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NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP.19/97

LOW PRIORITY

BETWEEN:	ANNETTE ELIZABETH LAUGHTON of Auckland, Office Manager Plaintiff
A N D:	C.N. and N.A. DAVIES LIMITED (formerly JOHN W SHACKELFORD & SON LTD) a duly incorporated company having its registered office at Auckland First Defendant
AND	CRAIG NORRICE DAVIES and NOELLE ALEXANDRA DAVIES both of Auckland, Company Directors Second Defendants
AND	NORANDER HOLDINGS LIMITED a duly incorporated company having its registered office at Auckland Third Defendant
AND	WAYNE ROBERT ADSETT and MARC REID BELCHER both of Auckland, Chartered Accountants Fourth Defendants
AND	WAYNE ROBERT ADSETT of Auckland, Chartered Accountant Fifth Defendant

Hearing: 22 September 1997

Oral Judgment: 22 September 1997

Counsel: *David Campbell* for plaintiff to oppose
Gary Judd QC for 1st, 2nd and 3rd defendants in support
Greg Everard for 4th and 5th defendants in support

ORAL JUDGMENT OF WILLIAMS J.

Solicitors:

Morrison Kent, DX CP18001 Auckland, for plaintiff
Lovegrove Finn & Harborne, DX CP35501 St. Heliers, for 1st, 2nd and 3rd defendants
Kensington Swan, DX CP22001 Auckland, for 4th and 5th defendants

This is an application brought by all defendants to strike out the statement of claim issued in this matter by the plaintiff, Mrs Laughton, on 30 January 1997. All defendants claim that there is no reasonable cause of action disclosed in the claim against them and say that if Mrs Laughton does have any valid cause of action it is against a company called Preform Company (403) Limited (In Receivership) and not against any of the defendants.

The principles which apply to applications such as this are well settled. The Court is required to regard the allegations in the statement of claim as being capable of proof and then considers whether those allegations, seen in that light, are so clearly untenable as to be incapable of success. If the Court concludes that such is the case then, although it acts sparingly, it strikes out the proceeding. If the proceeding is capable of amendment rather than striking out, in general the Court will permit that to be done (***McKendrick Glass Co v Wilkinson*** [1965] NZLR 717, 719).

The authorities dealing generally with striking-out are as follows :

Innes v Ewing, Dunedin A82/83, 23/12/86 Eichelbaum J;
Peerless Bakery Ltd v Watts [1955] NZLR 339;
Lucas & Son (Nelson Mail) Ltd v O'Brien [1978] 2 NZLR 284, 294-295;
Takaro Properties Ltd v Rowling [1978] 2 NZLR 314, 316-317;
Gartside v Sheffield Young & Ellis [1983] NZLR 37;
South Pacific Manufacturing Co Ltd v New Zealand Security Consultants & Investigations Ltd, Mortensen v Laing [1992] 2 NZLR 282.

As far as power to amend is concerned, it is helpful to bear in mind the remarks of Tipping J in ***Marshall Futures Ltd v Marshall*** [1992] 1 NZLR 316, 324 where that learned Judge said :

> "It seems to me that in a case where the plaintiff can undoubtedly start again, being within time, the Court should only strike out if satisfied that on the best view of the facts from the plaintiff's point of view he cannot succeed at law, or alternatively where the pleading is so deficient as to require a *de novo* start rather than an amendment. As Mr Goddard aptly put it, the question will often be one of degree. The difference, using by analogy the terminology of motor vehicle insurance, is between a pleading which is a total write off and one which is deficient but is capable of effective repair."

As regards that dictum, however, all parties were agreed that if Mrs Laughton's claim is struck out, any claim she may have is now statute-barred and thus it is not open to her to amend the existing pleading to include a fresh cause of action (R 187(3)(a)).

As noted, the claim was commenced by Mrs Laughton on 30 January 1997. It was drafted by her husband who has been involved in this matter throughout. It is only recently that counsel has been instructed to act on her behalf. It is well-settled that although litigants acting in person are entitled to a certain amount of leniency in complying with the requirements of the Court, they must ultimately still comply with the Court's requirements as to pleading and the Rules.

The claim relates to a contract whereby Preform was nominated by Mr Laughton to act as the purchaser in relation to an agreement for sale and purchase made on 16 September 1990 for a business then carried on by the

first defendant, CN & WA Davies Limited. The contract was for the purchase of that business. The business included licensing agreements, trademarks, indent orders and the like in connection with clothing and apparel. There was a substantial purchase price.

