IN THE EMPLOYMENT COURT
AUCKLAND

[2017] NZEmpC 12
EMPC 48/2016

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for leave to file an amended statement of claim (treated as an application for leave to extend time to file a reply to a positive defence)
BETWEEN	CATHERINE ANNE STORMONT Plaintiff
AND	PEDDLE THORP AITKEN LIMITED Defendant

Hearing:	18-26 October and 8-9 November 2016 and by way of further submissions dated 23 and 30 November 2016 (Heard at Auckland)
Appearances:	C W Stewart and C Pallant-Drake, counsel for plaintiff A Sharp, counsel for defendant
Judgment:	16 February 2017

INTERLOCUTORY JUDGMENT OF JUDGE CHRISTINA INGLIS

Introduction

[1] Ms Stormont worked with the defendant (Peddle Thorp) for around four years. Her employment agreement contained provision for a bonus if various qualifying criteria were met. The parties do not see eye-to-eye on the way in which the bonus should be calculated. Ms Stormont's position was made redundant in 2014. The bonus issue remained unresolved as at that date. Ms Stormont was unhappy with a number of matters, including Peddle Thorp's handling of her bonus

and pursued a claim against it. The Employment Relations Authority dealt with her claim and dismissed it.[1]

[2] The plaintiff challenged the determination on a de novo basis. The challenge was heard over eight days towards the end of last year. During closing submissions counsel for the defendant, Mr Sharp, raised a procedural issue. The issue revolved around an affirmative defence contained within the defendant's statement of defence to the plaintiff's statement of claim. Mr Sharp pointed out that the plaintiff had not filed a reply and argued that the consequence of this was that the plaintiff must be taken as having admitted the defendant's allegations.

[3] When Mr Sharp advanced the argument, Ms Stewart (counsel for the plaintiff) immediately raised an objection. She made it clear that she had been taken by surprise and disputed any suggestion that a reply had been necessary. Both parties wished to be heard further on the matter. The plaintiff subsequently filed documentation seeking leave to respond out of time, together with a draft third amended statement of claim (which I treat as an application to extend time under s 221 of the Employment Relations Act 2000 (the Act)) in reply to the defendant's pleaded affirmative defence (which I treat as a positive defence for the purposes of the Employment Court Regulations 2000 (the Regulations)). The defendant has filed an affidavit and submissions opposing the application. Counsel agreed to the issue being determined on the papers.

[4] Two particular questions arise:

(a) Was the plaintiff obliged to file a reply to the defendant's positive defence within the timeframe specified within the High Court Rules 2016 (namely 10 working days) if she was not to be taken to have admitted it?

(b) If the plaintiff was obliged to do so, should leave now be granted to extend the time to file a reply?

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[1] *Stormont v Peddle Thorp Aitken Ltd* [2016] NZERA Auckland 28.

Analysis

[5] Section 237 of the Act provides that regulations may be made prescribing forms for the purposes of the Act and prescribing the procedure in relation to the conduct of matters before the Court.[2] Regulation 6 of the Regulations requires that the Court must dispose of any matter coming before it "as nearly as may be in accordance with these regulations."[3] Accordingly the Regulations provide the starting point for analysis. Ms Stewart submits that they also provide the end point for analysis.

[6] The Regulations set out a number of detailed requirements in relation to statements of claim and defence.[4] Regulation 19 is entitled "Obligation to file statement of defence" and requires any party intending to defend a proceeding to file a statement of defence. The timeframe for doing so is spelt out (30 clear days) and the consequences of a failure to do so are also specified, namely that a defendant who fails to file a statement of defence within 30 days may only defend the claim with the leave of the Court.[5]

[7] Regulation 20 ("Statement of defence") provides that a statement of defence must be in Form 4 and must specify a number of matters, including whether the defendant admits or denies each of the allegations in the statement of claim. Regulation 20(1)(b)(ii) provides that the defendant must also specify, where the defendant has a positive defence, the details of that defence. The details of any positive defence must include the general nature of the defence; the facts upon which the defence is based; and reference to any employment agreement or legislation relied upon.[6] A positive defence must be specified with reasonable particularity so as to fully, fairly and clearly inform the Court and the other party of the nature and the details of the defendant's defence to the plaintiff's claim.

