IN THE EMPLOYMENT COURT
WELLINGTON

[2017] NZEmpC 152
EMPC 65/2017

IN THE MATTER OF	a challenge to a determination of the Employment Relations Authority
AND IN THE MATTER	of an application for strikeout of challenge
BETWEEN	PERFORMANCE CLEANERS ALL PROPERTY SERVICES WELLINGTON LIMITED Plaintiff
AND	IOANA CHINAN Defendant

Hearing: (on the papers dated 4 and 20 July, 1 and 18 September, 2 and 9 October 2017)

Counsel: B Buckett, counsel for the plaintiff
M Lawlor, counsel for the defendant

Judgment: 1 December 2017

JUDGMENT OF JUDGE B A CORKILL

Introduction

[1] This judgment resolves an application brought by Ms Ioana Chinan against Performance Cleaners All Property Services Wellington Ltd (Performance Cleaners) to strike out its challenge. The application is brought firstly on the basis that the challenge is frivolous and vexatious and/or amounts to an abuse of process. Secondly, that there is no jurisdiction to consider the challenge under the provisions of the Employment Relations Act 2000 (the Act).

[2] By way of background, the Employment Relations Authority (the Authority) considered allegations that as an employee Ms Chinan had received monies to which

she was not entitled, and breached the fiduciary and good faith obligations which she owed to Performance Cleaners as employer.[1]

[3] It was alleged that this occurred because, during the period of her employment as financial controller which ran from early 2005 to early 2012, Ms Chinan made unauthorised payments of salary and holiday entitlements; reimbursed personal and/or fictitious expenditure characterised as business expenses, and misappropriated funds, all for personal gain; it was also alleged that Ms Chinan employed and paid wages and holiday pay to her mother without consent. Finally, it was alleged Ms Chinan was in possession of property belonging to Performance Cleaners.

[4] The company's total claim against Ms Chinan was for $311,080.48, plus interest. A further order was sought requiring Ms Chinan to return the company's property, or reimburse it for the value of the items involved.

[5] The sole director of Performance Cleaners is Mr Peter Barron; he managed this and related companies. He was also in a de facto relationship with Ms Chinan from mid-2002 until January 2012.

[6] At the Authority's investigation meeting, there were many conflicts of evidence as between Ms Chinan and Mr Barron. The Authority considered Ms Chinan's evidence to be more reliable.[2] It accordingly dismissed the range of claims brought by Performance Cleaners, holding that Ms Chinan had not breached express or implied terms and obligations of her employment agreement.[3]

[7] The essence of the challenge which is now brought by Performance Cleaners is contained in this paragraph from its statement of claim:

> 29. The defendant was party to an IEA with express and implied terms of employment as referred to above … The defendant breached those obligations in a number of ways, *inter alia*:

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1 *Performance Cleaners All Property Services Wellington Ltd v Chinan* [2017] NZERA Wellington 15.
2 At [55] and [61].
3 At [99].

29.1 Diverting funds, without authorisation, to herself and others as salary and/or remuneration entitlements and benefits she and others were not entitled to;

29.2 Using company finance and resources for personal gain and benefit;

29.3 Using company documents and resources to obtain monies and benefits to which she was not entitled to;

29.4 Failing to properly secure and retain company records, documents and property;

29.5 Failing to keep the company fully informed about the matters relevant to her employment;

29.6 Misleading the company's external accountants in relation to the diversion of funds, her terms and conditions of employment and other matters relevant to her employment; and

29.7 Failing to serve the company honestly, faithfully and diligently.

[8] The statement of claim goes on to allege "Wrongful Diversion of funds" by Ms Chinan in multiple respects. Finally, the company alleges Ms Chinan had obtained unauthorised use and access to the company's confidential information. The pleading has been supplemented by a memorandum of further and better particulars.

[9] Performance Cleaners seeks a full hearing of the entire matter that was heard by the Authority, that is a hearing de novo.

[10] All these claims are refuted by Ms Chinan for the purposes of the challenge, and essentially on a similar basis to the successful defence points which were raised by her in the Authority.

Ms Chinan's application, and Performance Cleaners' response

[11] Of the three grounds relied on for a strike-out order, two are related: that the challenge is frivolous and vexatious, and that it is an abuse of the Court's process. In essence, Ms Chinan submits that there has been a protection order in place against Mr Barron stemming from the breakdown of the de facto relationship since 2012, with him being sentenced to nine months' supervision for breaches of the order in 2015; and that having regard to extended litigation which has taken place between

the parties in other courts in which Mr Barron has been criticised for the manner in which he participated in those proceedings, the Court should conclude that the challenge has been brought for an improper purpose, that is to vex and harass her.

[12] The second ground is in the alternative: because the causes of action in the company's statement of claim are based in equity and/or in tort, as opposed to arising essentially and directly from the employment relationship, the Authority (and now the Court) had no statutory jurisdiction to consider the company's claims. Reliance is placed on the dicta of the Court of Appeal in *JP Morgan Chase Bank NA v Lewis*, which is now the leading case as to jurisdictional issues of this type.[4]

[13] Performance Cleaners opposes the application for strikeout in all respects. It says the application requires resolution of disputed facts, which is not a permissible step when an application for strikeout is made.

[14] Performance Cleaners also denies that Mr Barron is acting in a retaliatory manner by bringing the challenge, there being no evidence to support such an assertion. It says the company has a genuine business purpose in bringing the claim, which is to obtain remedies to account for breaches of Ms Chinan's employment agreement.

[15] On the issue of jurisdiction, it is submitted that the circumstances of this case are distinguishable from those of *JP Morgan* because the company asserts that Ms Chinan breached her employment agreement; it says the employment relationship is a necessary component of the causes of action which it has pleaded.

[16] It is also argued that if the Court were to find that there was a defect in the company's pleadings, then an opportunity to amend the statement of claim should be given.

[17] The application for strikeout is supported by an affidavit of Ms Chinan, which in turn refers to evidence outlining the history of the litigation. For the

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4 *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255, [2015] 3 NZLR 618.

company, Mr Barron filed an affidavit referring to background matters which gave rise to the filing of the employment relationship problem.

