IN THE HIGH COURT OF NEW ZEALAND
CHRISTCHURCH REGISTRY

CIV-2006-409-1172

BETWEEN	NOELINE JANE TURNER Plaintiff
AND	CHRISTELLE JANE SIGGLEKOW First Defendant
AND	NAMEL LIMITED (IN RECEIVERSHIP AND LIQUIDATION) Second Defendant

Hearing: 29 September 2009

Appearances: P K Tucker for Plaintiff
Mr A J Davis for Defendant

Judgment: 11 November 2009 at 9 a.m.

JUDGMENT OF ASSOCIATE JUDGE DOOGUE

This judgment was delivered by me on ***11.11.09 at 9 am****, pursuant to Rule 11.5 of the High Court Rules.*

Registrar/Deputy Registrar

Date……

Counsel:
Joynt Andrews, P O Box 214, Christchurch
Clark Boyce Lawyers, P O Box 13-259, Christchurch

Background

[1] This proceeding has a long background which I will attempt to explain briefly in this part of the judgment.

[2] The proceeding arises out of the dealings between the plaintiff and the first defendant following the decision of the plaintiff to offer for sale four residential units which she owned in Christchurch. The first defendant was the real estate agent employed by the second defendant. The second defendant was the relevant licensed real estate firm in the transaction. The first complaint that the plaintiff makes is that the first defendant breached her obligations to the plaintiff by concocting and then carrying out a scheme which would result in apartment 1 of the four apartments being sold to an associate so as to affect an ultimate resale at profit, with the first defendant and her associate sharing expected profits. None of the first defendant's involvement in this scheme was disclosed or consented to by the plaintiff, according to the plaintiff's claim. The period which the alleged scheme spanned was from November 1995, when the contract for apartment 1 was signed, until February 1997 when the transaction settled.

[3] The second claim is that the first defendant, in breach of her obligations to the plaintiff, contrived to have the purchasers of the units which she was instrumental in selling on behalf of the plaintiff, delay their settlements. This, it is said, resulted in the plaintiff's mortgagee applying pressure to the plaintiff and forcing her to ultimately accept a lower price for the properties (including apartment 1 to which I have been referring) than she was entitled to under the contract.

[4] The current statement of claim in the proceeding is the amended statement of claim filed 8 April 2008. The original proceedings though, were filed 26 May 2006. An important aspect of the history of the proceeding is that the plaintiff was adjudicated bankrupt in 1998 and discharged from bankruptcy on 2 March 2002.

[5] In 2001 the plaintiff's son ('Mr Turner') and his wife ('Mrs Turner junior') involved themselves in the dealings between the plaintiff and the real estate agents by commencing proceedings in the District Court at Christchurch against the defendants. They did this in September 2001. In those proceedings they alleged that

the development, of which the construction of the four apartments was part, and the subsequent marketing of those apartments by the real estate agents was carried out not by the plaintiff but by a partnership entity, "Ronol Developments". Mr Turner and Mrs Turner junior claimed to be owners/part-owners of the apartments along with the plaintiff and also that the same people were parties to the agreements for sale and purchase pursuant to which the four units had been disposed of. As part of that arrangement, they concocted false documents in the form of agreements for sale and purchase which showed Ronol to be the vendor. Their fraudulent activity was exposed in due course in the District Court proceedings and it lead to Mr Turner later being prosecuted for fraud and imprisoned. A curious feature of the case was that in September 2002 the plaintiff consented to being joined as a plaintiff in the District Court proceedings but no order was ever made actually joining her as a plaintiff.

[6] Remarkably, the proceedings in the District Court occupied a hearing of seven days, with the first part of the hearing taking place in November 2002, the hearing continuing in February 2003 and a decision being given in August 2003. The Judge dismissed the plaintiffs' claim.

[7] The current proceedings were issued some three and half years after the dismissal of the District Court proceedings. In the present proceedings the plaintiff alleges that the defendants breached the Real Estate Agents Act 1976, and breached the fiduciary duty owed to the plaintiff by taking a secret profit from the sale of apartment 1 and by contriving to arrange the sale of the properties at a depressed value.

