

IN THE SUPREME COURT OF NEW ZEALAND

**SC 25/2009
[2009] NZSC 120**

BETWEEN	THE COMMERCE COMMISSION Appellant
AND	CARTER HOLT HARVEY LIMITED Respondent

Hearing: 11 August 2009

Court: Elias CJ, Blanchard, Tipping, McGrath and Anderson JJ

Counsel: A R Galbraith QC, J C L Dixon and N R Williams for Appellant
R G Simpson and J S Cooper for Respondent

Judgment: 27 November 2009

JUDGMENT OF THE COURT

- A The appeal is allowed.**
- B The order of the Court of Appeal is set aside and the application to strike out the appellant's proceeding is dismissed.**
- C The respondent is ordered to pay the appellant for its costs in this Court the sum of \$15,000 plus disbursements, to be fixed if necessary by the Registrar. The costs order made in the Court of Appeal is reversed and the costs order made in the High Court is reinstated.**

REASONS

	Para No
Elias CJ	[1]
Blanchard, Tipping, McGrath and Anderson JJ	[11]

ELIAS CJ

[1] The Commerce Commission appeals against a decision of the Court of Appeal¹ striking out its application for orders for compensation under s 43 of the Fair Trading Act 1986 on behalf of those who have suffered loss through conduct of Carter Holt Harvey Limited in contravention of the Act. It is claimed that Carter Holt Harvey, in breach of s 10 of the Act,² had misrepresented the grading of timber manufactured and supplied by it. The loss claimed is for overpayment because of the grading. The Court of Appeal held, contrary to the view earlier taken in the High Court by Asher J,³ that the application by the Commission was barred by the limitation provision contained in s 43(5):

(5) An application under subsection (1) may be made at any time within 3 years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered.

[2] The application under s 43 was brought by the Commission on 27 October 2006, two weeks after Carter Holt Harvey pleaded guilty to 20 charges brought by the Commission for misleading and deceptive conduct in relation to the grading of its timber between 2000 and 2003.⁴ The charges had been under investigation by the Commission since October 2002, when it received a complaint about misrepresentation of timber grades from an industry source. The contention of Carter Holt Harvey on its strike-out application was that the Commission had known or ought to have known on or before 26 October 2003 that loss or damage had been caused by the misrepresentation of grading. It relies on an affidavit filed in the District Court by the Commission on 24 October 2003 in support of search warrants. The affidavit referred to the result of tests undertaken on three packets of timber which had been milled and graded at two different Carter Holt Harvey mills. (Timber from the third Carter Holt Harvey mill producing machine-graded timber

¹ *Carter Holt Harvey Ltd v Commerce Commission* [2009] 3 NZLR 573 (Hammond, Chambers and Baragwanath JJ).

² The application was also brought on behalf of competitors for loss of profits for breaches of s 13 of the Act, but it is unnecessary to deal separately with this aspect of the application.

³ *Commerce Commission v Carter Holt Harvey Ltd* [2008] 1 NZLR 387.

⁴ The civil claim for compensation under s 43 relates however to the period May 1998 to October 2003.

had not at the time been tested.) The affidavit also referred to data apparently compiled from Carter Holt Harvey records for demonstration purposes (for the marketing of a software programme). The investigator who compiled the affidavit suggested that the testing and the data indicated deliberate tampering by Carter Holt Harvey with the stress-grading machines at its mills. If Carter Holt Harvey is correct in the contention that the affidavit discloses that the Commission knew or ought to have known at the time of the affidavit that timber had been sold at a higher price than was justified because of deliberate mis-grading, the application for civil remedies under s 43 is outside the statutory limitation of three years when filed on 27 October 2006.

[3] I am of the view that the application ought not to have been struck out at preliminary hearing. The facts need further investigation before it could confidently be concluded that loss or damage arising out of misleading conduct had been discovered by 27 October 2003 or ought reasonably to have been discovered by that date. There is controversy about whether the data used in the software programme promotion was real which means that it cannot be relied on for the purposes of the strike-out application. The status of the data will have to be resolved on the evidence at trial. For the purposes of the strike-out the critical material available to the Commission was the testing undertaken of samples taken from the three packets of timber. I have had the advantage of reading in draft the reasons prepared for the majority by Tipping J. I agree with his explanation why the sampling of three packets of timber already undertaken by October 2003 cannot confidently be said on the facts as they are known on the material available to the Court on strike-out to amount to discovery of loss attributable to misleading conduct. The Standards said to have been misapplied⁵ are expressed to assign particular grades to populations of “consignments” of timber. They note that assessment for conformity required “a reasonably large random sample of the consignment in question”:⁶

Assessment of conformity of structural properties of mechanically-graded stress timber cannot therefore be carried out on one or a small number of

⁵ AS/NZS 4490: 1997; AS/NZS 4063: 1992; AS/NZS 1748: 1997; AS 1720.1: 1997 and its amendments.

⁶ AS/NZS 1748: 1997. This Standard specifies structural property, marking and physical requirements for mechanically stress-graded timber.

individual pieces or sections of individual pieces of timber.

Whether the sampling undertaken prior to 27 October 2003 was sufficient to indicate deficiencies in compliance with the Standards is quite unclear on the information available. The inquiry may turn substantially on what constitutes a “consignment” population and “a reasonably large random sample” (points in fact taken by Carter Holt Harvey in its pleading to the Commission’s substantive s 43 claim and in earlier submissions to the Commission which preceded the claim). That conclusion is I consider dispositive of the appeal. The limitation defence contained in s 43(5) is therefore one for trial (perhaps as a preliminary issue) and is not suitable for peremptory determination on strike-out. I agree that the application should be reinstated.

