Kaipara District Council v McKerchar [2017] NZEmpC 55 (12 May 2017)

Last Updated: 16 May 2017

IN THE EMPLOYMENT COURT AUCKLAND

[2017] NZEmpC 55

EMPC 148/2016

IN THE MATTER OF	proceedings removed from the Employment Relations Authority
AND IN THE MATTER	of applications for strike-out
BETWEEN	KAIPARA DISTRICT COUNCIL Plaintiff
AND	ALAN MCKERCHAR Defendant

Hearing:	11 November and 5 December 2016 (Heard at Auckland)
Appearances:	SJ Turner and B Heenan, counsel for plaintiff AF Drake and R Gillies, counsel for defendant
Judgment:	12 May 2017

JUDGMENT OF CHIEF JUDGE G L COLGAN

A The plaintiff 's claims against the defendant are struck out as being in breach of an agreement between the parties not to sue each other.

B The plaintiff 's claims against the defendant for penalties for breach of an employment agreement are struck out for time limitation reasons.

C The defendant's counterclaim against the plaintiff is struck out as being beyond the jurisdiction of the Employment Relations Authority or the Employment Court.

D Costs are reserved on the terms set out at [289].

KAIPARA DISTRICT COUNCIL v ALAN MCKERCHAR NZEmpC AUCKLAND [2017] NZEmpC 55 [12

May 2017]

Introduction

[1] Both parties ask the Court to strike out the claims of the other, not on their merits after trial but because, they say, the other party cannot succeed. In one case that is on jurisdictional grounds and, in the other, because they have already agreed, validly and enforceably, not to sue each other. In a third instance, that is because the claims were not made until after expiry of the time limit for doing so.

[2] Kaipara District Council (the Council) has sued Alan (also known as Jack) McKerchar, formerly the Council's Chief Executive Officer, for what it claims were losses suffered by it as a result of Mr McKerchar's breaches of his employment contract obligations to it. Mr McKerchar says that the Council's claims cannot succeed because of the terms of an agreement which the parties reached concerning his resignation. In particular, he invokes a term of the settlement that he says precluded either party from bringing any employment-related proceedings against the other.

[3] Mr McKerchar's counterclaim against the Council asserts that it breached the terms of the same settlement agreement by disclosing them publicly, causing him losses for which it should compensate him. The Council's initial response to Mr McKerchar's counterclaim is that authoritative case law means that any such claim cannot be brought to the Employment Relations Authority (or now the Employment Court), although leaving open the possibility that Mr McKerchar may, nevertheless, sue the Council for this alleged breach of contract in the ordinary courts.

[4] These proceedings have been removed to the Court from the Authority for hearing at first instance.1 The decision on both applications to strike out is based on the pleadings, the interpretation and effect of the parties' settlement agreement, a recent and authoritative judgment of the Court of Appeal,2 and on affidavit and oral evidence which has been tendered to the Court in support of, and in opposition to, the strike-out applications.

[5] To understand the context in which this judgment arises and the plaintiff's claims against the defendant set out in its statement of claim, it is necessary to summarise very broadly the events which led to this litigation. I will set out factual findings in more detail later in the judgment but the following summary is intended to be sufficient to understand the pleadings.

[6] Kaipara District is a territorial local authority covering a significant area of New Zealand's North Island, coast to coast, south of Whangarei. Consistently with the nature of its largely rural land use, Kaipara District has relatively few ratepayers or other sources of rateable income. It was a feature of the Council's operations at relevant times that it had a small administrative staff, preferring to contract out even functions that many, especially larger, local authorities maintain in-house. In the early 1990s, the Council became concerned about wastewater pollution in and from the east coast seaside settlement of Mangawhai, occupied by a combination of permanent residents and holiday-home owners. It resolved to have built and operated, a wastewater treatment scheme to address the growing pollution of

waterways. Even from the outset, such a scheme was not universally popular but the

1 *Kaipara District Council v McKerchar* [2016] NZERA Auckland 203.

2 *JP Morgan Chase Bank NA v Lewis* [2015] NZCA 255, [2015] ERNZ 37, [2015] 3 NZLR 618.

Council nevertheless contracted with a number of commercial parties to implement this plan.

[7] As a result of a number of events which are outlined conveniently in the subsequently issued report of the Office of the Auditor-General (OAG),3 construction and operation of the scheme was delayed significantly but, importantly for this case, its cost to the Council ballooned very substantially, leading to associated problems in paying for the wastewater scheme.

[8] Some ratepayers and councillors believed that Mr McKerchar was personally responsible for these woes. They considered that he was responsible for the Council undertaking either illegal actions or dubious commercial transactions, or both, related directly or indirectly to the wastewater scheme. Included in that attribution of blame to Mr McKerchar was that the Council struck rates to attempt to pay for the scheme, that were both unlawful and onerous.

[9] In mid-2011 Mr McKerchar decided to explore the possibility of an early resignation from his role as Chief Executive. This was agreed to by the Mayor who prepared an agreement to this effect which also provided for monetary compensation to Mr McKerchar. That agreement included a clause compromising future litigation between the parties. It was signed by the parties on 2 August 2011 and Mr McKerchar ceased to be the Council's Chief Executive on 31 October 2011, a year before the expiry of his fixed term employment agreement.

[10] The Council claims to have become aware only subsequently of information which it says will confirm that Mr McKerchar breached his employment agreement in a number of respects but which were unknown, or at least insufficiently known, to the Council before his resignation. It has issued proceedings claiming damages for those alleged breaches. Although monetary remedies have not yet been ascertained

or fixed, there is little doubt that damages sought will amount to millions of dollars.

3 Auditor-General *Inquiry into the Mangawhai Community Wastewater Scheme* (Office of the

Controller and Auditor-General, 26 November 2013).

[11] Mr McKerchar has subsequently, by way of counterclaim, alleged that the Council publicised the terms and conditions of his exit agreement of 2 August 2011 and seeks damages against it for this alleged breach. He claims that the parties agreed to maintain confidentiality about the terms and conditions of his departure and there appears to be no argument that this was so. Under pressure from some residents or ratepayers, the Council subsequently published a copy or copies of the settlement agreement which Mr McKerchar claims was without his consent and in breach of the agreement. He seeks damages for this alleged breach of contract.

The Council's claims against Mr McKerchar

[12] The allegations against Mr McKerchar relate to the development, beginning in late 1999, of the reticulated wastewater treatment system at Mangawhai known as the Mangawhai Community Wastewater Scheme (the MCWS) or EcoCare Scheme. They also relate to advice given by him to the Council regarding payment for the capital and operating costs of the MCWS by rates levied on ratepayers, and to his administrative record-keeping.

[13] The Council's very detailed statement of claim seeks damages for breach of Mr McKerchar's employment agreement. It relies on the express, implied and statute-imposed provisions of his fixed term employment agreement of five years from 31 October 2007 to 31 October 2012. Express obligations said to have been breached included:

• to carry out responsibilities honestly, diligently and to the best of his ability;

• to provide high quality, quantitative, timely and relevant advice, information and recommendations to the Council;

• to ensure that the Mayor and Councillors received the assistance, information and advice they reasonably required in their roles as elected representatives;

• to ensure that the Council's resources were used prudently and lawfully in pursuit of its accepted goals and objectives and to its best advantage;

• to ensure that the Council received accurate, timely, relevant and easily understood financial reporting against its annual plan;

• to ensure that the Council did not breach statutes, bylaws or its own policies;

- to carry out the duties of the Principal Administrative Officer under
the Local Government Act and any other Act or regulation defining or

limiting the functions of territorial local authorities, or by any bylaw
or any provision of the Council's District Plan or any other statutorily

adopted plan or policy;

- to comply with s 42(2) of the Local Government Act including to ensure that all responsibilities, duties and powers delegated to him or
to any other person employed by the Council or imposed or conferred

by Act, regulation or bylaw, were properly performed or were
properly performed or exercised;

- to ensure the effective and efficient management of the activities of
the Council; and

- to provide leadership for the staff of the Council.

[14] Also relied on by the Council are the defendant's allegedly implied
contr actual
o bligations including:

- to act in accordance with his duty of fidelity;

- to act in the Council's best interests; and

• to act in a way so as not to damage the Council's trust and confidence

in him.

[15] The statement of claim deals first with rates struck and levied by the Council. The plaintiff alleges that from about 2006 and then continuing through each year of his employment, Mr McKerchar failed to ensure that the Council issued lawful rates assessments and invoices. The breach is said to have been of his contractual obligation to ensure that the Council did not contravene statutes, bylaws or its own policies; but that the failure included to ensure that rates were set in accordance with the Local Government (Rating) Act 2002 and in preparation of the Council's Funding Impact Statement (FIS) in accordance with that Act. The breaches are said to have occurred in relation to ratings or other charges known as the Mangawhai Uniform Targeted Rate (MUTR), the Mangawhai Uniform Annual Charge (MUAC), the Forest Owners' Targeted Rate (FOTR), the Maungataroto Station Village Volumetric Water Rate (MSV Water Supply Rate), and all other wastewater rates.

[16] Although not argued in these proceedings, at least yet, the effect (if any) of the validation of rating unlawfulness by the Kaipara District Council (Validation of Rates and Other Matters) Act 2013 (the Validation Act) may have an effect on any loss that the Council may now have incurred in this regard.

[17] The plaintiff says that for each of the years 2009-2010, 2010-2011 and 2011-

2012 Mr McKerchar failed to provide or provided inadequately for the MUAC in the FIS, contrary to the Local Government (Rating) Act. It claims he assessed the MUAC on a basis that was not authorised by the Local Government (Rating) Act.

[18] Next, in relation to FOTR, the plaintiff says that in each of the 2006-2007,

2007-2008, 2008-2009, 2009-2010, 2010-2011 and 2011-2012 years, Mr McKerchar did not provide for the FOTR in the FIS, contrary to the Local Government (Rating) Act, and provided for the rate to be struck on a basis and using a methodology that was not authorised by that Act.

[19] In relation to the MSV Water Supply Rate, the plaintiff also alleges that in those same six financial years, Mr McKerchar provided for the rate to be struck and assessed on a basis that was not authorised by the Local Government (Rating) Act.

[20] In respect of other wastewater rates and for the same six financial years, the plaintiff alleges that Mr McKerchar provided inadequately for the MUTR in the FIS, contrary to the Local Government (Rating) Act, and again provided for the rate to be struck on a basis and using an approach that was not authorised by that Act.

[21] These allegations of rating irregularities are referred to in the pleadings,

collectively, as "the Rating Irregularities".

[22] The plaintiff claims that these breaches by Mr McKerchar caused the Council loss and damage. In particular, the Council says that the rating irregularities attributable to Mr McKerchar caused Parliament to pass the Validation Act, incurring for the Council legal costs of $145,946.78. Further, the Council alleges that its legal costs of defending High Court judicial review proceedings brought against it by the Mangawhai Ratepayers and Residents Association Inc, amounted to $1.35 million which it claims from Mr McKerchar. Next, the Council claims that it incurred increased borrowing costs as a result of its being unable to access funding from the Local Government Funding Agency until after the conclusion of the High Court proceedings, being a loss of $819,160. Finally in this regard, the Council says that because of the refusal of a number of ratepayers to pay their rates as a result of these irregularities, it has incurred ongoing costs which amounted to $112,350 to the date of filing of the proceeding. It seeks to be reimbursed for these losses also.

[23] Next are the particulars relating to the breaches alleged against Mr McKerchar in his involvement in the MCWS for the overall management of which the plaintiff says he was responsible. The claim is that from an initial cost estimated in October 2005 to be $26.26 million, this increased progressively to a total cost of

$63.2 million in July 2009. The plaintiff relies on a report of the Auditor-General into these matters and says that a number of the Council's failings were attributable directly to Mr McKerchar. The Council claims that had the defendant not breached his employment agreement, it could have made decisions which would have reduced

the scope of the project during its construction and which could have resulted in a negotiated reduction in the cost of the MCWS before its payment by the Council. It seeks an inquiry into damages suffered by it which it claims were caused by Mr McKerchar's breaches of his employment agreement. Although the subject of an inquiry as to damages and so as yet unquantified, the potential claim against Mr McKerchar may be very substantial.

[24] The next head of claim relates to allegations of failure by Mr McKerchar to ensure that the Council's Long Term Council Community Plan 2009-2019 (LTCCP) was prepared on a sound financial management basis.

[25] The plaintiff alleges that Mr McKerchar had a contractual obligation to ensure that all responsibilities delegated to him, or any other person employed by the Council, were performed properly. These obligations were said to include that the LTCCP was prepared on a "sound financial basis" and that the Council was to be provided with "high quality, quantitative and relevant advice". The Council alleges that the LTCCP was not prepared on a sound financial basis, including that there were no records kept of any final workings; there were deficiencies within other workings; and there was no evidence that projected expenditure within budgets of each department of Council was included correctly in the LTCCP. These breaches are alleged to have caused loss and damage to the Council for which it also seeks an inquiry into damages for those breaches.

[26] Next, the Council particularises its allegation that Mr McKerchar failed to ensure that it maintained a sound financial position and, in particular, that cash flow use of special reserves was prudent. The plaintiff alleges that Mr McKerchar was responsible for the finalisation of the Council's 2011-2012 annual plan which recorded inaccurately a cash shortfall of $5.104 million instead of a true surplus of

$515,000. This breach is alleged to have caused loss and damage to the Council.

[27] Next is Mr McKerchar's alleged failure to ensure that the Council kept and adequately maintained full and accurate records. The Council alleges that he did not meet the standards required of him under his employment agreement including that

there are no, or inadequate, records or other documents relating to discussions at

Council meetings and workshops, and advice received and tabled.

[28] These breaches are also alleged to have caused loss and damage to the

Council for which it seeks an inquiry into those damages.