[8] By way of explanation as to the unusual course taken by the plaintiff, Ms Tucker said that the plaintiff experienced problems because of the intervention of the Official Assignee following her adjudication in 1999. Of course, on Ms Turner's adjudication, all property vested in the Official Assignee, including the causes of action against the defendants. The Official Assignee, although entitled to prosecute any breach of contract claim that the plaintiff may have had against the defendants, did not wish to so. However, the Official Assignee apparently took the view that a claim for breach of fiduciary obligation was personal to the plaintiff and therefore did not vest in him. Once this understanding had been reached between the plaintiff

and the Official Assignee, the plaintiffs, Ronol Developments, sought to have her joined as a party to the District Court proceedings which had been commenced in 2001. As already noted, though, notwithstanding her consent being given, matters were never progressed to the stage where she became a party to those proceedings. Eventually the plaintiff was discharged from bankruptcy on 2 March 2002. A further four years elapsed until she commenced the present proceeding in her own right in the High Court. The plaintiff pleads two types of cause of action:

a) breach of s 63(3) Real Estate Agents Act 1976; and

b) two claims of breach of fiduciary duty.

[9] There is one other proceeding that ought to be briefly mentioned. In August 2000 the Real Estate Agents Licensing Board conducted a hearing into the licence of the first defendant as a real estate agent. Mr Turner objected to the grant of the licence to the first defendant and gave evidence at the hearing of that matter.

[10] The defendants now move to strike out the plaintiff's proceeding in reliance on Rule 15.1 of the High Court Rule. It is alleged in the Notice of Application that:

a) The proceedings are vexatious; and

b) They are an abuse of process; and

c) That the proceedings are statute barred pursuant to s 4 of the Limitation Act 1950.

Abuse of Process Rule and Principles

[11] The relevant High Court Rules 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.

[12] I intend to adopt the following statements of principle which are to be found in *McGechan on Procedure* HR15.1.02 and following:

> **Principles**
>
> The established criteria for striking out was summarised by the Court of Appeal in *A-G v Prince* [1998] 1 NZLR 262; (1997) 16 FRNZ 258; [1998] NZFLR 145 (CA), at p 267, and endorsed by the Supreme Court in *Couch v A-G* [2008] NZSC 45, at para 33, per Elias CJ and Anderson J:
>
> (a) Pleaded facts, whether or not admitted, are assumed to be true. This does not extend to pleaded allegations which are entirely speculative and without foundation.
>
> (b) The cause of action for defence must be clearly untenable. In *Couch* Elias CJ and Anderson J, at para 33, said: "It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed."
>
> (c) The jurisdiction is to be exercised sparingly, and only in clear cases. This reflects the Court's reluctance to terminate a claim or defence short of trial.
>
> (d) The jurisdiction is not excluded by the need to decide difficult questions of law, requiring extensive argument.
>
> (e) The Court should be particularly slow to strike out a claim in any developing area of the law, perhaps particularly where a duty of care is alleged in a new situation. In *Couch*, at para 33, Elias CJ and Anderson J said: "Particular care is required in areas where the law is confused or developing." There is considerable authority that developments in negligence need to be based on proved rather than hypothetical facts.

[13] Further, McGechan's commentary continues at HR15.1.03:

> **Prejudice or delay**

(1) Meaning

All pleadings are apt to prejudice and/or delay, and what is required is an element of impropriety and abuse of the Court's process. This is implicit in the reference in r 15.1(1)(d) to the pleading being "otherwise an abuse of the process of the Court". Subject to that, the categories of pleading that improperly prejudice or delay are potentially very wide, and certainly defy definition.

(2) Examples

(a) An unnecessarily prolix pleading: *Hill v Hunt Davis* (1884) 26 Ch D 470

[...]

[14] And finally, at HR15.1.04:

Frivolous or vexatious

(1) Frivolous

This refers to a proceeding which is not a serious and proper use of the Court process, but trifles with it. True examples are, fortunately, rare but include *Fitzherbert v Acheson* [1921] NZLR 265. There, Salmond J struck out an action for damages for slander against the president of a Maori Land Board for things he had allegedly said in the course of a Board hearing. Salmond J, at p 269, described the action as "baseless and frivolous": whether the words had been used in a judicial or administrative capacity, no action could be maintained against the defendant. He had immunity from suit both at common law and under the relevant legislation.

