IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2009-404-1721

BETWEEN	SHER AFZAL KHAN First Plaintiff
AND	YOUMNA KHAN Second Plaintiff
AND	KEITH WILLIAM REID Defendant

Hearing: 27 October 2009

Appearances: Plaintiff in person and for second plaintiff
M Colthart for defendant

Judgment: 30 October 2009

JUDGMENT OF ALLAN J

In accordance with r 11.5 I direct that the Registrar endorse this judgment with the delivery time of 4.30 pm on Friday 30 October 2009

Solicitors/Counsel/parties:
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Introduction

[1] In June 1993 the second plaintiff, Mrs Khan, suffered a personal injury for which she sought and obtained compensation from the Accident Rehabilitation & Compensation Insurance Corporation (ACC). In April 1996, the plaintiffs were arrested and charged with using documents with intent to defraud the ACC. In May 1996 the defendant, then practising as a barrister, was retained to act for the plaintiffs by their solicitors, Skeates Simpson.

[2] A long sequence of civil and criminal hearings followed. The plaintiffs were eventually convicted of offences arising out of the second plaintiff's claim for compensation. Mr Reid acted for the plaintiffs until October 1997 in respect of some, but not all, aspects of their dealings with the ACC.

[3] The plaintiffs are dissatisfied with Mr Reid's advice. They consider that, as a result of what they allege to have been negligence on his part, they have suffered significant financial losses. The present proceeding was commenced on 26 March 2009. Mr Reid now seeks to strike out the proceeding or, in the alternative, an order granting him summary judgment against the plaintiffs. His application is based on several separate grounds, principal among which is the contention that the plaintiffs' claim is statute barred.

Factual background

[4] Mrs Khan received weekly compensation from ACC between December 1993 and April 1996. Her entitlements were calculated on the basis that she was, prior to the accident in which she was injured, an earner in the business operated by the plaintiffs. It appears that a disgruntled former employee laid a complaint with ACC and/or the police to the effect that Mrs Khan had not in fact been in receipt of salary or wages at the time of the accident.

[5] Mr and Mrs Khan were arrested on 16 April 1996. On 19 April 1996 the ACC issued a decision advising that Mrs Khan's weekly compensation payments would cease.

[6] In May 1996 Mr Reid was retained by the plaintiffs' then solicitors. On 12 July 1996 Mr Reid filed an application for review of the ACC's decision to discontinue Mrs Khan's compensation payments. In letters written on 17 January and 23 April 1997 respectively, Mr Reid sought to have the review application brought on for hearing.

[7] On 6 May 1997 the ACC wrote to Mr Reid in the following terms:

> Re Youmna Khan
>
> Thank you for your letter of 23 April 1997 concerning the review application lodged in relation to the Corporation's decision of 19 April 1996 to cease compensation.
>
> I refer you to my letter of 28 January 1997 in which I advised that the matter had been referred to Head Office, for guidance on how to proceed with the application. A response from Head Office has been received.
>
> **Section 90(9) of the Accident Rehabilitation and Compensation Insurance Act states:**
>
> > Where the hearing of a review has not been commenced within 3 months after the lodging of the application for review, and the delay is not caused or contributed to by the applicant, the application shall be deemed to have been determined in favour of the applicant.
>
> As the hearing of the application for Review was not commenced within 3 months of lodgement the decision must be found to be in the favour of the applicant. Accordingly Mrs Khan's compensation will be reinstated from the date of cessation on the provision of medical certification.
>
> **Section 73(1) of the Act states:**
>
> > The Corporation shall, if not satisfied on the basis of the information in its possession that a person is entitled to continue to receive any treatment, service, rehabilitation, related transport, compensation, grant, or allowance under this Act, suspend or cancel that payment for treatment, service, or related transport, or the payment of compensation, grant, allowance or provision of rehabilitation.
>
> Accordingly compensation will be re-ceased from 10 September 1996 in accordance with Section 73(1) of the Act (Three months from the date of the review application lodgement).

> This decision is based on the fact that the Corporation holds information that leads it to believe that the earnings details provided for the assessment of weekly compensation are incorrect. As you are aware this matter is set for trial on 28 July 1997.
>
> If you are not satisfied with this decision, or there is something you do not understand, you should contact us immediately and discuss your concerns. We will explain the decision and will explain your right to ask that the decision be reviewed.
>
> If you do want a decision to be reviewed a request must be made in writing using a special form which is available from our office. The written request for a review must be received within three months from the date of this letter.