[29] The Council seeks a judgment on Mr McKerchar's liability for breaches of his express and implied contractual obligations summarised above. It seeks damages for those breaches (to be quantified once preliminary jurisdictional matters are resolved) including:

• for actual losses as a result of the breaches;

• expense to which the Council has been put to rectify those breaches;

• repayment of sums paid to Mr McKerchar under the deed of settlement with him "on the basis the Council would never have entered into the Deed had it been aware of Mr McKerchar's breaches of contract";

• special damages for foreseeable loss of the cost of investigation of those breaches; and general damages for loss of executive time, inconvenience and interruption to the Council's business; and

• penalties for Mr McKerchar's breaches of his individual employment agreement and of statutory good faith obligations including that those penalties be paid to the Council.

[30] The plaintiff does not concede, however, that it is now out of time to seek those penalties or that claims for them must fail for this reason. It does, however, accept that the timing is tight around the expiry of the 12-month limitation period for claiming penalties for breach of an employment agreement.

The no-subsequent-claims (compromise) agreement

[31] At the heart of the defendant's strike-out argument is the meaning and effect of cl 9 of what the parties described as their "deed of settlement" prepared by the Council and signed by both parties on 2 August 2011. This agreement settled employment relationship issues or problems that had arisen between the parties. It evidenced a mutual intention to end Mr McKerchar's employment prematurely on terms. Clause 9 provides:

This Deed is executed by the parties in full and final settlement of all matters, rights, and obligations arising from the Employee's position of employment with the Employer, and is in full satisfaction of any actual or potential disputes, grievances, actions or other issues between the Employee and the Employer arising out of the Employee's position in employment with the Employer, whether out of statute, common law, equity, or otherwise.

[32] Despite a theoretical argument for the Council that the release may be limited to "... disputes, grievances, actions or other issues ..." solely between the employee (Mr McKerchar) as claimant, and the employer (the Council), the plaintiff does not take this position. By arguing that it is entitled to bring these claims against Mr McKerchar because their subject matter was not, or was insufficiently, known to it when the agreement was entered into, the Council concedes impliedly that cl 9 provides reciprocal rights and immunities for both parties. Similarly, there is no question that the Council's claims against Mr McKerchar arise out of his position in employment with the Council. These interpretive concessions narrow the question on which Mr McKerchar's strike-out application will turn.

[33] Clause 9 must be interpreted both in the context of the deed of settlement as a whole, and also in the context of the relationship of the parties including, especially, the events leading up to its execution, what might be called the context part of a 'text within context' analysis of the meaning of the agreement. The whole agreement and the context in which it was entered into are addressed later in this judgment.

[34] The Court's approach to contractual interpretation is uncontroversial. The Court must approach the exercise of determining a disputed meaning by concluding what an independent, but relevantly informed, third party would say that the words

mean. Irrelevant to this exercise are post-execution assertions by the parties as to their intended meanings.

[35] Two questions arise in relation to cl 9 on which the parties disagree. First, did the parties intend that neither would bring proceedings against the other irrespective of what might have been known or unknown to them on 2 August 2011? This is Mr McKerchar's primary submission, although it is denied by the plaintiff. Second, if the Court decides that the parties agreed that cl 9 was to apply only to potential actions known to the parties at the date of execution of their agreement, was the subject matter of the Council's claim unknown or so insufficiently known to it on 2 August 2011 so that its claims are not covered by cl 9? This is the plaintiff's position but it is denied by Mr McKerchar. If the Court finds for the defendant on his primary interpretation of cl 9, then it will be unnecessary, at least strictly, to consider the second question. If, however, the plaintiff's interpretation of cl 9 is preferred, then it will be a matter of factual analysis to decide whether the matters which are the subject of the Council's proceedings were unknown or insufficiently known to it for these to fall outside the scope of cl 9.

A sufficiency of evidence?

[36] The vast majority of relevant and admissible evidence for the Council about events leading to the settlement agreement is in contemporaneous documents. Mr McKerchar provided evidence by affidavit, on which he was cross-examined, about the events leading to the execution by the parties of the settlement agreement in early August 2011. The only witness for the Council in relation to these or any other matters, was Peter Winder. He was one of three Crown Commissioners for Kaipara appointed by the Minister for Local Government. He assumed many of the statutory functions of the Council and was subsequently, and until recently, the sole Crown Commissioner, before the Council was returned to full democracy at the 2016 local government elections. Mr Winder now has a limited role as Crown Commissioner with the Council which includes oversight of litigation. Recent unconfirmed news reports are that he may now no longer hold that role.

[37] Mr Winder's appointment as a Commissioner, however, post-dated (by about a year) the end of Mr McKerchar's employment as the Chief Executive. So, while Mr Winder has presented documents to the Court, he has been unable to give direct evidence (except as is disclosed in those documents) about the events that led to the signing of the agreement to terminate the defendant's employment. That absence of personal direct knowledge as could have been adduced by others who dealt with Mr McKerchar at the time, is particularly significant. This is in relation to the vital question of what the plaintiff (in the persons of the Mayor and councillors) knew or did not know of the matters for which it now sues Mr McKerchar, at the time the settlement between the parties was entered in August 2011.

[38] As the hearing went on and upon subsequently re-reading the transcript of evidence, it became increasingly obvious that the Council had not called relevant witnesses, who are apparently available to give evidence, to address critical issues in this case. In

particular were the Mayor at the time, Neil Tiller and, to a lesser extent, his Deputy, Julie Geange. Also, to a lesser but nevertheless important extent, the Court did not hear from the Chair of the Commissioners appointed by the Minister of Local Government to administer the Council and in whose hands responsibility for the preparation of the litigation then lay, John Robertson. No explanation was given to the Court why these persons had not given evidence. In the case of Mr Tiller especially, it was acknowledged for the Council that he would have been available to do so and, indeed, some preparatory affidavit work was apparently undertaken by the Council's lawyers for him to do so. Parties, on the advice of counsel, no doubt have their reasons not to call particular witnesses, but a party may be fixed with the consequences of not doing so if this means a dearth of important evidence ensues.

[39] Mr Winder's evidence was that particular responsibility for the litigation lay with the Chair of the Commissioners, Mr Robertson, who Mr Winder told the Court spoke with Mr Tiller on a number of occasions about Mr McKerchar's employment. Further, according to Mr Winder's evidence, it was the Mayor, the Deputy Mayor and Mr Robertson who engaged with a number of councillors about their awareness of the alleged breaches of his employment agreement and of his statutory duties by Mr McKerchar. Mr Winder was (understandably) unable to assist the Court with any such information at all, even by hearsay. I do not wish to be thought to be critical of

Mr Winder in these circumstances; he assisted the Court with what evidence he could give but the absence of other witnesses and evidence did not assist the Council's case.

The relevant evidence of events leading to the settlement agreement

[40] Further to the earlier summary of events to place the pleadings in context, I now set out a more detailed account of events relevant to the particular issues before the Court.

[41] From 1993 until he resigned with effect on 31 October 2011, Mr McKerchar was the Chief Executive of the Council. He held this office on a series of fixed-term employment agreements that were renewed upon expiry so that his employment in this role was effectively continuous.

[42] Throughout his tenure as Chief Executive, Mr McKerchar had been the subject of regular performance reviews by the Council, as a result of which he received financial bonuses in some years but not in others. Sometimes the Council's assessment of his performance fell below the level of "satisfactory". He had, nevertheless, served a number of fixed terms of employment in that role, following each of which he was reappointed by the Council as Chief Executive. With the exception of some neutral or negative performance reviews as already noted, no formal action was taken against him for any non-performance or poor performance of his role. His successive reappointments by the Council at the expiry of each fixed term of employment illustrate the Council's overall satisfaction with his performance in the role, or possibly at worst, the insufficiency of any dissatisfaction that might have caused the Council to appoint someone else after the expiry of the defendant's fixed terms, as it could have done.

[43] As from about March 2011, both the Mayor and Deputy Mayor spoke to Mr McKerchar about complaints they and some other councillors had received from ratepayers and from other councillors about the wastewater scheme being implemented by the Council in the Mangawhai area, and associated complaints about rates. While Mr McKerchar did not accept the validity of those complaints

against him, the fact that they had been made and the seriousness with which the Mayor, Deputy Mayor and some councillors regarded them, caused Mr McKerchar to consider whether he should continue to be the Council's Chief Executive. He says that from the mayoral conversations with him, the Council was aware of what some ratepayers and some councillors alleged were his serious shortcomings in the performance of his duties, especially affecting the Mangawhai wastewater scheme and the Council's rating decisions to pay for this.

[44] Amongst Mr McKerchar's concerns in mid-2011 were that he felt he was being made the scapegoat for decisions which councillors had made about the Mangawhai wastewater scheme; he considered he was being wrongly blamed both by some ratepayers and by councillors themselves who, or whose predecessors, had made the impugned decisions later attributed to him personally.

[45] Because of this perceived lack of confidence in his decisions, Mr McKerchar had arranged for discussions to be held between him and individual councillors, facilitated by an experienced former local government councillor and mayor who had also been a past President of Local Government New Zealand, Kerry Marshall. One of Mr McKerchar's objectives in this regard was to attempt to establish agreement with councillors about the respective roles of the elected councillors and the staff of the Council which he headed.

[46] As a result also of these discussions, and of Mr Marshall's report of them to the Mayor, Mr McKerchar came to the conclusion that the relationship between him and the Council was breaking down and he so advised the Mayor. By July 2011 Mr McKerchar had also raised with the Mayor the matter of his (Mr McKerchar's) possible resignation. The Mayor and Mr McKerchar reached agreement that he would resign with effect from the anniversary of his contract on 31 October 2011, although the fixed-term employment agreement still had one year to run from that date. Mr McKerchar suggested informally to the Mayor the broad parameters of how this resignation might be effected.

[47] The Mayor, on behalf of the councillors, then presented Mr McKerchar with a draft form of agreement that had been prepared by or for the plaintiff. After a

couple of minor changes suggested by Mr McKerchar which are not in issue in this case, both parties executed what was described as "the Deed" on 2 August 2011. Clause 9 was drafted and included by the Council, and agreed to without change by Mr McKerchar.

[48] Other relevant provisions of this agreement included the following. Section C (under "BACKGROUND") recorded that the parties had reached agreement that Mr McKerchar's employment would terminate one year before the expiry date of his then current fixed-

term employment agreement, on the terms and conditions provided for in the settlement agreement.

[49] Section D provided that the deed was entered into "to record the termination of the Employee's position of employment with the Employer, and to identify the terms and conditions thereof."

[50] The operative provisions included that Mr McKerchar:

1. ... shall resign from his position of employment ... on the 02 day of August 2011 ... [but] ... shall continue to undertake his duties in accordance with the terms of his Employment Contract until the effective date of termination being 31st October 2011.

[51] The Council agreed to pay, in two sequential lump sums as taxable income, the balance of Mr McKerchar's salary that he would have earned for the following (and final) year of his contract. Next, the deed recorded that Mr McKerchar would be paid the sum of $20,000 "by way of compensation pursuant to Section

123(1)(c)(i) of the Employment Relations Act 2000 ... to be a tax free payment to the Employee." It is unclear what that sum compensated for. It could not have been for an unjustified dismissal (as 123(1)(c)(i) payment is a remedy in respect of an unjustified dismissal or disadvantage personal grievance), because the document recorded that Mr McKerchar's employment would come to an end by resignation and the initiative for this had been his. Termination by resignation was also the reality of the ending of his employment. This s 123(1)(c)(i) payment was probably a mutually agreed fiction or sham to enable some of the money to be received by Mr McKerchar to be tax-free.

[52] Next, the deed provided that Mr McKerchar would be paid the sum of

$20,000 as a contribution to his "expenses and costs of out-placement assistance and

managing his career transition". This, too, was to be paid tax-free.

[53] Mr McKerchar was also entitled to have cashed up any outstanding annual leave entitlements to 31 October 2011 (taxable as income to him). The deed provided that the Council would indemnify Mr McKerchar against any tax deduction or claim made by the Commissioner of Inland Revenue against the two $20,000 payments.

[54] Next, and importantly for the purpose of Mr McKerchar's claims against the

Council, cls 5, 6, 7 and 8 of the deed provided:

5. Neither party will unilaterally publicise the resignation of the Employee. On the date of acceptance of the resignation of the Employee, the parties will cooperate in a jointly prepared statement to the media recording the Employee's resignation from the position of Chief Executive of the Kaipara District Council, and the Employer's acceptance of same.

6. The Employer will through the Mayor, provide the Employee with a positive reference for the Employee's use in securing future positions of employment, and will refrain from making any disparaging comments about the Employee, the Employee's performance of his duties, or the Employee's departure from his position of employment.

7. The Employer will undertake a normal public farewell to recognise the Employee's service to the Kaipara community, and to recognise the achievements made during the Employee's term of employment with the Employer.

8. Both parties to this Deed undertake to keep confidential the negotiations leading to the Employee's resignation, and the terms of the settlement recorded by this Deed, and to not disclose to any other person (other than professional advisers) any matters pertaining to the resignation of the Employee from his position of employment with the Employer, except in such form, and containing such details as is agreed in advance in writing by the Employer and the Employee.

[55] I have already set out cl 9 which is at the heart of the case.4 Finally, cl 10 recorded an acknowledgement that both parties had had an opportunity to take legal

advice in the negotiations of the terms of the settlement and its execution and that

4 At [31].

these were confirmed by them as being "a fair and reasonable settlement of all

matters pertaining to the Employee's employment with the Employer."

[56] This "deed" (in reality a contract) was an agreement between the parties whereby, primarily, in consideration of resigning early from his employment, Mr McKerchar would be paid remuneration, compensation and associated entitlements under his employment agreement, and some additional payments to be made ex gratia. The deed was executed by the Council "pursuant to a Resolution of Council" dated 2 August 2011, signed by the Mayor and witnessed by another councillor, the Deputy Mayor. Mr McKerchar signed it the same day, and he worked out his notice to the end of October 2011 according to the settlement agreement.