[8] The prescribed form for a statement of claim (Form 1) contains a notice to the defendant drawing specific attention to the need to file a statement of defence

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2 Employment Relations Act 2000, s 237(a), (d).
3 Employment Court Regulations 2000, reg 6(1).
4 Regulation 11 (statement of claim); reg 20 (statement of defence).
5 Regulation 19(4).
6 Regulation 20(1)(b)(ii).

and the timeframe for doing so, in the event that the defendant intends to defend the proceedings. It also requires that the consequences of a failure to file a defence are drawn to the defendant's attention, namely that the defendant will only be able to defend the claim with the leave of the Court. There is no comparable provision in respect of positive defences contained within Form 4 ("Statement of defence"). This can also be contrasted with various other forms which require a party to expressly draw to the opposing party's attention any obligation to file a response and the consequences of a failure to do so. Examples include:

- Form 6 ("Notice requiring disclosure"), which (under "Notes") states that any objection to disclosure must be filed within five clear working days and be in Form 7 and further notes, "[i]f in doubt, please contact the Registrar of the court immediately";

- Form 13 ("Application for rehearing"), which (under "Notice to the respondent") states that any opposition must be filed within 30 clear days;

- Form 14 ("Application for stay of proceedings"), which (under "Notice to the respondent") states that any respondent wishing to oppose the application must file written notice within 14 clear days;

- Regulation 21, which provides that when a defendant has filed a statement of defence that includes a response, the plaintiff may file a further document replying to the defendant's response within 14 clear days.[7]

[9] The essence of Mr Sharp's submission is that the Regulations do not provide a form of procedure for responding to positive defences and so recourse must be had to the procedure provided for under rr 5.62 and 5.63. The submission turns on the application of reg 6(2). It provides that:

> (2) If any case arises for which no form of procedure has been provided by the [Employment Relations] Act or these regulations or … section 212(1) of the [Employment Relations] Act, the Court must … dispose of the case—
>
> (a) as nearly as may be practicable in accordance with—

[7] Regulation 21(3) and (4).

…

(ii) the provisions of the High Court Rules 2016 affecting any similar case; …

[10] High Court Rule 5.62 requires that where a statement of defence asserts an affirmative defence or contains any positive allegation affecting any other party, the plaintiff or that party must file a reply within 10 working days. High Court Rule 5.63(2) provides that an affirmative defence or positive allegation in a statement of defence that is not denied is treated as being admitted. While the High Court Rules require that a statement of defence plead any affirmative defence,[8] a statement of defence containing an affirmative defence is not required to put the plaintiff on notice of rr 5.62 and 5.63, and the timeframe within which a reply is to be filed.

[11] While, as Ms Stewart points out, the High Court Rules refer to affirmative defences rather than positive defences, I do not think the terminology makes a material difference. Both are plainly directed at the same thing – namely material going beyond that alleged by the plaintiff in a statement of claim as answered in the statement of defence.[9] To use the language of reg 6(2)(ii), rr 5.62 and 5.63 are provisions of the High Court Rules affecting a similar case.

[12] It follows that if the High Court Rules apply, the plaintiff's failure to reply to the defendant's positive defences is to be taken as an admission. I pause to note that this would not previously have been the case, as the history to the affirmative defence provisions in the High Court Rules makes clear. Prior to 2009 (so at the time reg 6(2) was introduced) r 171 provided that "[e]very affirmative defence or positive allegation in a statement of defence shall be deemed to be denied unless admitted." Regulation 6(2) was amended in 2009 to refer to the (then) new High Court Rules, but no amendment was made consequent on the reversal of the deeming provision contained within them.

[13] The Regulations provide a formal procedure for positive defences, what they must include and how they are to be advanced. What the Regulations do not do is

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8 High Court Rules 2016, r 5.48(4).