[18] The foregoing submissions and evidence will be referred to in more detail as is appropriate.

Legal framework

[19] It is common ground that r 15.1 of the High Court Rules 2016 applies, via reg 6 of the Employment Court Regulations 2000 (the Regulations).[5] It provides:

> **15.1 Dismissing or staying all or part of proceeding**
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> (1) The court may strike out all or part of a proceeding if it–
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> (a) discloses no reasonably arguable cause of action, defence, or case appropriate to the nature of the pleading; or
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> (b) is likely to cause prejudice or delay; or
>
> (c) is frivolous or vexatious; or
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> (d) is otherwise an abuse of the process of the court.

[20] The Court of Appeal in *Attorney-General v Prince* outlined the standard principles which apply to such an application:[6]

a) Pleaded facts, whether or not admitted, are assumed to be true.

b) The cause of action or defence must be clearly untenable.

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, even if extensive argument is required.

e) The Court should be particularly slow to strike out a claim in any developing area of the law, especially where a duty of care is alleged.

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5 As confirmed in *New Zealand Fire Service Commission v New Zealand Professional Firefighters' Union Inc* [2005] ERNZ 1053 (CA) at [13].

6 *Attorney-General v Prince* [1998] 1 NZLR 262 (CA). (Endorsed by the Supreme Court in cases such as *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33], and *Carter Holt Harvey Ltd v Minister of Education* [2016] NZSC 95, [2017] 1 NZLR 78 at [10]).

[21] More specific factors may apply to particular categories of strikeout – such as where it is alleged a proceeding is frivolous and vexatious, or is an abuse of process. Authorities which are relevant to these categories will be considered later.

[22] It is important for present purposes to acknowledge the extent to which evidence may be used on a strikeout application. The Court of Appeal dealt with this issue in *Attorney-General v McVeagh:*[7]

> The Court is entitled to receive affidavit evidence on a striking-out application, and will do so in a proper case. It will not attempt to resolve genuinely disputed issues of fact and therefore will generally limit evidence to that which is undisputed. Normally it will not consider evidence inconsistent with the pleading, for a striking-out application is dealt with on the footing that the pleaded facts can be proved. … But there may be a case where an essential factual allegation is so demonstrably contrary to indisputable fact that the matter ought not to be allowed to proceed further.

[23] I deal with the present application for strikeout on the basis of these principles.

Frivolous and vexatious/abuse of process

[24] It is convenient to deal with these two grounds together, because they rely on the same factual background and to that extent are related.

[25] Ms Chinan relies on events and litigation which in the main, arose from her personal relationship with Mr Barron. Ms Buckett, counsel for Performance Cleaners, submitted that this evidence is irrelevant, because the present proceedings require a focus on the employment relationship, and the issues which arose in that context only.

[26] However, the Court is required to consider serious allegations as to the motivation for the present challenge. To consider these allegations, it is necessary to consider the factors which it is said render the challenge improper, or as it is put, a continuation of previous abusive behaviour by Mr Barron. It is essential that the Court has an accurate appreciation of these contextual matters. It is therefore necessary to describe the key events of the employment relationship between

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7 *Attorney-General v McVeagh* [1995] 1 NZLR 558 (CA) at 566.

Performance Cleaners and Ms Chinan, and as well the personal relationship between Mr Barron and Ms Chinan.

[27] Ms Chinan initially worked for an Auckland-based company, related to the plaintiff, in 2001. In 2002, she commenced accounting and office work for the plaintiff in Wellington.

[28] As already mentioned, the personal relationship between Ms Chinan and Mr Barron commenced in 2002. They had a daughter in 2004.

[29] In early 2005, Ms Chinan commenced working in the role of financial controller for Performance Cleaners.

[30] Soon after, Ms Chinan and Mr Barron separated for a time. Ms Chinan obtained a protection order against Mr Barron. Counselling then occurred. The couple then resumed their relationship, and decided to enter a contracting-out agreement under the Property (Relationships) Act 1976. Ultimately this agreement was signed on 5 December 2007.

[31] One of the provisions of the agreement was that in the event the parties separated, Mr Barron would make a payment to Ms Chinan equivalent to $100,000 for each anniversary of the agreement, up to a maximum of $500,000. It was agreed that such payments could be made by way of annual instalments of $50,000. Another aspect of the agreement was that Mr Barron would procure relevant companies to employ Ms Chinan as Financial Controller on a salary to be agreed.

[32] The personal relationship continued until Ms Chinan and Mr Barron separated on 1 January 2012.

[33] The employment relationship ended a few weeks later on 18 February 2012.

[34] On 4 October 2012, Ms Chinan issued civil proceedings against Mr Barron in the District Court at Wellington.[8] Her claim was for payments which she said were by then due under the terms of the contracting-out agreement. Judge SM Harrop dismissed Mr Barron's protest to jurisdiction on 9 April 2013. On 29 May 2014, Judge JM Kelly dismissed an application brought by Mr Barron for an order granting leave for an extension of time to file a counter-claim which would have alleged that during her employment Ms Chinan abused her position of trust by misappropriating funds from Performance Cleaners as well as Mr Barron's personal funds; the counter-claim would have related to the latter.[9]

[35] When the claim came on for hearing before Judge AIM Tompkins, on 29 July 2014, Mr Barron did not participate. After receiving evidence and submissions, the Judge ordered that Ms Chinan was entitled to the first three annual instalments of $50,000, totalling $150,000.