Evidence of the Council's knowledge or awareness of matters now the

subject of its claims

[57] If Mr McKerchar is not correct that cl 9 of the settlement agreement precluded any future employment-related litigation between the parties, irrespective of their knowledge of any causes of action and, therefore, that the plaintiff's interpretation of cl 9 is correct,

further factual analysis is necessary. This is to consider what the plaintiff knew or did not know of the subject matter of the causes of action as at 2 August 2011 if its claim is upheld that the present proceedings fell outside the scope of cl 9.

[58] Although I have already noted the paucity of persuasive evidence adduced for the plaintiff, it is nevertheless worth repeating this here and applying it specifically to the Court's factual findings. The following assessment of the evidence about the nature and extent of the Council's knowledge of matters which now underpin its causes of action, is the best that the Court can make of what is generally patchy, sometimes indirect and incomplete evidence presented by the plaintiff. It also seems that Mr McKerchar's requests for document disclosure from the Council are either yet to be satisfied or, at best, some important documents were only supplied to his lawyers very shortly before the hearing. Nevertheless, it is the Council's best case on this preliminary issue. That said, Mr McKerchar's evidence in support of the strike-out claim is also somewhat sketchy in some respects.

[59] Next, and as already noted, clearly central actors in these events leading up to the settlement agreement between the parties have not provided evidence. Excluding Councillor Bill Guest who has subsequently passed away, and as already noted, very significant was the absence of the (then) Mayor, Mr Tiller, and indeed any other (then) councillors whose individual and collective knowledge is at the heart of the Council's defence of Mr McKerchar's strike-out application.

[60] Mr Winder's evidence has, in the circumstances described previously, necessarily been limited to producing documents from which he has inferred what the Mayor and councillors, as he expressed it, must have known or "could not have known" in the period leading up to August 2011 when the settlement agreement was entered into. Mr Winder summed up his assumptions of the Mayor's and councillors' knowledge or awareness by saying that in his opinion they could not have known of the "scale, significance, and severity" of Mr McKerchar's alleged shortcomings which are now the subject of the Council's claims of breach of contract against him. Mr Winder had, however, not spoken to the former Mayor Mr Tiller; and his evidence was that one other ex-councillor spoken to by him had only a very general recollection of events from that time. Mr Winder's evidence was that in his opinion, the Mayor and councillors only had a general sense of "discomfort [and] unease" about Mr McKerchar's performance of his duties at the time he resigned. He said they had no knowledge of the "level of gravity or significance" of these that later emerged when investigations were undertaken particularly by the Auditor- General; and, in relation to the striking of rates by the Council, an opinion from lawyers Simpson Grierson was obtained.

[61] Mr McKerchar's case, on the other hand, is that these concerns (about MCWS, rates generally and his absence of record-keeping) that are the subject of the litigation, were all known to Mr Tiller as Mayor at the time the settlement agreement was entered into. Mr McKerchar's evidence is that these matters were known, at least to the Mayor as negotiator for and representative of the councillors, because Mr McKerchar discussed them with Mr Tiller at various times. He also points out that, before his resignation took effect, complaints had been made to the Crown's Minister for Local Government about these matters. Mr McKerchar believes that the Council (in effect the Commissioners who launched the proceedings) have only done so to

attempt to pacify ratepayers who are still angry at the Council about its wastewater scheme and rating illegalities. Mr McKerchar says that he retained few, if any, relevant documents following the conclusion of his employment and so, especially without disclosure to him of the Council's documents, he cannot corroborate his general evidence.

[62] Mr Winder's evidence is that it was not until mid-2013 that the (then) Commissioners, of whom he was one, had sufficient information to issue these proceedings including, principally but not solely, the very lengthy and detailed report into the Council's affairs of the Office of the Auditor-General (OAG). He denies Mr McKerchar's allegations of political motivations and says that the Commissioners considered they had a duty to the Council and to ratepayers to try to recover its losses from Mr McKerchar. Motive for bringing these proceedings is not relevant to their decision and I simply record Mr McKerchar's assertions and Mr Winder's denials in this regard.

[63] In chronological sequence following these general observations, the following relevant events are established by evidence.

[64] In mid-April 2010 the Northern Advocate newspaper reported a meeting of the Council in Dargaville.5 This report dealt in part with exchanges at a council meeting between Cr Guest and Mr McKerchar. These were described as emanating from Cr Guest voicing concerns about Mr McKerchar. The newspaper reported that the Council had voted not to take any further action on Cr Guest's recommendation at its February 2010 meeting that the Minister of Local Government be asked to

undertake an independent investigation into Mr McKerchar. The report continued: "The Council had no concern with its audits and process, and an internal review was already in the pipeline."

[65] What appears to have been a report tabled at a February meeting of the

Council by Cr Guest (but which is not now before the Court) contained allegations by him against Mr McKerchar. These were that the latter had so breached the

5 Annette Lambly "McKerchar lambasted by Kaipara councillor" *Northern Advocate* (New

Zealand, 13 April 2010).

requirements of mutual respect and trust necessary between the Chief Executive and the Council that he (Cr Guest) lacked confidence in the Chief Executive. Mr McKerchar's handling of legal proceedings against the Council, consultancy fees, perceived poor performance by consultant engineers, internal council processes and council debt were also the subject of Cr Guest's reported complaints. Mr McKerchar was reported to have said that if Cr Guest's view was held by the rest of the Council, it needed to act upon it.

[66] Mr McKerchar confirmed in evidence to this Court that he had made this statement. There was no disagreement by Mr McKerchar

about the accuracy of the news report of what was said by Cr Guest at this meeting.

[67] The newspaper report also contains reference to Mr McKerchar's assertion that a number of Cr Guest's allegations did not truly reflect the situation and that Mr McKerchar's answers to questions had been misreported. No doubt with a rhetorical flourish, Cr Guest was reported to have said to Mr McKerchar (using the words of Oliver Cromwell):

... "You have sat too long for any good you have been doing. Depart, I say, and let us have done with you. In the name of God, go!"

I am sorry Jack – these are terrible words but I wish you to reflect on them.

[68] The second sentence was, of course, counsellor Guest's, not Oliver Cromwell's. Counsellor Guest is reported to have continued to say that he would be standing in the forthcoming elections on a platform seeking public support for a change in the Council's management structure which would include encouraging the Chief Executive "to review his future and encourage him to look at other career opportunities".

[69] By letter dated 24 July 2010, addressed to the Mayor and received both by email and in hard copy and of which Mr McKerchar received a further copy, Cr Guest raised formally what he described as a "Complaint" against Mr McKerchar. This was said to be "Under Schedule 2 Council Governance Policy Type – Executive Requirements Policy 6 Complaints". Cr Guest's letter commenced:

I hereby give notice that I am lodging the following complaint under Section

6.1 (a), (b), (c) and (d) of the Policy and Clause 12 Termination for Cause of

the Chief Executive's Employment Agreement.

[70] Cr Guest contended that Mr McKerchar had breached:

... his fiduciary duty of his employment contract and Schedule 1 of his Job Description ... and in particular ... Council's Governance Policy Compendium 2008, Executive Requirements page 35 paragraphs 3.5 and 3.6

...

[71] In particular, Cr Guest alleged that Mr McKerchar had failed to provide the Council with accurate, timely and understandable information. He said that material ought to have included all known information to enable good quality decision- making by the Council. The particulars of Cr Guest's complaint included that the Chief Executive had not ensured that the Council was fully informed and supported in its work and, in particular, in relation to progress with projects and activities; management and organisation issues; any legal considerations (this was highlighted); significant trends; implications of Council decisions; and other issues or changes in basic assumptions upon which Council practices were based. Cr Guest also alleged that Mr McKerchar had failed in his duty to ensure that all such information addressed the issues and options facing the Council.

[72] As already noted, Cr Guest alleged that Mr McKerchar had failed to make the Council aware of legal proceedings which had been brought against it. He said that Mr McKerchar, in his report of 23 July 2010, had failed to give full details of a summary judgment proceedings which had been lodged in the High Court against the Council and first called in Whangarei on Monday 19 July 2010, four days before the Chief Executive's 23 July 2010 report to the Council. Cr Guest alleged that Mr McKerchar failed to disclose in his report to the Council sums of money that had been sought by a named contracting (drainage and earthmoving) company in its application for summary judgment which was for approximately $1 million plus costs.

[73] Further, Cr Guest complained that the Chief Executive had failed pursuant to his contract, job description and other council policies, to provide full disclosure to

the Council about all financial claims made against it and of any risk that it might be facing through legal action.

[74] Next, Cr Guest asserted that Mr McKerchar had failed to make full disclosure to the Council on a number of occasions about council contracts "and the costs involved prior to Council contractual rollovers".

[75] Cr Guest then said that Mr McKerchar had informed the councillors on 27

January 2010 that neither the Mayor nor the councillors were entitled to any more information than ratepayers were. Cr Guest said that Mr McKerchar confirmed this in writing on 5 February 2010 and asserted that he (Mr McKerchar) had received independent advice of this although, because it had been provided to him verbally, he was unable to provide a copy of that advice.

[76] Finally in this part of his complaint, Cr Guest asserted that Mr McKerchar had failed to provide full disclosure of "the legal proceedings lodged against the Council in December 2009 by a Mangawhai developer for a substantial amount of money." Cr Guest's complaint included that Mr McKerchar had "... continually failed to provide Council with copies of legal opinions and other advice that has not been backed up in writing." Cr Guest continued that Mr McKerchar appeared to have accepted, in his report to the Council dated 24 March 2010, that the councillors had "been drip-fed information."

[77] The remedies sought by Cr Guest in his formal complaint to the Mayor included that:

... the complaints procedure against the Kaipara District Council Chief Executive be immediately actioned, under the appropriate Policy Executive requirements as set out in the Chief Executive's Job Description and Policy,

...

I also hereby give notice that I am filing as part of this submission, a formal request asking for a full investigation of the actions of the Chief Executive Officer, Mr Jack McKerchar. I hold the view that his actions could be a serious breach of his contract and if proven to have substance, this would constitute a serious misconduct matter being brought against him.

I ask that my complaint against the Chief Executive be actioned immediately and that this issue be dealt with at a special meeting of Council.

I also ask that the Council immediately set a date for the annual Performance and Management Review of the Chief Executive, to be set down as soon as possible.

I also ask that the Council gives consideration at this meeting, under Clause

12.3 of his Employment contract, that where an employer has reason to believe the Chief Executive has been guilty of serious misconduct, it may suspend the Chief Executive's employment for a period not exceeding one month, to permit a full investigation of the matter to be completed.

[78] The evidence before the Court suggests that there was no formal follow-up to these requests to, or demands of, the Mayor by Cr Guest, although it is clear that this correspondence was received by Mayor Tiller. Nor is there any evidence that Cr Guest's requests were actioned by the Mayor or the Council. Cr Guest's complaints were made and received by the Mayor and Council almost a year before the exit agreement was proposed.

[79] I conclude that, in the way just described, the plaintiff was put on notice of serious and at least general concern about allegations of Mr McKerchar's non- compliance with his employment agreement. The fact that, for whatever reason, the Mayor and councillors may have done nothing over the ensuing year to respond to Cr Guest's formal complaints against Mr McKerchar does not mean that it was not on notice, and therefore aware of, these serious allegations of multiple breaches by Mr McKerchar which now form the plaintiff's causes of action.

[80] Next, a Mangawhai residents' group led by Clive Boonham complained about the legality of the rating methodology used in relation to the wastewater scheme. Mr McKerchar considered Mr Boonham's complaint, assessed that it might be correct, and sought legal advice about this from lawyers Bell Gully in Auckland. The Mayor approved the obtaining of this legal advice when asked to do so by Mr McKerchar. It appears, also, that a second legal opinion about rating issues, albeit different ones, was sought by Mr McKerchar from Bell Gully, although the details about the issues and the outcome of the legal reviews are not in evidence. Mr McKerchar has not retained any copies of records of Council business. I assume, however, that these records would be available even now to the Council as Bell Gully's client.

[81] As noted, before the settlement agreement was signed in August 2011, Mr McKerchar had obtained at least one legal opinion for the Council from Bell Gully about some specific rating questions. There is at present no evidence of the particular subject matter of the request or the lawyers' report or, in particular, whether this was related to one of the Council's causes of action now against Mr McKerchar. That legal advice was sought by Mr McKerchar, but only after obtaining the approval of the Mayor Mr Tiller to do so. It is unclear what became of the Bell Gully opinion, but I infer from the evidence before me that the Mayor was aware of its existence.

[82] In March 2011 the Mayor and Deputy Mayor had spoken to Mr McKerchar about complaints from ratepayers and, in particular, about the MCWS. Mr McKerchar denied personal responsibility for those matters about which the complaints had been made and believed that he was being made a scapegoat for decisions taken by the full Council and, in some respects, for the running of council business more generally.

[83] As a consequence, and with the approval of the Mayor as already noted, Mr McKerchar arranged for a facilitated discussion with councillors to address the roles of council members and the relationships between the Council and its individual councillors on the one hand, and the Chief Executive on the other. As already noted, the facilitator was Mr Marshall, an experienced local government councillor and Mayor (not of the Kaipara Council) who had formerly been a president of the umbrella organisation known as Local Government New Zealand. That private facilitated discussion took place in May 2011, following which Mr Marshall prepared a report for the Mayor and for Mr McKerchar.

[84] The discussions and Mr Marshall's report caused Mr McKerchar to consider further that the best way forward for all concerned might be for him to resign as Chief Executive. Accordingly, Mr McKerchar advised the Mayor that he believed his relationship with the Council was breaking down and raised the possibility of his resignation. This was at a time when the Mayor and Deputy Mayor were in discussions with a group of disgruntled Mangawhai ratepayers about the burden of

their rates to fund the MCWS and what some perceived to be an unnecessary wastewater scheme in any event.

