**IN THE HUMAN RIGHTS REVIEW TRIBUNAL** **[2018] NZHRRT 55**

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| | **Reference No. HRRT 026/2018** |
| **UNDER** | **SECTION 51 OF THE HEALTH AND DISABILITY COMMISSIONER ACT 1994** |
| **BETWEEN** | **NICOLA JAN ASHWORTH** |
| | **PLAINTIFF** |
| **AND** | **DAVID GREGORY KENT** |
| | **FIRST DEFENDANT** |
| **AND** | **FENDALTON EYE CLINIC LIMITED** |
| | **SECOND DEFENDANT (discontinued)** |

**AT WELLINGTON**

**BEFORE:**
**Mr RPG Haines ONZM QC, Chairperson**
**Ms K Anderson, Member**
**Ms GJ Goodwin, Member**

**REPRESENTATION:**
**Mr SP Rennie and Mr WAL Todd for plaintiff**
**Ms VJ Waalkens for defendants**

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| **DATE OF HEARING:** | **Heard on the papers** |
| **DATE OF LAST SUBMISSIONS:** | **23 November 2018 (Ms Ashworth)**<br>**16 and 28 November 2018 (Dr Kent)** |
| **DATE OF DECISION:** | **5 December 2018** |

## DECISION OF TRIBUNAL DISMISSING STRIKE-OUT APPLICATION[1]

[1] [This decision is to be cited as: *Ashworth v Kent (Strike-Out Application)* [2018] NZHRRT 55]

## The strike out application

**[1]** Dr Kent is an ophthalmologist who at the relevant time practised at the Fendalton Eye Clinic in Fendalton, Christchurch. Ms Kent was in 2012 a patient of Dr Kent. On 2 July 2018 Ms Ashworth commenced the present proceedings following a report by the Health and Disability Commissioner published on 9 March 2018 in which the Commissioner found Dr Kent had breached the Code of Health and Disability Services Consumers' Rights (the Code) in respect of Ms Ashworth.

**[2]** By application filed on 25 July 2018 Dr Kent and Fendalton Eye Clinic Ltd (Fendalton Eye Clinic) seek orders dismissing (or in the alternative striking out) Ms Ashworth's claim on the grounds:

> **[2.1]** The claim is statute barred by the Health and Disability Commissioner Act 1994 (HDCA).
>
> **[2.2]** The claim is statute barred by the Limitation Act 2010 (LA 2010).
>
> **[2.3]** The Tribunal has no jurisdiction in relation to Fendalton Eye Clinic.

**[3]** Ms Ashworth has since conceded the third point ie that the Tribunal has no jurisdiction in relation to Fendalton Eye Clinic. By notice dated 23 August 2018 she discontinued her proceedings as against the clinic. It will be seen a direction is made later in this decision to the effect that Fendalton Eye Clinic is henceforth to be removed from the intituling to these proceedings.

**[4]** As to the first point (that the claim is barred by the HDCA), Ms Ashworth has since stipulated that in these proceedings she is seeking exemplary, not compensatory damages. An amended statement of claim will be required to make this clear and to provide adequate particulars of the grounds on which it is alleged that in terms of HDCA, s 57(1)(d) there was "any action of the defendant that was in flagrant disregard of the rights [of Ms Ashworth]".

**[5]** In the result, only the second point remains for determination.

## BRIEF OVERVIEW OF THE FACTS

**[6]** As time is in issue a brief chronology of events may assist:

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| 23 February 2012 | Ms Ashworth underwent surgery by Dr Kent |
| 18 January 2016 | Ms Ashworth filed a complaint with Health and Disability Commissioner |
| 26 September 2016 | Health and Disability Commissioner investigation commenced |
| 9 March 2018 | Health and Disability Commissioner report published |
| 2 July 2018 | Ms Ashworth filed her proceedings with the Tribunal |

**[7]** Because Dr Kent asserts Ms Ashworth has brought her proceedings out of time it is necessary that a brief outline of the relevant facts be given. As the parties have yet to file any evidence, the following description of the background circumstances has been

taken from the Report of the Health and Disability Commissioner (Case 16HDC00083) published on 9 March 2018:

> 1. On 23 February 2012, Mrs Ashworth underwent laser eye surgery. The surgical treatment plan was to correct the left eye for long distance vision by creating a thin flap, and to create a thick flap in her right eye and place a KAMRA inlay underneath the thick flap to improve her near vision. Mrs Ashworth provided written consent for this treatment plan and consented to receiving the KAMRA inlay in her right eye.
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> 2. After receiving her consent, Dr Kent proceeded with the surgery, and [the Registered Nurse (RN)] programmed the laser. [The RN] accidentally programmed the thick flap in Mrs Ashworth's left eye. Dr Kent and [the RN] have differing recollections of whether a cross-checking procedure occurred.
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> 3. Dr Kent stated that he stopped and took some time to consider what to do, before talking to Mrs Ashworth about it. Dr Kent told HDC that he then informed Mrs Ashworth of the options available to her, and believed he obtained her consent to proceed with the KAMRA inlay in her left eye. Dr Kent then inserted the KAMRA inlay into her left eye.