[4] So far it has been convenient to proceed on the assumption that the relevant discovery which sets the limitation period running is that of the Commission as applicant. The point was however the subject of argument and in the lower Courts resulted in three different approaches. It is therefore necessary to consider whose discovery is relevant, in application of s 43(5). “Any person” can bring an application. In the present case the applicant was the Commerce Commission, but it has no particular status under s 43. The Commission argued in the High Court that the limitation period in s 43(5) ran from discovery of loss attributable to the misrepresentation by each person on whose behalf the claim was made. The submission was accepted by Asher J who concluded as a result that it was premature to rule on limitation issues because those on behalf of whom the Commission was bringing the application were not yet identified: some might have discovered the loss earlier and be out of time, others might still have no knowledge of it so that time had not begun to run in relation to them. In the Court of Appeal, Chambers and Baragwanath JJ considered that discovery by either the applicant or the person on whose behalf compensation was sought triggered the limitation period in respect of the application. Hammond J, on the other hand, took the view that the relevant discovery was that of the applicant, whether the loss sufferer or not. On further appeal to this Court the division of opinion has continued. I take the view, not shared by other members of the Court but in agreement with Chambers and Baragwanath JJ, that discovery by either the applicant or the person on whose behalf

the application is brought triggers the limitation period. My reasons can be stated briefly; they turn on the expression of s 43(5) and its purpose.

[5] Section 43(5) prescribes a time limit for applications which may otherwise be brought by “any person” seeking relief for a person who has suffered loss by reason of conduct in contravention of the Act. The time limit runs from the date when the loss or damage “was discovered or ought reasonably to have been discovered”. As Chambers J pointed out, the legislative history indicates that s 43(5) was amended to refer to discovery and reasonable discovery of loss⁷ in the belief that the trigger for the limitation period for applications for compensation for loss would then be equivalent to the trigger for limitation periods for tort.⁸ A complication not present in tort actions arises under the Fair Trading Act because an application under s 43 need not be made by the person who suffers loss. The purpose of permitting claims by “any person” is to facilitate consumer protection in circumstances where the loss of an individual may not warrant stand alone proceedings.⁹ The application for relief under s 43 must always however be on behalf of someone who has suffered loss. This duality necessarily affects the application of s 43(5). The concept of discoverability is expressed in s 43(5) in the passive tense, without attribution to any particular person. Such opacity may well have been deliberately adopted to reflect the duality of manner of claim under s 43.

[6] In any event, I am of the view that the expression of s 43(5) and its legislative purpose point to a composite focus on the application made on behalf of the loss sufferer. If either the applicant or the person on whose behalf the application is brought ought to have discovered the loss (in the general sense used in limitation cases¹⁰), then in my view the limitation period runs against the application from that

⁷ Originally the limitation ran from the date of “the matter giving rise to the application” (using the same terms as the limitation provision for regulatory offences). It was interpreted in *Murray v Eliza Jane Holdings Ltd* (1993) 6 PRNZ 251 (CA) to arise at the time of the proscribed conduct, rather than discoverability of loss.

⁸ At paras [180] – [182]. The assumption may require revision in the light of the decision of this Court in *Murray v Morel & Co Ltd* [2007] 3 NZLR 721, as members of the Court of Appeal thought to be the case. But there is no need for further consideration of this point in the present case.

⁹ Asher J discusses the relevant legislative history of the provision at paras [24] – [26] of the High Court decision.

¹⁰ As to which, see the cases cited by Lord Nicholls in *Haward v Fawcetts* [2006] 1 WLR 682 (HL) at pp 685 – 686.

point. This approach does not preclude a loss sufferer who could not reasonably have discovered loss from bringing an application himself or taking the benefit of an application brought by another person who is not precluded by knowledge. It prevents the limitation period being stretched by a dilatory applicant relying on the ignorance of the loss sufferer. Where an application can be made by “any person”, including a regulatory agency like the Commerce Commission, any such looseness could substantially undermine the balance of interests achieved by the statutory limitation period and could conceivably be quite oppressive. In addition, although it is a more far-fetched prospect, treating discoverability as referable to all interests engaged in the application itself (when brought by an applicant on behalf of a loss sufferer) also prevents a knowing loss sufferer using an ignorant applicant to evade the limitation. The effect is also consistent with the limitation for comparable applications in Australia, a desirable outcome given the realities of the Australasian market and its regulation. There, the trigger is expressed to be based on accrual of the claim (in which discoverability of loss is key), but I consider there is no effective difference in result between the provisions as I would construe s 43(5). The claim made in the application equally “accrues” for the purpose of limitation under the New Zealand Act when loss caused by the breach is reasonably discoverable.

[7] I would therefore come to the result preferred by Chambers and Baragwanath JJ in the Court of Appeal although differing from them in the view that the facts do not warrant the confidence necessary for strike-out. In the present case the knowledge of the loss sufferers does not seem to be a realistic impediment to the application (because whether there was breach of the Act was on any view not at all obvious), but in some cases the position may not be as clear. In such cases, even if the applicant could not reasonably have discovered the loss, consideration of the limitation defence is likely to be premature until the position of the loss sufferers can be identified, as Asher J recognised.

[8] Given the conclusion that it is not possible to be confident on the evidence available on summary argument on strike-out that the Commission had discovered or ought to have discovered the loss or damage attributable to breach prior to 27 October 2003, it is unnecessary to consider some of the further arguments addressed to us on the interpretation of s 43(5). I agree with Tipping J that the

reference in s 43(5) to “likelihood of loss or damage” refers to future losses. But I do not wish to be taken to agree with his further views as to the interpretation of s 43(5) and in particular his view at para [30] that the concept of likelihood is a useful standard against which to assess discoverability.