Towards the end of 1990 the parties were proceeding towards settlement in the normal way and on 29 November 1990 a settlement statement was sent to the purchasers for settlement in accordance with the contract which was due to take place the following day. However, the claim asserts that neither party was then in a position to proceed and that they therefore continued until the events about to be described. It does appear, however, that the parties did quite a lot towards settlement, including the assignment of the lease by the first, second and third defendants and the signing of a guarantee.

A settlement notice was sent on 5 December 1990 requiring settlement by 19 December although Mrs Laughton claims that the vendor was still not then in a position to be able to settle, not having obtained an assignment of the trademarks and intellectual property.

On 13 December 1990 Preform signed a debenture in favour of CN & NA Davies Limited and Mrs and Mrs Laughton signed a guarantee of the same.

However on 20 December 1990, immediately after the expiration of the settlement notice, the first defendant is said to have purported to have cancelled the agreement for non-compliance with that notice, despite Preform claiming to have been in a position to settle the following day.

The statement of claim then goes on to say that on 21 December 1990 CN & NA Davies Limited refused to settle with Preform unless it and Mr Laughton signed a deed amending the debenture in relation to the obtaining of letters of credit and signing a restraint of trade clause. That deed is pleaded as having been signed that day, namely 21 December 1990. However, there were then some amendments and as a result it appears, according to the statement of claim, that Mr and Mrs Laughton both signed an amended debenture as guarantors on 21 December 1990. It is pleaded that the debenture and the amended debenture are both void, not having been registered and being without consideration, and it is claimed that the amendment was obtained by Preform and consented to by the others including the plaintiff as a result of economic duress.

It is also asserted in the statement of claim that on or about that same day, 21 December 1990, Preform entered into an employment contract with Mrs Laughton as office assistant and with Mr Laughton as manager, requiring payment of regular salaries.

However on 31 January 1991 CN & NA Davies Limited purported to appoint the fourth defendants to this proceeding as receivers and managers of Preform. The statement of claim says that that was on the basis that the letters of credit had not then been arranged.

On 1 February 1991 the claim asserts that the fourth defendants took possession of Preform's assets and "by verbal notice purported to immediately terminate the employment contract of the plaintiff" and also the management contract of Mr Laughton.

The claim then asserts that the appointment of the receivers was void for a number of reasons including failure to give notice to remedy any default and failure to serve a notice of appointment, and that the termination of Mrs Laughton's employment contract was invalid on the basis that the receivers could not terminate the employment contract or had no basis for doing so or that there was insufficient notice and they failed to pay the salary due at the date of termination. Mrs Laughton claims in this proceeding to have lost the salary due to her and to have been unable to meet her obligations and commitments to a mortgagee Bank and had mortgagee sale proceedings issued against her - all of those being said to be as a result of the defendants' actions. Which defendant is said to be responsible does not clearly appear.

All defendants have filed statements of defence which amount largely to a bare denial although that filed by the receiver also asserts that they had no knowledge of Mrs Laughton's contract.

On its face, as counsel acknowledged, the claim appears to be one for breach of an employment contract by receivers said to have been invalidly appointed. (No counsel raised the question whether the claim should have been brought in the Employment Court: Employment Contracts Act 1991 s.104). However, Mr Campbell, in response to the submissions of the applicants, submitted that the claim was susceptible to interpretation as being based on inducement of breach of contract and not for breach of contract itself.

In order to assess whether that submission means that the claim has any chance of success it is necessary to consider, first, the position of the receivers and then the elements of the suggested cause of action.

It is unnecessary for present purposes to delve in any depth into the position of receivers. For current purposes it is sufficient to adopt, with respect, the passage from the decision of the Court of Appeal in ***Quik Bake Products Ltd (In Receivership) v The New Zealand Baking Trade Employees Industrial Union of Workers*** (1990) 5 NZCLC 66,701, 66,706 where the following passages appear :

> "The appointment of a receiver under a debenture does not in general bring the company's existing contacts to an end. They continue, unless the receiver expressly abandons them. Any liability accruing to the company under such

> contracts yields priority to the security of the debenture holder. The receiver - if he is also a manager - may enter into new contracts, and will usually need to do so if he wishes to carry on the company's business. He may also adopt existing contracts, effectively making them his own. He then becomes personally liable, although usually with recourse to the secured assets of the debenture holder, either on the basis that liability is a receivership expense, or under an indemnity: see sec 345(2) of the *Companies Act*. This is so despite the fact that by the terms of the debenture he may be declared to be the agent of the company. He may also become liable without a new contract, if by his conduct he creates an estoppel.
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> ...
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> The appointment of a receiver and manager under a debenture whereby he is the agent of the company will not of itself terminate ordinary contracts of employment ... In the usual cases, the workers continue as employees of the company. If the receiver, as agent of the company, dismisses them, they will have the same rights and remedies as if there had been no receivership (ie, for breach by the company of its contract with them), except that their claims rank after those of the debenture holder, save where sec 101 applies. If the receiver having dismissed then re-employs, or if he adopts the existing contracts, he will be personally liable for wages and other employment related costs in the same way as for any other expense of the receivership."