(2) Vexatious

As with the "prejudice or delay" ground, all pleadings tend to vex the opponent. Again, the key is an element of impropriety. For example, a second attempt, in a fresh proceeding, to obtain summary judgment, while an earlier proceeding dealing with the same transaction remained extant after summary judgment had been declined, was treated as vexatious and was stayed until the first proceeding had been discontinued and costs paid: *Registered Securities Ltd (in liq) v Yates* (1991) 5 PRNZ 68.

Abuse of process grounds for strike out

Issues already litigated in District Court

[15] In this section of my judgment I shall deal with the ground advanced for the strike out application that the subject matter of the present proceeding has already been litigated in the District Court.

[16] The argument for the defendants was that the subject matter of the High Court proceeding had already been litigated in the District Court.

[17] It is an abuse of process for the same litigant to attempt to litigate the same issues in multiple forums. But, in general terms, proceedings are not vexatious where they have been brought by different litigants, even though they raise issues which were dealt with in other proceedings. Mr Davis thought it significant that the plaintiff had filed an affidavit in the District Court proceedings in which she indicated her willingness to be joined in the proceedings which Mr and Mrs Turner had commenced in that Court. However, the fact is that she never became a party to those proceedings. It follows that by commencing proceedings in the High Court she was not attempting to launch duplicative proceedings in a second Court.

[18] At one point Mr Davis arguments appeared to raise considerations of issue estoppel but that ground was not relied upon when bringing the present application. In any event, the present plaintiff was not a party to the District Court proceedings and is not bound by their outcome. Nor would it appear that it was a privy of the parties to the District Court litigation. This ground fails.

[19] It is my view this ground for striking out is misplaced.

Plaintiff ought to have been party to District Court proceeding

[20] The next ground raised by the defendant was that the plaintiff ought to have been joined in the District Court proceeding.

[21] It was the plaintiffs, Mr Turner and his wife, suing as Ronol Developments who had control of the District Court proceedings. They, and not the plaintiff in this proceeding, were accountable for any shortcoming in those proceedings. It is not correct that the plaintiff is to be reproached for not somehow arranging to have herself joined into the District Court proceedings. No authority was advanced for the proposition that Mr Davis relied upon. I can see no reason in principle why the submissions that have been made on this point should be accepted by the Court. On the one hand it seems that the defendants agree that the District Court proceedings were misconceived in that they referred to the 'Ronol Partnership' and yet on the other the plaintiff is criticised for not taking part in and, presumably, attempting to advance those proceedings. This point must fail.

Ground that present proceeding caught by Limitation Act 1950

Introduction

[22] Section 4 of the Limitation Act 1950 so far as relevant provides:

> 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:
>
> …….
>
> (d) Actions to recover any sum recoverable by virtue of any enactment, other than a penalty or forfeiture or sum by way of penalty or forfeiture.
>
> ……..
>
> (9) This section shall not apply to any claim for specific performance of a contract or for an injunction or for other equitable relief, except in so far as any provision thereof may be applied by the Court by analogy in like manner as the corresponding enactment repealed or amended by this Act, or ceasing to have effect by virtue of this Act, has heretofore been applied.

[23] In his synopsis, Mr Davis says that the limitation grounds are set out in detail in the statement of defence. The statement of defence which the First Defendant filed says:

> 19. If the Plaintiff's claim against the First Defendant is an action founded in Tort, namely breach of Fiduciary Duty, then in such case the Plaintiff's cause of action and the existence of any such cause of action being denied by the First Defendant accrued in 1996 when the First Defendant provided the contracts to the plaintiff;

[24] In paragraph 22 the limitation defence is stated in the following way:

> 22. If the Plaintiff's claim against the first defendant is an action founded in contract, then in such case the Plaintiff's cause of action and the existence of any such cause of action being denied by the First Defendant accrued in 1996 when the first defendant provided the contracts to the plaintiff.

Cause of action under s 63(c) of Real Estate Agents Act 1976

[25] In their statement of defence the defendants do not deal expressly with the cause of action based upon s 63(c) of the Real Estate agents Act 1976 for the return of commission that the plaintiff paid to the first defendant of $23,197. While reference was made to this section during the course of argument before me, no reference is made to issues of limitation arising in relation to that section in the defendants' statement of claim and no explicit reference is made to it in the submissions which the defendants' counsel filed. However counsel for the plaintiff made reference to this cause of action in her memorandum and I consider it is appropriate to deal with it in this judgment.