[8] Mr Reid's evidence is that he wrote to the plaintiffs on 21 May 1997 enclosing a copy of the ACC's letter of 6 May 1997. Mr Reid's letter advised the plaintiffs as follows:

> Re: Youmna Khan – Application for Review
>
> Further to your faxed enquiry regarding my legal opinion on the prospects of success of Youmna Khan's application for reinstatement of weekly compensation you will recall my advice that as in the case of Banaras Khan's application we are hampered by the lack of what I call 'hard evidence' – wage books, PAYE details, tax certificates etc and the case will have to proceed on the evidence of the various participants in the company so basically it becomes an issue of credibility – will the review officer believe that evidence.
>
> I was endeavouring to press ACC into setting the review matter down for hearing. Youmna's file had gone to head office and I now have a response which is attached. You will see that the head office reply is that because the review application was not commenced within three months of its lodgement the decision is presumed to go in Youmna's favour and accordingly weekly compensation was reinstated from the date of cessation which I have at 17 April 1996. Then immediately on top of that the Corporation invoked section 73(1) indicating that it was not satisfied on the information that Youmna was entitled to any compensation so compensation will be stopped again from 10 September 1996. This letter constitutes a fresh decision and requires a fresh application for review which we will lodge but quite obviously the Corporation has no intention of hearing Youmna's application for review before the criminal prosecution.
>
> This new decision means that Youmna's weekly compensation will be reinstated from 17 April 1996 to 10 September 1996.
>
> Quite obviously I am unable to advance this matter further until the prosecution is concluded. I can do no more at the moment than lodge the new application for review. A copy of this letter is also available for your counsel in the prosecution and this is the obvious logical point to tidy up matters by your letting me have a cheque for my account previously rendered.

[9] The plaintiffs say that they never received Mr Reid's letter, nor the 6 May letter from the ACC. Their contention lies at the heart of the dispute, and is pivotal to the plaintiffs' claim against Mr Reid. I will return to the evidence surrounding the 21 May 1997 letter shortly.

[10] Mr Reid thereafter undertook certain work for the plaintiffs. In particular, he provided a number of calculations to Mr Cagney, who at the time was the barrister retained to act for the plaintiffs in the criminal proceedings. Mr Reid prepared handwritten calculations of a notional entitlement which Mrs Khan might have had "in normal circumstances". This material was sought from Mr Reid by Mr Cagney in order to support the defence case in the criminal proceedings.

[11] The plaintiffs' criminal trial took place in September 1997. They were then represented by Mr Barry Hart. Each plaintiff was convicted. On 13 October 1997 Mr Reid reported to Mrs Khan. He advised in the light of the outcome of the criminal prosecution, there was no point in proceeding with a pending application for review of the ACC's decision of 6 May 1997.

[12] It is common ground that Mr Reid carried out no further work for the plaintiffs after October 1997.

[13] Thereafter there was no communication between the plaintiffs and Mr Reid until on 16 November 2007. Mr Khan contacted Mr Reid by telephone on that day to complain that the letter had failed to advise the plaintiffs of the ACC decision notified to Mr Reid in the letter of 6 May 1997.

[14] In a follow-up letter Mr Khan wrote to Mr Reid as follows:

> Reference to my telephone discussion with you today in relation to deemed decision.
>
> You were acting for Mrs Khan in review which was lodged against Corporation decision suspending Mrs Khan weekly entitlement after we were arrested on 16 April 1996.
>
> You wrote to Corporation on 23 April 1997, regarding review application the Corporation advised you on 6 May 1997 that review has not been commenced within 3 months therefore Mrs Khan Compensation will be reinstated from the date of cessation.

> The Corporation 6 May letter was produced in Auckland District Court therefore we were shocked to know that there was deemed decision but you failed to advise us.
>
> We believe that if deemed decision had been known to Judge and Jury the case would have been dismissed.
>
> Please find herewith copy of Judge Barber deemed decision which he found in Mrs Khan favour in 2004, he cancelled debit raised by Corporation. Judge Barber also directed Corporation to pay further back dated payment to Mrs Khan from 16 April 1996 till 8 May 1997.