[9] Section 43(5) deals with discovery of existing loss or damage and discovery of the prospect of future loss or damage. In respect of both, the question is whether the loss or the prospect of likely loss was discovered or ought reasonably to have been discovered. In the case of loss yet to be suffered, what needs to be discovered (or ought reasonably to be discovered) is that loss is likely, meaning more likely than not. Likelihood is not however a standard for discovery of future loss, any more than it is imported as a standard for discovery of existing loss. Rather, future loss (necessarily a prediction) is not treated as loss in fact (as existing loss is) unless it is likely. Discovery of the threshold fact (existing loss or likely loss) is a question of fact. It turns on what was known or ought to have been known. Employment of the word “likelihood” in the very different context of future loss in s 43(5) provides no reason for its use as a standard for discovery and may well be confusing. Nor do I think that it is necessary to struggle with the use of the definite article in the reference in s 43(5) to “*the* loss or damage”. “The loss or damage”, discovery of which sets the limitation period running in s 43(5), refers back to the “loss or damage” identified in s 43(1). It is “loss or damage by conduct of any other person that constitutes or would constitute ... a contravention of any of the provisions of Parts 1 to 4 [of the Fair Trading Act 1986]”.¹¹ Read with s 43(1), s 43(5) is a limitation based on reasonable discovery of the basis for application. It is not necessary for the purposes of disposition of the present appeal to consider whether the approach to reasonable discoverability of extent of loss and its attribution, described in cases such as *Invercargill City Council v Hamlin*,¹² requires reassessment in the context of the bringing of applications for compensation in consumer protection legislation. There may well be no difference in substance. I am not convinced that the differences in the legislation considered in *Haward v*

¹¹ That is the loss or the likelihood of loss identified by s 43(5) and which makes the use of the definite article in relation to both explicable without reference to speculation about drafting technique.

¹² [1996] 1 NZLR 513 (CA).

*Fawcetts*¹³ are so material as to make what is said in that authority unhelpful in New Zealand in application of s 43(5) when considering the extent of knowledge required for reasonable discoverability. These are deep waters, recently stirred in *Morel*.¹⁴ I would decline to agitate them further in a case where consideration of the degree of knowledge required is not immediately in issue and may not eventually cause difficulty. A special approach to the limitation provision in s 43(5) would be a significant step which I consider should not be taken with the limited perspective of this strike-out application. It is not relevant to the grounds of disposition of the appeal on which all members of the Court are agreed.

[10] I concur in the making of the orders proposed by Tipping J.

BLANCHARD, TIPPING, McGRATH AND ANDERSON JJ

(Given by Tipping J)

Introduction

[11] The issue in this appeal is whether an application made by the Commerce Commission under s 43(1) of the Fair Trading Act 1986 should be struck out as time-barred by s 43(5) of the Act. By statement of claim dated 27 October 2006, the Commission applied under s 43(1) for orders under s 43(2) against Carter Holt Harvey Ltd (CHH) on the basis that persons had suffered loss or damage by reason of misleading conduct on the part of CHH contrary to s 10 of the Act. The essence of the allegation was that CHH had, for several years, been representing timber it sold as being of a certain grade when in fact it was of a lesser grade. The consequence alleged was that end users of the timber paid more than they would or should have done if they had been aware of the actual quality and characteristics of the timber.

¹³ [2006] 1 WLR 682 (HL).

¹⁴ *Murray v Morel & Co Ltd* [2007] 3 NZLR 721 (SC).

[12] On 12 October 2006 CHH had entered guilty pleas in the Auckland District Court to 20 charges under s 10. In the civil proceeding, which was brought in the High Court, the Commission claimed orders under paras (c) and (d) of s 43(2). The first was that CHH should refund to end users of the timber the difference between what they each paid and the fair market value of the grade of timber actually supplied. The second, based on an alleged contravention of s 13(a), was that CHH pay to its competitors the amount of the loss of profit suffered by each of them. CHH applied to have the Commission's application struck out on the basis that it was time-barred by s 43(5), the text of which is set out in para [14] below.

[13] In the High Court Asher J declined to strike out the Commission's application.¹⁵ His decision was reversed by the Court of Appeal.¹⁶ The Commission brings this further appeal seeking the reinstatement of the High Court's conclusion. The essential thrust of the Commission's case is that when s 43(5) is properly analysed and the principles applicable to strike-out on limitation grounds are applied to the facts, it cannot be said on the material at present before the Court that the application is so clearly time-barred that it should be summarily struck out.

Legislation

[14] Sections 43(1), 43(2) and 43(5) are in the following terms:

43 Other orders

- (1) Where, in any proceedings under this Part of this Act, or on the application of any person, the Court finds that a person, whether or not that person is a party to the proceedings, has suffered, or is likely to suffer, loss or damage by conduct of any other person that constitutes or would constitute—
- (a) A contravention of any of the provisions of Parts 1 to 4 of this Act; or
 - (b) Aiding, abetting, counselling, or procuring the contravention of such a provision; or

¹⁵ *Commerce Commission v Carter Holt Harvey Ltd* [2008] 1 NZLR 387.

¹⁶ *Commerce Commission v Carter Holt Harvey Ltd* [2009] 3 NZLR 573 (Hammond, Chambers and Baragwanath JJ).

- (c) Inducing by threats, promises, or otherwise the contravention of such a provision; or
- (d) Being in any way directly or indirectly knowingly concerned in, or party to, the contravention of such a provision; or
- (e) Conspiring with any other person in the contravention of such a provision—

the Court may (whether or not it grants an injunction or makes any other order under this Part of this Act) make all or any of the orders referred to in subsection (2) of this section.