9 See commentary in *McGechan on Procedure* (online looseleaf ed, Thomson Reuters) at HR5.48.15(1).

prescribe a requirement for responding to a positive defence, or a timeframe for doing so. As I have said, this can be contrasted with various provisions and forms within the Regulations which do.

[14] The key issue is this – is there an *absence of a procedure for dealing with* a positive defence in the Regulations or is there an *absence of a requirement to file* a response in the Regulations? The difference lies in invoking the High Court Rules in the former; not in the latter.

[15] Ms Stewart submits that it is revealing that there is no case in which the Employment Court has expressly applied the High Court Rules where a positive defence has been pleaded. While that appears to be correct, I do not consider that it materially assists the interpretative exercise.

[16] Ms Stewart also submits that there is no obligation on a plaintiff to respond by way of a formal pleading and that the Regulations, and the relevant forms prescribed under them, represent a comprehensive code for dealing with such matters. On this basis there is no need to have recourse to the High Court Rules. Ms Stewart submits that had Parliament intended the Employment Court to adopt the same procedural requirements as the High Court in relation to positive defences it would have made this explicit in the Employment Court Regulations. Rather, she says, Parliament chose to prescribe its own procedure for such defences in the Regulations.

[17] Regulations are made by the Governor-General by Order in Council, not by Parliament. There is, however, some strength in Ms Stewart's legislative-scheme argument, particularly having regard to the detailed way in which the Regulations are drafted and the fact that where a response by a party is contemplated, and there are adverse consequences in a failure to do so, the prescribed forms expressly require that notice of the obligation and the potential consequences of a failure to take any steps, be drawn to the other party's attention. It might be inferred that the absence of any such express requirement and/or notice provision in any of the regulations and forms dealing with positive defences suggests that no such requirement is intended to apply, and accordingly there is no basis for looking to the High Court Rules to

read it in. Such an interpretation may be seen to fit comfortably within the context of the employment jurisdiction and accessibility of applicable procedural requirements, particularly where the legislation specifically permits non-legally trained persons to appear before the Court on behalf of parties (in contrast to rights of audience in other courts).

[18] However the fundamental difficulty with the approach advanced on behalf of the plaintiff is that it leaves a lacuna for the Court in terms of how to dispose of the case, and for the defendant, in terms of how to respond, if at all, to a positive defence, and how to deal with the absence of a reply. Procedural lacunas are, of course, the very thing that reg 6(2) is directed at addressing. High Court Rules 5.62 and 5.63 fill the void left by the Regulations. Rule 171 would have previously done so,[10] at the time the Regulations were made.

[19] I agree with Mr Sharp's submission that reading the Regulations in the way Ms Stewart contends for would mean that a defendant would have no way of knowing whether or not a positive defence was to be deemed accepted or denied. Ultimately the key purpose of pleadings is to ensure that the parties and the Court have a degree of clarity as to the nature of the matters at issue requiring resolution. That is no doubt what rr 5.62 and 5.63 are designed to achieve.

[20] It may be regarded as unfortunate and confusing that the Regulations appear at first blush to set out comprehensively the applicable procedural requirements in relation to pleadings (much of which effectively mirrors what is in the High Court Rules), but on analysis stop short of addressing some key elements, requiring recourse to a different regime with no clear pointers (other than generally worded reg 6(2)) as to when it might be necessary to do so. This case has involved two experienced employment lawyers who have each harboured a different view of the application or otherwise of the High Court Rules relating to positive defences. As I have said, many non-legally trained persons routinely appear in this Court, as do a number of litigants in person.

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[10] High Court Rules (1 January 1986 to 31 January 2009) (New Zealand), rr 170 and 171.

[21] While I accept that rr 5.62 and 5.63 apply in relation to positive defences, that is not an end to the matter.

[22] The first point is that while the plaintiff did not file and serve a formal reply to the defendant's pleaded defence of estoppel by conduct, the pleadings filed on her behalf touched on the issue.