[85] Mr McKerchar's uncontradicted, but generalised, evidence is that the Council had accurate information about its debt levels before the agreement was signed because he himself had provided this information to the Mayor and councillors.

[86] Also before Mr McKerchar and the Council entered into their agreement on 2

August 2011, rates protestors had raised with both the Council and Mr McKerchar, the lawfulness of council rates which had been struck, including in relation to the MCWS. Mr McKerchar took it upon himself to investigate these and reached a preliminary conclusion that they may indeed have been imposed unlawfully by Council. His uncontradicted evidence is that he passed this information on to the Mayor. As already noted, the defendant then commissioned a legal review of the Mangawhai rates and, again, the Council and the Mayor were aware of this.

[87] The Mayor prepared the final draft of the parties' settlement agreement and presented this to Mr McKerchar for his approval which was given by the defendant. On 2 August 2011 there was an extraordinary meeting of the Council at which, after going into committee, the councillors resolved to instruct the Mayor to sign the settlement agreement with Mr McKerchar. The contents of this agreement had been disclosed to, and discussed by, councillors at that meeting.

[88] To complete this part of the narrative, on the same day, 2 August 2011, the Mayor executed the agreement on behalf of the Council which was witnessed by councillor and Deputy Mayor, Ms Geange. Mr McKerchar also signed the settlement agreement on the same day. Mr McKerchar concluded his role on 31

October 2011 according to the agreement's provisions.

[89] Following requests from individual and groups of ratepayers for government intervention in the running of the Council, on 8 September 2011 the Minister of Local Government, the Hon Rodney Hide, met with the Mayor Mr Tiller and Mr McKerchar who was then working out his notice of resignation. As a result of that meeting, the Minister issued a press release. He recorded his decision that he would

not then intervene statutorily in the Council's affairs and that it was preferable for

local issues to be resolved locally. The Minister's press release continued:

The Council is taking steps to address the issues it is facing. For example it has commissioned independent financial advice, has appointed a Treasury advisor to help manage its debt, and is seeking to build internal capability in these areas. And, following the resignation of Mr McKerchar, they have started looking for a new chief executive, with the help of an experienced recruitment company.

[90] In or about November 2011, following the receipt of further complaints from ratepayers, the Council instructed its lawyers (Simpson Grierson) to review and to report to it on the rates it had struck to fund the construction and operation of the MCWS.

[91] In mid-February 2012 Simpson Grierson's advice and report were received by the Council. It identified that there had been irregularities with the rates assessed and struck to fund the MCWS; that there were other questionable rating practices; and that there were irregularities with rates assessments and invoices issued by the Council.

[92] This led the Council to initiate several reviews of its decision-making processes in relation to the MCWS, including a financial review. The Council determined that an independent investigation was needed and, on 28 February 2012, requested the Auditor-General to undertake an investigation into these matters. The Auditor-General agreed to do so. On 16 March 2012 the Auditor-General released the terms of reference for her inquiry into the MCWS.

[93] In June 2012, at the request of the Council, the Minister of Local Government appointed a review team to inquire into the Council's governance processes and financial management. The terms of reference for this inquiry were released on 15 June 2012. The review team's report issued on 17 August 2012 recommended that Commissioners be appointed to perform the functions and powers of the Council.

[94] On 13 August 2012 the Council resolved to request the Minister of Local

Government to appoint commissioners to exercise its functions; and on 6 September

2012 the Minister appointed commissioners headed by Mr Robertson and including

Mr Winder.

[95] In March 2013 the Mangawhai Ratepayers and Residents Association Inc filed judicial review proceedings in the High Court against the Council relating to decisions about, and borrowings for, the MCWS, challenges to rates and alleged defects in consultation about a contributions policy. Two judgments of the High Court were subsequently issued on 28 May 20146 and 25 July 20147 respectively.

[96] The No 3 judgment of the High Court addressed an application for judicial review brought by the Ratepayers' and Residents' Association challenging the lawfulness of rates struck by the Council to repay borrowings for the construction of the wastewater scheme. Heath J, in preliminary comments in the judgment, noted, as I have concluded also, pertinently for the purpose of this case:

[3] The records of the Council are incomplete. No elected members of the Council, or any members of its executive team who held positions of responsibility at the time the relevant decisions were made were "available" to give evidence. ...

[97] This High Court judgment relied significantly on what was then the recent report by the AOG.

[98] As this judgment of Heath J also noted, while those judicial review proceedings were pending, Parliament enacted the Kaipara District Council (Validation of Rates and Other Matters) Act 2013 (the Validation Act) which affected the nature and scope of the Residents' and Ratepayers' Association judicial review proceedings.

[99] At [7] of the No 3 High Court judgment, Heath J noted: "At an institutional level, this proceeding has exposed a high degree of incompetence among those who

were elected to serve on the Council, and also their executive officers."

6. *Mangawhai Ratepayers' and Residents' Assoc Inc v Kaipara District Council (No 3)* [2014] NZHC 1147, [2014] 3 NZLR 85 (the No 3 judgment).
7. *Mangawhai Ratepayers' and Residents' Assoc Inc v Kaipara District Council (No 4)* [2014] NZHC 1742 (the No 4 judgment).

[100] Ignoring, for the purpose of this judgment, those parts of Heath J's judgment affecting the constitutionality of the Validation Act including analysis of the New Zealand Bill of Rights Act 1990, the result of this High Court proceeding was a number of declarations. These included that the decisions taken by the Council to enter into what were known as the EcoCare agreements and the 2006 decision to adopt what was known as Modification 1, were entered into in breach of the Local Government Act 1974. Further, the High Court declared that each of the contracts by which the Council borrowed money to pay for the wastewater project was a "protected [transaction]" for the purposes of the Local Government Act in respect of which a creditor would be entitled to take enforcement action if the Council were to default on its obligations to those creditors.

[101] The No 4 judgment of the High Court addressed, materially for the purpose of the case before me, the form which declarations should take. Justice Heath made the following relevant formal declarations:8

(a) The decisions taken in 2006 and 2007 by Kaipara District Council to enter into the EcoCare agreements and to adopt Modification 1 were each made in breach of Part 6 of the Local Government Act 2002, and were therefore unlawful.

(b) The EcoCare agreements and the adoption of Modification 1 were each entered into in breach of Part 6 of the Local Government Act

2002, and were therefore unlawful.

(c) Notwithstanding the *prima facie* invalidity of the loan contracts entered into as part of the EcoCare agreements and the adoption of Modification 1, each of the contracts by which Kaipara District Council borrowed money to pay for the Mangawhai Wastewater Scheme is a "protected transaction" for the purposes of subpart 4 of Part 6 of the Local Government Act 2002. As a result, the creditor is entitled to take enforcement action if Kaipara District Council were to default on its obligation to pay the debt.

...

[102] Following its earlier circulation to relevant people (including Mr McKerchar) of a draft, the Auditor-General's final report was released on 3 December 2013. That was more than 2 years after Mr McKerchar ceased his employment with the Council. It says that this report identified a number of significant failings with the way in

which development of the MCWS was managed by Mr McKerchar. The following

8 The No 4 judgment, above n 7, at [38].

is an assessment of its contents as affects understanding of the High Court's

judgments.

[103] This OAG report is a voluminous document which, in addition to examining how the Council managed the MCWS between 1996 and 2012, was also a critical self-examination of the role of the Auditor-General in relation to the Council for which that office had statutory audit responsibilities during the same period. The Auditor-General's overview described her findings overall as a failure by the Council to attend to its fundamental legal and accountability operations, and that the Council effectively lost control of a major infrastructure project.

[104] The Auditor-General concluded that the decision that Mangawhai needed a reticulated wastewater scheme was well founded. She also found that the MCWS as built works effectively and has appropriate capacity for population growth. However, her following findings are described by the Auditor-General herself as "more sobering". These are that the MCWS had come at a significant cost on which the Auditor-General could not provide a precise figure because of the Council's poor management of the project. She noted, pertinently for this case about the allegations now made against Mr McKerchar:

KDC's records did not contain good or systematic information on the total amount spent.

[105] Addressing the 2006 estimated project cost of $35.6 million which, over the following six years, had increased to about $57.7 million most of which was borrowed by the Council. The Auditor-General's summary included:

The overall costs are not just financial. They include a failed council, councillors who have been replaced with commissioners, the departure of a chief executive, a severely damaged relationship between the council and community, an organisation that has needed to be rebuilt, and much more.

[106] The Auditor-General's report comments frequently on what it describes as "the poor state of KDC's records" which, despite seeking information from other sources, meant that the Auditor-General was in some respects unable to establish exactly what happened. The summary continued:

KDC's decision-making processes were also poor throughout the entire 16 years of the wastewater project. KDC relied too heavily on its professional advisers and had a practice of receiving briefings and effectively making decisions in informal workshops. The governance and management arrangements put in place specifically for the project were also inadequate. In our view, these underlying problems made it harder for KDC to deal with the problems that emerged as the project progressed.

[107] Although Council "staff" are referred to frequently in the Auditor-General's report, this is usually in the phrase "the councillors and staff", and mostly does not identify Mr McKerchar or the role that he held as Chief Executive specifically. There are, however, some references to the Chief Executive's role in both the wastewater project and the setting of rates. In Part 3, 3.3 of the report, summarising the Auditor-General's conclusion about "How Kaipara District Council set up the wastewater project", the report says:

KDC failed to identify how it was going to manage the project. No group or individual within KDC was responsible for the project. By default, this later became the role of the Chief Executive personally.

[108] After setting out passages of the report of a financial consultant presented to the Council in June 1999 about its ability to finance major projects, 3.11 of the Auditor-General's report notes:

KDC's Management Accountant, after reviewing Mr Mitchell's [the consultant's] paper, recommended to the Chief Executive that the concept of third parties and developers funding Mangawhai's capital development needed to be explored. In his view, "Council's funding of the entire $15 million is quite simply unaffordable." He also reiterated the report's conclusion that "borrowing will need to be undertaken in a cautious and conservative fashion and should not attempt to test the upper limits".

[109] The Report notes that in October 1999 Council staff met with the engineering firm Beca to discuss how it could construct the infrastructure identified in the Mangawhai Infrastructural Assets Study. The report of the Auditor-General notes that the minutes of that meeting record that the Chief Executive (Mr McKerchar) advised that:

Council's major issue is that the Local Government Act 1974 does not permit the debt levels needed to fund the provision of the infrastructure. Options include BOOT (Build, Own, Operate, Transfer), DBO (Design, Build, Operate), DB (Design, Build, with Council operating), amalgamate with another Council.

[110] Beca was asked to prepare a strategic plan for implementing the infrastructure, including options for funding, for the Council to consider at its December 1999 meeting.

[111] As already noted but reiterated here as part of the chronology of relevant events, on 10 December 2013 Parliament passed the Kaipara District Council (Validation of Rates and Other Matters) Act 2013, validating in law former rating irregularities which had occurred including while Mr McKerchar was the Chief Executive of the Council.

[112] Mr McKerchar accepts that some of the issues in relation to the lawfulness of the striking of rates could not have been known to the Council before the settlement agreement with him was entered into on 2 August 2011. This is because it was only subsequently, as a result of what Mr McKerchar told the Court was a High Court case concerning rates struck by the Christchurch City Council, that it became clear that such rates could not be struck lawfully. Neither the defendant nor his counsel identified this case. Research for me has not revealed the name of this case Mr McKerchar relied on, or even its existence, let alone confirmed Mr McKerchar's assertion. The defendant said that the Council (and he himself), as with other councils in New Zealand, had followed advice from Local Government New Zealand as to how to levy rates. Until the High Court's Christchurch judgment was delivered, Mr McKerchar says this previous practice was assumed by him and other council chief executives to be lawful.

[113] If Mr McKerchar is correct about this, it is unlikely that he could be liable to the Council for having followed and applied known and accepted practices. Again, there was no evidence to contradict or even challenge Mr McKerchar's.

[114] There is also no relevant evidence about what happened at the Council during the period after the receipt of those reports and opinions in late 2013, and the launch of these proceedings in the Authority on 19 December 2014.

[115] The foregoing is the totality of the reliable evidence about the actual, as opposed to the assumed or speculative, knowledge of the Council in relation to Mr

McKerchar's performance of his duties, at the time the parties entered into the settlement agreement on 2 August 2011. The question, assuming that the test of what is a "potential action"9 brought against Mr McKerchar is satisfied, is whether this level of knowledge of the Mayor and councillors was sufficient to mean that the proceedings now brought by the Council were "potential" proceedings covered by cl

9 of the agreement and are thus unable to be brought as having been settled in

August 2011.

[116] The plaintiff asserts that it did not know and/or was not aware of "the matters giving rise to this claim" at the date the deed was entered into. It says, therefore, that the deed did not settle its claims now brought before the Court

[117] The Council launched its proceedings in the Authority by filing a statement of problem on 19 December 2014. The Council's claims in that statement of problem then filed in the Authority relied on breaches of express obligations in his employment agreement to:

(a) carry out his responsibilities honestly, diligently and to the best of his ability (clause 2.2);

(b) provide high quality, quantitative, timely, and relevant advice, information and recommendations to the Council (clause 1.1, job description, Schedule 1);

(c) ensure that the Mayor and Councillors received the assistance, information and advice they reasonably required in their roles as elected representatives (clause 1.4, job description, Schedule 1);

(d) ensure that the Council's resources were used prudently and lawfully, in pursuit of the Council's accepted goals and objectives to the Council's best advantage (clause 5.1, job description, Schedule

1); and

(e) ensure that the Council received accurate, timely, relevant and easily understood financial reporting against its annual plan 9 (clause 5.4, job description, Schedule 1).