(2) For the purposes of subsection (1) of this section, the Court may make the following orders—

- (a) An order declaring the whole or any part of a contract made between the person who suffered, or is likely to suffer, the loss or damage and the person who engaged in the conduct referred to in subsection (1) of this section or of a collateral arrangement relating to such a contract, to be void and, if the Court thinks fit, to have been void *ab initio* or at all times on and after such date, before the date on which the order is made, as is specified in the order:
- (b) An order varying such a contract or arrangement in such manner as is specified in the order and, if the Court thinks fit, declaring the contract or arrangement to have had effect as so varied on and after such date, before the date on which the order is made, as is so specified:
- (c) An order directing the person who engaged in the conduct, referred to in subsection (1) of this section to refund money or return property to the person who suffered the loss or damage:
- (d) An order directing the person who engaged in the conduct, referred to in subsection (1) of this section to pay to the person who suffered the loss or damage the amount of the loss or damage:
- (e) An order directing the person who engaged in the conduct, referred to in subsection (1) of this section at that person's own expense, to repair, or provide parts for, goods that had been supplied by the person who engaged in the conduct to the person who suffered, or is likely to suffer, the loss or damage:
- (f) An order directing the person who engaged in the conduct, referred to in subsection (1) of this section at that person's own expense, to supply specified services to the person who suffered, or is likely to suffer, the loss or damage.

...

- (5) An application under subsection (1) may be made at any time within 3 years after the date on which the loss or damage, or the likelihood of loss or damage, was discovered or ought reasonably to have been discovered.

Section 43(5)

Issues

[15] Before turning to the facts of the case, it is necessary to examine three points arising on the interpretation of this subsection. The first concerns who it is that must discover or reasonably have discovered the loss or damage referred to. Put in another way, the question is whose knowledge is relevant to the discovery inquiry. The second point concerns the proper compass of the expression “likelihood of loss or damage”. The third question is what it means to “discover” loss or damage; what degree of awareness of the loss or damage does one need before being found to have discovered it, and how likely must the suffering of loss or damage be before it can be said to have been discovered.

First question – whose knowledge?

[16] Three views were taken below on the question whose knowledge is relevant to when time begins to run under s 43(5). In the High Court Asher J held that it was the knowledge of the person who actually suffers the loss or damage.¹⁷ In the Court of Appeal Hammond J considered that it was the knowledge of the person making the application under s 43(1), here the Commission.¹⁸ Chambers and Baragwanath JJ held that it was a combination of these two approaches – if either the applicant or the loss sufferer has knowledge time will start to run against both those parties. By this approach, it seems that the loss sufferer’s limitation period would begin to run from the time the applicant acquired knowledge, even if the loss sufferer had no knowledge at that time, and vice versa.¹⁹

[17] In my view Hammond J was right. The person who must discover the loss or

¹⁷ At para [75].

¹⁸ At paras [131] – [132].

¹⁹ See Baragwanath J at paras [19] and [26] and Chambers J at paras [166], [171] – [172].

damage is the applicant for the order under s 43(1). It is that person's knowledge which subs (5) puts in issue. The subsection allows an application to be made within three years after the discovery date. It therefore prohibits the making of an application more than three years after that date. The natural implication from the way the subsection is expressed is that it is discovery by the particular applicant that is in issue. Clearly, if the applicant is a loss sufferer, that person has three years from discovery (actual or constructive) within which to make the application. The language of the subsection does not suggest any difference if the applicant is another person.

[18] What we regard as the natural reading of the text of the subsection, that it is the applicant whose discovery of the loss or damage is in issue, accords with its purpose, which is to balance the interests of those applying for orders under subs (1), whoever they may be, with the interests of those against whom the application is made. We can see no basis for declining to apply the limitation provision to the Commission in the same way as it applies to a loss suffering applicant. The subsection speaks of "an application" in a generic way. There is no suggestion that the position differs depending on who makes the application and no clear policy reason to adopt that approach. The subsection allows "any person" to bring an application. It is not focussed specifically on loss sufferers or on the Commission. Its generality in that respect is appropriately matched by construing subs (5) as focussed on and applying to whoever makes the application. The Australian Trade Practices Act 1974 expressly entitles the Australian Competition and Consumer Commission to sue on behalf of a loss sufferer.²⁰ However, the provisions of that Act are materially different from our own, and counsel did not suggest they were relevant to the issue of whose knowledge is involved. That is a different issue from that of what must be discovered.

[19] We are mindful of the point that if this interpretation is adopted, a person who is already out of time could simply nominate another person who was not statute-barred to make the application, on the basis that s 43(1) does not limit who

²⁰ See ss 82(2) and 87.

may make applications in any way. This potential difficulty is substantially ameliorated by the fact that it cannot have been intended that someone could apply under subs (1) for the purpose of recovering loss or damage in respect of which the actual loss sufferer was already time-barred. The Commission accepted that this was so.

[20] In the High Court Asher J was concerned that a nominal plaintiff could be chosen as a means of circumventing the limitation period. While it must be acknowledged that this is theoretically possible, there is no capacity for any practical harm because, as we have said, no one could be ordered, pursuant to such an application, to pay compensation for loss or damage suffered by a person who was already time-barred at the time the application was made. For these reasons the question in the present case is whether the Commission, as applicant, discovered, or ought reasonably to have discovered, the loss or damage which is the subject of its application more than three years before it brought the application. If that is so, the application is time-barred.

[21] Although Asher J considered that the person whose knowledge was relevant to the discovery of loss or damage was the person who suffered the loss or damage, he also held²¹ that if the test was based on the Commission's knowledge, he could not conclude, for strike-out purposes, that it had the requisite knowledge by 26 October 2003, being three years prior to when the application was made. Hence he declined to strike out the Commission's application. As mentioned earlier, the Court of Appeal allowed an appeal by CHH and ordered that the application be struck out on the ground that it was time-barred by s 43(5).