**[8]** The Commissioner found Dr Kent breached the Code in three respects in relation to Rights 4(1), 5(2) and 7(1):

> 4. By failing to ensure that the correct flap measurements were programmed into the laser machine and by not detecting this error prior to commencing the procedure, Dr Kent failed to provide services to Mrs Ashworth with reasonable care and skill, and breached Right 4(1) of the Code of Health and Disability Services Consumers' Rights (the Code).
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> 5. Pursuant to Right 5(2) of the Code, Mrs Ashworth had the right to an environment that enabled her and Dr Kent to communicate openly, honestly, and effectively. In the circumstances of this case where the change in procedure was not due to an emergency, mid-procedure was not an appropriate environment for Dr Kent to seek Mrs Ashworth's informed consent for the change in procedure, and did not allow for effective communication. Accordingly, Dr Kent breached Right 5(2) of the Code.
>
> 6. Right 7(1) states that services may be provided to a consumer only if that consumer makes an informed choice and gives informed consent. Because Dr Kent discussed the change in procedure with Mrs Ashworth during the surgery, while Mrs Ashworth was sedated, Mrs Ashworth was not able to give adequate consideration to whether she wanted to have the KAMRA inlay inserted in her left eye, and was not in a position to give her consent to the change in procedure freely. Accordingly, Dr Kent also breached Right 7(1) of the Code.

**[9]** No breach of the Code was found in relation to Fendalton Eye Clinic and that is why Ms Ashworth has discontinued her proceedings as against the clinic.

## WHEN AGGRIEVED PERSON MAY BRING PROCEEDINGS BEFORE THE TRIBUNAL

**[10]** The effect of HDCA, ss 50 and 51 is that a plaintiff intending to bring proceedings before the Tribunal must show:

> **[10.1]** That the defendant is a person to whom s 50 of the Act applies ie is a provider in respect of whom **an investigation has been conducted** under Part 4 of the Act in relation to any action alleged to be in breach of the Code of Health and Disability Services Consumers' Rights; **and**
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> **[10.2]** That the Health and Disability Commissioner has **found a breach of the Code** on the part of the provider; **and**

**[10.3]** That the Commissioner has not referred the person to the Director of Proceedings under s 45(2)(f) of the Act **or** that the Director has declined or failed to take proceedings.

**[11]** The requirements are cumulative and cannot be satisfied until the Commissioner's report and findings have been published. An intending plaintiff has no control over the course and speed of the Commissioner's investigation.

**[12]** The text of HDCA, ss 50 and 51 follows:

> **50 Proceedings before Human Rights Review Tribunal**
>
> (1) This section applies to any health care provider or disability services provider in respect of whom or of which an investigation has been conducted under this Part in relation to any action alleged to be in breach of the Code.
> (2) Subject to sections 44(1) and 53, civil proceedings before the Human Rights Review Tribunal shall lie at the suit of the Director of Proceedings against any person to whom this section applies for a breach, by that person, of the Code.
> (3) The Director of Proceedings may, under subsection (2), bring proceedings on behalf of a class of persons, and may seek on behalf of persons who belong to the class any of the remedies described in section 54, where the Director of Proceedings considers that a person to whom this section applies is carrying on a practice which affects that class and which is in breach of the Code.
> (4) Where proceedings are commenced by the Director of Proceedings under subsection (2), neither the complainant (if any) nor the aggrieved person (if not the complainant) shall be an original party to, or, unless the Tribunal otherwise orders, join or be joined in, any such proceedings.
>
> **51 Aggrieved person may bring proceedings before Tribunal**
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> Notwithstanding section 50(2) but subject to section 53, the aggrieved person (whether personally or by any person authorised to act on his or her behalf) may bring proceedings before the Tribunal against a person to whom section 50 applies if he or she wishes to do so, and—
> (a) the Commissioner, having found a breach of the Code on the part of the person to whom that section applies, has not referred the person to the Director of Proceedings under section 45(2)(f); or
> (b) the Director of Proceedings declines or fails to take proceedings.

**[13]** The limitation on the right to bring proceedings where the matter has been resolved by agreement between the parties has no application on the facts but is referred to for completeness.

## The ACC bar and the claim for exemplary damages

**[14]** Section 52(2) of the HDCA explicitly prohibits the award of damages other than punitive damages arising directly or indirectly out of personal injury covered by the Accident Compensation Act 2001. That Act, in turn, makes explicit provision in s 319 that the terms of that statute do not prevent the bringing of proceedings for exemplary damages for conduct by the defendant that has resulted in personal injury covered by that Act.

**[15]** Consequently, while Ms Ashworth lodged an ACC claim through her General Practitioner in 2012 and while it further appears that claim was accepted, there is no bar to her claiming exemplary damages in the present proceedings.

