IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2006-485-751

BETWEEN	KEITH HUGH NICOLAS BERRYMAN AND MARGARET BERRYMAN Plaintiffs
AND	HER MAJESTY'S ATTORNEY-GENERAL Defendant

Hearing: 20 July 2009

Counsel: R A Moodie for Plaintiffs
H S Hancock and J R Burns for Defendant

Judgment: 31 July 2009 at 4.55pm

I direct the Registrar to endorse this judgment with a delivery time of 4.55pm on the 31st day of July 2009.

RESERVED JUDGMENT OF MACKENZIE J

The Applications

[1] This latest chapter in the litigation between these parties involves three interlocutory applications:

(a) An application by the defendant for strike out – the second such application in these proceedings;

(b) An application by the defendant for further and better particulars of the statement of claim, or, alternatively, for further and better discovery;

(c) An objection by the defendant to a notice by the plaintiff under (now) r 7.14 of the High Court Rules requiring trial by a jury.

[2] There is a fourth application, described in the intituling as "plaintiffs' interlocutory application on notice for orders that persons with knowledge of facts relevant to these proceedings refusing to make an affidavit be ordered to appear and be examined on oath before the Court". That application was not the subject of full argument at this hearing.

The course of this proceeding, to date

[3] A brief description of the procedural course of the litigation in between these parties is necessary. No description of the wider background to the long running dispute between the parties is necessary, as that has been well ventilated in other judgments of this Court and the Court of Appeal. A description is contained in the judgment of the Court of Appeal on the earlier strike out and summary judgment applications in this proceeding; *New Zealand Defence Force v Berryman* [2008] NZCA 392 at paragraphs [8] to [45] under the heading "Factual Background". I refer to that as "the Court of Appeal judgment".

[4] There has been other litigation by Mr and Mrs Berryman. In May 2003 they commenced an application for judicial review of certain decisions of the Coroner in relation to the inquest, and of the Solicitor-General in relation to their attempts to have the inquest re-opened. Those proceedings were discontinued in March 2005, following an unsuccessful application for non-party discovery against the New Zealand Defence Force. A further application to the Solicitor-General for him to exercise the powers available to him to re-open the inquest process was made. Following the decision of the Solicitor-General on that application, a further judicial review application was commenced in 2005. That proceeding was the subject of a

judgment on 30 April 2008 by Mallon J (CIV-2005-485-1795 HC WN 30 April 2008).

[5] This proceeding was commenced in April 2006. Three causes of action were pleaded against the defendant (sued in respect of the Army):

(a) Misfeasance in public office – this alleged deliberate acts of the Army in relation to the coroner's inquest;

(b) Breach of contract – this alleged breach of a contract between the plaintiffs and the Army relating to the design and construction of the bridge in 1986;

(c) Negligence – this alleged a breach by the Army of a duty of care owed by it to the plaintiffs in relation to the design and construction of the bridge in 1986.

[6] The relief sought in respect of each cause of action was identical. Damages were sought under several heads which may be briefly summarised as:

(a) The cost of materials provided by the plaintiffs for use in the construction of the bridge;

(b) The costs of demolition of the failed bridge;

(c) Costs incurred in defending the OSH prosecution;

(d) Costs incurred in representation at the inquest;

(e) Costs in the judicial review proceedings;

(f) Reimbursement for costs incurred "during their endeavour to clear their names and restore their reputations";

(g) Damages for "pain and suffering, damage to health, injury to feelings and humiliation resulting from the blame attached to the plaintiffs for the death of Mr Richards";

(h) Damages "for the loss of their formerly mortgage free and freehold farm";

(i) Damages "as compensation for consequential loss of farm income between 1994 and 2006";

(j) Exemplary damages.