[36] For the purposes of an application for indemnity costs, the Judge recounted the history of matters before the Courts, which it is necessary to reproduce for present purposes:[10]

> [35] … Ms Trotman [counsel for Ms Chinan] sought payment of costs on an indemnity basis in accordance with the District Court Rule 4.6. In summary, she submitted that by his conduct, both personally and through his legal advisors, [Mr Barron] has acted improperly and unnecessarily prolonged these proceedings with the intention of delaying their resolution, causing additional unnecessary costs and adding to the distress, anxiety, and stress suffered by [Ms Chinan].
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> [36] In particular, Ms Trotman points to an earlier application by [Mr Barron] protesting jurisdiction, which was dismissed by His Honour Judge Harrop on the basis that it was misconceived.
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> [37] Then Ms Trotman notes that 16 months after the notice of claim was served and 10 months after [Mr Barron's] notice of response was filed, an application for leave to file a counterclaim, essentially on the basis that [Ms Chinan] had misappropriated funds from his business, was declined by Her Honour Judge Kelly, who in her decision noted that there were "serious issues regarding the merit of the proposed counterclaim".
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> [38] Ms Trotman then points to a failure to pay costs awarded in respect to both the challenge to jurisdiction and the application for leave to file a

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8 *Chinan v Barron* DC Hutt Valley CIV-2012-032-000491, 29 May 2014 at [13].
9 At [16].
10 *Chinan v Barron* DC Wellington CIV-2012-032-000419, 29 July 2014.

> counterclaim, that failure subsisting until the last moment in the latter case, requiring [Ms Chinan] to seek, and His Honour Judge Broadmore to make, an "unless order" which resulted in [Mr Barron] then paying the costs award directly to [Ms Chinan's] bank account (rather than to her solicitor's trust account) in circumstances where the reference applied to that payment by [Mr Barron] could, on one interpretation, be considered intimidating.
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> [39] In that last respect, Ms Trotman noted … the continuing existence of the protection orders. The payment of those costs in that fashion, Ms Trotman asserting, constituted a breach of that order. In any event she notes that since these proceedings were filed [Mr Barron] has been charged with, and on at least three occasions pleaded guilty, to breaches of that protection order.
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> [40] The point Ms Trotman makes is that [Mr Barron] has, she submits, chosen to conduct his part in these proceedings in such a way as to enable him to have continued harassing and intimidatory contact with [Ms Chinan] through his conduct of these proceedings.
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> [41] Lastly and in a similar vein, Ms Trotman notes a flurry of activity between 14 July up until 23 July of this year, which included both the commencement of High Court proceedings (and their unnecessary personal service in [their daughter's] presence) and a without notice application to the Family Court, in the context of extant parallel Family Court proceedings, where Ms Trotman asserts the existence of and the stage at which these proceedings was not, as it should have been, revealed to the Family Court, and lastly the eleventh-hour advice to the Court and to [Ms Chinan] on 23 July 2014, that [Mr Barron] did not intend to defend these proceedings at today's hearing.
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> …
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> [44] In those circumstances, I am satisfied that [Mr Barron's] conduct of these proceedings has been for a number of collateral purposes, and has been conducted with the intention of delaying their resolution, causing [Ms Chinan] to incur additional and, as it turns out, unnecessary costs and conducted in such a way as to endeavour to intimidate and harass her.

[37] The Court accordingly ordered Mr Barron to pay indemnity costs of $40,509.90 including GST, with disbursements to be fixed.[11]

[38] The High Court proceedings, to which mention was made in the above passage, had been initiated by Performance Cleaners, as well as a related company and Mr Barron, against Ms Chinan in July 2014. The minutes which were issued by the Associate Judge in the course of that proceeding are before the Court. They record the Associate Judge's view that submissions should be provided to the Court

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[11] At [45].

as to whether it had jurisdiction, since the claims appeared to him to be employment-related.

[39] The plaintiff's initial claim was for $395,923.26, a sum which it was alleged had been misappropriated. According to the final minute of the Associate Judge dated 29 May 2015, most of that claim had been abandoned by the plaintiffs as not being within the jurisdiction of the court.

[40] The same minute dealt with two other causes of action. The first was for $36,248, said to be overpayment of a loan. According to the minute, it was agreed that this was a civil claim which should be heard by the District Court; it was agreed that the claim be transferred accordingly. Other evidence suggests that this claim was subsequently the subject of a settlement agreement.

[41] The second cause of action was a claim for $14,991.93; it was alleged Ms Chinan had procured one of the plaintiff companies to pay her this sum without authority. The court ruled that if Ms Chinan "took money during the course of her employment", then there was an employment relationship problem, which would be within the exclusive jurisdiction of the Authority. The claim was accordingly struck out.

[42] It was following these developments that Performance Cleaners filed its employment relationship problem in the Authority, leading to the determination which is now under challenge.

[43] Finally, I record that in early 2015, Ms Chinan issued a further application for summary judgment for $50,000 plus interest, against Mr Barron.[12] This was described as the fourth instalment due to her under the contracting out agreement.

[44] In the course of that proceeding, the Court was required to consider an application brought by Mr Barron, in which he contended he had a valid cross-claim so that it would be unjust to allow Ms Chinan to have judgment without bringing that claim into account.

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12 *Chinan v Barron* DC Hutt Valley CIV-2012-032-491, 23 March 2015.

[45] The elements of the cross-claim were recorded as being the subject of the High Court action referred to above. Judge CN Tuohy described the causes of action which had been brought in the High Court proceeding as being in conversion[13] and misappropriation, as follows:[14]

- That Ms Chinan had substantially overpaid salary to herself ($253,146.58);
- That she had intentionally misrepresented or altered accounting records by assigning fake or incorrect accounting entries or codes ($142,806.68);
- That she had claimed reimbursements for personal or fictitious expenses using a personal credit card (a sum to be ascertained).

[46] In his judgment of 8 April 2015, Judge Tuohy found that the existence of the cross-claim even if arguable in whole or in part, was not sufficiently linked to Ms Chinan's claim such as to prevent judgment being given on it.[15] He accordingly entered summary judgment for Ms Chinan.[16]

[47] For Ms Chinan, it is argued that the employment relationship problem, and now the challenge, is the latest in a long history of claims against Ms Chinan. It is submitted that whilst these various claims have been found to be meritless, they have had the direct effect of causing Ms Chinan significant stress, anxiety and financial strain, beyond the extent normally expected as a result of litigation.

[48] It was submitted that Mr Barron's underlying motives for directing Performance Cleaners to pursue the claims could be seen as an attempt to:

- ultimately limit his financial loss in respect of payments which may be owing under the contracting out agreement; and

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13 At [9].
14 At [8].
15 At [41].
16 At [43].