**[16]** In her submissions Ms Ashworth concedes compensatory damages cannot be claimed by her in these proceedings. It follows that should she successfully resist the

limitation defence now advanced by Dr Kent, an amended statement of claim will be required to make clear the claim is confined to exemplary damages.

**[17]** As the limitation defence is the only remaining substantive point for determination and as it has been raised in these proceedings in the context of a strike-out application, it is necessary to briefly refer to the Tribunal's jurisdiction to strike out proceedings.

## JURISDICTION TO STRIKE OUT

**[18]** In a number of decisions the Tribunal has explained in some detail its jurisdiction to strike out proceedings. We do not in the present decision intend repeating what has been said in those decisions. The principal points relevant to the present application follow.

**[19]** Section 115 of the Human Rights Act 1993 (incorporated into proceedings under the HDCA by virtue of s 58 of the latter Act) provides:

> **115 Tribunal may dismiss trivial, etc, proceedings**
>
> The Tribunal may at any time dismiss any proceedings brought under section 92B or section 92E if it is satisfied that they are trivial, frivolous, or vexatious or are not brought in good faith.

**[20]** In *Mackrell v Universal College of Learning* HC Palmerston North CIV-2005-485-802, 17 August 2005, Wild J held that this provision confers on the Tribunal a wide discretionary power to strike out or dismiss a proceeding brought before it:

> [45] Subject to observance of natural justice, fairness and reasonableness, and equity, the Tribunal has a wide discretion as to the procedure which follows: ss 104 and 105 of the Human Rights Act. Section 105 requires the Tribunal "to act according to the substantial merits of the case, without regard to technicalities". That section applies, with necessary modifications, to decisions of this Court on appeal against a decision of the Tribunal: s123(5).
>
> [46] The Tribunal has an express power to dismiss proceedings, if satisfied that they are frivolous, vexatious or not brought in good faith: s115. As Mr Laurenson points out, the Tribunal deliberately did not exercise this power. It struck out Ms Mackrell's claim.
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> [47] There are also the Human Rights Review Tribunal Regulations 2002 which place, in terms of the Tribunal's procedures, an emphasis on fairness, efficiency, simplicity and speed. I refer particularly to regulation 4.
>
> [48] Thus, the Tribunal has a wide discretionary power to strike out or dismiss a proceeding brought before it. This will be appropriate in situations similar to those contemplated by rr 186 and 477 of the High Court Rules which are the basis for the present application.

**[21]** The reference by Wild J to rr 186 and 477 of the High Court Rules is now to be read as a reference to High Court Rules, r 15.1 which provides:

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

**[22]** It is clearly established (and confirmed by High Court Rules, r 15.1(1)(a)) that abuse of process extends to proceedings where there is no arguable case and to proceedings which are seriously and unfairly burdensome, prejudicial or damaging or productive of serious and unjustified trouble and harassment. See *Waterhouse v Contractors Bonding Ltd* [2013] NZSC 89, [2014] 1 NZLR 91 at [30]-[32].

**[23]** To the foregoing the following must be added:

> **[23.1]** First, the jurisdiction to dismiss is to be used sparingly. If the defect in the pleadings can be cured, an amendment of the statement of claim will normally be ordered. See *Commissioner of Inland Revenue v Chesterfields Preschools Ltd* [2013] NZCA 53, [2013] 2 NZLR 679 at [89] and *Parohinog v Yellow Pages Group Ltd (Strike-Out Application No. 2)* [2015] NZHRRT 14 (5 May 2015) at [30].
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> **[23.2]** Second, the fundamental constitutional importance of the right of access to courts (and tribunals) must be recognised. Nevertheless such right of access must be balanced against the desirability of freeing defendants from the burden of litigation which is groundless or an abuse of process. See *Heenan v Attorney-General* [2011] NZCA 9, [2011] NZAR 200 at [22] and *Parohinog* at [31].
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> **[23.3]** Third, the ordinary rule is that a strike-out application proceeds on the assumption that the facts pleaded in the statement of claim are true. See *Attorney-General v Prince and Gardner* [1998] 1 NZLR 262 (CA) at 267.
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> **[23.4]** Fourth, it is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed. The case must be so certainly or clearly bad that it should be precluded from going forward. Particular care is required in areas where the law is confused or developing. See *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33] per Elias CJ.

**[24]** These principles have equal application in cases where a defendant asserts that the plaintiff's claim is statute-barred.

**[25]** However, there is authority for the proposition that limitation questions should not be decided in interlocutory proceedings in advance of the hearing except in the clearest of cases. See *Commerce Commission v Carter Holt Harvey Ltd* [2009] NZCA 40, [2009] 3 NZLR 573 at [2] per Baragwanath and Chambers JJ:

> **[2]** If a defendant satisfies the court that a claim is statute-barred it will be struck out as an abuse of process under r 186(3) of the High Court Rules (*Murray v Morel & Co Ltd* [2006] 2 NZLR 366 (CA) at paras [59] and [60] and [2007] 3 NZLR 721 (SCNZ) at para [33]). But limitation questions will not be decided in interlocutory proceedings in advance of the hearing except in the clearest of cases (*Wardley Australia Ltd v State of Western Australia* (1992) 175 CLR 514 at para [31]).