[7] In its statement of defence, the defendant pleaded, in respect of the breach of contract and negligence actions, that the causes of actions were barred by s 4 of the Limitation Act 1950, and by the agreement of satisfaction referred to in paragraph [13] of the Court of Appeal judgment. The defendant applied for strike out, and summary judgment. Those two applications were heard by Associate Judge Christiansen in June 2007. Shortly before hearing, the plaintiff discontinued the breach of contract and negligence causes of action, so the strike out and summary judgment applications were concerned only with the first cause of action, misfeasance in public office. In a judgment delivered on 6 July 2007, the two applications were dismissed. The defendant appealed against that decision.

[8] Before the hearing of that appeal an amended statement of claim was filed, in December 2007. That raised a new second cause of action, and alleged breach of the New Zealand Bill of Rights Act 1990, and Magna Carta 1297 "in relation to the conduct of the Crown in relation to the inquest".

[9] The appeal was heard in June 2008. The judgment of Associate Judge Christiansen dealt with both a strike out application and a defendant's summary judgment application. The procedural issues to which that gave rise are discussed at paragraphs [4] to [6] of the Court of Appeal judgment. The appeal was, for the reasons there given, concerned only with the summary judgment application. The Court of Appeal judgment delivered on 25 September 2008 dismissed the

defendant's appeal. The reasons for that decision are relevant in the present context and I return to those later.

[10] In November 2008, the defendant applied to strike out the December 2007 statement of claim. A second amended statement of claim was filed in April 2009. That now pleads only one cause of action, misfeasance in public office. The heads of damage claimed are, with some differences in amount and in the wording of the claims, broadly similar to those claimed in the original statement of claim, with the deletion of items (c), (d) and (e) in paragraph [6] above.

[11] In September 2008, the plaintiffs gave notice under (then) r 435 of the High Court Rules that they require the matter to be tried before a Judge and a jury. In May 2009 the defendant filed a "memorandum in opposition to plaintiffs' application for jury trial". Though it is not framed as an application by the defendant for an order that the proceeding be tried before a Judge without a jury, in terms of s 19A(5) of the Judicature Act 1908, that is the effect of the memorandum and it is convenient to treat it as such.

[12] In May 2009, the defendant filed two memoranda seeking further particulars of the claim, or further discovery. All of the additional material sought related to the question of the various heads of damages claimed. The plaintiffs oppose, and it is convenient to treat the memoranda as an application for further and better particulars, or for further discovery.

The strike out application

[13] The defendant's application seeks orders that certain paragraphs in the statement of claim be struck out, stayed, or dismissed. Additionally or alternatively, it seeks orders that the December 2007 amended statement of claim be struck out in its entirety (on Limitation Act 1950 grounds). Although the application was filed in relation to the December 2007 amended statement of claim, the application was argued in relation to the April 2009 second amended statement of claim and can conveniently be dealt with in relation to that statement of claim.

[14] The principles to be applied on a strike out application are well established. The strike out jurisdiction is addressed in r 15.1 of High Court Rules. The essential criteria are those summarised by the Court of Appeal in *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262. The principles have recently been considered by the Supreme Court in *Couch v Attorney-General* [2008] 3 NZLR 725. Pleaded facts are assumed to be capable of proof unless the particular pleaded allegation is entirely speculative and without foundation. The cause of action must be clearly untenable and it is inappropriate to strike out a claim summarily unless the Court can be certain that it cannot succeed. The jurisdiction is to be exercised sparingly, and only in clear cases. The Court should be particularly slow to strike out a claim in any developing area of the law.

[15] In my view, consistent with those principles, the only basis upon which it can be contended, on the application, that the cause of action is clearly untenable and that the Court can be certain that it cannot succeed is that related to the Limitation Act defence. An earlier strike out application on other grounds has been rejected. The Court of Appeal has held that an hypothesis for a claim of misfeasance in public office could not, on a summary judgment appeal, be ruled out on the evidence. It is therefore convenient to deal first with the Limitation Act point, despite that being expressed as an alternative and additional argument in the application. The question is, is it so clearly apparent that the claim is statute barred that the Court can be certain that, whether or not the claim might otherwise succeed, the limitation defence must be a bar to it?