[15] Subsequently, in a letter dated 12 December 2007, Mr Reid responded by indicating that his file showed that he had written to the plaintiffs on 21 May 1997, attaching a copy of the ACC's letter of 6 May 1997. Mr Reid's letter reads:

> **File number 230 Mrs Y Khan Application for Review**
>
> Further of your letter of 16 November 2007 I have retrieved Mrs Khan's file from storage. You state in paragraph 4 of your letter that I failed to advise you of the ACC deemed decision. This is not correct. My file shows that on 21 May 1997 I wrote to you explaining the effects of the deemed decision and attaching a copy of ACC's letter of May 1997, was in response to your request that these correspondence items should be faxed to you at number 6233173. I enclose a copy of my letter of 21 May 1997 showing 3 pages sent and I have on file a transaction report showing a transmission of 3 faxed pages to number 6233173 having been completed successfully. When I took instructions on this matter I wrote your phone numbers and fax number on the outside of my file and the fax number you gave me was 6233173.

[16] Nothing further passed between the parties until this proceeding was commenced in March 2009.

The plaintiffs' claim

[17] The plaintiffs are self-represented in this proceeding. The statement of claim suffers from some inadequacies, but is broadly understandable. Having recited certain background material, the plaintiffs say at paragraph 8 of the statement of claim that the Corporation had an obligation under s 67 of the 1992 legislation to advise them within 28 days of the deemed decision in favour of Mrs Khan but "deliberately failed to do so". Thereafter, the following core allegations appear:

> 9. That Barrister Keith Reid had been dealing with Corporation in relation to review application therefore the Corporation wrote to

Keith Reid on 6 May 1997, Section 90(9) of the Accident Rehabilitation and Compensation Insurance Act states;

> Where the hearing of a review has not been commenced within 3 months after the lodging of the application for review, and the delay is not caused or contributed to by the applicant, the application shall be deemed to have been determined in favour of the applicant.

As the hearing of the application for Review was not commenced within 3 months lodgement the decision must be found to be in the favour of the applicant. Accordingly, Mrs Khan's compensation will be reinstated from the date of cessation on the provision of medical certification.

10. That Mr Keith Reid failed to advice (sic) plaintiffs about deemed decision which had been severe detrimental impact leaded (sic) to conviction of both plaintiffs, however if deemed decision had been known to Jury and court the plaintiffs would have never been convicted.

11. That Mr Reid knew about deemed decision since May 1997, five month(s) prior to criminal trial have been (sic) dealing with Plaintiffs and defence lawyer John Cagney attended criminal trial hearing till plaintiffs were convicted in September 1997, but filed (sic) to advice (sic).

12. That the plaintiffs have serious doubt why Mr Reid has failed to advice (sic) plaintiffs and defence lawyer about deemed decision.

13. That as a result of Mr Keith Reid negligence (sic) failure to advice (sic) the plaintiffs about deemed decision suffered serious reputation in community and business losses.

[18] The plaintiffs seek by way of relief:

a) an inquiry into damages suffered;

b) interest from the date the cause of action arose.

[19] At the hearing of the present application Mr Khan indicated that he placed primary reliance upon the defendant's alleged failure to notify the plaintiffs of the 6 May 1997 letter of advice from the ACC. But it seems that the plaintiffs are dissatisfied also with the quality and extent of other advice given, or not given as the case may be, by Mr Reid. On Mr Reid's file there is a letter sent by facsimile by the plaintiffs, in which they appear to be seeking Mr Reid's general advice about all aspects of the ACC legislation insofar as it affected them at the time. These more

general complaints are not pleaded, and Mr Khan accepted that he would need to reformulate his claim in order to bring them within the purview of the litigation.

Procedural history

[20] Although perhaps of only marginal relevance to the issues now requiring determination, it is instructive to summarise the lengthy procedural background.

[21] The plaintiffs appealed to the Court of Appeal against their convictions in the District Court. The appeals were dismissed in a judgment given on 9 March 1998.

[22] On 8 July 1998 the ACC advised the plaintiffs that it was raising a debt of $36,167.35. The plaintiffs applied for a review of that decision on 12 August 1998. The review took place on 28 April 1999; in a decision of 22 June 1999 the reviewer confirmed the decision of the ACC.

[23] The plaintiffs filed a notice of appeal against the review decision. For various reasons which it is unnecessary to discuss here, there were significant delays in bringing the appeal on for hearing. Ultimately it was heard by Judge Barber on 11 November 2003. In a reserved decision dated 10 March 2004, His Honour upheld the appeal but indicated that consequential issues including arithmetical calculations, would need to be dealt with in a subsequent hearing.