[23] There was a sequence of pleadings and amended pleadings prior to trial. The defendant pleaded a number of positive defences. All but one was abandoned in opening at trial. That left estoppel by conduct. It is useful to return to the pleadings at this point. The defendant's so-called affirmative defence (referred to in the Regulations as a positive defence) of estoppel is pleaded at [37] to [42] of the first amended statement of defence, but appeared in the same form in the original. The defendant's pleadings were as follows:

> 37. In *June of 2010 the Defendant provided the Plaintiff with a calculation outline as to how the figure would be determined upon which the bonus would be calculated.*
>
> 38. That calculation was in conformity with the standard practices of financial accounting used within the Defendant's practice.
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> 39. The particulars provided further indicated that indirect costs (such as administration) were apportionable on a pro rata basis to the Interiors section.
>
> 40. That generally, a break-even point of 2.2 x salaries was required.
>
> 41. The *plaintiff subsequently received, at the monthly meetings, analyses in the format outlined to her above and at no stage prior to the conclusion of that financial year and prior to the middle of 2011 did she challenge the methodology of calculating the figure on which the bonus would be calculated.*
>
> 42. In the circumstances the Defendant says that *the Plaintiff, having represented by her conduct to the Defendant that the parties were in agreement as to the methodology to be used in the accounting process, is estopped from denying that agreement upon which the Plaintiff relied* as, to permit her to do so, would be unconscionable causing the Plaintiff prejudice.
>
> **WHEREFORE THE DEFENDANT SAYS THAT:**
>
> (a) The figures upon which the bonus is to be calculated are those as determined and outlined by the Defendant;

(b) The manner of determining those figures is as set out in the June 2010 outline to the Plaintiff;

(c) That the Plaintiff in the circumstances is estopped from denying that methodology and advancing any alternative methodology at hearing; and

(d) Costs be awarded to the Defendant.

[Emphasis added]

[24] The plaintiff's original and then subsequent amended statements of claim contained a number of factual pleadings relevant to the bonus issue, including that:

25. The defendant produced various summaries of the Interiors division during the first year of the plaintiff's employment which were for the purposes of tracking the financial performance of the Interiors division and were useful for establishing the break-even position *but did not relate to the calculation of the plaintiff's bonus.*

26. The defendant held management meetings at which *general financial matters were discussed among staff however these meetings were not about the calculation method for the plaintiff's bonus which was a matter governed by the plaintiff's individual employment agreement.*

27. *It was not until after the end of the plaintiff's first year of employment when the break-even position had been assessed that the question of the calculation of the quantum of the bonus became applicable. Once the plaintiff received the financial statement for the Interiors for the end of her first year she immediately raised her concern about the calculation of the bonus.*

28. The defendant's failure to pay the bonus is in breach of the plaintiff's employment agreement as it has failed to pay the bonus to the plaintiff in accordance with its contractual obligation.

…

31. The plaintiff on the other hand made *numerous attempts to resolve the issue of her unpaid bonus* and in particular:

    a. *She raised the issue as soon as she became aware of it* after the end of the financial year for 2011;

    b. She raised the issue with Mr Barnes at her performance review meeting in September 2011;

    c. She raised the issue with Mr Barnes at her performance review/meeting in 2013;

    d. She instructed her accountant, Mr Nigel Wilde, to provide his bonus calculations to Mr Goldie in September 2013;

e. She emailed Mr Goldie in January 2014 expressing her desire to resolve the issue;

f. She advised the directors at a meeting on 6 October 2014 that she was ready to discuss the bonus and had material from her accountant to present to them.

32. These *attempts by the plaintiff to resolve the issue were not responded to either at all or adequately by the plaintiff.*

[Emphasis added]

[25] As is apparent, each of these pleadings is relevant to the asserted factual basis for the defendant's claim of estoppel by conduct. That is because it is alleged that the documentation provided to the plaintiff during the first year of her employment (which the defendant relies on as the crux for its estoppel defence) was irrelevant to her bonus calculation and was provided to her for other purposes (hence she did not immediately raise any issues); as soon as her bonus became relevant (namely at the time her bonus entitlement kicked in at the end of her first year) she raised concerns about the calculation and she pleads that she persisted in raising issues and concerns about her bonus in a reasonable manner thereafter.