**[26]** On appeal in *Commerce Commission v Carter Holt Harvey Ltd* [2009] NZSC 120, [2010] 1 NZLR 379 this approach was reinforced by Elias CJ at [3]. Tipping J at [39] stated:

> As this is a strike-out application CHH must demonstrate that the Commission's application is so clearly statute barred that it can properly be regarded as frivolous, vexatious or an abuse of process. There must be no reasonable possibility that the Commission's application was brought within time. If there is, the matter must go to trial, with the limitation point being a defence to be assessed on the basis of all the evidence led at trial. [Footnote citations omitted]

## THE LIMITATION POINT – THE CASE FOR THE PLAINTIFF AND FOR THE DEFENDANT

**[27]** The relevant event occurred on 23 February 2012. The Limitation Act 2010 had come into force almost twelve months earlier on 1 January 2011. The submission by Dr Kent is that the primary period for the claim expired on 24 February 2018 and the late knowledge period provided for in LA 2010, s 11(3) has no application. As the actual filing date of the present proceedings was 2 July 2018, Ms Ashworth brought her proceedings four months out of time.

**[28]** For Ms Ashworth it is submitted the late knowledge period is relevant to this case because the relevant event is not the treatment error; rather it is the breach of the Code. Not until the Health and Disability Commissioner published his report on 9 March 2018 could Ms Ashworth know whether a breach of the Code had occurred and who was responsible for that breach. The date of publication of the Commissioner's report is the late knowledge date. As the statement of claim was filed just four months after publication of the report, the proceedings have been filed well in time.

**[29]** In his reply submissions Dr Kent accepts that a statement of claim cannot be filed until the Commissioner has made a finding that there has been a breach of the Code. Nevertheless, he submits the issue is Ms Ashworth's status to bring the claim. In effect the submission is that to preserve her status to bring the claim, Ms Ashworth should have complained to the Health and Disability Commissioner much earlier so that any breach finding occurred within the six year limitation period running from the date of the treatment injury. Otherwise absurd consequences would allegedly follow. A finding that Dr Kent had breached the Code is an act of the Commissioner, not of Dr Kent and cannot be attributed to Dr Kent. Furthermore, by delaying the making of the complaint to the Commissioner, an aggrieved person could extend the time for filing proceedings at will, thereby defeating the stated purpose of LA 2010 as set out in s 3 of that Act.

**[30]** It will be seen it is not necessary for any of these issues to be addressed as there is a more fundamental objection to the strike-out application, namely that LA 2010 does not apply except by way of analogy and then only in the context of the exercise by the Tribunal of its discretion to refuse relief. Consequently the delay point has been raised prematurely and is unsuitable for determination in the context of a strike-out application.

**[31]** As the submissions for both parties appeared to have overlooked these points a *Minute* was issued on 8 November 2018 drawing attention to the terms of LA 2010, ss 4, 8, 9 and 10 (as well as other relevant research material) and inviting the parties to file further submissions. Those further submissions have been taken into account in the preparation of this decision.

## THE LIMITATION DEFENCE - DISCUSSION

**[32]** Limitation law in New Zealand has always been statute based. See JC Corry *Laws of New Zealand* Limitation of Civil Proceedings (online ed) at [3] and [4] and Law Commission *Limitation Defences in Civil Proceedings* (NZLC R6 1988) at paras 19 to 38. As that report points out at para 52, statutory limitation on the bringing of proceedings is best described as providing a special defence for defendants rather than imposing any prohibition on claimants. A defendant is not bound to use that special defence. The limitation defence is procedural in nature. It does not (with few exceptions) extinguish a right or claim, but prevents the court from enforcing it. See now LA 2010, s 43 which provides:

**43 Established defence bars relief, not underlying right**

If the defendant establishes a defence under this Act against a claim, and no order under section 17, 35(5), 36(4), or 50 applies to the claim,—

(a) a court or tribunal must not grant the relief sought by the claim; but

(b) the establishment by the defendant of the defence does not extinguish, as against the defendant or any other person, any entitlement, interest, right, or title of the claimant on which the claim is based.

**[33]** The defences in LA 2010 do not apply unless the claim is made in a civil proceeding in "a specified court or tribunal", or in an arbitation. See s 10:

**10 Defences: application, exceptions, and modifications**

Every defence prescribed by this Act—

(a) applies only to a claim—

(i) based on an act or omission after 31 December 2010; and

(ii) made in a civil proceeding in a specified court or tribunal, or in an arbitration (*see* section 39); and

(b) is subject to the exceptions and modifications set out in this Act.