Second question – “likelihood of loss or damage”

[22] This question concerns the way the concept of “likelihood of loss or damage” fits within the subsection. Does likelihood look to loss or damage which has already occurred and, on that premise, represent a standard against which its occurrence is to be measured, or is likelihood descriptive of loss or damage which has not yet

²¹ At paras [93] and [98].

occurred but which is “likely” to occur in the future?

[23] In the High Court Asher J held that the phrase “likelihood of loss or damage” referred to knowledge of losses that were likely to arise in the future.²² He was of the view that the phrase made it clear that s 43(5) applies to future losses as well as present losses. His Honour added that the concept of likelihood was not meant to represent a test as to when potential discoverability started time running. It did not mean “probability” of loss in the present tense but rather the “probability” of loss in the future.²³

[24] This point was not addressed in specific terms in the Court of Appeal.²⁴ In this Court CHH challenged Asher J’s analysis and submitted that in its context the expression “likelihood of loss or damage” was a reference to loss or damage which had already occurred. The concept of likelihood was the standard against which the discovery issue was to be assessed. Put another way, CHH submitted that the phrase “likelihood of loss or damage” meant that loss or damage is discovered by the applicant under s 43 when that person knows or ought to know it is likely that loss or damage has been suffered.

[25] We consider that Asher J was correct. The reference in s 43(5) to likelihood of loss or damage matches the similar references elsewhere in s 43. Subsection (1) refers to the Court finding that a person has suffered, or is likely to suffer, loss or damage. It does not say “likely to have suffered”. This reference to likelihood is clearly forward looking. Again, subs (2)(a) speaks of a contract made between the person who suffered, or is likely to suffer, loss or damage and the contravener. Similarly, paragraphs (e) and (f) of subs (2) speak of the person “who suffered, or is likely to suffer, the loss or damage”. For the same reason these references are also forward looking.

[26] Mr Galbraith QC, for the Commission, submitted that this dichotomy of past

²² At para [65].

²³ At para [65].

²⁴ While the Court of Appeal did not directly consider the difference between past and future loss, the Court appears to have proceeded on the premise that the concept of “likelihood” in s 43(5) applied to past loss: see Baragwanath J at paras [78] and [81] – [82] and Hammond J at paras [141] and [146].

and future loss or damage was appropriately reflected in subs (5) and explained the purpose and meaning of the concept of likelihood in that provision. We accept this argument which supports the meaning which otherwise naturally flows from the words of subs (5). If likelihood had been meant to refer to past loss, there would have been little point in employing the dichotomy of loss or damage or its likelihood. Logically all that would have been necessary, if likelihood had been intended to be a standard against which occurrence was to be measured, was a reference to likelihood alone. Furthermore, if likelihood was backward looking, there would be no limitation period for applications based on future loss, unless one adopted the inherently improbable view that likelihood was intended to be both backward and forward looking.

[27] In short, time starts running when the applicant discovers or ought to have discovered that loss or damage has already occurred, or is likely to occur in the future. Discovery that loss or damage is likely to occur in the future will be relevant to applications seeking relief on account of that likelihood. If relief is sought for loss or harm already suffered, then time will start running from discovery (actual or constructive) of that fact. In the present case we are concerned with discovery of loss or harm which had already occurred.

Third question - discovery

[28] As already foreshadowed, there are potentially two aspects to this question. The first is what degree of awareness must an applicant have of loss or damage before being found to have discovered it. The second concerns how likely the suffering of loss or damage must be before it can be said to have been discovered. A further point, to which we shall return, is that s 43(5) refers to *the* loss or damage when addressing loss or damage that has already occurred.

[29] For present purposes, the concept of discovery entails finding something out, in the sense of becoming aware of it. An applicant discovers the loss or damage when he or she acquires knowledge of it. In the Court of Appeal there was some discussion about the “extent” of knowledge required. Extent in this context is not concerned with the quality of the necessary knowledge. Rather it is concerned with

the subject matter of that knowledge. Is that subject matter the certainty of loss or damage, the possibility of its having occurred, or some intermediate position? It is neither necessary nor desirable to attempt some qualitative description of the knowledge inherent in the concept of discovery. Put simply, an applicant either is or is not aware of the loss or damage. Furthermore, if there is any doubt about whether the applicant was actually aware of the loss or damage, the enquiry then moves to whether the applicant ought reasonably to have been aware of it. The Court will then have to consider whether a reasonable person, situated as the applicant was, ought to have known that loss had occurred. No further refinement is required on either of these aspects of the matter.

[30] It is, however, necessary to determine how likely the occurrence of loss should be before it can be said to have been discovered or that it ought to have been discovered. There are four options: (1) mere possibility of loss; (2) likelihood of loss in the sense that loss may well have occurred; (3) likelihood of loss in the sense that loss is more probable than not; and (4) near certainty of loss. In the case of future loss, the applicant must be aware that it is likely to occur. Likelihood sets the standard for the discovery of future loss as well as being descriptive of it. In this context we consider likelihood means that loss is more probable than not. There is merit in adopting the same standard for past loss. What the applicant must therefore know to set time running in respect of past loss, is that it is more probable than not that loss has occurred. This analysis has a consequence similar to the analysis we have rejected in respect of the purpose of the words “likelihood of loss” in s 43(5). As we have said, those words are descriptive of a type of loss, namely future loss. But the similar concept of probability is an appropriate standard against which the occurrence of past loss should be measured.

[31] Adopting this standard represents an appropriate reconciliation of the interests of applicants and defendants, both for actual knowledge and for constructive knowledge. Time should not start running when past loss is just a mere possibility or something that could well have happened. Nor should the commencement of the three years be deferred until past loss is a near certainty. Likelihood of past loss in the sense that it is more probable than not strikes an appropriate balance between the competing interests in legislation the principal

purpose of which is consumer protection. Any lesser degree of likelihood would be apt to have time running against plaintiffs too early to be a satisfactory reflection of the statutory purpose. On this basis, in a case like the present, the question to be answered is when did the Commission become aware that it was more probable than not that a person or persons had suffered loss. As loss is not relevant for present purposes unless it was occasioned by a contravention of the Act, the words “as a result of a contravention of the Act” are necessarily implicit in this question. The same concept of probability should apply, for present purposes, to the applicant’s awareness that loss has been occasioned by a contravention.