The report of the Office of the Auditor-General (OAG)

[118] I have so far referred to the Report of the Auditor General principally in the context of the High Court judgments affecting this proceeding. A more than cursory

9 To use the relevant words of cl 9 of the settlement agreement.

examination and evaluation of the Auditor-General's report has been necessary. That is because, the Council says in this proceeding, its contents were what alerted it first and principally in a concrete fashion to what it claims were Mr McKerchar's manifold and serious failings and which provided the principal impetus and its ability to bring these proceedings for damages against him. I now examine this report independently of the foregoing summary for the purposes of decision of this case. That is because it is the main plank of the plaintiff's assertions that it was not in a position to know of the defendant's breaches until it received the report.

[119] The report of the OAG issued in late 2013 was provided as an exhibit to the Court by the Council. Regrettably, no references to its contents were made in evidence and the Council's submissions did not refer to it. It was simply produced to the Court as a substantial and important document but, I assume, left for me to read and apply without assistance or submission. It is, as already noted, a tome running to more than 300 pages, and is clearly a thorough review of the history of the MCWS and associated issues including the ways in which the Council purported to pay for the scheme. It was, however, issued after the enactment of the Act validating the Council's unlawful ratings and at the same time as residents' claims were before the High Court, and so did not examine issues of the lawfulness of the Council's conduct, or that of Mr McKerchar to the limited extent that it refers to him or the Council's staff for whom he was responsible.

[120] Despite the absence of reliance by either party on any particular part of the Auditor-General's report, it was nevertheless said by the Council to have been the information which eventually emerged, allowing and causing it to bring these proceedings against Mr McKerchar personally. More importantly for its case, the Council also says that at the time of signing the settlement agreement on 2 August

2011, the Council could not have been aware of the abysmal state of its administrative affairs, which it attributes to Mr McKerchar personally, that was revealed to it principally, although not exclusively, by the publication of this report. I have, in these circumstances, read the entire report for the purposes of delivering this judgment. It would have been better if the party relying on the content of it had identified relevant passages in it, rather than leaving the whole report for the Court to read and make of it what it will.

[121] It is important to note the purpose for which the Auditor-General's report was written and the scope of its subject matter. It was not a report into the performance by Mr McKerchar of his job as the Council's Chief Executive at relevant times. Although the Auditor-General notes several times that, by default, responsibility for aspects of the project fell to the Chief Executive (Mr McKerchar), criticisms are of the Council generally and not Mr McKerchar in particular, even those relating to considerations such as the inadequacy of its record-keeping for which the Council now alleges Mr McKerchar was responsible personally in breach of contract.

[122] The report contains a timeline and some detail of interactions with various governmental agencies including the OAG and the Auditor-General in particular. This account does not, however, clarify, at least sufficiently, whether the Council and/or Mr McKerchar were involved or included in this correspondence. Had it done so, the report may have assisted the plaintiff in this case as to the state of knowledge of the councillors and the Mayor as at 2 August 2011 when the settlement agreement was signed. That is not helped by the absence in the OAG's report of any identification of a number of resident/ratepayer complainants who are simply referred to by letters of the alphabet. These are not able to be co-related safely to the evidence presented to the Court which identified particular complainants by name.

[123] So, while the Auditor-General's comprehensive report provides informative background or contextual information about the wider events in which those the subject of this case occurred, its contents do not assist Mr McKerchar's assertion that many of the Council's claims against him were known to it before 2 August 2011. Equally, however, it does not assist the Council's assertions that important matters only came to light for it after 2 August 2011 and, in particular, with the circulation of the Auditor-General's Report in late 2013. I have already quoted the passages of the Report which relate to Mr McKerchar's performance of his contractual role and to the performance of the Council's staff for whom he was responsible. There is no more relevant and identified information in it that assists the Council's case beyond those passages identified by Heath J in his judgments already summarised.

Defendant's case to strike out plaintiff's claims

[124] As to what has been described traditionally as an 'accord and satisfaction' pr a 'compromise', but which has been referred to in this case as the parties' "settlement", counsel for Mr McKerchar (Mr Drake) relies first on the principles of the old case *British Russian Gazette & Trade Outlook Ltd v Associated Newspapers*

*Ltd.*10 There, Scrutton LJ said by way of definition that this was::11

The purchase of a release from an obligation whether arising under contract or tort by means of any valuable consideration, not being the actual performance of the obligation itself. The accord is the agreement by which the obligation is discharged. The satisfaction is the consideration which makes the agreement operative.

[125] Next, Mr Drake submits that there must be a genuine dispute between the parties for there to be an accord and satisfaction.12 Counsel submitted that if there is a dispute of fact about whether there was an accord and satisfaction, evidence of a meeting of minds will be necessary to establish this; or, if not, that one of them must have acted in such a way as to induce the other to think that money (or other consideration) is taken in satisfaction of a claim. As will be seen from my analysis

of more modern statements of legal principle, I do not necessarily accept that Mr Drake is correct in making such a concession for his client. The law has developed and evolved in the last 80 or more years.

[126] Examining cls 9 and 10 of the agreement, Mr Drake invites the Court to find that cl 9 alone is drawn sufficiently broadly to catch the Council's claims in this case. That is by reference, particularly, to the full and final settlement of any actual or potential disputes, grievances or other issues arising out of the defendant's position of employment with the plaintiff. Counsel submits that even if the words of cl 9 were insufficient alone, the parties further agreed in cl 10 that they had had an opportunity to seek legal advice and acknowledged that the terms of the settlement were fair and reasonable in relation to "all matters pertaining to the Employee's employment with the Employer". This is said to reinforce that cl 9 applies to the

plaintiff's proceedings against Mr McKerchar.

10. *British Russian Gazette & Trade Outlook Ltd v Associated Newspapers Ltd* [1933] 2 KB 616, [1933] All ER 320 (CA).

11 At 643-644.

12 *Harris v Birchwood Farm Holdings Ltd* [2002] NZEmpC 124; [2002] 2 ERNZ 392 at [46].

[127] As the defendant submits, correctly, all of the allegations against the defendant in the Council's statement of claim are matters pertaining to, or arising from, Mr McKerchar's employment with the Council.

[128] Mr Drake also emphasised that para 36 of the Council's statement of claim asserts that the agreement was entered into to resolve a loss of confidence by the Council arising from Mr McKerchar's generally poor performance in his role. The reference to these performance issues is said to be underpinned by the words of cl 6 of the agreement prohibiting the Council from commenting about Mr McKerchar's performance of his duties.

[129] As authority for the proposition that a release need not be confined to known claims, counsel cites different passages from the judgments of the House of Lords in *Bank of Credit and Commerce International SA v Ali* (a decision I will come back to.13 There, Lord Nicholls recognised that general releases are commonly entered into, making it plain that the parties intend that the release should not be confined to known claims. That is consistent with the assumed wish of the parties to achieve finality of their relationship. This led Lord Nicholls to say:14

... When, therefore, a claim whose existence was not appreciated does come to light, on the face of the general words of the release and consistently with the purpose for which the release was given the release is applicable. The mere fact that the parties were unaware of the particular claim is not a reason for excluding it from the scope of the release. ...

[130] Lord Clyde stated succinctly:15

Generally if they intend their agreement to cover the unknown or the unforeseeable, they will make it clear that their intention is to extend the agreement to cover such cases.

[131] As Mr Drake submits, the law recognises the possibility of parties contracting out of rights to claim, including claims the possible existence of which is unknown to a party, if the language to this effect is clear and unambiguous. In this

case, counsel submits, the language of the agreement as a whole and, in particular, of

13. *Bank of Credit and Commercial International SA v Ali* [2001] UKHL 8; [2002] 1 AC 251, [2001] 2 WLR 735 [HL] (*BCCI*).

14 At [27].

15 At [79].

cls 9 and 10, is clear and unambiguous and the Court should give effect to that intention.

[132] The defendant also relies on the fact that the agreement was prepared by the plaintiff. He invokes the contra proferentem rule to which I have referred already.

[133] The defendant contends that having regard to the language used in cls 9 and

10 of the agreement, the parties must be said to have contemplated settling claims founded on their employment agreement that were "actual or potential disputes". Counsel submits that the language is broadly drafted to include both known and unknown claims and emphasises that there is no specific carve-out in the agreement for raising further, or new matters arising out of the employment

relationship that were unknown at the time the parties entered into the agreement. Counsel submits that the agreement illustrates a common intention, in light of adverse publicity about the MCWS, calls for councillors to investigate the defendant's performance, and letters of complaint from councillors, both to achieve certainty and to avoid litigation

risks. Counsel relies further on the words of Lord Nicholls in *BCCI* that:16

... The risk that further claims might later emerge was a risk the person giving the release took upon himself. It was against this very risk that the release was intended to protect the person in whose favour the release was made. ...

[134] Next, counsel for the defendant submits that while a strike-out application may proceed on an assumption of correctness of the pleadings by considering whether that claim is sustainable in law, this case has been approached necessarily in a different manner by the parties. The defendant has put the plaintiff to the proof of its essential allegation that it was not, and could not have been, aware of the claims now brought by it against Mr McKerchar at the time that the agreement was entered into. Specifically, the defendant denies that the plaintiff was not aware of complaints against him including about his performance, fiduciary obligations and other obligations under his employment agreement. Counsel points out that these issues had been raised by the defendant, including to the plaintiff through the then Mayor, in 2010 and also in the public arena through the media. Mr McKerchar says that the

Council was clearly on notice that there were serious allegations about the

16 At [27].

performance by him of his role as Chief Executive and that these were a significant element of the reasons for entering into the agreement on 2 August 2011.

[135] The defendant relies on the judgment of this Court in *Marlow v Yorkshire* for the principles to be taken into account when determining what was resolved by the agreement interpreted in the light of the circumstances at the time.17 The defendant submits that a proper interpretation of the compromise agreement means that it extended to the plaintiff's current claims before the Court and that Mr McKerchar's resignation was brought about, at least in part, by serious concerns expressed by councillors about his work performance.

Plaintiff's case in opposition to defendant's strike-out application

[136] I now set out the Council's grounds of opposition to Mr McKerchar's application to strike out the claims against him. The plaintiff advances three principal grounds of opposition. First, it says that the settlement agreement does not operate to prevent the plaintiff advancing its claims because the settlement was not an agreement signed pursuant to s 149 of the Act. Second, the plaintiff says that it was not aware of the matters giving rise to the claims that it has now brought, at the date the agreement was entered into. Third, the plaintiff says that it did not intend to, and did not, settle what it describes as those "unknown claims" when it entered the settlement agreement on 2 August 2011.

[137] The foregoing first ground of opposition can be disposed of briefly. Unlike for enforcement purposes, there is no distinction between a s 149 settlement agreement and another such agreement not entered into under that statutory process. Whilst there may be jurisdictional significance in enforcement of a s 149 agreement

as the Court of Appeal concluded in *JP Morgan Chase*,18 when construing and

applying the agreement, the same principles apply to any compromise when it comes to any positive and absolute defence to proceedings. That may, as in this case, mean that there is less evidence available surrounding the execution of the agreement

because of the very tight secrecy provisions of s 149, but it does not mean that there

17 *Marlow v Yorkshire New Zealand Ltd* [2000] 1 ERNZ 206 (EmpC) at 214-215.

18 *JP Morgan Chase,* above n 2.

is any difference in substance between those two sorts of settlement agreement in

New Zealand employment law. I am not persuaded to this first ground of opposition.

[138] The second and third grounds of the plaintiff's opposition are in issue. The plaintiff accepts the definition of an accord and satisfaction relied on by the defendant and as summarised earlier in this judgment from the *British Russian Gazette* case of 1933.19 The plaintiff accepts, also, that it is necessary to construe the agreement which is said to have compromised contractual rights and obligations, to determine whether an accord and satisfaction has been reached in this case.20

Specifically, the plaintiff submits that the following principles expressed by the Court of Appeal in construing settlement agreements or release clauses (in *Tag Pacific Ltd v Habitat Group*), and which I accept, are appropriate:21

The ultimate objective is always to ascertain the intention of the parties from the words they have used, interpreted in the light of the objective circumstances known to them at the time.

[139] The plaintiff also relies on *BCCI,* which was called in aid by the defendant. That was essentially a case about interpreting a particular general release clause in settlement of claims by ex-employees who had been paid redundancy compensation. The agreement purported to prevent them from bringing further claims against their former employer. After Mr Ali executed his settlement agreement, other employees were successful in a suit against BCCI for what were called 'stigma damages', that is damages

for being stigmatised by the employees' association with an employer which had conducted its business dishonestly and unlawfully. Until the judgment in the stigma damages case, it had not been thought that such a cause of action even existed or that it could succeed. In these circumstances, Mr Ali and his colleagues launched further claims for stigma damages and BCCI sought to invoke the general release or compromise to prevent them from doing so.

[140] A majority of the law lords concluded that the release in the *BCCI* case could not be read completely literally and should not be interpreted as applying to any and

all claims arising out of the ending of the employment relationship. Mr Ali and the

19 *British Russian Gazette*, above n 10.

20 *Cabletalk Astute Network Services Ltd v Cunningham* [2004] NZEmpC 43; [2004] 1 ERNZ 506 (EmpC) at [22].

21 *Tag Pacific Ltd v Habitat Group* [1999] NZCA 493; (1999) 19 NZTC 15,069 (CA) at 8.

other ex-employees were not precluded thereby from pursuing their claims for stigma damages which had not been in the parties' contemplation at the time the releases were signed.

[141] The relevant wording of the general release in *BCCI* included that the terms were:22

... in full and final settlement of all or any claims whether under statute, Common Law or in Equity of whatsoever nature *that exist or may exist* and, in particular, all or any claims rights or applications of whatsoever nature that the Applicant has or may have or has made or could make ...

(emphasis added)

[142] Lord Bingham, delivering the leading judgment for the majority, concluded:23

... a long and in my view salutary line of authority shows that, in the absence of clear language, the court will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware."