**[34]** A "specified court or tribunal" is defined in s 4 as meaning:

**[34.1]** The High Court, the District Court, the Family Court, or a Disputes Tribunal; or

**[34.2]** The Employment Court, the Environment Court, or the Māori Land Court.

**[35]** The 2010 Act may be applied to another proceeding or lower tribunal by another Act. For example see the Construction Contracts Act 2002, s 71(1) which enacts that the Limitation Act 2010 applies to adjudications as it applies to claims as defined in the Limitation Act 2010, s 4, and the Weathertight Homes Resolution Services Act 2006, s 37(1) which enacts that the making of an application under that Act has effect as if it were the filing of proceedings in a court.

## HRRT not a specified court or tribunal

**[36]** As the Human Rights Review Tribunal (HRRT) is not included in the statutory definition of "a specified court or tribunal" and as LA 2010 is not applied by any statute to the HRRT, the limitation defence in s 11 is not available in proceedings before the Tribunal.

**[37]** The omission was deliberate. See the Explanatory Note to the Limitation Bill:

> Claims for damages under the Human Rights Act 1993 or the Privacy Act 1993 are not money claims, because the claims to which the Bill will apply (*see clause 9* [now s 10]) do not include claims made in proceedings in the Human Rights Review Tribunal. The special complaints procedures, and preconditions to commencement of proceedings for damages, under those Acts, make it inappropriate to superimpose on those claims a general civil limitation defence. Any necessary or desirable limitation defences to those claims are best prescribed by special provisions in those Acts.

**[38]** We refer to the Explanatory Note because the admissibility of parliamentary history to assist with the process of statutory interpretation has undergone substantial liberalisation in New Zealand over the past three decades, and it is often referred to, including by the Supreme Court. See Ross Carter and Jason McHerron *Statutory Interpretation Update* (NZLS CLE, June 2016) at 126 and 128.

## The decision of the High Court in *O'Neill*

**[39]** In *Director of Health and Disability Proceedings v O* [2005] NZHRRT 25 the Tribunal concluded it was not a court of law for the purpose of the Limitation Act 1950, s 4(7).

**[40]** That decision was later described by the Full Court (Williams and Venning JJ) in *Attorney-General v O'Neill* [2008] NZAR 93 at [35] as "not at all persuasive and should not be followed". However, the issue in *O'Neill* was not whether a limitation defence could be raised in proceedings before the Tribunal but whether the Tribunal had sufficient features in common with an inferior court to allow it to be treated as such a court for the purposes of the Judicature Act 1908, s 88B which permitted the restriction of vexatious actions. The Full Court was careful to emphasise its decision should not be construed as a determination that the Tribunal was an inferior court and the decision was expressly confined to the specific context of s 88B:

> [34] We conclude that the Tribunal is an inferior Court for the purposes of s 88B of the Judicature Act and that proceedings issued in it, including those proceedings issued by Mr O'Neill, are civil proceedings issued in an inferior Court for the purposes of that section.

**[41]** Consequently the disapproval of the Tribunal's decision in *Director of Health and Disability Proceedings v O* was obiter in respect of the limitation issue.

**[42]** In *Pope v Human Rights Commission (Strike-Out Application)* [2014] NZHRRT 3 at [46] and [47] the Tribunal held that it was an inferior court for the purposes of the Ombudsmen Act 1975, s 25 which provides (inter alia) that no decision of an Ombudsman is liable to be challenged, reviewed, quashed, or called in question in any court. This holding was justified on the basis that it could not have been intended that the prohibition have no application in proceedings before an inferior tribunal. See further Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington, 2015) at 314.

**[43]** The fact that a tribunal may be treated as a court for certain purposes must be seen as the outcome of a statutory interpretation exercise focused on the particular context of the relevant statute (eg the Judicature Act or the Ombudsmen Act). The rulings referred to do not mean the Tribunal is in truth a court in all contexts. As observed in *O'Neill* at [36], nomenclature is not determinative of jurisdiction.

**[44]** To the extent that the Full Court decision in *O'Neill* might be taken as suggesting that limitation defences are available in proceedings before the Tribunal, that decision (given on 20 December 2007) has been overtaken by the subsequent enactment of the Limitation Act 2010. As earlier explained, that statute is explicitly confined to "a specified court or tribunal". As the HRRT is not included in the definition of that term and was deliberately omitted from the definition, there can be little doubt a limitation defence to a money claim under LA 2010, s 11 is not available in proceedings before the Tribunal.

## Conclusion

**[45]** Without attempting an exhaustive repetition of the foregoing analysis, our principal reasons for finding a limitation defence under s 11 of the Limitation Act 2010 is not available in proceedings before the Tribunal are:

> **[45.1]** The Limitation Act 2010, s 10 explicitly limits the defence in s 11 to "a specified court or tribunal". That phrase is equally explicitly defined (exhaustively) as meaning the High Court, the District Court, the Family Court, a Disputes

Tribunal, the Employment Court, the Environment Court and the Māori Land Court. The definition does not extend to or include the Tribunal.