Defendant's general submission on Limitation Act 1950

[26] Before I make further reference to that cause of action, I need to record what the defendants' counsel said about the accrual of causes of action generally.

> 39. The Limitation Act allows a Plaintiff to bring proceedings within six years of the accrual of a cause of action. Time therefore runs from the date of the accrual of cause of action, and the 'reasonable discoverabiltiy test' must be applied in all cases.

[27] The statement of claim alleges that the various transactions involving the units about which the plaintiff complains continued until 1997. The last date upon which an offending act occurred was 27 February 1997. However, as I have already stated, the parties are agreed that for limitation purposes, the time does not start running until the plaintiff could have reasonably discovered the existence of the facts giving rise to the causes of action.

[28] Striking out a statement of claim is a serious matter and is to be undertaken only in exceptional circumstances. I do not consider that such an order should be made on the basis of the application now before the Court. I shall now set out my reasons.

Postponement of limitation because of fraud

[29] The defendants' counsel submitted that s 28 of the Act, which provides for postponement of limitation period in case of fraud or mistake, does not apply because the plaintiff has not pleaded the applicability of that section. Section 28 provides, so far as relevant:

> **28 Postponement of limitation period in case of fraud or mistake**
>
> Where, in the case of any action for which a period of limitation is prescribed by this Act, either—
>
> (a) The action is based upon the fraud of the defendant or his agent or of any person through whom he claims or his agent; or
>
> (b) The right of action is concealed by the fraud of any such person as aforesaid; or
>
> (c) The action is for relief from the consequences of a mistake,—
>
> the period of limitation shall not begin to run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could with reasonable diligence have discovered it:
>
> Provided that nothing in this section shall enable any action to be brought to recover, or enforce any charge against, or set aside any transaction affecting, any property which—
>
> (d) In the case of fraud, has been purchased for valuable consideration by a person who was not a party to the fraud and did not at the time

> of the purchase know or have reason to believe that any fraud had been committed; or
>
> (e) In the case of mistake, has been purchased for valuable consideration, subsequently to the transaction in which the mistake was made, by a person who did not know or have reason to believe that the mistake had been made.

[30] There are two comments that I will make on the applicability of s 28. The first is that while I acknowledge that the defence has not been pleaded, it would be open to the plaintiff to rely upon that section at trial. If that is the intention of the plaintiff to invoke s 28, that would seem to amount to a 'reply' within the meaning of High Court Rule 5.62 and such a reply is now required by the Rules rather than being optional. I would not, however, rule out the possibility of the plaintiff, if she wishes to, to rely upon that section of the Act. For present purposes though, it needs to be noted that the limitation period is postponed until the plaintiff has discovered the fraud or could with reasonable diligence have discovered it.

[31] But that is not the end of the matter. The defendants' position is that the plaintiff knew about the causes of action generally, including the statutory causes of action, or could with reasonable diligence have discovered the existence of the cause of action by February 2000. The significance of that date is that is the point in time when her son, Mr Turner, approached one of the participants in the scheme to discuss his involvement in the sale of apartment 1 in February or March of 2000. The person he spoke to gave him information confirming that the agent had been in breach of her obligations to the plaintiff. I will next deal with the problems that emerge when an attempt is made to deal with factual matters in the context of an application to strike out.

Factual problems in determining when time commences running for purposes of limitation.

[32] There was considerable discussion about when the plaintiff might have known these facts. Mr Davis arguments focused on various statements made at various times by Mr Turner, the plaintiff's son. For these purposes Mr Davis appeared to conflate the plaintiff's discovery that she had been bilked by the real estate agent with Mr Turner's knowledge which was obtained in the circumstances I have outlined in paragraph [31].

[33] In general, a strike out application is not a suitable vehicle for determining factual questions generally. Evidence as to factual matters can be given where the Court is satisfied that there is no substantial uncertainty about the factual matter raised. An example will be where it is necessary to formally place before the Court a document about which there is no dispute. But beyond that, in general terms factual matters are to be resolved, if not by admission and agreement, then at trial. By the time the trial stage has been reached in a proceeding the parties will have had the fullest opportunity to prepare the factual ground by means of interlocutory steps such as discovery, interrogatories and the seeking of particulars. But that point has not yet been reached in this case.