[26] The position is reinforced by the briefs of evidence filed and served five weeks prior to the hearing. Part of the plaintiff's evidence-in-chief was devoted to issues relevant to the defendant's estoppel argument, including that she took issue with the way in which the bonus issue was being approached by the defendant from an early stage and that she did the best she could in the particular circumstances to draw her concerns to her employer's attention in a timely manner.

[27] There was no suggestion at the time the brief of evidence was filed and served, or at the time it was read out in Court, that these parts were irrelevant on the basis that they were not in dispute. Rather Mr Sharp spent some time cross-examining the plaintiff on the adequacy or otherwise of the steps she said she had taken to pursue the bonus issue. By way of example the following exchange occurred during cross-examination:

> Q: Because the company's position is that before 18th of May everybody thought they were on the same page.

A: Well nowhere did those, [Mr Forrest] didn't even know what my contract was. No one – what page did they think we were on I'm wondering because all it was was just to sort of track the health of Interiors and meanwhile I had my eye on the ball with regard to my bonus. And I knew how to calculate that and, you know, certainly to a degree and yeah, so, to be honest there was, it never was an issue prior to the end of the financial year …

…

Q: And your bonus is dependant, ultimately, on the health of the department because if you don't get there you don't get a bonus, correct?

A: If I didn't achieve the multiplier or profitable, yes.

Q. So they've put up a memorandum to you, they give you a first set of financial statements, summary as per the memorandum.

A. Mhm.

Q. You get, the summary is given to you month after month after month.

A. Mhm.

Q. You say in your evidence that you don't understand everything in that memorandum and, well that's your evidence.

A. Yeah, yeah, yeah.

Q. And despite that here you are some 11 months into your employment, actually 13 months, what am I saying? And eight months after receipt of Mr Forrest's memorandum and you still haven't clarified the issues that you don't understand with him.

A. No, I don't, I think that's really twisting things. Mr Forrest's memorandum was never the memorandum to tell me how my bonus was going to be calculated, that is a very straightforward accounting formula. It was never, Mr Forrest's statement was not my, the formula for my bonus.

Q. Well that's the company's position.

A. Okay, well it's never mentioned in there about my bonus, nowhere in any of those financial statements is my bonus mentioned, it's only at the very end there's a comment about the bonus and even then that bonus isn't confirmed as being 20% of gross profit which reflects my contract it just says "bonus".

[28] There are instances in which the High Court has held that a formal reply to an affirmative defence may not be necessary where a reply has been sufficiently given in another formal document filed in the interlocutory process such as a memorandum of counsel identifying the issues in dispute for the purposes of a case management

conference.[11] The distinguishing factor in this case is that the key formal document referred to (the second amended statement of claim) pre-dated the positive defence contained in the pleading to it. That said, it post-dated the earlier pleadings, including the original statement of defence which had incorporated reference to it in precisely the same terms. While it is possible to argue that a reply was sufficiently given in the particular circumstances of this case, I prefer to deal with the issue on the basis of leave to extend the 10-day timeframe for filing and serving a reply.

[29] As cases decided in the High Court make clear, leave may be granted to extend the time to file a reply despite the apparently mandatory nature of the requirement to file a reply within the stated timeframe if an affirmative defence is denied.[12] If it were not so, a slip in the process of refining the pleadings would have the effect of denying the plaintiff the opportunity to argue the validity of the positive defence claimed and technicality would trump merits.[13]

[30] In *Frankton Gateway Apartments (2003) Ltd (in liq) v Sullivan*, the High Court observed that there was no doubt that the filing and service of a reply to an affirmative defence was a mandatory procedural step,[14] and described rr 5.62 and 5.63 as:[15]

> … a mechanism to bring about prompt definition of the issues in a case. I do not think these rules are to be interpreted so as to deprive a plaintiff of access to justice. The phrase "treated as being admitted" should be interpreted as having procedural effect only, not substantive.