**[45.2]** Where a statute provides an exhaustive list of what is included in a definition it is not possible to add by way of supplementation categories which lie outside the text: *Burrows and Carter Statute Law in New Zealand* at 319-320.

**[45.3]** The Explanatory Note to the Limitation Bill reinforces the foregoing points. Claims for damages under the Human Rights Act and the Privacy Act 1993 were deliberately excluded from the Act because the special complaints procedures and the preconditions to the commencement of proceedings for damages under those Acts make it inappropriate to superimpose a general civil limitation defence. Any necessary or desirable limitation defences are best prescribed by special provisions in those Acts. Although proceedings under the HDCA are not referred to in the Explanatory Note, the same considerations apply with equal force. See the next point.

**[45.4]** Proceedings before the Tribunal under the HDCA can only be taken by an aggrieved person once the special complaints procedure prescribed by the HDCA itself has been followed. Specifically, proceedings by such person can only be taken when, following an investigation conducted under Part 4 of the Act, the Commissioner has found a breach of the Code on the part of the provider and the Commissioner has not referred the person to the Director of Proceedings under HDCA, s 45(2)(f) or the Director has declined or failed to take proceedings. These conditions precedent are far more rigorous than those which apply under the Human Rights Act and under the Privacy Act in that proceedings under those two statutes are not made contingent upon a prior finding by the first instance decision-maker that a breach of the Act has occurred.

**[45.5]** A strained or artificial interpretation of LA 2010, ss 10 and 11 is unnecessary because delay by a plaintiff under the HDCA can be taken into account by the Tribunal in the context of determining what remedy, if any, is to be granted.

**[46]** The determinative point is that the Tribunal is not included in the definition of "specified court or tribunal".

**[47]** Our conclusion is that Dr Kent does not have a defence under LA 2010, s 11 to the money claim filed by Ms Ashworth. That, however, is not the end of the matter.

## JURISDICTON TO REFUSE RELIEF AND LIMITATION BY ANALOGY IN EQUITY

**[48]** Sections 8 and 9 of the Limitation Act 2010 carry over from the 1950 predecessor recognition that claims in equity are subject to the same policy considerations which underlie the purpose of the limitation defence, namely (in the words of LA 2010, s 3) to encourage claimants to make claims for monetary or other relief without undue delay by providing defendants with defences to stale claims. Sections 8 and 9 provide:

> **8 Act does not affect jurisdiction to refuse relief**
>
> Nothing in this Act limits or affects any equitable or other jurisdiction to refuse relief, whether on the ground of acquiescence or delay, or on any other ground.
>
> **9 Act may be applied by analogy to equitable claims**

> Nothing in this Act prevents it from being applied by analogy to a claim in equity to which no defence prescribed by this Act applies.

**[49]** As will be seen both the discretion to refuse relief and the equitable claims jurisdiction apply to the Tribunal.

**[50]** The 1950 version of these provisions was explained by the New Zealand Law Commission in its 1988 report at paras 54 to 57 in the following terms:

> **EQUITABLE RULES**
>
> 54 Under s.4(9) of the 1950 Act, claims for equitable relief (such as specific performance or an injunction) in relation to matters subject to a six year limitation period - such as, tort and contract - are expressly excluded from that period "except insofar as [it] may be applied by the court by analogy". This reflects the historical development of English law through two different court systems - the courts of equity, and the common law courts - and the rule that courts exercising the equitable jurisdiction will apply limitation rules by analogy in certain cases:
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> > ... when claims are made in equity, which are not, as regards equitable proceedings, the subject of any express statutory bar, but the equitable proceedings correspond to a remedy at law in respect of the same subject matter which is subject to a statutory bar, a court of equity, in the absence of fraud or other special circumstances, adopts, by way of analogy, the same limitation for the equitable claim. (16 Halsbury's Laws of England (4th ed) para. 1485.)
>
> 55 …
>
> 56 A body of equitable rules which may bar claimants from obtaining a remedy (even where the 1950 Act does not) survives under s.31:
>
> > Nothing in this Act shall affect any equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise.
>
> The application of equitable principles under this section is limited to refusals of relief. The main thrust of those principles is that a claimant is bound to pursue his or her claim without undue delay. Equity does not specify a fixed time after which claims are barred. The doctrine of laches looks at the circumstances of the case - in particular, acquiescence on the claimant's part and any change of position on the defendant's part. The doctrine applies when an action is subject to the Act and the court refuses to grant relief to a claim not already barred by the Act - effectively shortening the period. That is most likely to happen where there has been a short delay but serious prejudice to the defendant.
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> 57 An equitable defence is generally only available where the claimant knew or reasonably should have known of the existence of a cause of action and where the that delay was actually prejudicial to the defendant. Prejudice is the key notion: in the absence of prejudice, even a long delay will not bar an action; but a short delay with serious prejudice will certainly do so.