[34] The reluctance of the Court to deal with factual issues at the strike out stage is well- known and generally adhered to. The fact that in this case the plaintiff did not choose to enter into an exchange of affidavits on disputed factual matters on the present strike out application conforms to that approach. That the plaintiff did not agree to involve herself in such a dispute does not take the application outside the general rule from which I have referred. That is to say, a defendant in the position of the present defendants cannot convert a strike out application into a hearing of substantially disputed factual matters by filing affidavits and then commenting on the failure of the other party to engage in dispute about the facts.

[35] There is an exception to the general rule to which I have already made reference (that is that factual issues are left for trial) and that is, of course, the summary judgment process. The Court can resolve substantial factual issues by means of a summary judgment application brought by either a plaintiff or a defendant. The difference between such an application and a strike out application is not simply academic. One safeguard that is present where summary judgment is sought is that a plaintiff must aver that in the plaintiff's belief the defendant has no defence.

[36] The exercise that Mr Davis invited me to embark upon, namely to assume the truth and reliability of what Mr Turner said to invest his evidence with the necessary degree of accuracy that it could be depended upon is simply not a process that can be engaged in on a strike out application. Quite apart from anything else, two aspects

of background occur. The first is that the plaintiff is an elderly lady. The second is that Mr Turner has criminal convictions for fraud. Mr Davis's assumption is that the Court can tell with clarity from the affidavit evidence when the various facts became known to Mr Turner and secondly that he accurately and faithfully communicated to his mother the extent of his knowledge; and further that she accepted the accuracy and truth of, and understood, what he said. I am not prepared to make those assumptions.

[37] In any case, the evidence which Mr Turner seeks to place before the Court as to what Mr Rouse told him is necessarily hearsay evidence. Section 18 of the Evidence Act 2006 is to the following effect:

> **18 General admissibility of hearsay**
>
> (1) A hearsay statement is admissible in any proceeding if—
>
> (a) the circumstances relating to the statement provide reasonable assurance that the statement is reliable; and
>
> (b) either—
>
> (i) the maker of the statement is unavailable as a witness; or
>
> (ii) the Judge considers that undue expense or delay would be caused if the maker of the statement were required to be a witness.
>
> (2) This section is subject to sections 20 and 22.

[38] While such evidence is admissible under the Evidence Act 2006, the entitlement to place such evidence before the Court is a provisional one and requires the Court to evaluate the evidence first. There is simply insufficient material available to the Court to carry out such an assessment, even if it were appropriate to do so.

[39] The result is that the applicant is unable to prove that the discovery of the circumstances giving rise to the plaintiff's claim against the defendants occurred at such a point in time that the causes of action generally are statute-barred.

Limitation and the claim for breach of Real Estate Agents Act 1976

[40] The statutory claim which the plaintiff brings is based on s 63(3) of the Real Estate Agents Act 1976 which provides:

> **63 Purchase or lease by agent voidable**
>
> (1) No real estate agent shall, without the consent on the prescribed form of his [or her] principal, directly or indirectly and whether by himself [or herself] or by any partner or sub-agent,—
>
> (a) Purchase or take on lease, or be in any way concerned or interested, legally or beneficially, in the purchase or taking on lease of any land or business which he [or she] is commissioned (at the instigation of the principal or otherwise) by any principal to sell or lease; or
>
> (b) Sell or lease to his [or her] spouse[, civil union partner, de facto partner,] or child any such land or business.

(2) No partner or employee of a real estate agent and no officer of a company that is a real estate agent shall, without the consent on the prescribed form of the principal of the real estate agent, directly or indirectly,—

(a) Purchase or take on lease, or be in any way concerned or interested, legally or beneficially, in the purchase or taking on lease of any land or business which the real estate agent of whom he [or she] is a partner or by whom he [or she] is employed, or of which he [or she] is an officer, is commissioned (at the instigation of the principal or otherwise) by any principal to sell or lease; or

(b) Sell or lease to his [or her] spouse[, civil union partner, de facto partner,] or child any such land or business.

(3) Any contract made in contravention of this section shall be voidable at the option of the principal. No commission shall be payable in respect of any such contract, whether the principal has avoided it or not; and any commission paid in respect of the contract shall be repayable by the real estate agent to his [or her] principal and shall be recoverable by the principal as a debt.