[143] The judgments of the House of Lords recognised that a party may agree to release claims of which that party is unaware and of which the party could not have been aware: that is, even claims that could not on the facts known to the parties have been imagined, if appropriate language is used to make plain that intention. The Lords considered, however, that a court should be reluctant to infer that a party intended to give up something which neither party knew of, nor could have known

that either or both had potentially.24

[144] The plaintiff also relies on the judgment of this Court in *Marlow*.25 That was a case of a redundancy settlement reached with employees which included the term that they would have "no further claim" against the employer in respect of their employment agreements. This was held not to be a bar to bringing a common law action alleging breach of the duty to provide a safe workplace. The reasons for that conclusion in *Marlow* were that the claimant employee was not aware at the time of

entering into the settlement that the employer's previous omissions had caused her

22 *BCCI*, above n 13, at [3].

23 At [10].

24 At [17].

25 *Marlow*, above n 17.

harm during the course of her employment. She had only turned her mind to redundancy issues, and so was not precluded from raising a claim for damages despite the existence of a full and final settlement to compromise all claims, actual or potential.

[145] *Marlow* was said by counsel for the plaintiff, Ms Turner, to have been followed and applied by this Court in *Rickards v Ruapehu District Council* which also took into account *BCCI*.26 In *Rickards* the waiver clause read:27 "This agreement is in full and final settlement of any and all claims arising between the parties." Subsequently, a new claim was made by the former employee which concerned the proper rate of annual salary under an expired collective employment contract which had not been in dispute between the parties in the period leading up to the settlement. The Court could not discern from evidence any reference to the

new claim or to an actual or potential dispute as to the proper rate of annual salary before the general release was signed. The Court concluded that a mediated settlement between the parties was not all-embracing but was only limited to claims the existence of which both parties were aware at the time, and did not extend to a new claim relating to the rate of annual salary which had not been in issue between the parties leading up to the settlement. The Court expressed its conclusion this

way:28

... Mrs Rickards cannot on a reasonable or proper construction of the agreement be taken to have given away her rights and remedies under the expired CEC, for those rights were never previously in issue.

[146] The plaintiff's submissions in the case of Mr McKerchar add a further feature and, so far as I am aware, a unique one, to this

argument that the compromise cannot extend to causes of action of which the Council was unaware at the time of execution of the agreement. In addition to the plaintiff saying that it could not have given away its right to sue on a ground of which it was not aware, the submission appears to go on to say that this is particularly so where the Council now says that Mr McKerchar had an obligation to alert it to those breaches by him but with which he

failed to comply. It is unclear whether this is the basis for a submission that the

26 *Rickards v Ruapehu District Council* [2003] NZEmpC 57; [2003] 1 ERNZ 400.

27 At [8].

28 At [47].

release does not extend to the plaintiff's causes of action, or whether any failure by Mr McKerchar to comply with an obligation to alert his employer to his breaches of his contract makes it especially important to allow the plaintiff to bring these claims. Either way, I assume that the plaintiff must assert either a common law or implied duty of this sort upon Mr McKerchar or, alternatively, seek to rely on the provisions of s 4 of the Act which address, generally, good faith behaviour between employers and employees and, in particular, mutual responsibilities to be responsive and communicative by both parties.

[147] The plaintiff's position in this case is that it was not until after the general release had been signed that it became aware of circumstances to which it says Mr McKerchar should have alerted it and which it claims caused it loss as a result of relevant breaches of the employment agreement. The plaintiff says that on a reasonable and proper construction of the settlement agreement, the Council did not give away its rights which had never previously been in issue, and especially about which it says the defendant knew but failed wrongfully to advise it.

[148] There are several answers to this previously unheralded submission. The plaintiff's pleading does not include reference to an alleged breach by Mr McKerchar either of the s 4 (good faith) obligations of the Act or any express or implied term or condition of his employment. Next, the preponderance of evidence (to date and for the purpose of these applications) does not establish such a breach by Mr McKerchar and indeed, if anything, points the other way. In addition to there being no affirmative evidence called by the plaintiff in this regard, Mr McKerchar was not cross-examined, when he did give evidence, about both his knowledge of these allegations and, pertinently, any refusal or failure by him to make those breaches known to the Council. It is one thing for an employee to be in breach of his express, implied or statutory terms and conditions of his employment. That is what the parties' case is about. It is quite another for that employee, who denies breaches, to be liable to his employer for failing or refusing to disclose his breaches to the employer. There is no pleading or evidential support for this submission that the compromise agreement should be so interpreted and that Mr McKerchar's application to strike out the claims against him, based on the compromise agreement, should be rejected for that reason.

[149] I have already commented on the incompleteness of the Council's case on this issue and, in particular, the absence of evidence relevant to the state of knowledge of its elected officials or other senior staff, apart from Mr McKerchar, about the events known to it before the settlement agreement was entered into.

[150] Counsel for the plaintiff has identified the judgment in *Speirs v Perry Developments Ltd* as addressing a similar position to that here, on an application to strike out a proceeding because of the effect of an accord and satisfaction.29 In *Speirs*, too, evidential proof was required of the accord and satisfaction although, without the opportunity to examine the background material, the High Court said it would not be satisfied that the position was sufficiently clear for it to proceed with a strike-out.30

[151] There is another case in which the High Court refused to strike out a claim because of the absence of clarity, from the terms of settlement, that the claim subsequently brought was one to which the agreement applied. That was *Gilman v Residual Health Management Unit*.31 The Associate Judge in *Gilman* considered a settlement modelled on the (then) Employment Tribunal's standard documentary form of settlement. Payment of a sum by the employer to the employee was said to be "as full and final settlement of all claims arising from the employee's employment with the employer and the termination thereof."32 This was held not to preclude the employer from joining the employee as a third party to a claim to an indemnity sought in High Court proceedings that were later brought against the employer, based, in part, on the alleged vicarious liability of the employer for the employee's failings.

[152] Next, the plaintiff relies on the longstanding practice that, for the purpose of a strike-out application, the Court will assume that the pleaded facts will be able to be established in evidence. Although a dispute about those facts will usually be an issue for trial, it is correct, as the plaintiff contends, that for the purposes of this

strike-out application, the Court proceeds on the basis that the plaintiff's factual

29 *Speirs v Perry Developments Ltd* HC Hamilton CIV-2005-419-1251, 15 December 2006.

30 At [12].

31 *Gilman v Residual Health Management Unit* HC Wellington CP117/97, 22 October 1999.

32 At [15].

claims can be substantiated. I have approached Mr McKerchar's application on this basis, but that is not to the point of a strike-out application in a case such as this. Even assuming that the plaintiff's allegations will be proven, the issue in this case is whether such litigation was agreed to be compromised in the parties' settlement agreement of 2 August 2011.

[153] What is doubtful, also, is the next proposition that the pleaded claims of the plaintiff "clearly disclose a cause of action and must proceed." That is to misstate the position. Simply because the statement of claim discloses an apparently justiciable proceeding (based on the presumed acceptance of the facts alleged) does not mean that the proceeding cannot be struck out if, in whole or part, it has been compromised previously by a valid contract between the parties that the proceeding will not be brought.

[154] The plaintiff's next proposition is also true as far as it goes but, again, its claimed extension to the circumstances of this case is doubtful. Ms Turner submits that the proper approach is that if there are disputed questions of relevant fact, the Court will not strike out a proceeding if, on the way to doing so, it has to decide those disputed questions of fact. Here, however, it is at least arguable that on the facts relating to the parties' intentions in settling the general release, there is no dispute between them, at least not one that can arise out of the evidence presented for the plaintiff which was essentially and substantially speculative. This subtlety is illustrated by the plaintiff's counsel's submission at 5.5 of their synopsis of argument. Counsel contend that the Council:

... did not have knowledge of any actual or potential claims against the plaintiff when the Deed was entered into on 2 August 2011. It could not have known about the potential claims against the defendant as they were not determined until after the Deed was entered [into].

[155] Factual support for this proposition is said to be the contents of Mr Winder's

affidavit sworn on 6 October 2016, and his oral evidence at the hearing on 11

November 2016. That is, however, to misstate the position. Mr Winder's evidence is, at best, only speculative because he was not involved with the Council at that time. He has not spoken to very relevant potential witnesses who were. There is no evidence from those persons to corroborate Mr Winder's speculative evidence of

what happened. There is little documentary evidence to support the plaintiff's contentions. So the evidence for the plaintiff is, at best, Mr Winder's opinion that, as at 2 August 2011, the Council could not have known about the matters that have subsequently become its causes of action.

[156] The plaintiff challenges the adequacy of Mr McKerchar's contradictory evidence in relation to events leading to the signing of the settlement agreement. This is said to include "alleged discussions" between the Mayor and Deputy Mayor on the one hand, and the defendant on the other, about general complaints from ratepayers about the MCWS; Mr McKerchar's evidence of "allegedly" being blamed for decisions taken by the Council in relation to the scheme and the running of the Council more generally; and Mr McKerchar's relationship with the Council breaking down.

[157] In the absence of direct contradictory evidence which could have been called from persons such as the former Mayor, former councillors and perhaps also from the facilitator, Mr Marshall, and the Chair of the Commissioners, the Court is entitled to accept Mr McKerchar's evidence of the existence of that state of affairs. Mr McKerchar was not moved from that evidence in cross-examination, and Mr Winder, the Council's sole witness, conceded that his evidence amounted to his opinion of what might or might not have happened. Mr McKerchar's evidence was directly of what he said and what was said to him, and what he did and what was done to him. That is not to say that such evidence must be accepted uncritically: it is not. But the question is, if it is credible evidence, has it been rebutted?

[158] I do not accept the plaintiff's submission that all of the evidence shows that at the time of entering the settlement agreement there was only an increasing general loss of confidence with Mr McKerchar's performance so that the purpose of the deed was principally, if not solely, to achieve the early termination of his employment. Although that was the trigger for the instigation of negotiations leading to the settlement agreement, the evidence shows that there was significantly more knowledge on the part of the Council than only a general loss of confidence with Mr McKerchar's performance.

[159] It is correct, as the plaintiff submits, that the discussion facilitated by Mr Marshall, that ultimately led to the early termination of Mr McKerchar's employment, focused on relationships between councillors and ratepayers on the one hand, and the Chief Executive on the other. However, there is no evidence of the detail underpinning the relationship breakdown that was discussed.

Plaintiff's case to strike out defendant's counterclaim

[160] Unsurprisingly, at the forefront of the plaintiff 's argument to strike out Mr McKerchar's counterclaim is the judgment of the Court of Appeal in *JP Morgan Chase* which, as all counsel accept correctly, is binding on this Court unless distinguishable.33

[161] The plaintiff summarises correctly Mr McKerchar's claims as being of breach by the Council of the 2 August 2011 agreement by releasing details of it to a member of the public on 17 August 2012, by releasing the text of the entire agreement to news media outlets on various dates between 23 August 2012 and 5 February 2013 and by making statements about its contents in a press release dated 26 August 2014. All these alleged breaches occurred not only after the agreement was signed but also after Mr McKerchar's employment ceased on 31 October 2011.

[162] The plaintiff relies first on the principles of striking out civil proceedings set out by the Court of Appeal in *Attorney-General v Prince*.34 It submits, correctly, that the same principles are applicable to proceedings in this Court.35 Those principles include that:

- Pleaded facts, whether or not admitted, are assumed to be true. This does not extend, however, to pleaded allegations which are entirely

speculative and without foundation.

33 *JP Morgan Chase*, above n 2.

34 *Attorney-General v Prince* [1997] NZCA 349; [1998] 1 NZLR 262 (CA) at 264.

35 *New Zealand Fire Service Commission v New Zealand Professional Firefighters' Union Inc*, [2005] ERNZ 1053 (CA) at [13], *Milne v Air New Zealand Ltd* [2014] NZEmpC 101 at [18] and *Ahmed v Connect Supporting Recovery Inc* [2016] NZEmpC 127 at [14].

• The cause of action or defence must be clearly untenable.

• The jurisdiction is to be exercised sparingly, and only in clear cases, reflecting the Court's reluctance to terminate a claim or defence otherwise than on its merits.

• The Court should be particularly slow to strike out a claim in any developing area of the law: for example, where a duty of care is alleged in a new situation.

[163] Clear untenability and deference to caution in a developing area of law were also factors emphasised by the Court of Appeal in *Couch v Attorney-General* where Elias CJ and Anderson J said: "It is inappropriate to strike out a claim summarily unless the court can be certain that it cannot succeed."36

[164] As the Court of Appeal concluded in *JP Morgan Chase*, the Authority's jurisdiction (and the Court's now inherited jurisdiction) is derived from s 161(1) of the Act. The Authority has, thereby, exclusive jurisdiction to make determinations about employment relationship problems generally including:

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

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

...

(r) any other action (being an action that is not directly within the jurisdiction of the court) arising from or related to the employment

relationship or related to the interpretation of this Act (other than an

action founded on tort):

...

[165] In *JP Morgan Chase* the Court of Appeal had to consider whether a settlement agreement, such as the one in this case, could be capable of being characterised wholly or in part as a variation to an employment agreement where there is no question of express statutory enforceability arising out of that agreement

being subject to s 149 of the Act, being an agreement certified by a mediator.

36 *Couch v Attorney-General* [2008] NZSC 45, [2008] 3 NZLR 725 at [33].

[166] The Court of Appeal concluded that such an agreement could not amount to a variation of the parties' employment agreement (and so part of an employment agreement for the purposes of s 161(1)(a)), even where the settlement agreement provided (as here and as in *JP Morgan Chase*) for temporarily continued employment. That was because the settlement agreement set out terms intended not to operate as terms of employment but to terminate that employment and to operate thereafter. The Court of Appeal also held that the settlement agreement could not be categorised as an employment agreement for the purpose of s 5 of the Act.