**[51]** As to the 2010 provisions, the *Laws of New Zealand* title Limitation of Civil Proceedings at [38] is to similar effect:

> **38. Limitation by analogy in equity.**
>
> Nothing in the Limitation Act 2010 prevents it from being applied by analogy to a claim in equity to which no defence prescribed by the Act applies.
>
> The doctrine of limitation by analogy developed in the courts of equity when the limitation statute then in force applied to actions at common law but not to suits in equity. When a suitor in equity sought equitable relief that corresponded to a common law action for the same relief, but barred by the limitation statute, the court of equity applied the same time limit to the corresponding suit in equity "by analogy", although no statutory time limit applied to the corresponding suit in equity. Later limitation statutes have enacted statutory limitation periods or defences that apply directly to equitable claims, and which a court of equity applies directly not by analogy. Thus, the limitation defence to a money claim applies directly to a money claim in equity. In addition, the limitation defences prescribed in the Limitation Act 2010 for recovery of equitable estates or interests in

> land, for recovery of personal property held on trust, and the limitation defences prescribed in the Act for certain claims against a trustee, apply directly, and do not apply by analogy. Apart from these defences to particular equitable claims, the Act does not prescribe any defence to a claim for specific performance, injunction, or other equitable relief.
>
> The principle of the doctrine of limitation by analogy is that where the remedy in equity is correspondent to the remedy at law, and the latter is subject to a limit in point of time by the statute of limitations, a court of equity acts by analogy to the statute and imposes on the remedy equity affords the same limitation. A claim for a form of equitable relief that does not correspond to relief available at common law is not capable of being barred by analogy, but a claim for equitable relief that corresponds to another claim for equitable relief that is time barred, may be barred by analogy. A time bar for a bare account will not be applied by analogy to a claim for an account that involves some element of trust or breach of trust.
>
> Where the doctrine applies and the claim in equity has been concealed from the plaintiff by the fraud of the defendant, time runs from the discovery of the fraud and not from an earlier date on which the cause of action arose.
>
> Where the limitation statute applies directly to a claim for equitable relief there is no room for the statute to be applied by analogy. [footnote citations omitted]

## The obligations of the Tribunal under equity and good conscience

**[52]** Against this background it is important to observe that the Human Rights Act, s 105(2)(c) explicitly requires that in exercising its powers and functions, the Tribunal must act "according to equity and good conscience". This provision has application to proceedings under the HDCA by virtue of s 58 of that Act. Section 105 of the HRA provides:

> **105 Substantial merits**
>
> (1) The Tribunal must act according to the substantial merits of the case, without regard to technicalities.
> (2) In exercising its powers and functions, the Tribunal must act—
> (a) in accordance with the principles of natural justice; and
> (b) in a manner that is fair and reasonable; and
> (c) according to equity and good conscience.

## The discretion to refuse relief

**[53]** Sections 54 and 57 of the HDCA make it clear that the grant of any remedy, including exemplary damages, is discretionary. It follows from these provisions as well as from HRA, s 105 that delay by a plaintiff and any consequential prejudice to the defendant must be taken into account by the Tribunal in determining what remedies, if any, are to be awarded to a plaintiff who has otherwise established his or her case.

## The distinction between monetary and non-monetary claims for relief

**[54]** In the application of LA 2010, ss 8 and 9 it would be appropriate for the Tribunal to take into account the distinction between monetary and non-monetary claims for relief. See the ruling in *PF Sugrue Ltd v Attorney-General* [2004] 1 NZLR 207 (CA) at [69] to [73]. Under the Limitation Act 1950 there was no limitation period for claims for damages under the New Zealand Bill of Rights Act 1990 (NZBORA). For this there were two reasons. First, the NZBORA was enacted 40 years after the Limitation Act 1950 and second, the NZBORA makes no provision for a remedy of damages for breach. A remedy in damages was subsequently developed by the Court of Appeal in *Simpson v Attorney-General* [1994] 3 NZLR 667 (CA) commonly known as *Baigent's Case*. The effect of the ruling in *PF Sugrue Ltd v Attorney-General* was that while a claim for *Baigent* damages is not a claim for a "sum" within s 4(1)(d) of the 1950 Act and thus not statute barred by

delay, the discretion to award damages for such claims would be "guided" by the 1950 Act. That is, a court could refuse monetary relief where a plaintiff delayed too long in bringing his or her claim. The Court cautioned, however, that the discretion to dismiss a monetary claim for undue delay would not necessarily apply to a claim for non-monetary relief, such as a declaration of breach of a guaranteed right. It might well remain appropriate, despite the delay, to vindicate the plaintiff's right in that way:

> **[70]** It does not, however, follow that a claim of this nature, for monetary compensation, should be able to be brought no matter how belatedly the claimant chooses to put it forward. *Baigent* damages are a form of compensation which the Court awards, as we have noted, in the exercise of a discretion. In that respect they bear a resemblance to compensation awards in equity. And, as with equitable awards, the Court should be able to refuse monetary relief if the plaintiff delays too long in bringing a *Baigent* claim. The Court must have a degree of flexibility in determining how long a delay is too much. All the circumstances, including those in which the cause of action arose, whether the alleged breach of the plaintiff's rights may have had an effect which excuses the delay and whether the delay has prejudiced the defence of the claim, should be considered. Appropriate and significant weight should obviously be given to the fact that the claim is one for breach of a fundamental human right guaranteed by the Bill of Rights. But it can be expected that the Court will still be guided to an extent by the periods set for the bringing of common law and statutory claims by the Limitation Act, just as it is when there has been a delay in commencing a claim in equity: see generally *Matai Industries Ltd v Jensen* [1989] 1 NZLR 525.
>
> …
>
> **[73]** …It would not follow from the exercise of the discretion to dismiss a monetary claim for undue delay, that the Court would on the same basis dismiss a claim for non-monetary relief, such as a declaration of breach of a guaranteed right. It might well remain appropriate, despite the delay, to vindicate the plaintiff's right in that way, and thereby admonish the Crown and warn against any repetition of the conduct in question.

**[55]** While by virtue of LA 2010, s 12(2)(c) a claim for damages for a breach of the New Zealand Bill of Rights Act is now included in the definition of a "money claim" the ruling in *PF Sugrue Ltd v Attorney-General* remains relevant to claims for remedies in proceedings before the Tribunal under the Human Rights Act, the Privacy Act and the HDCA.

## CONCLUSION

**[56]** While a defendant in proceedings before the Tribunal does not have a limitation defence of the kind available under LA 2010, s 11 the principle which underpins that provision is nevertheless applicable in proceedings before the Tribunal by analogy either because of the discretion to refuse relief (as explicitly recognised by LA 2010, s 8) or because of the Tribunal's obligations in equity and good conscience (as recognised by HRA, s 105(2)(c) and LA 2010, s 9). However, the factors relevant to the exercise of the discretion to dismiss a monetary claim for undue delay may not necessarily have the same application to a claim for non-monetary relief, such as a declaration under the relevant statute. It might well be appropriate, despite the delay, to vindicate the plaintiff's right in that way.

### Whether appropriate for issues of delay to be determined in the context of a strike-out application

**[57]** The remedies to be granted to a successful plaintiff fall to be determined at the conclusion of a case, not during the preliminary or interlocutory stages. Only at the conclusion can an informed assessment be made of all the relevant circumstances, including any delay or prejudice asserted by the defendant. The discretion to refuse relief and the Tribunal's obligations in equity and good conscience cannot be exercised in a vacuum.

**[58]** This is the point made by Elias CJ and Tipping J in *Commerce Commission v Carter Holt Harvey Ltd* in the passages earlier cited under the heading "Jurisdiction to strike out". For the reasons given by both judges, the general rule is that limitation questions will not be decided in interlocutory proceedings in advance of the hearing except in the clearest of cases.

**Overall conclusion**

**[59]** The application by Dr Kent to have the proceedings by Ms Ashworth struck out is dismissed.

**[60]** Costs are reserved.

**Directions**

**[61]** The following directions are made:

**[61.1]** Ms Ashworth having discontinued her proceedings against Fendalton Eye Clinic Ltd, the clinic is no longer to be cited as a defendant in these proceedings.

**[61.2]** Ms Ashworth is to file an amended statement of claim in which only Dr Kent is cited as a defendant and in which her case is re-pleaded to make explicit the remedies now sought and that the only damages claimed under the Health and Disability Commissioner Act 1994 are those allowed by s 57(1)(d). Full particulars must be provided of the grounds on which it is alleged that any action by Dr Kent was in flagrant disregard of the rights of Ms Ashworth. The amended statement of claim is to be filed and served by 4pm on Friday 25 January 2019.

**[61.3]** Dr Kent is to file and serve an amended statement of reply by 4pm on Friday 22 February 2019.

**[61.4]** A case management teleconference is thereafter to be convened by the Secretary. The parties are, however, to note that owing to the Tribunal's heavy workload delay is to be expected. That delay has come about because of an unprecedented increase in the Tribunal's workload and because until late November 2018 the Human Rights Act did not allow the appointment of deputy chairs to assist the Chairperson to keep pace with the inflow of new cases. The circumstances are more fully explained in *Wall v Fairfax New Zealand Ltd (Delay)* [2017] NZHRRT 8. While the Act has now been amended, no deputy chairs have yet been appointed by the Governor-General.

**[61.5]** Leave is reserved to both parties to make further application should the need arise.

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| ..... | ..... | ..... |
| **Mr RPG Haines ONZM QC** | **Ms K Anderson** | **Ms GJ Goodwin** |
| **Chairperson** | **Member** | **Member** |