- cause Ms Chinan stress, anxiety and financial strain in a manner that could not be regarded as a breach of the protection order which has been made against him.

Frivolous or vexatious?

[49] The criteria relating to the striking out of a claim which is frivolous and vexatious were discussed in *Gapuzan v Pratt and Whitney Air New Zealand Services.*[17] A frivolous claim is one where there is a significant lack of legal merit so that it is impossible for the claim to be taken seriously.[18] A vexatious one involves conduct that has no reasonable or probable cause or excuse, or is harassing or annoying.[19]

[50] I have already mentioned that the Authority was required to make many credibility assessments when considering the claims brought by Performance Cleaners. It is evident that strong findings were made rejecting Mr Barron's evidence in many respects.

[51] Performance Cleaners has now, however, exercised its statutory right to challenge to the Authority's determination.

[52] A conclusion that the challenge is either frivolous or vexatious cannot necessarily be reached merely because the plaintiff failed to make out its claim in the Authority and now exercises its statutory right to have the case reheard.

[53] Subject to issues of jurisdiction, the challenge involves allegations as to whether monies were misappropriated. The dispute is a factual one which turns on the credibility of Ms Chinan and Mr Barron. Although it might be thought that this is an ambitious claim for the company to establish given the clear findings made by the Authority, it is not inconceivable that it could do so.

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17 *Gapuzan v Pratt & Whitney Air New Zealand Services* [2014] NZEmpC 206 at [52] – [58] and [66] – [67]; see also *Lumsden v Skycity Management Ltd* [2015] NZEmpC 225, [2015] ERNZ 389 and *Maharaj v Wesley Wellington Mission Inc* [2016] NZEmpC 129.

18 At [58].

19 At [66].

[54] Credibility issues cannot be resolved on the affidavit evidence which has been filed. Nor can the Court do so on the basis of findings made in the determination which is challenged. The Court must proceed on the basis that the pleaded facts are assumed to be true. Having regard to the pleadings, the Court cannot conclude that the challenge would be incapable of success, (subject to the jurisdictional point). It is not frivolous and vexatious. I dismiss the application for strikeout on this ground.

Abuse of process?

[55] Ms Chinan's plea that the challenge is in effect an abuse of process raises distinctly different issues, which should be considered from a wider perspective. The question in short is whether the challenge is brought for the ulterior purpose of harassing Ms Chinan.

[56] It is well established that Court proceedings may not be used for an improper collateral purpose.[20] A convenient summary of the applicable principles was given by Associate Judge Abbott in *Air National Corporate Ltd v Aiveo Holdings Ltd*.[21] There he said:

> [32] The courts have identified several matters which guide their approach to whether a proceeding has been brought for an improper purpose:
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> (a) The improper purpose need not be the sole purpose, as long as it is the predominant purpose.[22]
>
> (b) A stay will not be granted to debar a litigant from pursuing a genuine cause of action that is to be pursued in any event because there is an ulterior purpose as a desired by-product.[23]
>
> (c) The onus is on the party alleging abuse of process to show that the proceeding was brought for an improper purpose. It is a "heavy onus" and one to be exercised only in exceptional circumstances.[24] …

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20 *Williams v Spautz* (1992) 147 CLR 509 (HCA) at 528 and 536, referring to *In Re Majory* [1955] Ch 600 (CA) at 623 – 624.

21 *Air National Corporate Ltd v Aiveo Holdings Ltd* [2012] NZHC 602.

22 *Goldsmith v Sperrings Ltd* [1977] WLR 478 (CA) at 496; *Williams v Spautz*, above n 20, at 529.

23 *Goldsmith v Sperrings*, above n 22, at 503; *Williams v Spautz*, above n 20, at 522, followed by the High Court in *Solicitor-General v Siemer* HC Wellington CIV-2010-404-8559, 13 May 2011 at [60] – [62]; see also *Ulrich v Ulrich* (1996) 10 PRNZ 253 (HC) at 255, following *Hanrahan v Ainsworth* (1990) 22 NSWLR 73 (CA) at 112.

24 *Williams v Spautz*, above n 20, at 529.

(d) It is unnecessary to prove commission of an improper act to justify exercise of the power to stay;[25] however save in the clearest of cases, it will be necessary to point to some separate manifestation of the defendant's intent in the form of an overt act such as the demand which identifies the true collateral purpose.[26]

[57] An example of this problem arose recently in the insolvency jurisdiction of the High Court, where an application was made to annul a bankruptcy order. Although the statutory context of course differs from the present one, it nonetheless illustrates the range of factors which it may be necessary to consider when it is alleged there has been an abuse of process, if there is a domestic context.

[58] Following separation, a husband had adjudicated his former wife bankrupt, relying on a comparatively modest debt.[27] The High Court held that technically the debt was due. However, the wife could not meet the debt because of the actions of the husband. It was one which would be repaid by her as soon as her relationship property entitlements were met. It was found that the husband had deliberately chosen bankruptcy as a weapon of oppression, so that the application for adjudication had been an abuse of process. The conscience of the court was clearly engaged. Annulment was ordered.

[59] It is clear from this and many other authorities that whether circumstances should be characterised as an abuse of process is a question of fact and degree. Applications brought on this ground must obviously be considered on a case by case basis.

[60] The extent of the litigation which has taken place in the present case is troubling, and Ms Chinan's reaction by arguing that it is an abuse of process is understandable. However, aspects of the litigation were beset by jurisdictional problems, which were probably unforeseen by Mr Barron and his legal advisors; this particularly applies to the jurisdictional issues which arose in the High Court proceedings. Nor does the continued pursuit of the claims by Performance Cleaners and/or Mr Barron necessarily lead to a conclusion that the predominant purpose is

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25 *Williams v Spautz*, at 527 – 529.

26 *Ulrich v Ulrich*, above n 23, at 255 – 256 citing *Hanrahan v Ainsworth*, above n 23, at 107 – 123; see also *Williams v Spautz*, above n 8.