[24] The further hearing took place on 27 and 28 January 2005, and a final decision was delivered on 2 August 2005. At the conclusion of the very lengthy judgment Judge Barber determined that, although the debt claimed by the ACC was not payable by the appellants, nevertheless Mrs Khan had not established on the balance of probabilities that she was an earner prior to the date of her incapacity on 18 June 1993. Accordingly, the Judge ruled she was not entitled to receive the further weekly compensation in issue on the review.

[25] Mrs Khan then applied to the District Court for an order directing a rehearing of the appeal determined by Judge Barber. The application for a rehearing was dismissed by Judge Cadenhead on 5 July 2006. Mrs Khan also applied to the

District Court for leave to appeal against Judge Barber's decision to the High Court. Judge Beattie declined that application on 20 July 2007. Judge Cadenhead's decision was the subject of an appeal to this Court, dismissed by Cooper J on 25 February 2008. An application for leave to appeal from the decision of Cooper J was declined by him in a judgment given on 14 August 2008.

[26] Mrs Khan then sought special leave to appeal to this Court against Judge Barber's decision of 2 August 2005. That application was dismissed by Venning J in a judgment given on 22 December 2008. An application for special leave to appeal to the Court of Appeal against that decision was dismissed by Venning J in a judgment delivered on 11 March 2009.

[27] Mrs Khan then applied to the Court of Appeal for special leave to appeal against the decision of Venning J declining to grant special leave to appeal to that Court. In a judgment given on 23 June 2009 the Court of Appeal dismissed the application for want of jurisdiction, but expressed the view that the appeal would not in any event have succeeded on the merits.

[28] It is plain that over many years the plaintiffs have pursued a variety of proceedings aimed at remedying what they consider to have been a grave injustice, arising from the way in which they have been treated by the ACC and by the judicial system.

[29] They are also dissatisfied with their former legal representatives. At about the same time as the present proceeding was filed, the plaintiffs lodged a separate claim in this Court seeking damages from Mr S Cassidy, the barrister who represented them in their appeal against conviction to the Court of Appeal in March 1998. They alleged that Mr Cassidy was in breach of his duty to them by accepting in the Court of Appeal that there was evidence upon which the jury was entitled to convict the plaintiffs. Against Mr Cassidy they sought damages of $50,000 for legal costs, together with $500,000 for loss of reputation, and a further unparticularised sum for loss of income.

[30] Mr Cassidy applied to have that proceeding struck out. In a judgment given on 11 September 2009, Sargisson AJ granted the application on the primary ground that the claim did not disclose a reasonably arguable cause of action, whether in negligence or otherwise. The Judge considered that the claim could not be repaired by reason of the provisions of s 47 of the Evidence Act 2006, and, separately, because it amounted to an abuse of process. The Judge also expressed the tentative view that the claim appeared to be time barred, but she did not consider it necessary to reach a firm conclusion on that point, given her other findings.

[31] Mr Khan advised the Court at the hearing of the present application, that the plaintiffs have applied to review Judge Sargisson's judgment of 11 September.

Summary judgment and strike out principles

[32] The defendant applies for summary judgment, or in the alternative an order striking out the plaintiffs' claim. The proper approach to an application by a defendant for summary judgment against a plaintiff was discussed by the Court of Appeal in *Westpac Banking Corporation v MM Kembla (NZ) Ltd* [2001] 2 NZLR 298 at [58]-[64], where the Court said:

> [58] The applications for summary judgment were made under R 136(2) of the High Court Rules which permits the Court to give judgment against the plaintiff "if the defendant satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed".
>
> [59] Since R 136(2) permits summary judgment only where a defendant satisfies the Court that the plaintiff cannot succeed on any of its causes of action, the procedure is not directly equivalent to the plaintiff's summary judgment provided by R 136(1).
>
> [60] Where a claim is untenable on the pleadings as a matter of law, it will not usually be necessary to have recourse to the summary judgment procedure because a defendant can apply to strike out the claim under R 186. Rather R 136(2) permits a defendant who has a clear answer to the plaintiff which cannot be contradicted to put up the evidence which constitutes the answer so that the proceedings can be summarily dismissed. The difference between an application to strike out the claim and summary judgment is that strike-out is usually determined on the pleadings alone whereas summary judgment requires evidence. Summary judgment is a judgment between the parties on the dispute which operates as issue estoppel, whereas if a pleading is struck out as untenable as a matter of law the plaintiff is not precluded from bringing a further properly constituted claim.