It is also clear from the decision of the Court of Appeal in ***First City Corporation Ltd v Downsview Nominees Ltd*** [1990] 3 NZLR 265, 274 per Richardson J (as he then was) that the legal duties of a receiver, though principally owed to the debenture holder, are not exclusively so owed. Similarly, the Court adopts with respect the passage from *Blanchard & Gedye: The Law of the Company Receiverships in New Zealand and Australia* 2nd ed., (1994) para.11.34 p310-311 where the following passage appears :

> "Receivers incur no liability for inducing a breach of contract merely because they disclaim or abandon a pre-receivership contract unless they are not acting bona fide or are acting outside the scope of their authority. In *Lathia v Dronsfield Bros Ltd* [1987] BCLC 213, an action was brought against receivers claiming that they were liable to the plaintiff, to whom the company had, prior to receivership, agreed to supply goods, because the receivers had caused the company to decline to deliver the goods and thereby deliberately induced a breach of contract. The action was struck out because it was held to have no prospect of success. The Court said that an agent has "immunity from a claim for inducing breach of contract unless he has not acted bona fide or acted outside the scope of his authority ie he had not acted as agent". In considering whether a receiver has acted in good faith allowance must be made for the existence of the receiver's primary duty to the debenture holder."

As far as the elements of a claim for inducing breach of contract are concerned it is sufficient to adopt, again with respect, the summary of those elements appearing in *Bullen & Leake & Jacob's: Precedents of Pleadings* 13th ed (1990) p 462 where the following appears :

> "The essential ingredients of the tort of inducing breach of contract are that :
>
> (i) the wrongdoer knew or acquired knowledge of the contract in question and its essential, although not necessarily its precise, terms;
> (ii) he so acted or "interfered" whether by persuasion, inducement or procurement or other means so as to show that he intended to cause a breach of the contract or prevent its performance by one party to the detriment of the other party;
> (iii) the breach of contract was directly attributable to such act or interference; and
> (iv) damage was occasioned or was likely to be occasioned to such other party."

In the light of those authorities it is clear that when receivers are appointed that act, of itself, does not bring to an end any employment contracts between employees and the company placed into receivership and it is also clear that receivers may act as the agent of the company in all matters including, of course, the employment contracts of its employees. It is, however, also clear that the receivers may incur personal liability for those contracts only if they act in ways such as those set out in the authorities earlier discussed. They may become personally liable for wages of employees only if they do not act bona fide or act outside their authority.

The problem for the plaintiff in this case is that there is nothing in the statement of claim to suggest that the receivers in this case conducted

themselves in any way which would give rise to personal liability on their behalf. True, it is alleged that their appointment was invalid, for the reasons earlier noted, and that the termination of Mrs Laughton's contract of employment with Preform was invalid, again for those reasons. But there is nothing in the statement of claim as currently pleaded to suggest that the receivers did not act bona fide.

Next, as far as questions of the receivers' authority and the tort of inducing breach of contract are concerned, it is plain that the necessary inducement may be direct or indirect. Because it was through Preform, indirect inducement to breach this contract was the only basis on which it was argued that the receivers could have been in breach. In cases of indirect inducement, unlawful means must be pleaded (*Bullen & Leake & Jacob op.cit.* p.462-463). In this case the only possible pleading of unlawful means which could arise is the allegation that the receivers' appointment and therefore their actions were void. However, that raises the difficulty that if the receivers' appointment on 31 January 1991 was invalid, then they had no power to act as it is pleaded they did the following day and to terminate Mrs Laughton's appointment through Preform. They could only have done that if they were validly appointed. At that point the lawfulness or otherwise of the termination of her employment could have been in issue. So it would therefore seem to be the case that as far as the receivers are concerned, if this Court accepts the allegations as they currently appear in the statement of claim and for present purposes accepts that the receivers

were invalidly appointed, then it must necessarily follow that it was not possible for them to have induced breach of Mrs Laughton's contract with Preform validly or invalidly. Put another way, she was entitled to resist their actions at that stage and continue as an employee. But it would appear that she has never done anything to discharge her duties as an employee since 1 February 1991.