27 *Willis v Willis* [2017] NZHC 2586.

improper. The assertion of harassment also relies on the protection order and its breaches. No evidence has been provided about the relevant circumstances which gave rise to these events, which would allow the Court to properly evaluate this assertion.

[61] Although the District Court made adverse comments about Mr Barron in Ms Chinan's enforcement proceedings, it does not follow that the predominant purpose of the present proceedings is to harass Ms Chinan. Because of the very high threshold for such a conclusion, I am not satisfied that the evidence is sufficiently persuasive as to establish that this is Mr Barron's intent.

[62] I accordingly dismiss the application for strikeout on this ground.

Jurisdiction

[63] As summarised earlier, Mr Lawlor, counsel for the defendant, submitted that the Authority had no jurisdiction to consider the matter that came before it. Thus, he said the challenge must also fall outside the jurisdiction of the Court. He argued that Performance Cleaners does not simply wish to recover an alleged overpayment, but pleads significant wrongful conduct.

[64] Mr Lawlor submitted that on the basis of the pleaded assertions, the claim could not be said to relate to or arise out of an employment relationship under s 5 of the Act; that is, it is not one "that directly and essentially concerns the employment relationship": *JP Morgan*.[28] Mr Lawlor's submissions contained a detailed analysis of that Court of Appeal judgment, the reasoning of which he said is directly applicable.

[65] In her submissions, Ms Buckett, counsel for the plaintiff, also addressed the *JP Morgan* judgment in detail. She said that the focus of the dicta in that case was on the "precision of the articulation of the claim, and whether this relates to or is arising from the employment relationship". She emphasised that it is alleged Ms Chinan breached the express and implied terms of her employment agreement. She

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[28] *JP Morgan Chase Bank NA v Lewis*, above n 4, at [95].

said Performance Cleaners was not claiming misappropriation of funds or conversion, and the statement of claim should not be read as if it was. She argued that the existence of the employment relationship was a necessary component of each cause of action, as pleaded, and that these arose essentially and directly from the employment relationship. She also said that the specialised knowledge of the Employment Court was required to assess whether the terms of employment were breached, and if so to order remedies described in the Act.

[66] Alternatively, it was submitted that the decision of *JP Morgan* should be distinguished. Ms Buckett said that the case concerned an interpretation of a settlement agreement, not an employment agreement. Furthermore, the present case was primarily concerned with Ms Chinan's conduct during the employment relationship, and not with post-employment conduct as had been the case in *JP Morgan*.

[67] Ms Buckett also submitted that the Court of Appeal's discussion of the case of *The Hibernian Catholic Benefits Society v Hagai*, which Mr Lawlor had argued was on all fours with the present case, involved a claim for breach of fiduciary duty and for money had and received.[29] She acknowledged that Performance Cleaners was relying on a breach of fiduciary duty but only "insofar as this sets up implied terms of the employment agreement". Consequently, the comments in *JP Morgan* made by the Court when it considered *The Hibernian* could not apply to the present case. Ms Buckett said that the reasoning of the Court of Appeal in *JP Morgan* was *obiter dictum* only.

[68] Ms Buckett also argued that since *JP Morgan*, this Court had taken a broad approach when considering jurisdiction issues, citing examples such as *Pretorius v Marra Construction (2004) Ltd*[30] and *Edminston v Sanford Ltd.*[31] She said that similar trends could be observed in determinations of the Authority.

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29 *The Hibernian Catholic Benefits Society v Hagai* [2014] NZHC 24, (2014) 11 NZELR 534.

30 *Pretorius v Marra Construction (2004) Ltd* [2016] NZEmpC 95, (2015) 10 NZELC 79-066 at [75].

31 *Edminston v Sanford Ltd* [2017] NZEmpC 70.

[69] Ms Buckett said that the Authority had not considered any issue of jurisdiction, the implication being that it was therefore able to proceed as it did. She also said that the plaintiff's claims were particular to the employment jurisdiction, since Performance Cleaners sought not only an order of repayment to reflect the loss alleged loss it had suffered, but also penalties for breaches of good faith and other duties.

[70] It was submitted that if there were defects in the statement of claim, an opportunity should be provided to Performance Cleaners to cure any problems, by way of an amended statement of claim: *Commissioner of Inland Revenue v Chesterfield Preschools Ltd*.[32]

[71] Finally, it was submitted that the interests of justice required the matter to proceed. In particular, reference was made to the ruling in the High Court that it did not have the applicable jurisdiction. Ms Buckett submitted it would be unfair for Performance Cleaners now to be denied jurisdiction in the Employment Court as well. Equity and good conscience required the matter to proceed. She pointed to the allegation that financial records had been left by Ms Chinan in a deficient state, and that information belonging to Performance Cleaners was held by Ms Chinan which she had not relinquished. That information should be available to the plaintiff by the disclosure processes of the Court.

Legislative provisions

[72] I begin by outlining the legislative context. First, it is appropriate to refer to the provisions relied on by counsel. Mr Lawlor submitted that the applicable sub-section was s 161(1)(r) of the Act. Ms Buckett submitted that a broader range of sub-sections were relevant, that is s 161(1)(a), (b), (f), and/or (m)(i). She also said that if the pleaded case did not fall under these particular sub-sections, then it would nonetheless fall within the confines of the catch-all provision of s 161(1)(r).

[73] I set out these provisions:

161 Jurisdiction

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[32] *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [89].

(1) The Authority has exclusive jurisdiction to make determinations about employment relationship problems generally, including–

(a) disputes about the interpretation, application, or operation of an employment agreement:

(b) matters related to a breach of an employment agreement:

…

(f) matters about whether the good faith obligations imposed by this Act (including those that apply where a union and an employer bargain for a collective agreement) have been complied with in a particular case.

…

(m) actions for the recovery of penalties–

(i) under this Act for a breach of an employment agreement:

…

(r) any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment relationship or related to the interpretation of this Act (other than an action founded on tort):

…

[74] Also relevant is s 5 of the Act which states:

5 Interpretation

…

Employment relationship problem includes a personal grievance, a dispute, and any other problem relating to or arising out of an employment relationship, but does not include any problem with the fixing of new terms and conditions of employment

[75] The opening words of s 161(1) make it clear that the Authority's exclusive jurisdiction is to make determinations about "employment relationship problems generally". As a result, the problems which are described compendiously in ss 161(1)(a) to (r) must all qualify as "employment relationship problems", as that term is defined in s 5.