[16] As I have noted, this is the second strike out application which has been made, in relation to the misfeasance in public office cause of action. The statement of claim has been amended following the Court of Appeal judgment on the first strike out/summary judgment application. It is often the case that the detailed consideration of a cause of action which is necessarily involved in a strike out application leads to refinements which need to be reflected in an amended statement of claim. Subsequent attempts to strike out the claim where an earlier strike out application has been unsuccessful are not to be encouraged. If there may be more than one ground which might support a strike out application, all grounds should be raised in the one application. In this case, no limitation defence was initially pleaded

in respect of the misfeasance cause of action, despite being explicitly pleaded for the other causes of action. There is no obvious reason why the Limitation Act point could not have been raised at the outset and addressed in the earlier application. Despite that less than satisfactory position, I consider that at the question whether the operation of the Limitation Act is so clear that the claim cannot succeed must be considered at this stage. It would not be in the interests of justice to allow the claim to proceed to trial if it was doomed to fail on that ground.

[17] The potential availability of a claim for misfeasance in public office in this case is considered at length in the Court of Appeal judgment. The Court held that a claim for misfeasance in public office is not available in relation to the evidence given or submissions made to the coroner, because of the principles of immunity from suit in relation to evidence and submissions made to a Court. But for that, the Court of Appeal would have regarded the aspect of the claim for misfeasance in public office which focussed on the submissions made to the coroner as sufficiently tenable to survive a summary judgment application.

[18] The Court then considered whether a claim for misfeasance in public office might be available in relation to the withholding of the Court of Inquiry report and associated material from the coroner. The Court said:

> [85] That leaves two alternative bases upon which the claim might conceivably be prosecuted:
>
> (a) Someone who held the status of superior commander and was aware of the submissions to be advanced at the inquest made a decision not to release the Court of Inquiry report and associated material; or
>
> (b) Colonel Howard and/or Mr McGuire made a decision not to recommend to a superior commander that he or she release the report and this decision was itself made by them as public officers and was of a sufficiently public character to be subject to a claim for misfeasance in public office.
>
> [86] There is no evidence at all which supports the first hypothesis and it is inconsistent with the pattern of the evidence as a whole. It can, we think, be fairly regarded as having been excluded as a substantial possibility.
>
> [87] The second hypothesis is not particularly probable as it seems far more likely that Colonel Howard and Mr McGuire simply took the non-release of the Court of Inquiry report (and associated material)

> as a given. Nonetheless, it has not been excluded, as the only direct evidence from Colonel Howard and Mr McGuire is in the form of a very brief affidavit from Colonel Howard confirming that he was not, and never has been, a superior commander. So the hypothesis cannot be ruled out on the evidence.

[19] In the third amended statement of claim, the allegations of misfeasance are framed in such a way as to reflect that statement by the Court of Appeal. For the purposes of this application, I must assume that the plaintiffs may be able to establish that factual basis for a claim. While it appears tenuous, it cannot be held to be untenable, in the light of the Court of Appeal judgment.

[20] A limitation defence may constitute a basis for a successful strike out application; *Murray v Morel & Co Ltd* [2007] 3 NZLR 721 (SC); *Kerridge v Kerridge* [2009] 2 NZLR 763 (CA). Not all limitation issues are appropriately dealt with in a pre-trial application; *W v Attorney-General* [1999] 2 NZLR 709, at [115]; *Crown Health Financing Agency v P* [2009] 2 NZLR 149. In this case, the limitation defence does not raise issues of a type similar to those in the cases where pre-trial disposition of a limitation defence is not appropriate.

[21] The cause of action for misfeasance in public office is an action founded on tort. Under s 4(1) of the Limitation Act 1950 an action founded on tort shall not be brought after the expiration of six years from the date on which the cause of action accrued. A cause of action accrues when every fact exists which it would be necessary for the plaintiff to prove in order to support right to the judgment of the Court: *Williams v Attorney-General* [1990] 1 NZLR 646, at 678 (CA); *Invercargill City Council v Hamlin* [1996] 1 NZLR 513 at 526 (PC). This proceeding was filed on 6 April 2006. Accordingly, it will be statute barred if the plaintiffs' cause of action accrued before 6 April 2000.

