation, objected in principle to the use of estoppel as a sword rather than a shield and argued that it could not be used as the foundation for a cause of action. I would not be prepared in the present state of the law to go so far as to strike it out on that basis alone as I think there may well be an arguable case in these days that promissory estoppel may be used to found an action at least in some circumstances. However, apart from, as I perceive it, the futility of introduction of estoppel in the circumstances here I think there was also some force in Miss Gwyn's submissions that the essential elements of estoppel as summarised in Spencer, Bower & Turner, Estoppel by Representation were not fulfilled here. In particular that there was no unequivocal promise or assurance as to future conduct nor is there any pleading as to the plaintiffs having relied on such conduct and having altered their position in

reliance thereon and as to having suffered any detriment as a consequence. So on those grounds as well I would have been prepared to strike out the third cause of action, but I do so principally on the basis that in the particular circumstances of this claim it is not a cause of action at all, it is a response which can well be appropriately pleaded either by way of further particulars of the cause of action relating to breach of contract or by way of response to the positive defence advanced by the Railways Corporation. There is a regrettable tendency these days for statements of claim to be greatly enlarged and proceedings to be complicated by the introduction of a multiplicity of quite unnecessary separate causes of action all based on the same set of facts and at the end of the day all coming down to exactly the same issues. That tendency is to be discouraged where it can properly be done and I think this is one of those occasions where the cause of action can be struck out without any injustice to the plaintiff and with a consequent tidying up of the issues to be confronted. Accordingly the third cause of action will be struck out.

In relation to the fifth cause of action which is based on alleged injurious reliance or unjust enrichment, bearing in mind that the jurisdiction is to be sparingly exercised I am not at this stage prepared to strike out that cause of action even though I suspect that it may not be the strongest card that the plaintiff holds. In recent years the Courts appear to have been moving closer to the concept of relief being

available on the grounds of unjust enrichment, even though it may be difficult to fit that concept into any of the conventional causes of action. Although I do not think we yet have any binding authority to constitute such a cause of action in its own right, the tendency is to give relief against unjust enrichment by way of conventional constructive trust concepts or in other ways and the Courts may yet take the final step and constitute unjust enrichment on its own as an independent cause of action. Perhaps the most recent case which tends in that direction is that of Powell v Thompson & Ors (Unreported Auckland Registry, CP.2140/88, Thomas, J. judgment 23.10.90). That I am not prepared to strike out the cause of action is not to suggest that the plaintiffs on further consideration might not think it desirable to amend their pleading in that respect to endeavour to make it conform to one of the more readily recognised causes of action which have been used to embrace the concept of unjust enrichment. That is a matter for them to consider.

In relation to the sixth cause of action, namely breach of s.9 of the Fair Trading Act, there is much force in Miss Gwyn's submissions that as pleaded there is no pleading as to deceptive or misleading conduct and I accept her submissions based on the Australian cases referred to by Barker, J. in Sinclair v Webb & McCormack Ltd (Unreported Auckland Registry, CP.71/88, Barker, J. judgment 6.3.89) and on the comments of Barker, J. himself that the mere fact that representations may not be carried out do not of themselves amount to misleading

or deceptive conduct. However, it does seem to me that there is a sufficient foundation appearing in the statement of claim read as a whole to admit of the possibility that by amendment introducing an allegation of absence of intent to carry out the representations at the time they were made, in effect bad faith at that time if the plaintiffs are satisfied that their case will support such a pleading, the pleading might appropriately be amended so as to allege misleading or deceptive conduct. On that basis I am not prepared to strike that cause of action out at this stage.

In summary, therefore, the third cause of action will be struck out, but the fourth defendant's application to strike out the fifth and sixth causes of action is declined. Costs on this application will be reserved, but for the benefit of the Judge who may later have to consider the question of costs I record that the matter has taken just on one and a half hours to dispose of.

Addendum:

I overlooked fixing a further mention date for this matter which I now fix for 9 August 1991. If the plaintiffs wish further to amend their statement of claim as a result of this judgment such further amended statement of claim is to be filed by 2 August 1991.

Solicitors: Morrison Morpeth, Auckland for Plaintiff Chapman Tripp Sheffield Young, Auckland for Fourth Defendant