[76] This means that *any* such problem must relate to or arise out of an employment relationship.

Case law

[77] The term "employment relationship problem" was considered by the Court of Appeal in *JP Morgan*; because that Court discussed several previous judgments of the High Court, it is useful to refer to them first.

[78] In 2001, Pankhurst J said this in *Pain Management Systems (NZ) Ltd v McCallum*:[33]

> [22] To my mind the core concept which is determinative of the exclusive jurisdiction of the Authority is whether the determination which is required is indeed about an employment relationship problem. In the words of the definition of that concept is the underlying problem one relating to, or arising out of, an employment relationship. I think it is important to distinguish between a claim which may have its origins in an employment relationship on the one hand, and a claim the essence of which is related to or arises from the employment relationship of the parties on the other. Is the issue in a particular claim an employment relationship one, or is the subject-`matter of the claim some right or interest which is not directly employment related at all? In this regard it may be necessary to distinguish between situations where the opportunity to breach the right or interest at stake arose in the context of an employment relationship as opposed to those where some employment right or interest is truly at stake.
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> [23] It is in this sense that I find the judgment in *Pike v Semi Plastics* helpful, in particular for the focus upon the gist of the claim, the rights or interests asserted by the plaintiff having been infringed. Where the subject matter is property rights and the claim is tortious, equitable or statutory it may be unlikely that the case is one within the exclusive jurisdiction of the Authority. Put another way where the rights or interests claimed by the plaintiff do not derive from a contract of service the general jurisdiction of this Court is unlikely to be ousted.
>
> (footnotes omitted)

[79] This analysis was followed in subsequent High Court decisions. In 2005, a full Court elaborated on the issues: *BDM Grange Ltd v Parker*.[34] It emphasised that the definition of "employment relationship problem" would not encompass claims arising from tortious conduct, even if occurring between an employer and employee, "since the relationship merely provides the factual setting for the cause of action; the duty arises independently";[35] and later, that "a claim for relief which in essence arises not out of the employment relationship, but is to be characterised as

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33 *Pain Management Systems (NZ) Ltd v McCallum* HC Christchurch CP72/01, 14 August 2001.
34 *BDM Grange Ltd v Parker* [2006] 1 NZLR 353 (HC).
35 At [66].

substantially, say, a claim in equity … is properly within the jurisdiction of the High Court".[36]

[80] In 2013, Duffy J addressed the same question in *RPD Produce Holdings Ltd v Miller*.[37] There, an employer contended that in the course of employment, former employees had wrongfully obtained or received the plaintiff's funds, and then invested them in a property which they jointly owned. In considering a jurisdiction argument, the court noted that the claim was in equity:[38] the fiduciary duties of loyalty and not to profit at the expense of the person to whom the duty of loyalty was owed were equitable in nature. Duffy J found that fiduciary obligations could coexist with contract obligations; and that when they do, their presence is due to particular features of the relationship.[39] This meant that there was little point in classifying the particular relationship in issue; it was held that whilst the particular equitable obligations which were before the Court occurred in an employment relationship, they did not spring from the contract of employment.[40]

[81] Relying on *Pain Management* and *BDM Grange*, the Court concluded that the claim before the court was not about an employment relationship problem; the underlying problem as alleged did not involve some employment right or interest; and that the rights and interests of the plaintiff were not derived from the contract of employment, but existed independently of it.[41]

[82] In *JP Morgan*, the Court of Appeal approved the approach which had been adopted in *Pain Management*[42] and in *BDM Grange*;[43] and it impliedly approved the dicta of *RPD Produce*.[44] The Court considered that where the employment relationship is not a necessary component of an available cause of action that could

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36 At [88].
37 *RPD Produce Holdings Ltd v Miller* [2013] NZHC 705, (2013) 10 NZELR 521.
38 At [10] and [14].
39 At [15]; relying on *Amaltal Corp Ltd v Maruha Corp* [2007] NZSC 40, [2007] 3 NZLR 192, at [21].
40 At [18].
41 At [32].
42 *JP Morgan Chase Bank NA v Lewis*, above n 4, at [95] – [96].
43 At [98].
44 At [49].

have been asserted, then the essence of the claim was not employment-related, and should not be regarded as being within the Authority's exclusive jurisdiction.[45]

[83] In the course of its consideration of the issue, the Court of Appeal considered *The Hibernian*. Since the views expressed by the Court of Appeal are of some significance in this case, I set out the relevant passage in full:

> [94] In *The Hibernian Catholic Benefits Society v Hagai* the plaintiff sued to recover money stolen by an employee in the course of her employment, claiming that the employee had used her knowledge and control of the plaintiff's accounting systems to divert funds into bank accounts controlled by her husband and herself. Associate Judge Bell held that the claim should have been advanced before the Authority, considering the defendant's theft of the plaintiff's money whilst she was at work not only fell "within the general wording of an employment relationship problem", but also came within three of the "heads" in s 161(1): paras (b) (breach of employment agreement), (f) (breach of good faith obligations) and (r). The Judge thought para (r) would, relevantly, embrace claims based on the breach of fiduciary duty and for money had and received. Since the Authority had jurisdiction, the High Court did not. In a passage relied on by [counsel], the Judge said:
>
> > … A claim that one party to an employment relationship should pay a sum to another party to the relationship on account of a liability incurred in the context of that relationship comes comfortably within the meaning of employment relationship problem under s 5 and is therefore within the jurisdiction of the Authority under s 161.
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> [95] We do not agree with this reasoning. It effectively treats all issues that arise between employer and employee as exclusively within the Authority's jurisdiction because of the existence of that relationship. We do not think that can have been Parliament's intention when it passed the Act. In accordance with the definition in s 5 and "employment relationship problem", must relate to or arise out of an employment relationship. We consider this means that the problem must be one that directly and essentially concerns the employment relationship.