[31] Rule 1.19(1) of the High Court Rules permits the Court in its discretion to extend the time appointed for any step in a proceeding and r 1.19(2) provides that an

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11 See, for example, *Frankton Gateway Apartments (2003) Ltd (in liq) v Sullivan* [2012] NZHC 2399 at [31]; *Sargison v VinPro Ltd* HC Dunedin CIV-2011-412-453, 28 October 2011; and *Main Farm Ltd (in rec) v Otago Regional Council* HC Dunedin CIV-2010-412-385, 21 November 2011.

12 See *Sargison v VinPro Ltd* at [11]-[23]; *Frankton Gateway Apartments* at [17]-[32]. See also *Main Farm Ltd (in rec) v Otago Regional Council* at [41]-[45].

13 See Employment Relations Act 2000, s 189(1): "In all matters before it, the court has, for the purpose of supporting successful employment relationships and promoting good faith behaviour, jurisdiction to determine them in such manner and to make such decisions and orders, not inconsistent with this or any other Act…, as in equity and good conscience it thinks fit." See too s 221. See also s 101: "The object of this Part is — (a) to recognise that, in resolving employment relationship problems, access to both information and mediation services is more important than adherence to rigid formal procedures; …".

14 *Frankton Gateway Apartments*, above n 11, at [29].

15 At [30].

extension may be granted on an application after the expiration of the time appointed. A similar provision is found in s 221 of the Employment Relations Act. It provides that:

> In order to enable the court … to more effectually dispose of any matter before it according to the substantial merits and equities of the case, it may, at any stage of the proceedings, of its own motion or on the application of any of the parties, and upon such terms as it thinks fit, by order,-
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> …
>
> (b) amend or waive any error or defect in the proceedings; and
>
> (c) subject to section 114(4), extend the time within which anything is to or may be done; …

[32] The plaintiff argues that leave, if required, ought to be granted. The defendant argues that it should not. The answer clearly emerges from a review of the way in which the case has unfolded, and a consideration of the overall interests of justice.

[33] I understood Ms Stewart's submission to boil down to a concern that the plaintiff had been lulled into a false sense of security because Mr Sharp had not made it clear that the defendant intended to argue that the procedure for filing a reply applied; that the timeframe for doing so had lapsed; and that the Court would be invited to regard the plaintiff as having admitted the positive defence.

[34] It is true that there were multiple opportunities after the statement of defence was filed to have expressly raised the issue and put the defendant's position squarely on the table to enable it to be dealt with in a streamlined manner. Mr Sharp submits that various statements made along the way ought to have rung alarm bells in the ears of an experienced practitioner but I think this overstates the position. In any event, it would have been clear that the alarm bells had either not rung or had rung with insufficient volume to alert Ms Stewart to the argument that Mr Sharp was intending to run in closing. And insofar as the defendant may have been under any misapprehension as to the plaintiff's position, a direction could have been sought to clarify matters, including a direction to file a reply to put everything squarely into focus.

[35] In this jurisdiction the legislation makes it clear that litigation is to be dealt with according to substantial merits and equities rather than by pedantically clinging to technical rules of procedure. Generally this is the approach adopted by those appearing before the Court, highlighting the issues requiring judicial attention. Often these are reduced well before trial in discussions between counsel. Having said that parties are, of course, entitled to stand on their procedural rights and advance technical arguments for strategic reasons. The point is that the potential benefit in doing so is often assessed as being outweighed by the time and cost involved in advancing such arguments, and the uncertainty with which they will ultimately be greeted by the Court given the nature and scope of its jurisdiction to deal with matters coming before it.

[36] The defendant submits that it would be significantly prejudiced if leave is granted. As I understand it that is primarily because it decided to call (and not call) evidence based on its assumption about the consequences of the plaintiff's failure to file a reply to its positive defence. The claimed prejudice is particularly directed at the decision not to call Mr Goldie, a director of the defendant company who was intimately involved with the matters at issue in this proceeding, including matters relating to the bonus. As Ms Stewart points out, a decision not to call Mr Goldie was made at a very late stage and after evidence on behalf of the plaintiff had been given. Indeed, while the defendant's written opening referred to Mr Goldie giving evidence, and a brief of evidence had been filed and served for him, it was not until the defendant opened its case that Mr Sharp advised that a decision had been made not to call Mr Goldie. In these circumstances Ms Stewart voiced a degree of scepticism that a lack of formal reply to the defendant's positive defences had had a material bearing on the defendant's late decision not to call Mr Goldie as a witness, and doubted the nature and degree of prejudice claimed by the defendant in opposition to any application to extend time for filing a reply.