[167] The Court of Appeal applied a line of cases decided in the High Court which interpreted restrictively the provisions of s 161(1) set out above. It said that the settlement agreement and its enforcement could not be said to be matters that arose from, or were related to, an employment relationship or an employment agreement. In doing so, the Court of Appeal upheld and applied the judgments in *Pain*

*Management Systems (NZ) Ltd v McCallum*37 and of the full High Court in *BDM*

Grange Ltd v Parker.38 Counsel for the plaintiff emphasised in their submissions that, following the *JP Morgan Chase* judgment, the phrases "arising from" and "related to" in s 161(1)(r) of the Act must be construed narrowly and non-literally.

[168] For the sake of completeness, the plaintiff submits that the Court should not stay its hand to strike out the counterclaim on grounds that this is a developing area of the law. I agree. The Court of Appeal has spoken recently and clearly; and however counter-intuitive the placement of the jurisdictional dividing line may seem to some commentators, that is a matter for Parliament to address and cannot be said now to be an uncertain or developing area of the law for the courts to decide.

Defendant's opposition to plaintiff's strike-out application

[169] In arguing for jurisdiction, counsel for Mr McKerchar identifies s 161(1)(r) as establishing this. It must follow, necessarily, that the defendant asks the Court not to follow the judgment of the Court of Appeal as it is obliged to, because the cases are

said to be distinguishable.

37 *Pain Management Systems (NZ) Ltd v McCallum* HC Christchurch CP 72/01, 14 August 2001.

38 *BDM Grange Ltd v Parker* [2005] NZHC 515; [2006] 1 NZLR 353 (HC) at [66].

[170] The defendant says that *JP Morgan Chase* is inapplicable because the agreement both terminating Mr McKerchar's employment, and setting out the parties' subsequent respective rights and obligations, was not entered into between strangers. Rather, counsel contend it was linked indelibly to their prior and ongoing (although time-limited) employment relationship. Counsel submits that there are good public policy reasons to prevent a multiplicity of actions about the same employment relationship in different forums which will be the result if the counterclaim were to be struck out. It seems to be common ground that if *JP Morgan Chase* is to be followed, Mr McKerchar's claims against the Council could be brought in one of the courts of ordinary jurisdiction, most likely the District Court because of the amount of such damages as might flow from such a breach.

[171] Also invoked by the defendant are ss 178(2)(c) and 189 of the Act. Section

178(2)(c) is said to be a pertinent example of Parliament's intention that there should not be multiple proceedings before different forums because it has specified that one of the grounds for removal of proceedings from the Authority to the Court is that "the court already has before it proceedings which are between the same parties and which involve the same or similar or related issues". Counsel submits, in these circumstances, that:

Parliament cannot have intended that parties to an employment dispute based on an employment relationship would have to go to different forums when the dispute relates to the same or similar facts and issues. Such a suggestion would be a significant barrier and burden to employees with limited financial resources from bringing claims.

[172] While this argument is logically attractive, the state of the case law is such that the achievement of this objective cannot now be changed radically by this Court. Rather, if it is warranted, a legislative solution is required. That is so even though the imprimatur of a mediator's certification of such a settlement agreement under s

149 would be sufficient to cause it to be justiciable in the Authority and this Court.

[173] Alternatively, Mr Drake for the defendant argues that the act of publishing the details of the settlement agreement in violation of it, is an "employment relationship problem" even although it arose out of a settlement agreement which itself arose out of an employment relationship problem which, in turn, arose out of

the employment relationship. Counsel submits that the judgment in *JP Morgan Chase* can and should be distinguished because in that case the employer was alleged to have made a negligent misstatement or made a statement amounting to an injurious falsehood but in whichever event, was tortious.

[174] Mr Drake submits, partly but not completely correctly, that "Torts are not and never have been for the employment institutions". That is not an entirely correct assessment because this Court has at least a confined and exclusive tort jurisdiction under pt 8 of the Act. Further, Mr Drake argues that in distinction to *JP Morgan Chase*, in this case the settlement agreement was intended to augment an existing fixed-term employment agreement which was to continue to operate from 2 August

2011 to 31 October 2011. In any event, Mr McKerchar's counterclaim in this Court is for breach of contract and there is no reason apparent to me why that could not continue to be the cause of action before another court.

[175] That is, however, no different in principle from *JP Morgan Chase*: only the length of the continued employment differed. In *JP Morgan Chase* it was a matter of a day or two between the signing of the settlement agreement and the conclusion of the employment whereas here the period of continued employment between those dates was about three months. There is, however, no difference in principle based on the lengths of these periods alone.

[176] Mr Drake next seeks to distinguish the judgment of the Court of Appeal in *JP Morgan Chase* on its facts. These include that whereas in *JP Morgan Chase* the settlement agreement's fundamental purpose was to bring the employment relationship to an end (and so was the antithesis of an employment agreement), the arrangements made in the settlement agreement in this case are said to differ in that they varied the term of the agreement. In *JP Morgan Chase* the Court of Appeal concluded that the fact that the employment relationship remained alive for one day following the settlement agreement was "artificial" as it could not have been possible for both agreements to have been performed contemporaneously.

[177] By contrast, Mr Drake submits, Mr McKerchar's agreement (and the employment relationship) was of a fundamentally different character. His agreement

was for a fixed term so that it was always anticipated that this would come to an end and that the fixed term employment agreement would govern that relationship until it so ended.

[178] Counsel submits that the effect of the parties' deed was to bring forward the end date of the employment relationship by advancing effectively by nine months, when its fixed term would expire. In these circumstances, the period of three months between the execution of the agreement and the cessation of Mr McKerchar's employment allowed concurrent performance of both agreements for that period, the deed in this case not displacing the employment agreement as it did in *JP Morgan Chase*, at least for that period of almost three months.

[179] Further, the defendant submits that the settlement agreement in this case bestowed additional benefits on each party. The Council had an extended handover period in which it could retain the services of Mr McKerchar as its Chief Executive. For the defendant, it provided him with time in which to find new employment as well as dealing with the potential reputational consequences of the ending of his employment.

[180] Next, unlike in *JP Morgan Chase* in which Mr Drake submits that the Court of Appeal considered only two characterisations of the agreement, counsel submitted in this case that Mr McKerchar's agreement falls into a possible third category. Mr Drake identified those two alternative categorisations in *JP Morgan Chase* as being either an employment agreement or an agreement to rescind the employment agreement. Here, the possible third category is said to be an agreement related to the employment relationship and the employment relationship problem. The plaintiff has pleaded that there was an employment relationship problem arising out of alleged loss of confidence by it in Mr McKerchar because of his poor performance.

[181] Counsel submits that the Employment Court should undertake the same exercise as the Court of Appeal did in *JP Morgan Chase*: that is to consider the fundamental character of the agreement and only then determine whether it falls within or beyond the Authority's (now the Court's) exclusive jurisdiction. To strike

out the counterclaim at this point would, counsel submits, preclude such a proper analysis as the Court of Appeal did and applied in *JP Morgan Chase*.

[182] It follows, in Mr Drake's submission, that if part of the settlement agreement falls within the Authority's exclusive jurisdiction, then the whole of it must also do so because the fundamentals of the settlement agreement cannot change between its parts. It cannot be, Mr Drake says, that the Council should be permitted to say that its claims (undeniably an employment relationship problem) fall outside the provisions of the deed but, at the same time, that enforcement of it in the same forum does not.

[183] It is, however in my view, to mischaracterise the nature of the two issues. The Council's argument is that the proper interpretation of the terms of the deed and, in particular cl 9, do not cover its claims now made. That is to be contrasted with the plaintiff's application to strike out the counterclaim which says, irrespective of the interpretation of any of those particular clauses, that enforcement is beyond the jurisdiction of the Court or the Authority because of the *JP Morgan Chase* interpretation of s 161(1)(r) of the Act.

[184] I do not accept Mr Drake's submission that if the Court has jurisdiction to consider Mr McKerchar's strike-out claim, it must likewise have jurisdiction to consider his claim in relation to enforcement which is a claim of breach of the same deed or agreement.

[185] The other fallacious assertion in this regard is that if the Court has jurisdiction to entertain Mr McKerchar's strike-out claim (which is not denied by the Council), then it must surely have jurisdiction to consider his counterclaim of breach. There is, however, no doubt that the Court (via the Authority's exclusive jurisdiction) is empowered by statute to hear and decide claims for damages for breach of contract arising out of the performance of an employment agreement by the parties. As an element of this, and by way of positive defence, Mr McKerchar is entitled to assert, as he does, that what is otherwise a case within jurisdiction, must fail because the parties agreed that it could not be brought. That is, however, fundamentally different from the plaintiff's application to strike out Mr McKerchar's

counterclaim. It is that such claims cannot be brought to the Authority or the Court because the Act does not include these within its exclusive jurisdiction.

[186] So, in the absence of express statutory jurisdiction as the law requires, Mr McKerchar's claim against the Council is not barred completely but only as to the court where it may be brought. The default position is in the courts of ordinary jurisdiction by way of a common law breach of contract claim.

The law on strike-outs of proceedings generally

[187] Having now summarised the issues in the litigation and the relevant evidence, it is appropriate to state the law relating to strike-outs of proceedings generally and, more particularly, in circumstances where parties have compromised their entitlements to bring proceedings against each other. I deal first with the general law of striking out.

[188] Coincidentally, the most recent and authoritative statements case about striking out employment-related proceedings come from the Court of Appeal in *JP Morgan Chase Bank*. At [88] the Court of Appeal confirmed that the existence or absence of jurisdiction to consider a claim is a proper use of the strike-out procedure. One must, however, look to earlier authorities about when and how the striking out of a proceeding before trial is a proper exercise of this power in employment law.

[189] In *New Zealand Fire Service Commission v New Zealand Professional Firefighters' Union Inc* the Court of Appeal addressed the question of strike-out of proceedings in the Employment Court based on res judicata or issue estoppel, that is on grounds that the case has been decided previously and finally.39 That was, that the particular issue at the heart of the case involving interpretation of a collective agreement in compliance with the Holidays Act 2003, had been decided previously. The case before the Court sought, in effect, to re-litigate the same issues. That is not the ground for strike-out here, but the broad principles affecting the remedy are

applicable nevertheless.

39. *New Zealand Fire Service Commission v New Zealand Professional Firefighters' Union Inc*, above n 36.

[190] The Court of Appeal in *NZ Fire Service Commission* concluded that where a claim dependent on a question of law is capable of decision on the material before the Court, the Court is obliged to determine the question at strike-out stage, even if extensive argument may be necessary to resolve it.40

[191] In particular, the Court of Appeal wrote:

... As this Court has often made clear, where a claim depends on a question of law which is capable of decision on the material before the Court, the Court should determine the question at the strike out stage, even though extensive argument may be necessary to resolve it: *Gartside* at 45, and the cases there referred to. ... We can see no reason for the Employment Court to approach strike out applications on any basis other than that applying to the High Court.

[192] The Court of Appeal referred to its earlier decision in *Gartside v Sheffield Young & Ellis.41* That was a case in which the Judge at first instance struck out a claim in negligence because there was no duty of care then recognised by the law between the parties to that litigation, a potential beneficiary under a putative will and the solicitors who had not prepared it but had not had the will executed.

[193] In the *Gartside* judgment, Richardson J said:42

The Judge applying well settled principles properly directed himself that the jurisdiction is one to be sparingly applied: if the Court is left in doubt whether a claim may lie the application must be dismissed, but if a claim depends on a question of law capable of decision on the material before the Court the Court should determine that question even though extensive argument may be necessary to resolve it: *Peerless Bakery Ltd v Watts* [1955] NZLR 339; *R Lucas & Son (Nelson Mail) Ltd v O'Brien* [1978] 2 NZLR

289; and *Takaro Properties Ltd v Rowling* [1978] 2 NZLR 314. Approaching the matter on the assumption that the allegations in the

statement of claim were factually correct, that they might be expected to be amplified at any hearing of the action but as pleaded they gave fair notice of

the substance of the plaintiff's claim, he ruled that the action must necessarily fail in law.

[194] I will follow these principles in deciding these applications. Here, however, the decision whether to strike out depends on the interpretation given to a disputed

clause in a contract; it is a decision of what the parties intended the clause to mean

40 At [12]-[13].

41 *Gartside v Sheffield Young & Ellis* [1983] NZCA 37; [1983] NZLR 37 (CA).

42 At 45.

and, if the defendant is successful, that the plaintiff's right to sue him has been

foregone.

The law on compromise of litigation

[195] This part of the judgment relies upon some New Zealand cases, but, principally, on the law of compromise as set out in the leading common law textbook, *Foskett on Compromise*.43 A settlement agreement may often, as it did here, include a prohibition upon subsequent litigation between the parties. This is often referred to in law as a compromise. *Foskett* summarises the common law, and, principally, the position in the United Kingdom of Great Britain (the UK). After analysing the commentary set out in the Laws of New Zealand (LONZ) on the topic, I identify the key principles, predominantly from *Foskett.*

[196] I will examine in four steps this complex but vital analysis of the law necessary for the decision of the case. First, I will address the arguable necessity for the existence of a dispute between the parties before an effective compromise can be settled. Second, I will address the distinction between "actual" and "potential" litigation (to use the words of the parties' cl 9) and, in particular, the position of an inchoate or unforeseen proceeding. Third, I will examine the requirements of a general release. Finally, I will deal with the particular features of the compromise in this case.

[197] Before that detailed analysis of the law, I start with the overarching principle that the law will seek to uphold a compromise where it is clear that finality was envisaged. In Chapter 6 ("Effect of a Compromise"), *Foskett* notes44

An unimpeached compromise represents the end of the dispute or disputes from which it arose. Any issues of fact or law that may have formed the subject matter of the original dispute are buried beneath the surface of the compromise. The court will not permit them to be raised afresh in the context of a new action. ...

...

43 David Foskett *Foskett on Compromise* (8th ed, Sweet & Maxwell, London, 2015).

44 At 6-01 – 6-02.

[198] This principle applies whether or not litigation was commenced in relation to the dispute and, if it was, whether or not the compromise has been embodied in a consent order or judgment of the Court. The foundation of the principle lies in two aspects of public policy: the need for there to be an end to disputation and the desirability of parties being held to their bargains.45 Where, as here, parties compromise without embodying their agreement in a court order or judgment, the latter consideration dominates.