“The” loss or damage

[32] There is one further point which needs to be addressed in relation to the construction of s 43(5). It has already been foreshadowed and relates to the use of the definite article in the phrase “*the* loss or damage”. We do not consider this usage requires the applicant to have become aware of the actual loss or damage as ultimately established. That would not be consistent with general limitation practice and that degree of specificity cannot have been intended. The question becomes what degree of specificity is signalled by the expression “the loss or damage” in its context.

[33] It is again appropriate to reflect in this assessment the purpose of the limitation provision and the need to reconcile the competing interests of applicants and defendants. The general approach taken to limitation issues suggests that when reasonable discoverability is a feature of the regime, the plaintiff should be aware not only of the facts or circumstances constituting the wrong, but also of the fact that some more than minimal loss or harm has resulted from the commission of the wrong. The definite article “the” in the expression “*the* loss or damage” was, we consider, incorporated into that expression more for linguistic reasons than as a signal that greater specificity was intended than would ordinarily be expected in a limitation context.

[34] The expression was probably picked up by the drafter from similar expressions containing the definite article in subs (2). In the result the expression

should be held to mean some more than minimal loss or damage, without the need for any greater specificity as to the nature or amount of that loss or damage. That meaning is available, in context, from the text. And from the point of view of the purpose of the provision it represents an appropriate reconciliation of the competing interests. If an intending applicant knows that some more than minimal loss or damage is likely to have resulted from a probable contravention, it is by no means unreasonable to require them to make all necessary further enquiries and file their application within three years of acquiring that knowledge.

[35] We should add that there may be cases in which there is more than one class of loss sufferer. That could happen when loss of materially different kinds results from the same contravention. If the Commission discovers or ought reasonably to have discovered the loss suffered by one class, it will not necessarily follow that it will or should also have discovered that loss has probably been suffered by another class. Whether that is so will, of course, depend on the particular circumstances.

Haward's case

[36] In coming to these conclusions we have borne in mind the submissions made for CHH and in particular Mr Simpson's reliance on the decision of the House of Lords in *Haward v Fawcetts (a firm)*.²⁵ That was a case which required the Court to ascertain the date on which the plaintiff acquired knowledge that advice given to him by the defendants was negligent. The issue arose under s 14A(8)(a) of the Limitation Act 1980 (UK). Knowledge for this purpose was described as "the knowledge required for bringing an action for damages in respect of the relevant damage". That knowledge was defined to mean knowledge of certain facts including "the material facts about the damage in respect of which damages are claimed" and that "the damage was attributable in whole or in part to an act or omission which is alleged to constitute negligence".

[37] It can immediately be seen that these provisions are substantially more detailed and specific than those to be found in our s 43(5). Lord Nicholls summarised the matter by saying that the claimant had a period fixed by Parliament

²⁵ [2006] 1 WLR 682.

(three years there also) in which to start proceedings after he had “the knowledge he reasonably needs for that purpose”.²⁶ Despite that summary, there are observations in the speeches which suggest that time had started to run before the claimant had enough knowledge to commence proceedings. Lord Nicholls himself said that to start time running there needed to be “something which would reasonably cause [the plaintiff] to start asking questions about the advice he was given”.²⁷ That is a very low threshold. Lord Walker spoke narratively of time starting to run when the claimant’s knowledge about his claim was “far from complete”.²⁸ Both Lord Scott and Lord Brown spoke of the claimant needing to know “the essence of the act or omission” to which his damage was attributable,²⁹ and “the substance of what ultimately comes to be pleaded as his case in negligence”.³⁰ Lord Mance said that actual knowledge involved knowing “enough to make it reasonable to [begin to] investigate whether or not there is a claim ...”.³¹

[38] Their Lordships, in making these several observations, were concerned with the different and not altogether straightforward provisions of the United Kingdom Act. We respectfully consider that the threshold evident in at least some of their opinions is too low to reflect the consumer protection purposes of our Fair Trading Act. That threshold has, or is capable of having, time starting to run earlier than is appropriate in a consumer protection environment. Hence we do not consider *Haward*’s case should influence the proper interpretation of s 43(5).

Conclusion

[39] The foregoing discussion means that CHH must show that the Commission knew or ought reasonably to have known, on or before 26 October 2003, that some person or persons were likely to have suffered loss or damage as a result of a probable contravention by CHH. As this is a strike-out application CHH must demonstrate that the Commission’s application is so clearly statute barred that it can

²⁶ At para [7].

²⁷ At para [21].

²⁸ At para [57].

²⁹ At paras [41] and [90] respectively.

³⁰ At paras [40] – [41] per Lord Scott and at para [90] per Lord Brown.

³¹ At paras [126] and [128].

properly be regarded as frivolous, vexatious or an abuse of process.³² 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.

The present case

Overview

[40] On 14 October 2002 the Chief Executive of New Zealand Timber Industry Federation (NZTIF), Mr Wayne Coffey, telephoned the Commission to complain that CHH had misrepresented its timber graded as MGP10. NZTIF alleged that CHH had tampered with its stress-grading machines to achieve a higher grade of timber at lower cost. The allegation was confirmed in a written complaint by NZTIF to the Commission on 15 October 2002, which attached two reports. The first report was prepared by Forest Research Institute Ltd (FRI), which had tested three packets of timber, one from CHH and the others from other producers. FRI concluded that some suppliers were not ensuring that machine-graded timber met the appropriate requirements. The second report related to the testing of a second packet of CHH timber labelled as MGP10. It had been confidentially commissioned by NZTIF. That report confirmed the results of the first report, and concluded that this packet of CHH timber also did not achieve the Modulus of Elasticity (MOE) specified for timber graded as MGP10. On 27 November 2002 the Commission interviewed Mr Coffey, who gave more detailed information about how the grading process worked and the reasons for NZTIF's concerns about CHH's timber.