[37] It is also said that if a reply had been filed by the plaintiff, the defendant would have sought further disclosure. It remains unclear from the material filed in support of the defendant's opposition what further disclosure would have been sought, particularly given the plaintiff was proceeding on the basis that the issues at the heart of the positive defences were live. And, as Mr Barnes observes in his

affidavit filed in support of the defendant's opposition, if the plaintiff had advanced an application for leave to file a reply after the plaintiff's evidence had closed and the defence had opened (so well after issues relating to disclosure had been dealt with), it would have been difficult to argue any disadvantage to the defendant.

[38] Mr Sharp also submits that the fact that the plaintiff has failed to make an offer to meet any costs associated with the application is a material factor to be considered in assessing prejudice. No authority is referred to in support of this proposition and I do not find it an attractive one. The Court retains the ability to allocate costs consequent on an application, including one where an indulgence has been granted to a party and where an order of costs is necessary to address any prejudice suffered. I do not see why the failure to go on the front foot to offer to meet costs ought to be regarded as a factor weighing against the plaintiff's application in the present case.

[39] Mr Sharp raises another procedural objection. He says that the plaintiff ought to have filed an application for leave to file a reply out of time, rather than seeking leave to file an amended statement of claim. Again, I am not drawn to Mr Sharp's argument. There is no provision under the Act or Regulations for the Court to grant leave to file a reply out of time. Rather s 221 provides for an application to extend time. As I have said, this provision is reflected in the High Court Rules. The plaintiff is effectively applying to extend the timeframe for filing a reply, and I treat the application as such.

[40] Nor am I able to discern any requirement for a particular format for a reply to a positive defence, and more particularly a prohibition on incorporating a reply in an amended statement of claim. A review of the cases reflects this. So, for example, in *Main Farm Ltd* leave was granted to amend the statement of claim to deny an affirmative defence.[16] In other cases, including *Sargison v VinPro* and *Frankton Gateways*, leave was granted, in the interests of justice, to file a reply but without stipulating the form it was to take.[17]

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16 *Main Farm Ltd (in rec) v Otago Regional Council*, above n 11, at [28].

17 *Sargison v VinPro Ltd*, above n 11, at [23]; *Frankton Gateway Apartments*, above n 11, at [32].

[41] Mr Sharp takes issue with the draft reply, submitting that it is not in line with particular evidence given at hearing. The difficulty with that submission is that the evidence needs to be assessed as a whole. There were numerous areas of contested evidence, including as to the way in which documentation said to relate to the bonus calculation was viewed at the time and what Ms Stormont was and was not allegedly told.

[42] Mr Sharp submits that the Court should be reluctant to grant leave given that the evidence has concluded, referring in support to authority for the proposition that amendments after the close of a case will be rare. Ultimately the Court must be guided by the overall interests of justice. In the present case an extension of time to reply is necessary to enable a key controversy between the parties to be determined. Declining the application would significantly prejudice the substantive interests of the plaintiff. I am not persuaded that granting the application, even at this late stage, would cause any real prejudice to the defendant which could not otherwise adequately be addressed.

[43] In the circumstances, and having particular regard to the reasons why no reply was filed and weighing the potential prejudice to both parties, I consider it to be in the overall interests of justice to grant the application to extend the time for filing a reply to the defendant's positive defence relating to estoppel by conduct (the remaining positive defences having been abandoned). The draft third amended statement of claim filed on 23 November 2016 is to be treated as final. The defendant will have the opportunity to advance an application to call further evidence (namely from Mr Goldie). Any such application and supporting material is to be filed and served within 10 working days of the date of this judgment. A telephone directions conference is then to be scheduled with counsel.

[44] Costs are reserved.

Christina Inglis
Judge

Judgment signed at 3.30 pm on 16 February 2017