> [61] The defendant has the onus of proving on the balance of probabilities that the plaintiff cannot succeed. Usually summary judgment for a defendant will arise where the defendant can offer evidence which is a complete defence to the plaintiff's claim. Examples, cited in McGechan on Procedure at HR 136.09A, are where the wrong party has proceeded or where the claim is clearly met by qualified privilege.
>
> [62] Application for summary judgment will be inappropriate where there are disputed issues of material fact or where material facts need to be ascertained by the Court and cannot confidently be concluded from affidavits. It may also be inappropriate where ultimate determination turns on a judgment only able to be properly arrived at after a full hearing of the evidence. Summary judgment is suitable for cases where abbreviated procedure and affidavit evidence will sufficiently expose the facts and the legal issues. Although a legal point may be as well decided on summary judgment application as at trial if sufficiently clear (*Pemberton v Chappell* [1987] 1 NZLR 1), novel or developing points of law may require the context provided by trial to provide the Court with sufficient perspective.
>
> [63] Except in clear cases, such as a claim upon a simple debt where it is reasonable to expect proof to be immediately available, it will not be appropriate to decide by summary procedure the sufficiency of the proof of the plaintiff's claim. That would permit a defendant, perhaps more in possession of the facts than the plaintiff (as is not uncommon where a plaintiff is the victim of deceit), to force on the plaintiff's case prematurely before completion of discovery or other interlocutory steps and before the plaintiff's evidence can reasonably be assembled.
>
> [64] The defendant bears the onus of satisfying the Court that none of the claims can succeed. It is not necessary for the plaintiff to put up evidence at all although, if the defendant supplies evidence which would satisfy the Court that the claim cannot succeed, a plaintiff will usually have to respond with credible evidence of its own. Even then it is perhaps unhelpful to describe the effect as one where an onus is transferred. At the end of the day, the Court must be satisfied that none of the claims can succeed. It is not enough that they are shown to have weaknesses. The assessment made by the Court on interlocutory application is not one to be arrived at on a fine balance of the available evidence, such as is appropriate at trial.

[33] This passage was cited with approval by the Privy Council in *Jones v Attorney-General* [2004] 1 NZLR 433 at 437.

[34] Applications by defendants for summary judgment are now governed by r 12.2 which provides that the Court may give judgment against a plaintiff if the defendant satisfies the Court that none of the causes of action in the plaintiff's statement of claim can succeed. No difference in approach is signalled by the new rule.

[35] Strike out applications are governed by r 15.1, which provides:

15.1 Dismissing or staying all or part of proceeding

(1) The court may strike out all or part of a pleading if it—

(a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or

(b) is likely to cause prejudice or delay; or

(c) is frivolous or vexatious; or

(d) is otherwise an abuse of the process of the court.

(2) If the court strikes out a statement of claim or a counterclaim under subclause (1), it may by the same or a subsequent order dismiss the proceeding or the counterclaim.

(3) Instead of striking out all or part of a pleading under subclause (1), the court may stay all or part of the proceeding on such conditions as are considered just.

(4) This rule does not affect the court's inherent jurisdiction.

[36] The established criteria for striking out a plaintiff's claim were discussed by the Court of Appeal in *Attorney-General v Prince* [1998] 1 NZLR 262, and more recently by the Supreme Court in *Couch v Attorney-General* [2008] 3 NZLR 725.

[37] The following principles must be taken into account:

a) pleaded facts whether or not admitted are assumed to be true, save that allegations which are entirely speculative and without foundation may be discounted by the Court;

b) the cause of action must be clearly untenable; that is, the Court must be certain that it cannot succeed;

c) the jurisdiction is to be exercised sparingly, and only in clear cases;

d) the jurisdiction is not excluded by the need to decide difficult questions of law requiring extensive argument;

e) the Court should be slow to strike out a claim in a developing area of the law.

[38] In the present case nothing turns on the differences between the Court's jurisdiction to strike out and the alternative power to grant summary judgment to a defendant. In the first instance I deal with the strike out application.