[22] In the case of torts which are actionable *per se* the plaintiff has a cause of action at the moment when the wrongful act is committed and whether damage has been suffered is not material. In the case of torts which are actionable only on proof of damage, a cause of action accrues only from the date of the damage: *Bowen v Paramount Builders (Hamilton) Ltd* [1977] 1 NZLR 394 (CA);

Mount Albert Borough Council v Johnson [1979] 2 NZLR 234 (CA); *T v H* [1995] 3 NZLR 37 (CA).

[23] Counsel for the plaintiffs submitted that damage is not an essential element of the cause of action for the tort of misfeasance in public office. If that is so, then the claim is clearly statute barred. The act or omission relied upon must have occurred no later than the date of the coroner's inquest. Accordingly, if misfeasance in public office is actionable *per se*, the cause of action must have accrued no later than June 1997. However, I do not consider that that submission is correct. In *Watkins v Secretary of State for the Home Department* [2006] 2 AC 395 HL(E) the question whether misfeasance in public office is a tort actionable *per se* was directly addressed. Lord Bingham of Cornhill commenced his speech as follows: "Is the tort of misfeasance in public office actionable without proof of financial loss or physical or mental injury and, if so, in what circumstances?" He answered that question at paragraph [27]:

> … I would accordingly rule that the tort of misfeasance in public office is never actionable without proof of material damage as I have defined it.

That same answer was given by all of their Lordships, albeit, at least on the part of Lord Walker of Gestingthorpe and Lord Carswell, with some reluctance.

[24] That means that any cause of action for misfeasance in public office would not be complete until the plaintiffs suffered damage from the acts or omissions relied upon as constituting the tort of misfeasance.

[25] A cause of action for a tort which is actionable only on proof of damage accrues at the time when damage is first suffered. The fact that damage may be ongoing will not extend the limitation period. In cases where the same tortious act or omission gives rise to some subsequent separate damage, a new cause of action may arise. In *Bowen v Paramount Buildings*, it was suggested that it is a question of fact and degree whether the damage is sufficiently distinct to result in a separate cause of action (per Cooke J at 424). That approach was referred to and applied in *Mount Albert Borough v Johnson* at 240 (Cooke and Somers JJ) and 243 (Richardson J).

[26] In applying those principles here, the appropriate approach is to consider each of the heads of damage now claimed by the plaintiffs to determine whether the damage claimed under the particular head was first suffered before or after April 2000. If some heads of damage were first suffered before April 2000 and others first suffered afterwards, it will be necessary to consider whether the damage first suffered afterwards is sufficiently distinct to result in a fresh cause of action.

[27] The pleading as to damages is now contained in paragraph [80] of the second amended statement of claim, in these terms:

> The deliberate acts and/or omissions of the Army did cause damage to the plaintiffs including:
>
> (a) pain and suffering, damage to health, injury to feelings and humiliation resulting from the blame attached to them for the death of Kenneth John Richards; and
>
> (b) financial loss through the forced sale of their farm, consequential loss of income and other economic loss including wasted, unnecessary legal expenses; and
>
> (c) loss of their right to take legal proceedings against the New Zealand Army in tort or contract for any fault in the design, materials used, and the construction of the Te Rata Bridge as a result of the expiry of the 10 year limit for bringing proceedings under section 393 (2) of the Building Act 2004 as a result of being misled by the Army's false submissions to the Coroner and before becoming fully aware of the faults in the Army's design and construction of the bridge.

[28] The particularisation of the damages claimed, in the prayer for relief, broadly follows those categories. It is convenient to consider the question of the accrual of the cause of action against the three heads of damage set out in paragraph [80]. In doing so, I must, in accordance with strike out principles, proceed on the hypothesis that the plaintiff may establish that all or any of those heads of damage do flow from the alleged misfeasance.