[41] This claim is covered by s 4(1)(d) of the Limitation Act 1950 which I referred to in [22] above. I also consider that it would be open to the plaintiff to plead that the cause of action is based upon fraud and that limitation is therefore postponed until the point where the cause of action could have been discovered with reasonable diligence. That being so, issues arise as to when that point of time had been reached. That, too, is a factual enquiry that is not appropriately to be determined on a strike out application.

Limitation and the breach of fiduciary obligation claim

[42] Counsel agreed that there was no explicit time limitation provided for in the Limitation Act 1950 for a claim based upon a breach of fiduciary obligation. The argument I heard centred on the question of whether any provision of the Limitation Act should be applied by analogy under s 4(9). I also heard submissions on the issues of laches and acquiescence. I will deal with both these matters in this part of my judgment.

Limitation by analogy

[43] The subject of limitation by analogy was considered in the case of *Johns v Johns* [2004] 3 NZLR 202. At paragraph 80, the Court of Appeal said that a fiduciary claim will always *prima facie* survive the statutory barring of an allied common law or indeed equitable claim.

> [80] There will be a bar by analogy only when the fiduciary claim parallels the statute barred claim so closely that it would be inequitable to allow the statutory bar to be outflanked by the fiduciary claim. In order to determine how close the parallel is the Court must examine not only the underlying facts but also the nature of the relationship between the parties and the policy and purpose of the different causes of action. If there is a sufficient difference in any material respect, the suggested parallel is unlikely to be close enough to make it appropriate in equity to apply an analogous bar.

[44] The obvious type of claim which would be analogous to a claim for breach of fiduciary obligation in this case would be a claim in contract for breach by the agent of her implied duties of loyalty to the client. However, there are real distinctions between such a claim and one based upon breach of fiduciary obligation. The former arises out of the agreement between the parties. The latter has its origins in equity. The latter claim, the claim against fiduciary, reflects the vulnerability of the claimant to breaches of good faith by the fiduciary. The distinctiveness of the two types of claim has had influence upon two features of fiduciary claims that are relevant here. The first concerns the basis upon which the fiduciary must compensate the client. The remedy in such cases, in brief, is not restricted to the types of loss which the client is able to recover when suing in contract, but instead focuses on illicit gains. An alternative approach in the form award of equitable compensation to repair loss – might be the preferable approach in appropriate cases. Secondly, while there are indications that the law in New Zealand might not be entirely settled on the point,[1] the causation test is more favourable from the point of view of persons in the position of the plaintiff in this case, that is, a principal of an agent appointed by contract.

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[1] *Premium Real Estate Ltd v Stevens* [2009] 2 NZLR 384

[45] There may also be differences between a claim based in contract and a fiduciary–based action with regard to the Commission. A real estate agent in the position of the defendants forfeits commission as well as being obliged to reimburse profits to, or compensate, the plaintiff where it has been proved that there has been a breach of fiduciary obligation. Therefore when calculating the compensation for the plaintiff, if the approach is taken of requiring the agent to account for a sale at a higher price than the plaintiff achieved, the agent does not have the right to deduct from the compensation the commission that would have been paid payable. This aspect of the matter may or may not have relevance depending upon how the plaintiff frames her claims in the current proceedings. This is another distinguishing feature which ought to be placed in the balance when assessing the degree of correspondence between a contract claim, which is admittedly barred by virtue of section 4 of the Limitation Act 1950, and an application based on breach of fiduciary obligation, which is not.

[46] In my view there is an insufficient degree of correspondence between the fiduciary–based claim and a claim founded in contract to justify on the basis of the material I have available to me on the strike out application that the claim for breach of fiduciary obligation should be barred by analogy.

[47] If that conclusion is correct, there is no need for the plaintiff to resort to notions of ‘reasonable discoverability’ in order to justify a postponement of the limitation period. For these reasons, the application to strike-out the fiduciary duty-based parts of the plaintiff’s claims cannot succeed.

Conclusion

[48] The application to strike out is dismissed. The parties ought to be able to agree on the issue of costs. If they cannot the matter is to be referred to any Associate Judge sitting at Christchurch.

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J.P. Doogue
Associate Judge