[39] The Court's approach to such applications where a limitation defence is advanced was considered in *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525. There, having cited *Ronex Properties Ltd v John Laing Construction Ltd* [1982] 3 All ER 961, Tipping J said at 532:

> If the plaintiff in opposition to the defendants' proposition can show that it has a fair argument that the claim is not statute-barred or that the limitation period does not apply or is extended for any reason, then of course the matter must go to trial. To hold the interests of plaintiffs and defendants in fair balance in this context the Court should in my view be slow to strike out a claim or cause of action altogether in limine but against that, if the position is quite clear, then a defendant should not be vexed by having to go to full trial when the answer is obvious and inevitable.

[40] Tipping J returned to the topic in the recent Supreme Court judgment reported as *Murray v Morel & Co Ltd* [2007] 3 NZLR 721 where at [33] he said:

> 33. I consider the proper approach, based essentially on *Matai*, is that in order to succeed in striking out a cause of action as statute-barred, the defendant must satisfy the Court that the plaintiff's cause of action is so clearly statute-barred that the plaintiff's claim can properly be regarded as frivolous, vexatious or an abuse of process. If the defendant demonstrates that the plaintiff's proceeding was commenced after the period allowed for the particular cause of action by the Limitation Act, the defendant will be entitled to an order striking out that cause of action unless the plaintiff shows that there is an arguable case for an extension or postponement which would bring the claim back within time.

Discussion

[41] The starting point is s 4(1) of the Limitation Act 1950, which prohibits the bringing of an action after the expiration of six years from the date on which the cause of action accrues, under a simple contract:

> **4 Limitation of actions of contract and tort, and certain other actions**
>
> (1) Except as otherwise provided in this Act or in subpart 3 of Part 2 of the Prisoners' and Victims' Claims Act 2005, the following actions shall not be brought after the expiration of 6 years from the date on which the cause of

action accrued, that is to say,—

(a) Actions founded on simple contract or on tort:

…

[42] A cause of action accrues when all of the necessary elements have come into existence. In *Murray v Morel* at [69], Tipping J said:

> [69] In my view the numerous references in the Limitation Act to accrual of a cause of action can only be construed as references to the point of time at which everything has happened entitling the plaintiff to the judgment of the Court on the cause of action asserted. Save when the Limitation Act itself makes knowledge or reasonable discoverability relevant, the plaintiff's state of knowledge has no bearing on limitation issues. Accrual is an occurrence-based, not a knowledge-based, concept. The Limitation Act as a whole is structured around that fundamental starting point. The periods of time selected for various purposes must have been chosen on that understanding. The circumstances of postponement and extension have themselves been similarly framed.

The majority of the Supreme Court agreed with that approach.

[43] Statutory grounds justifying extension of the prescribed limitation period include disability, fraud and mistake. Of course, there are also the limited exceptions to the ordinary rule, to be found in the cases. The primary exceptions are latent building defects, sexual abuse and bodily injury. In such cases, a reasonable discoverability test may apply.

[44] None of the possible exceptions is applicable in the present case. Whether approached as a claim of breach of contract of retainer, or alternatively as a claim for negligence, time commenced to run for limitation purposes from the date of any act or omission of Mr Reid upon which the plaintiffs rely. It is common ground that Mr Reid's instructions did not extend beyond October 2007. It follows therefore, in my view, that the limitation period of six years expired in or about October 2003, some five and a half years before the present proceeding was filed.

[45] Mr Khan argues that neither plaintiff was aware of the letter from the ACC of 6 May 1997 until the time of the hearing before Judge Barber. He said that it was Mr Reid's responsibility in terms of his instructions from the plaintiffs, to provide a copy of the letter promptly to the plaintiffs. Had he done so then the plaintiffs would

not have been convicted of fraud, and would not have suffered the losses for which they now claim. So runs the plaintiffs' argument.

[46] But in order to succeed at trial the plaintiffs would have to show that, for limitation purposes, time did not commence to run against them until a date no earlier than March 2003, being six years prior to the date of filing the proceeding. In contending that time did not commence to run for limitation purposes until the plaintiffs allegedly first became aware in 2004 of the 6 May 1997 letter from the ACC, Mr Khan is effectively seeking to rely upon a reasonable discoverability exception in a conventional claim in contract and/or tort. The reasonable discovery exceptions do not apply in this case. In my opinion the plaintiffs' claim became statute barred, at the latest, in or about October 2003. On this ground alone the defendant is entitled to an order striking out the plaintiffs' claim.