[41] During January 2003 the Commission engaged FRI to test a third packet of CHH timber labelled as MGP10. That testing and the report on it were completed in July of that year. The report concluded that this packet of timber "failed to achieve the bending stiffness or bending strength requirement of the MGP10 grade", and that "it would appear the MGP10 lower grade threshold is set too low and hence significant quantities of the timber should be graded out into a lower grade". At this point, the Commission was concerned that the data it had was not sufficiently

³² *Murray v Morel & Co Ltd* [2007] 3 NZLR 721 (SC) at para [33].

representative to establish that CHH's MGP10 timber generally had not complied with the relevant timber grading Standards promulgated by Standards New Zealand. The essence of these Standards, for present purposes, required an assessment directed to the average of a relevant population of timber; a matter that will be addressed further below. In August 2003 the Commission therefore asked Professor Vignaux of Victoria University of Wellington to assess the statistical probability that the three packets which had been tested were representative of CHH's production of MGP10 timber generally. Professor Vignaux advised that there were "real difficulties" in relying upon the limited data that the Commission possessed at that time for this purpose.

[42] As a result, on 24 October 2003, officers of the Commission, including Mr Mervyn Theobald, the officer in charge of the investigation, swore affidavits in support of applications for search warrants to obtain relevant information and records from CHH. The District Court Judge granted the warrants and they were executed on 29 October 2003. The Commission's application in these proceedings was made on 27 October 2006. Hence the question is what the Commission knew or ought to have known by 26 October 2003. Section 43(5) of the Act refers to discovery of loss. But in this case, as the allegations are framed, loss by end users³³ was a necessary consequence and corollary of breach. Hence, the essential question is whether, as at 26 October 2003, the Commission had discovered or ought to have discovered the asserted contravention by CHH. As earlier discussed, CHH must, as this is a strike-out application, show beyond any reasonable capacity for argument that, by this date, the Commission was aware or ought to have been aware that CHH had probably committed the asserted contravention.

Pleadings

[43] It is appropriate now to examine the pleadings to the extent necessary to see what is alleged by the Commission in its application, and the response of CHH. The Commission's essential allegation is that the timber sold by CHH did not meet its represented grade; CHH was selling timber as meeting the Standards pertaining to

³³ The suffering of loss by competitors may well not have been so clear cut, but that cannot assist CHH.

timber with a specification of MGP10 whereas it did not in fact do so. CHH admits that from time to time during the relevant period (3 May 1998 to 29 October 2003) quantities of timber produced, labelled and sold by it as MGP10 failed to “consistently” meet the required MOE and accordingly the specification for MGP10 in the relevant Standards; but otherwise it denies that the timber sold failed to meet the Standards.

[44] It is therefore vital in determining what the Commission knew or ought to have known to understand with some precision and clarity what it means to meet or comply with the Standards involving MGP10 timber. The key feature, for present purposes, is that whether the MOE requirement for MGP10 timber is met is to be assessed on the basis of the average of a population rather than on an individual stick or packet of timber basis. The population average is based on a comparison with a “reference population” with a characteristic MOE of not less than 10 gigapascals (GPa). In this respect CHH pleads that while the relevant Standard states that a reference population is defined in terms of the source of the timber, the moisture content, size of pieces, the stress grade and the method of grading, it does not provide any further definition of a reference population.

[45] It is implicit in this pleading that there is a lack of clarity and certainty as to what size the population and perhaps also the reference population should be. As compliance with the Standards is based on the average of all timber in a population (what constitutes a population being undefined), it must be difficult, if not impossible, to determine whether there has been compliance unless and until the appropriate population and reference population are determined and a sufficient sample has been taken from the appropriate population to see whether the average of the whole population does or does not comply with the Standards.

[46] When referring to reports supplied to it by the Commission, CHH pleads that although they appeared to show that the particular samples tested did not meet the MOE required by the Standards, the reports were based on “insufficient sample sizes” to enable any conclusion to be reached on whether CHH’s product generally met the requirements of the Standards. In effect CHH was thereby pleading that as compliance or not with the relevant Standard is based on the average of an

appropriately defined population, the reports obtained by the Commission and made available to it were incapable of showing breach by reason of the small sample size from that population. Nevertheless, at the same time, CHH argues in support of its strike-out application that the Commission knew or ought to have known that loss had probably been occasioned by a breach of the Standards. As it emerged in argument, CHH's best point was that because its timber is machine-graded, evidence that individual packets failed to meet the MOE value set for a population of timber was sufficient for a conclusion that endemic breach had probably occurred. But, for reasons to which we will come in a moment, we do not consider that point is established with sufficient clarity to justify striking out the Commission's application.

[47] CHH's pleading suggests that at the time it says time started running, the Commission had not discovered, and could not reasonably have discovered, by reason of the insufficient sample size, that CHH had probably contravened the Standards and had therefore misrepresented the timber, thereby committing a breach of the Act. This is because, according to CHH's pleading, there was no basis on which the Commission could have known whether there was a contravention of the Standards because it did not have the necessary data from CHH to make the requisite population average assessment.