[84] I turn now to consider whether the foregoing conclusions are applicable to the present jurisdiction argument.

Discussion

[85] As a starting point, it is necessary to identify the nature of the problem, or the "gist of the dispute".[46] In my view the authorities emphasise that the Court is required to assess the essence or reality of the claim. The Court is entitled to analyse

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45 At [97].

46 As it was put by Gilbert J in the more recent decision of *Ecostore Company Ltd v Worth* [2017]

the substance of the allegations, not merely their form.[47] Although the Court must assume that the pleaded facts are true, that does not mean that the Court is prevented from considering the legal consequences of the pleaded facts in a realistic fashion.

[86] The Court must consider whether the essence of the case is whether Ms Chinan breached the terms and conditions of her employment agreement with Performance Cleaners, or if it is in reality about deliberate misconduct, so that the causes of action should properly be regarded as being claims in conversion, misappropriation, or other relevant causes of action in equity and/or tort.

[87] In undertaking this assessment, I begin with the pleadings. There are several relevant paragraphs which require consideration:

a) In para 22 it is alleged that an investigation was undertaken by financial advisors which concluded that Ms Chinan had withdrawn funds from Performance Cleaners' accounts to which she was not entitled for her own benefit. Six particulars are then given, each of which are alleged to be examples of the diversion of funds without authorisation.

b) In para 23 it is pleaded that the investigation just mentioned raised concerns about the state of the company's financial records which were due either to negligence and/or a failure to retain and preserve company property and documentation, or that there was a deliberate intent on Ms Chinan's part to frustrate and disguise the true nature of the financial transactions. In related paragraphs, it is pleaded that Performance Cleaners will require discovery of documents to ascertain the full extent of Ms Chinan's conduct.

NZHC 1480; and see also *Pain Management*, above n 33, at [23], and *BD Grange*, above n 34, at [88].

47 This proposition is well established with regard to strikeout applications and jurisdiction arguments: *New Zealand Social Credit Political League Inc v O'Brien* [1984] 1 NZLR 84 (CA) at 95; *Collier v Butterworths of New Zealand* (1997) 11 PRNZ 581 (HC) at 586; *Green v Matheson* [1989] 3 NZLR 564 (CA) 572 – 573; and in this Court, *Clark v NCR (NZ) Corporation* [2006] ERNZ 401, at [35] and [37].

c) In para 29 it is alleged that there were multiple breaches of express and implied terms of Ms Chinan's employment agreement. Although this paragraph was set out earlier, because it contains the key allegations, it is worth repeating its elements. It is pleaded that these included a diversion of funds without authorisation; the use of company finance and resources for personal gain and benefit; the use of company documents and resources to obtain monies and benefits to which Ms Chinan was not entitled; a failure to properly secure and retain company records, documents and properties; a failure to keep the company informed about matters relevant to her employment; misleading external accountants with regard to the diversion of funds, and failing to serve the company honestly, as well as faithfully and diligently.

d) Then follow a series of paragraphs described as "Particulars", that is, of the primary allegations just summarised. Each of those six particularised circumstances are pleaded as involving a "wrongful diversion of funds". Salary payments are alleged to have been "frequent, erratic and irregular, indicating lack of entitlement". The diversion of funds is also described as being "under the guise of wages"; that "false entries" were made in company records, and that a transaction was recorded in a particular way "to disguise the true nature of the payment". The further and better particulars which supplement these allegations, repeat references to the assertion that Ms Chinan "wrongly recorded" financial information, and that funds were "wrongfully diverted".[48]

e) It is claimed that there was unauthorised use of and access to the company's confidential information. In the memorandum of further and better particulars, reference is made to six documents which Ms Chinan produced at the Authority's investigation meeting several of which relate to circumstances which occurred in 2010. It is pleaded that the retention of such information put Performance Cleaners at risk,

[48] At paras [47] and [48] of the pleadings.

and was prejudicial to its interests; but no particulars of these consequences are given, nor is any loss pleaded. It is said that this conduct demonstrates a "lack of integrity". This claim is clearly related to the earlier claims, and should be assessed in the same factual context, or setting.

f) Paragraphs 53 onwards plead remedies. An order of repayment of all funds wrongfully diverted in an amount to be quantified, and interest, is sought. Damages of $20,000 for multiple breaches of duties is also requested, together with penalties for breach of each of those duties. Finally, an order requiring return of confidential information, and prohibiting any further use or attempts to access confidential information is sought.

[88] I accept the submission made for Ms Chinan that read as a whole, it is clear from the pleading that in each instance the company clearly alleges that Ms Chinan knowingly engaged in wrongful conduct, and took advantage of her position to the point of acting dishonestly.

[89] There are other relevant indicators of the intent of the proceeding which lead to a similar conclusion:

a) As discussed earlier, parallel allegations were contained in the High Court proceedings; Associate Judge Bell[49] stated there had been a substantial claim for "misappropriations"; Judge Tuohy referred to the claim as being one in conversion.

b) In the subsequent letter of 8 October 2015, which was sent to Ms Chinan by the company's lawyers prior to the filing of the statement of problem, reference was made to an assertion that arguably, unauthorised payments to Ms Chinan herself could amount to "an unlawful taking of a benefit by deceit or fraud".

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[49] Minute of 29 May 2015.

c) In its determination, the Authority recorded that the allegations against Ms Chinan were particularly serious; and that although the company had not made direct claims of fraud there was an inference in its submissions to that effect.[50]

d) In an argument which was not refuted, Mr Lawlor said that the plaintiff's submissions to the Authority referred to Ms Chinan's conduct as being "unethical", "deliberate and deceptive" and not the result of "mistake or misguidance".

[90] Although the statement of claim which raised the challenge refers to alleged breaches of express and implied terms of the employment contract, in my view the substance of the claim involves duties which arise independently of the employment relationship. The employment relationship, to adopt the language used in *BDM Grange*, "merely provides the factual setting for the cause of action".[51]

[91] Notably, the pleading does not assert that an employee made overpayments to herself by mistake. The clear thrust of the claims made is that there was deliberate wrongful conduct on multiple occasions, which included dishonesty. Each claim is properly to be regarded as an action in equity or tort since each relies on rights that are not particular to the employment circumstances.