[47] But even if I am wrong in that, I am satisfied that the proceeding cannot succeed on the merits. Although the Court will ordinarily proceed on the basis of the facts pleaded in the statement of claim, findings of fact, if available on affidavit evidence, can and should be made in respect of applications founded upon limitation periods: *Attorney-General v McVeagh* [1995] 1 NZLR 558 at 566 (CA); *Clear Communications Ltd v Sky Network Television Ltd* HC WN CP19/96 1 August 1997; *Body Corporate No.202254 v Approved Building Certifiers Ltd* HC AK CIV 2003-404-3116 13 April 2005; *Heaven v Webster Malcolm & Kilpatrick* HC AK CIV 2004-404-2826 9 November 2005.

[48] As pleaded, the plaintiffs' claim hinges entirely upon Mr Reid's alleged failure to notify the plaintiffs promptly of the existence of the ACC letter of 6 May 1997. Mr Reid's evidence is that he did in fact notify the plaintiffs of this letter, in that it was sent as an enclosure with his facsimile letter to them of 21 May 1997. The plaintiffs say they did not receive it. Mr Reid nevertheless points out that the facsimile number to which his letter of 21 May 1997 was sent (proved by the production of a facsimile transmission sheet) is the same facsimile number as was provided to him as the plaintiffs' facsimile number when he first took instructions. Mr Reid produced in evidence the front cover of his file which sets out, inter alia, the

plaintiffs' relevant telephone, facsimile and PO Box numbers. He says they were written on the file cover by him.

[49] The plaintiffs have given no evidence of their correct facsimile number at the time, and indeed they stopped short of denying on oath that the facsimile number to which Mr Reid sent his letter was not in fact theirs. They simply deny that they received the 6 May letter. During the course of argument I asked Mr Khan to advise the Court of the facsimile number or numbers utilised by him in May 1997. He was unable, and apparently unwilling, to do so. He indicated that he had made an inquiry of Telecom, which was unable to assist. The inference I draw, and which any trial Judge would inevitably draw in my view, is that there is no evidence to the effect that the facsimile number recorded by Mr Reid on his file cover and to which he transmitted his letter of 21 May 1997, was not the correct number as given to him by the plaintiffs.

[50] On a strike out application the Court must take great care to ensure it does not simply prejudge a factual issue where there are arguable competing contentions. But in the absence of evidence from the plaintiffs on the point, the inference I have drawn is irresistible.

[51] I am fortified in my conclusion by reference to what occurred when the second plaintiff filed her application for review in August 1998. In an application completed by hand, the second plaintiff refers to the applications to be reviewed as being those of 6 May 1997 and 8 July 1998. It is a proper inference from the reference to the 6 May 1997 letter that, at least by August 1998, the plaintiffs were aware of the earlier letter.

[52] I put that proposition to Mr Khan during the course of argument. He did not suggest that the reference to the 6 May 1997 letter was not included by the second plaintiff as part of her application. He simply contended that the reference was irrelevant to the issues before the Court.

[53] I cannot accept that argument. The fact that Mrs Khan referred to the 6 May 1997 decision in the course of completing her application for review in August 1998,

points inexorably to the fact that the plaintiffs knew about the 6 May 1997 letter by August 1998. That would be the inevitable conclusion reached by a trial Judge.

[54] It follows that even if the reasonable discoverability exceptions extend to the present case (which I am satisfied they do not) time must be taken to have commenced to run against the plaintiffs in August 1998, if not earlier. The claim is therefore statute barred.

[55] In view of my conclusions on the limitation argument, it is unnecessary to consider Mr Colthart's further arguments to the effect that:

a) the claim is barred by the provisions of s 47 of the Evidence Act 2006; and

b) the proceeding amounts to a collateral attack on the verdict of the Court in the criminal proceedings.

[56] During the course of the hearing Mr Khan indicated he was proposing to replead and to file an amended statement of claim which would incorporate a wider range of allegations against Mr Reid. Given my conclusions in respect of the defendant's limitation argument, the plaintiffs are unable to improve their position by seeking to amend their claim.

Result

[57] I am satisfied that the plaintiffs' claim is statute barred. It is accordingly struck out. The defendant is entitled to costs, which I fix in accordance with category 2B. The defendant is also entitled to reasonable disbursements to be fixed, if necessary, by the Registrar.

C J Allan J