[29] In approaching the issue in that way, I do not address any issues of causation which arise. The Court of Appeal judgment discussed (at paragraph [47]) the possible forensic significance of the fact that the plaintiffs did not have access to the Butcher report, and described these as 'forensic disadvantages". If those forensic disadvantages are themselves damage, then the disadvantages were suffered at the

time of the inquest hearings. If the categories of damage in paragraph [80] are damage claimed to arise from the forensic disadvantages, then causation issues arise. For present purposes, I approach this application on the (somewhat artificial) hypothesis that the various categories of damage may be damage suffered as a consequence of the withholding of the Butcher report, but not damage suffered at the time the Butcher report was allegedly wrongly withheld.

[30] Paragraph 80 (a) refers to damage resulting from the blame attached to them for Mr Richards' death. The "blame" which is referred to must arise from the comments made by the coroner in his final findings on the inquest. Those findings were released on 20 June 1997. Accordingly, any damage must first have been first suffered at or near the time when the findings were released, and certainly well prior to April 2000.

[31] The second head of damage is the financial loss through the forced sale of the farm with consequential loss of income and other economic loss. The pleadings do not contain any assertion as to when the farm was sold. Nor do they assert facts which might establish any connection between the sale of the farm and the alleged misfeasance. It is however common ground that the farm was sold by Mrs Berryman, who was the sole registered proprietor, in November 1999. Any loss arising from the sale of the property must have crystallised at that point, and any ongoing loss from the loss of the farm must have begun to run at that time.

[32] The third head of damage is the alleged loss of the right to take proceedings against the Army in tort or in contract for any fault in the design materials used and construction of the bridge as a result of the ten year limit for bringing proceedings under s 393(2) of the Building Act 2004 as a result of being misled by the Army's false submissions to the coroner. Paragraph 78 of the statement of claim asserts that the acts constituting the alleged misfeasance were decisions not to recommend the release of the Butcher report to, or to withhold knowledge of the existence of that report from, the coroner, to facilitate the making of submissions known to be wrong. The plaintiffs must necessarily rely on alleged decisions as to the non-release of the report, rather than acts in the drafting of the submissions, because of the immunity from suit referred to by the Court of Appeal in respect of the submissions.

Therefore, this claimed head of damage rests on the proposition that, as a result of the alleged misfeasance, the Butcher report was concealed from the plaintiffs and was not revealed to them until June 2002.

[33] There are several steps involved in the proposition that the alleged misfeasance in withholding the report was causative of the loss of a right to sue the Army in tort for deficiencies in the design or construction of the bridge in 1986. It would be necessary to show:

(a) That the plaintiffs had a cause of action in tort, arising from the damage which occurred in 1994;

(b) That the plaintiffs were unaware of that cause of action in 1994;

(c) That the plaintiffs would have been aware of the cause of action if they had knowledge of the Butcher report;

(d) That, had the alleged misfeasance not occurred, they would have become aware of the Butcher report in 1997;

(e) That the right of action would still have been available (that is, not time-barred) in 1997;

(f) That the right of action had become time-barred by the time when the Butcher report became known to them, in June 2002.

[34] If these steps were all established, that might conceivably lead to findings that the loss of the right to sue was damage caused by the alleged misfeasance, and that the damage was suffered when the hypothetical negligence cause of action became time barred. I consider that the plaintiffs face huge factual and conceptual difficulties on each of these steps. There are major difficulties of causation which would have to be overcome. For example, the Court of Appeal judgment contained comment relevant to step (d). At paragraph [94], it said:

> … A decision not to release the Court of Inquiry report and associated material for the purposes of the inquest would have been perfectly legitimate. If the incongruity between the submissions which were intended to be made and the Court of Inquiry report and associated material had been addressed, it is far more likely that the submissions would have been toned down rather than that the Court of Inquiry report and associated material would have been released. …

That example demonstrates the difficulty in establishing a causative relationship between the alleged misfeasance and the loss of the right to sue for negligence.