[92] That being the case, I conclude that the essence of each claim is not employment-related, and was not within the Authority's exclusive jurisdiction. It follows that expertise in assessing whether terms of employment might have been breached is not a relevant consideration.

[93] Although it was submitted that the Authority proceeded to investigate the claim, that does not mean it possessed jurisdiction. That is not a matter that can be bestowed by consent, or by failure to raise an objection. It either exists or it does not: *Telfer Electrical Nelson Ltd v Trotter*.[52]

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50 *Performance Cleaners All Property Services Wellington Ltd v Chinan*, above n 1, at [28].
51 *BDM Grange*, above n 34, at [66].
52 *Telfer Electrical Nelson Ltd v Trotter* [2017] NZHC 2528 per Dobson J at [41], citing *Rothmans of Pall Mall (Overseas) Ltd v Saudi Arabian Airlines Corp* [1981] QB 368 (CA) at 376;

[94] In my view, the nature of the case which was run by the company before the Authority, which clearly alleged deliberate misconduct, meant that it was in fact without jurisdiction even if the point was not raised on Ms Chinan's behalf.[53]

[95] For completeness, I refer to other submissions made by Ms Buckett as to the application of *JP Morgan*.

[96] The factual scenario in that proceeding was of course different from the circumstances which arise for consideration here. However, it is the statement of principle which is identified in *JP Morgan* that must be considered. It is directly applicable to cases such as the present, as its discussion of the judgment in *The Hibernian* shows.

[97] That takes me to the submission that the observations of the Court of Appeal about *The Hibernian* were *obiter dicta*. The statement of principle identified by the Court of Appeal in *JP Morgan* conflicted with the reasoning which had been adopted in *The Hibernian*, which meant that it had been wrongly decided. The discussion about that case illustrated the reasoning which the Court approved.

[98] I do not accept that subsequent decisions of this Court have taken a broader approach to jurisdictional issues or one that conflicts with the dicta in *JP Morgan*. In *Pretorius* when considering certain equitable propositions, the Court made it clear this did not mean that any cause of action could be brought, for instance in equity. It was clearly stated that an employment relationship must be a necessary component of the cause of action.[54]

[99] In *Edminston*, the Court distinguished *JP Morgan* not on the question of jurisdiction, but on a prior question it considered, which was whether the Employment Court had been wrong in law to hold that a written agreement was capable of being characterised either wholly or in part as a variation to an

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Houston-Quay v Henson [2013] NZHC 294 at [22] and *Griffiths v Winikeri* (1989) 4 CRNZ 313 (HC) at 315.

53 *Performance Cleaners All Property Services Wellington Ltd v Chinan*, above n 1, at [94], relying on *JP Morgan*.

54 *Pretorius*, above n 30, at [73].

employment agreement.[55] Accordingly, it was held that the defendant was not seeking to apply or enforce a term or condition of the parties' employment agreement; rather the case was about the interpretation which the Court should give to another agreement, a settlement agreement.[56]

[100] Next, I am not persuaded that the fact there is a claim for penalties under the Act should lead to a different conclusion. If an action in equity or tort were to succeed, no doubt there are potentially remedies for proved egregious conduct, such as aggravated or exemplary damages. None of the other remedies for repayment or return of information could give rise to difficulty.

[101] The principle point that was made in support of the company's submission as to where the interests of justice lie was that the High Court had determined that one of the claims before it lacked jurisdiction; it was asserted that it would now be unfair for Performance Cleaners to be denied jurisdiction in this Court as well.

[102] Again, I do not consider this to be a dispositive factor. Either the Authority, and now the Court, had jurisdiction or it did not. Further, it appears that the Associate Judge, when issuing his ruling, did so on the basis of his previous judgment in *The Hibernian*;[57] and did so before the Court of Appeal judgment of *JP Morgan* was issued which determined that *The Hibernian* was incorrectly decided. Beyond that point, considerations of comity preclude this Court from expressing any view as to whether or not the claims which are now before the Court could now be brought again in the High Court.

[103] Finally, I am not satisfied that ordering Performance Cleaners to amend its pleading is appropriate. Counsel did not indicate what amendment might be made, and it is not for the Court to speculate.[58] Performance Cleaners were asked to and did provide further and better particulars; it had the opportunity thereby, or otherwise, to amend further but did not do so. It is clear from its statement of claim and memorandum of further and better particulars that the company asserts

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55 *JP Morgan*, above n 4, at [53] – [86].
56 Edminston, above n 31, at [77].
57 See minutes of 2 December 2014 at [2]; and 5 March 2015 at [5].
58 *(CED) Distributors (1988) Ltd v Computer Logic Ltd (in rec)* (1991) 4 PRNZ 35 (CA).

deliberate misconduct. Given those circumstances, it is difficult to see how any amendment might improve the pleading so as to legitimately overcome the jurisdictional issue.

[104] There is a further point. In several instances, it was pleaded that the plaintiff would seek disclosure to "reveal the full extent of the defendant's conduct". It is well established that where dishonesty is alleged, a plaintiff must be able to show a proper or prima facie case at the time of filing the pleading,[59] and cannot get by in the hope that something might turn up in discovery or on cross-examination.[60] These considerations lend weight to the conclusion that the case is not one where an opportunity to amend should be provided.

Conclusion

[105] The application for strikeout succeeds. The challenge is struck out for want of jurisdiction.

[106] I reserve costs. This topic should be discussed in the first instance between counsel. If agreement cannot be reached, an application may be made within 21 days, and responded to within 21 days thereafter.

B A Corkill
Judge

Judgment signed at 2.40 pm on 1 December 2017

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59 *Ng v Harkness Law Ltd* [2014] NZHC 850 at [44].
60 *Three Rivers District Council v Bank of England (No 3)* [2003] 2 AC 1 (HL) per Lord Hobhouse at [160].