Then, as far as CN & NA Davies and the second defendants are concerned, there is nothing in the statement of claim as currently pleaded which gives rise to any suggestion that they or it acted unlawfully in appointing the receivers to Preform in a way which would have resulted in Preform invalidly terminating Mrs Laughton's employment.

It follows from all of that, in this Court's view that, as currently pleaded, there is no basis on which the claim could be capable of success and it requires to be struck out.

The remaining question, therefore, is whether the plaintiff should be given an opportunity to endeavour to amend her current claim so as to make what Mr Campbell submitted was an arguable case for inducing breach of contract much plainer and to ensure that the statement of claim conforms with the requirements for a claim under that cause of action, both factually and legally.

In that regard it has to be said that to allow the plaintiff to amend the statement of claim to that extent would certainly come within the passage from ***Marshall Futures*** earlier referred to, and in fact it would require wholesale reconstruction and repleading to bring it within the requirements of such a cause of action.

It is unfortunate if Mrs Laughton finds herself shut out of the claim because of infelicity in pleading or a failure to plead a cause of action which has any chance of success. But in that regard the Court bears in mind, first, that she and her husband chose to issue the proceedings together and on what must, on any view of the matter, have been the last possible day of the limitation period. There is no explanation put before the Court why there was a delay of all but 6 years between the events which gave rise to this proceeding and the commencement of the proceeding itself. That is particularly the case because in argument the Court's attention was drawn to CP.877/91 (Auckland Registry) which is in large measure the mirror image of this claim. In it, Preform and Mr Laughton and others - but not Mrs Laughton - sue CN & NA Davies Limited and the other defendants in this claim, seeking declarations that the debenture and amended debenture are void and similar orders including inquiries as to damages and accounting for profits, those being part of the prayer for relief in Mrs Laughton's claim. It is of importance to note in that regard that CN & NA Davies Limited, on 19 July 1991, issued a counterclaim against the plaintiffs and impleaded Mrs Laughton as a counterclaim defendant. Neither she nor they have

pleaded in opposition to that claim since and CP.877/91 is now stayed pursuant to R 426A. However, it is nonetheless the case that had Mrs Laughton and her husband wished to pursue their rights under this claim, whether seen as a breach of an employment contract or seen as a claim for inducing a breach of contract, the opportunity must have been open to them many years ago to commence counterclaims based on those causes of action much earlier than in this matter.

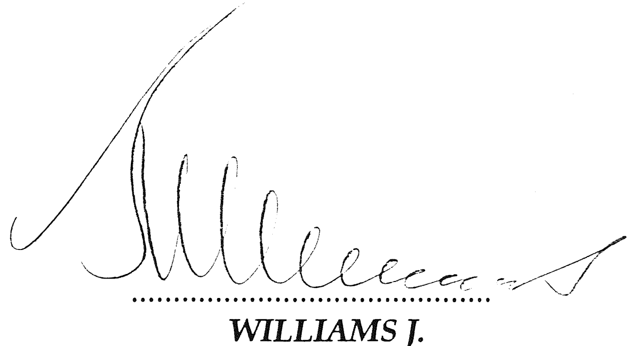
In all those circumstances, notwithstanding that Mrs Laughton's claim is statute-barred, this Court reaches the view that the causes of action she pleads, no matter how seen, are untenable and incapable of success and accordingly the defendants' application to strike them out is granted and the statement of claim is dismissed.

Both defendants seek orders for costs against the plaintiff. In response, counsel for Mrs Laughton advised that she and her husband have suffered the mortgagee's sale referred to earlier in this judgment and that Mr Laughton is bankrupt and will remain so for some period to come. The Court accordingly infers that their financial circumstances are modest at best and may well be less charitably described. In those circumstances it is appropriate that the defendants have costs but that the quantum of costs should be modest. In this Court's view the appropriate order is that the plaintiff pay to the first, second and third defendants and to the fourth and

fifth defendants the sum of $750.00 for each of those groups of defendants, plus disbursements as fixed by the Registrar.

ADDENDUM

During the course of editing the transcript of this oral judgment for comprehensibility, the Court read the judgment of the Court of Appeal in ***CN & NA Davies Ltd v I C J Laughton & Parks*** (CA.264/96 21/7/97). No counsel referred to that decision in argument. It appears to reflect factual differences in some respects from those discussed in this judgment.



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WILLIAMS J.

25 September 1997