[35] However, those are not difficulties which it would be appropriate to address on a strike out application. The one aspect of these steps which is amenable to consideration at this stage is the issue of when a cause of action against the Army in respect of the design and construction of the bridge would have expired. It would be necessary for the plaintiffs to establish that the cause of action became time barred within the limitation period for the present proceedings; that is, after April 2000.

[36] If the plaintiffs had a claim in contract against the Army in relation to the construction of the bridge, then that cause of action would have commenced to run from the date of breach. Damage is not an essential element of the cause of action. The date of breach cannot have been later than the date of handing over the bridge. That date would have been on or about the date on which the agreement of satisfaction was signed, namely 23 March 1986. Thus, any cause of action in contract was already time barred before the date of the inquest, and indeed before the date of collapse of the bridge.

[37] So far as a claim in tort for breach of a duty of care in the design or construction of the bridge is concerned, any such breach of duty would not have become actionable until damage was first suffered. That could not have been later than the collapse of the bridge in March 1994. On that basis, a cause of action in tort would have become time barred in March 2000. So, any damage from loss of the right to sue arising from failure to disclose the Butcher report occurred outside the limitation period for this proceeding, which requires that the damage occurred after 6 April 2000.

[38] The expiry of the limitation period for a claim in tort would also be affected by the "long stop" provision for claims in respect of building work. The statement of claim refers to s 393(2) of the Building Act 2004. Due to the timing of events, the relevant provision is the predecessor provision, s 91 of the Building Act 1991. There is no material difference between the two provisions, for present purposes. Section 91, as relevant, provides:

> (1) Except to the extent provided in subsection (2) of this section, the provisions of the Limitation Act 1950 apply to civil proceedings against any person where those proceedings arise from—
>
> (a) Any building work associated with the design, construction, alteration, demolition, or removal of any building; or
>
> (b) The exercise of any function under this Act or any previous enactment relating to the construction, alteration, demolition, or removal of that building.
>
> (2) Civil proceedings relating to any building work may not be brought against any person 10 years or more after the date of the act or omission on which the proceedings are based.
>
> …
>
> (5) Notwithstanding section 93(1)(a) of this Act, subsection (2) of this section applies to any proceedings commenced after this Part of this Act comes into operation, except proceedings commenced before the 1st day of July 1993.

[39] Although this bridge was completed in 1986, before the 1991 Act with the first "long stop" provision came into force, s 91(2) will apply, by virtue of subs (5). Paragraph 80 of the statement of claim is not specific as to the time at which the plaintiffs' allege that the ten year limit would have expired. It is important to bear in mind that s 91 does not extend the Limitation Act period. That is clear from subs (1). So, s 91(2) cannot have the effect of establishing a later date for the time barring of a cause of action in tort for negligence in the design and construction of the bridge than that arising under s 4 of the Limitation Act. That, as I have held, is not later than March 2000. It appears that the effect of s 91(2) in this case would be to bar any action in tort from a date earlier than March 2000. That subsection precludes any proceedings after the expiry of ten years from the date of the act or omission for which the proceedings are based. The act or omission for an action in negligence in relation to the design or construction of the bridge must necessarily

have occurred before March 1986. The effect of s 91 would be to preclude any claim after March 1996.

[40] For these reasons, I consider that it is clear as a matter of law that even if the plaintiffs could establish that the alleged misfeasance may have affected their knowledge of the existence of a potential claim against the Army in tort, the misfeasance could not have been causative of any loss or damage after 6 April 2000, since any right to sue the Army in respect of the construction of the bridge had become statute barred before that date. That conclusion makes it unnecessary to consider whether damage falling under the head claimed in paragraph 80 (c) is separate damage, for which time would run afresh, independently of the damage claimed under paragraphs (a) or (b).