[48] In that part of its statement of defence which advances specifically the affirmative defence that the Commission's application is time-barred, CHH alleges that the date on which the Commission discovered or ought reasonably to have discovered all the facts giving rise to the claim, including the basis on which end users and competitors had suffered loss, was 14 October 2002. As the argument was presented, that date is clearly untenably early. CHH's ultimate argument was that the date of discovery was no later than 24 October 2003, that being the date on which Mr Theobald swore his affidavit in support of the search warrant application. While that event became the ultimate focus of the discovery or discoverability argument, the actual pleading by CHH does not lay a convincing foundation for what came to be its assertion. This then is the state of the pleadings against which the evidence adduced in support of, and opposition to, the strike-out application must be assessed.

Evidence

[49] CHH's argument that the Commission knew or ought to have known prior to 27 October 2003 that there probably was a contravention is based on the contents of Mr Theobald's affidavit. If this evidence is insufficient to demonstrate knowledge (actual or constructive) on the part of the Commission, there is no other evidence which could alter the position. The essential thrust of the affidavit was to lay a foundation for the proposition that the Commission needed a search warrant in order to obtain records and other materials from CHH to assist in determining whether CHH had contravened the Fair Trading Act. That was the purpose of the evidence which is now relied on to demonstrate that by then the Commission had discovered or ought to have discovered the probability of a contravention.

[50] In his affidavit Mr Theobald discussed the existence of what are called the Tadpole data. Tadpole, which is a computer software programme that monitors and collects data produced by stress-grading machines at CHH's sawmills, is a marketing programme produced independently of CHH. It is not disputed that CHH provided the information for the Tadpole marketing material. FRI had advised Mr Theobald that the Tadpole data appeared to indicate that CHH's stress-grading operations were producing timber below the represented grade. The Commission inferred that this was an allegation that CHH was tampering with the settings on its stress-grading machines at mills, thereby producing timber of a lower grade for financial gain. In covert questioning (undertaken by an employee of FRI) a CHH staff member stated that the information contained in the Tadpole marketing material was not "real" but was instead simply generated for the publication. From Mr Theobald's affidavit, it is clear FRI did not consider this to be a logical explanation, as the purpose of the Tadpole marketing material was promotion of the Tadpole system and this seemed a very strange way to go about that exercise. It is not clear from his affidavit what Mr Theobald's view was about the "realness" of the data provided by CHH. There is insufficient clarity and certainty on this aspect to meet the high standard required for strike-out purposes.

[51] Mr Theobald also made reference in his affidavit to the testing of the three packets of timber which had been purchased. His statements about the results of that

testing must be viewed in the light of the small size of the sample they represented. The three packets comprised a total of about 7.5 cubic metres of MGP10 timber, whereas CHH produced annually a total of about 150,000 cubic metres of MGP10 timber at its mills. The results of the testing demonstrated the possibility that a more extensive and representative sample might demonstrate a contravention. The best way of furthering that process was to obtain CHH's records in order to see whether lack of compliance with the Standards might emerge from that material. It can certainly be said that if there was a contravention loss would probably have been suffered, at least by end users, if not competitors. The crucial point, however, is that, on a proper appreciation of what a contravention involves, Mr Theobald's affidavit does not establish to the necessary level of certainty for strike-out purposes that the Commission knew or ought to have known that a contravention was more probable than not. Indeed, towards the end of his affidavit Mr Theobald stated, with apparent justification, that the Commission required further information to ascertain whether CHH was engaging in contravening conduct.

Conclusion

[52] We have reached a different conclusion from that of the Court of Appeal because that Court appears to have proceeded on the premise that there had been a contravention on a single packet basis and the Commission must have known that. But whether there has been a contravention does not appear to depend on the contents of a single packet, but rather, as Mr Galbraith emphasised in his reply, it depends on consideration of the average of an appropriately delineated population. The Court of Appeal did not consider the necessary question from the correct standpoint. The MGP10 description does not represent that the MOE average for every packet of MGP10 graded timber will be 10 GPa or above. It simply means that the average MOE for an appropriate population will be 10 GPa or more. The very concept of an average, leaving aside any question of weighting, suggests that there are likely to be as many individual packets with an average MOE below 10 GPa as there will be above 10 GPa. The fact that none of the three CHH packets individually had an average MOE above 10 GPa did not necessarily indicate that, when the appropriate population was addressed, a contravention had occurred, even

allowing for the fact the timber was machine-graded. Because of the small size of the sample which the three packets represented, it could not be said that, because they each fell below the Standards, the average of a properly defined population would probably contravene the Standards. We cannot accept CHH's argument in this respect.

[53] Neither individually nor collectively was the information available to the Commission sufficient to warrant the conclusion that it knew or ought to have known that CHH had probably contravened the Act. The evidence established only that three packets failed to achieve the required MOE value for MGP10 graded timber. It did not indicate that there was probably an endemic breach. It could not, at the relevant time, be said that the results were probably representative of an appropriate population. It is clear this was of concern to the Commission, to the extent that it employed Professor Vignaux to assess the statistical probability that endemic breach could be inferred from the testing of these three packets. Indeed, CHH's statement of defence shows that it challenged the sample size when the information was put to it. The Tadpole data, which on its face appeared to indicate that CHH's machines were set at a level which did not accurately grade the timber as represented, did not, without more, provide sufficiently clear evidence of probable endemic breach.

Disposition

[54] The Commission appropriately recognised that it needed to obtain further information. This could realistically have come only from CHH itself, pursuant to a search warrant. CHH has not shown with sufficient clarity, for strike-out purposes, that as at 26 October 2003 the Commission knew or ought to have known that a person or persons had suffered loss or damage as a result of a probable contravention by CHH. The Commission was, no doubt, aware that a contravention was possible. But, on the material before the Court, CHH has not demonstrated that the Commission knew or ought to have known that there had probably been a contravention. The Commission's application should not therefore have been struck out. The appeal must be allowed and the application for strike-out dismissed with

costs here and below.

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