[41] For completeness, I should add that I do not consider that, on the issue of whether the present proceedings are within time, any regard should be paid to any possibility that the limitation period for an action in the tort of negligence against the Army relating to the design and construction of the bridge might be extended under s 28 of the Limitation Act. That section provides for a postponement of the limitation period in cases where the right of action is concealed by the fraud of any person. That section can have no possible application to the facts here. All relevant facts relating to the design and construction of the bridge, and to its collapse, were known to the plaintiffs. There is no basis for a tenable argument that the actions in relation to the Butcher report which are relied upon as constituting misfeasance could amount to fraudulent concealment of a cause of action. In an event such as the collapse of this bridge, all parties potentially involved may make their own inquiries and investigations, and obtain expert's reports and the like. There is no general obligation to make such reports available to other interested parties. Where there is litigation, there may be discovery obligations. However, legal professional privilege may attach to such reports. Here, there were at the relevant time, namely the time of the inquest, no potential discovery obligations on the Army. It was under no obligation to make the report available. If the issue of postponement of a possible cause of action in tort were relevant, that is an issue which should have been addressed directly by invoking s 28 in relation to that cause of action. That was not done, and that cause of action has now been discontinued.

[42] For these reasons, I consider that this proceeding has not been commenced within six years after the accrual of the cause of action for the alleged misfeasance in public office and that the action, if allowed to proceed to trial, must necessarily fail on that account.

[43] Having reached that conclusion I must consider whether this is an appropriate case in which to exercise the discretion to strike out the proceeding. The Court will always be cautious in depriving any litigant of its day in Court in respect of a claim. In this case, the sole remaining cause of action is the claim for misfeasance in public office. The Court of Appeal has held, without considering the limitation point, that to claim was not appropriate for summary judgment and I have applied that by accepting that, in respects other than the limitation point, the claim should not be struck out. However, the Court of Appeal clearly did not regard the claim as strong. It said:

> [93] As will be apparent from what we have just said, our acceptance that there is an insufficient evidential basis for the entry of summary judgment is not an endorsement of the factual merits of the case.

[44] The Court also said:

> [50] These comments are not intended to excuse the submissions that were made to the Coroner on behalf of the Army. Nor do they in any way amount to a finding of fault with the Berrymans, either in relation to the bridge collapse or what happened at the inquest. And we accept that the forensic disadvantages identified in [47] might amount to sufficient damage to support a claim for misfeasance in public office if it is otherwise available. But it is right to recognise that those forensic disadvantages are reasonably indirect; so much so that it is not altogether plausible to attribute to anyone connected with the Army an intention to cause (or recklessness asto) damage to the Berrymans as opposed simply to a desire to present the Army in the best possible light. As well, our analysis of the dynamics associated with the ways in which the Army and the Berrymans presented their cases at the inquest illustrates the reality that the Berrymans are now seeking to re-litigate the issues that were before the Coroner, a point which is relevant to whether the Army has immunity from suit in relation to what happened at the inquest.

[45] Those statements are relevant to whether I should now give effect to my conclusion that the very different type of damage alleged by the plaintiffs occurred at a time which is outside the limitation period, or whether I should leave that question to be finally determined by trial. I have reached the clear view that it would not be

in the interests of justice to allow this proceeding to continue. The actions of the Army in relation to the Butcher report have been well ventilated, both in the public arena and in the Courts. I respectfully concur in the view which the Court of Appeal has expressed, that the reality is that the plaintiffs are now seeking to relitigate the issues that were before the coroner. There has been scrutiny of these matters in the judgment of Mallon J in the judicial review proceedings. There can, in my view, be no public interest in allowing these matters to be further litigated in these proceedings, when there is no prospect that that might lead to the only remedy which could properly be claimed in these proceedings, namely a remedy in damages. Nor do I consider that the interests of the plaintiffs would be served by allowing them to continue with a claim which is bound to fail as statute barred.

Result

[46] For these reasons, I consider that the claim must be struck out. That conclusion makes it unnecessary for me to address the other applications.

[47] There will be an order striking out the proceeding. Costs are reserved.

A D MacKenzie J”

Solicitors: Moodie & Co., Feilding for Plaintiffs
Crown Law Office, Wellington for Defendant