[199] LONZ refers to the general principle of release from an obligation in the following way. Under the heading "**Release: (32) Discharge by subsequent agreement**" the authors note:46

A release is an act of one of the parties to a contract discharging a right of action against the other which arises out of the contract. A release may take the form either of a deed; or of a parol agreement made for valuable consideration. The latter amounts to an accord and satisfaction or discharge.

[200] The footnote to this last sentence records that the words or phrases “a release”, “an accord and satisfaction”, “a waiver” and “promissory estoppels” are not clearly distinguishable terminologies.

[201] The same paragraph goes on to state:

A parol release unsupported by consideration amounts to a mere expression of intention not to insist upon the right of action and is no bar either at law or in equity. However, there are three exceptions to the rule that a parol release unsupported by consideration is ineffective: first, the plaintiff's conduct may be such as to estop them from asserting the continuance of the right; ...

[202] The remaining exceptions referred to in this quotation are not relevant to this case.

Is a dispute a prerequisite for a settlement agreement?

[203] At the core of a compromise such as cl 9 of the parties’ agreement addresses, conventional wisdom says there must be a dispute between the parties which they

arrange to settle by each making concessions. Just what constitutes ‘a dispute’ is a

45 At 6-02.

46 *Laws of New Zealand* Contracts (online ed) at [350] (footnotes omitted).

moot point, certainly for the decision of this case. The law of compromise is sometimes described as involving “... the complete or partial resolution by agreement of differences before final adjudication by a court or tribunal of competent jurisdiction”.47 *Foskett* relies on an unreported UK Court of Appeal judgment, *Garlick v Royal Trust Bank.*48 It was said, in the judgment of Peter Gibson LJ:

... that a compromise is merely a contract which emerges from the course of negotiations, that there must be some underlying dispute before a true compromise could be said to have emerged [and] that a compromise is designed to bring an end to the dispute ....

[204] However, as Foskett notes, while there must exist some actual or potential dispute, it is not necessary that litigation be pending.49

[205] I now address the New Zealand position about any requirement for a dispute. In the case of the ending of an employment relationship by agreement, the scope of the term “dispute” was considered by the Employment Court and, on appeal by the Court of Appeal, in *Morgan v Whanganui College Board of Trustees*.50 The issue in that case related to an agreement concerning “without prejudice” communications, and the ‘privilege’ thereby asserted which would have had the effect of excluding consideration of communications in court proceedings based on the parties’ agreement. The Employment Court did not accept the necessity for there to be a dispute as defined narrowly by the employee party in that case, before the

privilege could be asserted in respect of inter-lawyer discussions during an employer’s investigation of alleged misconduct.

[206] Mr Morgan appealed to the Court of Appeal against the judgment of the Employment Court.51 The Court of Appeal’s reasoning in dismissing Mr Morgan’s appeal is also analogous to the question in this case of compromise or settlement in

litigation. Bearing in mind that the Court of Appeal judgment in *Morgan* relates to

47 *Foskett* at 1-01.

48 *Garlick v Royal Trust Bank*, unreported, 10 February 1999, CA (civ), [1999] Lexis Citation

1507.

49 *Foskett* at 2-01.

50 *Morgan v Whanganui College Board of Trustees* [2013 NZEmpC 117], [2013] ERNZ 285;

Morgan v Whanganui College Board of Trustees [2014] NZCA 340, [2014] ERNZ 80.

51 *Morgan v Whanganui College Board of Trustees* [2013] NZCA 587.

“without prejudice” communications, it deals, for the purpose of this judgment, with the necessity for, and the scope of, a dispute:52

In its original formulation the rule required as a precondition to its invocation: (1) the existence of a dispute or negotiations and (2) the offer of terms for settlement. That prerequisite has since been compendiously described as a difference, and its scope is much wider than it was historically. The protection extends to negotiations where at the time of the communications “the parties contemplated or might reasonably have contemplated litigation if they could not agree”. That is because such a construction of the rule “fully serve[s] the public policy interest underlying it of discouraging recourse to litigation and encouraging genuine attempts to settle whenever made”.

[207] Agreeing with the judgment of the Employment Court, the Court of Appeal concluded:

[17] ... The word “dispute” is not a term of art; its use was not meant to be exclusive. And, as noted, “negotiations” or the broader term “difference” will suffice. None of these phrases warrant a narrow construction where something has arisen between the parties which

must be resolved and they have expressly agreed their communications should be protected for that purpose.

[18] In our view the common law protection must include a situation where, as the Chief Judge found, there is a serious problem in the employment relationship – that is, a problem relating to or arising out of the employment relationship. To that we would add the requirement that the problem is one that could give rise to litigation, the result of which might be affected by an admission made during negotiations.

[19] Whether the parties are in dispute or a state of negotiations is a fact- specific question. ... Axiomatically there was an employment relationship problem which required prompt resolution: ...

(footnotes omitted)

[208] Returning to the broader common law position, authority for the proposition that an "actual" dispute will not exist until a claim is asserted by one party which is "disputed" by the other, is said by *Foskett* to be *Smith v Smith*.53 In that case a party had abandoned applications to a court, acknowledging that the party had no beneficial interest in the property concerned although subsequently sought leave to make such a claim. In response to an assertion that the party was precluded from

doing so by virtue of the consent order made previously which was categorised as a

52 At [13] (footnotes omitted).

53 *Smith v Smith* (1974) 5 Fam. Law 125 CA.

compromise not to seek a lump sum, the UK Court of Appeal held that merely abandoning claims for specific relief in relation to property could not be construed as agreeing not to claim a lump sum from the proceeds of its sale. So, *Foskett* concludes, at the earlier time the party had not asserted a claim for relief by way of lump sum provision and thus there was no "dispute" about it, meaning that a claim could not have been compromised.

[209] I consider that in the present case there was a 'dispute' between the parties as that term is defined broadly. Although the initiative for his premature resignation came from Mr McKerchar, there were risks both that he could subsequently have asserted that he was constructively dismissed and that, as has occurred, the Council might subsequently seek to hold him personally liable for the situations that led to its loss of confidence in him. However unlikely either of those scenarios may have appeared in late July/early August 2011, they were indicative of what the Court of Appeal described in *Morgan* as "an employment relationship problem" which required prompt resolution. I conclude that the compromise of actual but, more importantly, potential proceedings between the parties fulfils the common law requirement for the existence of a dispute between the parties capable of compromise.

The compromise of "potential" litigation

[210] Clause 9 in this case purports, at least in part, to be a compromise of potential disputes between the parties. At 2-08 *Foskett* addresses a "potential dispute" and notes:

The intention of such wording is plain. It is intended that the payment should discharge finally all claims that have not merely already been advanced, *but also those which might subsequently be advanced in connection with whatever incident or state of affairs had brought the parties into dispute.* It follows that the intention of the agreement underlying the use of this formula [incorporated into cl 9] is that an issue not yet identified or formulated is also to be regarded as comprehended in the settlement. ...

(my emphasis and bracketed interpolation)

[211] *Foskett* states that the "buying off" of a potential claim has long been

recognised as important and that, where appropriate, courts have supported this.54

The author points out that in *BCCI,* the House of Lords recognised that a party may be bound by a compromise agreement supported by valuable considerations where the party agrees:55

to release claims or rights of which he is unaware and of which he could not be aware [and] even claims which could not on the facts known to the parties have been imagined.

[212] In *Kitchen Design and Advice Ltd,* insurance company parties settled a subrogated claim by signing a form of discharge which expressly stated that the sum was accepted "in full satisfaction, liquidation and discharge of all claims we have or may have against [the first party] in connection with [the specified event]".56 Phillips J, as he then was, found against an argument that the phrase "all claims we have or may have" meant that the settlement was restricted to claims which had either been

advanced or were in a position to be advanced at the time the formal discharge was signed and that the subject matter of the agreement was limited to the claims that were actually discussed between the parties. In rejecting these arguments, Phillips J said that the phrase "was clearly designed to cover, not merely claims actually advanced in relation to the [specified event] but other claims not advanced which might be advanced."

[213] As *Foskett* notes, the phrases used in an agreement bringing about such a significant consequence will depend on the subject matter of the dispute giving rise to the agreement and to the general nature of the agreement into which the parties had entered.

[214] The release of an unforeseen claim may be achieved even in circumstances where an unimpeachable formula, including specifically an unforeseen claim, has not been used expressly by the parties. The authors cite the personal injuries judgment

in *Bristow v Grout.*[57] In that case a figure for general and special damages for

54 *Foskett* at 2-10.

55 *BCCI*, above n 13, at [9] (footnotes omitted).

56 *Kitchen Design and Advice Ltd v Lea Valley Water Co* [1989] 2 Lloyd's Rep 22; cited in *Foskett* at 2-09.

57 *Bristow v Grout* (1987) (unreported), Times, 9 November, [1987] Lexis Citation 654. (CA).

personal injury by accident was agreed upon following a claim for such damages by the injured party consisting of "damages for the personal injury, losses, expenses and inconvenience arising from the accident." Later, the injured party began to suffer from a hitherto undisclosed injurious consequence of the accident and sought increased damages. The UK Court of Appeal held that he was not entitled to seek damages either for the original injuries or the further consequences since the parties' agreement was intended to be in full and final settlement of his claim in negligence for personal injuries arising out of the accident which claim had been made and settled by letter before proceedings were issued.

[215] So far I have examined the scope of a compromise agreement in dealing with actual or potential disputes as that latter word has been defined historically. However, a third scenario exists, where a dispute is not clearly articulated, but an underlying problem is recognised which has the potential to grow into a dispute.

Foskett calls this "The Unarticulated Dispute". It says:58

It has been suggested ... that the absence of a dispute, actual or potential, precludes the emergence of a compromise in its true sense. An actual dispute will invariably be articulated expressly by the parties. Even a potential dispute will be articulated expressly in the sense that the parties will have identified the essential legal and factual matrix or substratum from which the potential dispute might arise. An argument has been advanced for what is, on one view, a third situation, namely, one where parties reach an agreement "without [having spelt] out a dispute, [but sensing] that an underlying problem might grow into a fully articulated disagreement".

[216] *Foskett* goes on to state:59

The distinction between this situation and that of a compromise of a potential dispute ... may be that no "underlying problem" has been contemplated by the parties in respect of the latter: each has effectively said to the other:

"If there is something arising from the state of affairs that brought us into dispute which we have not yet identified, we expressly forego any further claims or counterclaims arising therefrom."

58 *Foskett* at 2-12, quoting from NH Andrews, "Mistaken settlement of disputable claims" (1989) 4 L.M.C.L.Q. 431 (footnotes omitted).

59 *Foskett* at 2-13. This third scenario is attributed to an article by NH Andrews in "Mistaken settlement of disputable claims".

[217] Foskett describes this categorisation as being effectively a mutual internal recognition that some dispute may emerge from the shadows but which neither has raised expressly with the other or in a way that identifies the area of shadow.

Requirements of a compromise generally

[218] Having considered the requirement for a dispute (actual, potential, unarticulated), I now move to the requirements of a valid compromise.

[219] Turning to the essential requirements of a valid compromise, *Foskett* puts these as four:60

• The existence of consideration;

• an identifiable agreement which is complete and certain;

• the parties' intention to create legal relations; and

• in some cases, the performance of certain formalities.

[220] Consideration was present and is not in issue in this case. Mr McKerchar forewent his entitlement to continued office for one year, if not potentially a further term as CEO, in return for the payment to him of what would have been his salary had he done so, plus some other compensatory payments.

[221] At 3-03 *Foskett* notes that in compromises, consideration is often provided by the promised or actual forbearance of one party to pursue a claim against another in return for some promised or actual act by the other. Here both parties promised to forego claims against the other in return, respectively, for Mr McKerchar vacating his office prematurely and, in the other, receiving sums of money to which he was not hitherto entitled contractually. As *Foskett* notes at 3-07, in cases of a promised or actual forbearance to sue, consideration "moves each way" and it can legitimately

be said that a contract of compromise has been concluded by the parties.

60 *Foskett* at 3-01.

[222] There is no suggestion from the Council in this case that there was any lack of mutual intention to create legal relations by the execution of the settlement deed. Nor is it suggested that the settlement was ultra vires the Council as a local authority having only statutory powers. Hence, only certainty of meaning is arguably (for the plaintiff) absent from the face of the agreement. If interpretation of the parties' meaning is established, so too will have been a compromise between them on certain terms.

[223] Addressing the need to apply principles of contract construction to the interpretation of compromise agreements, *Foskett* addresses what it describes as the "rules" of construction of compromises.61 Having described the standard approach

to contractual interpretation of phrases which may be ambiguous, it notes:62

... certain phrases, hallowed by long and frequent usage, are likely to receive substantially the same response by way of construction in most compromises in which they appear. An obvious example would be the well-established formula "in full and final settlement of all claims that [the party/parties] [has/have] or may have arising from ...".

[224] Addressing "Releases" (from future demands and liabilities arising out of the dispute that has led to the compromise), *Foskett* says that such provisions are not infrequently expressed in very general terms. It emphasises that in *BCCI*, Bingham LJ said:63

In construing this provision as any other contractual provisions, the object of the Court is to give effect to what the contracting parties intended. To ascertain the intention of the parties the Court reads the terms of the contract as a whole, giving the words used their natural and ordinary meaning in the context of the agreement, the parties' relationship and all relevant facts surrounding the transaction as far as known to the parties. To ascertain the parties' intentions the Court does not of course inquire into the parties' subjective states of mind but makes an objective judgment based on the materials already identified.

[225] Whether a compromise agreement amounts to a general release in terms, must be ascertained using the words of the contract and examining the circumstances

61 *Foskett* at 5-18 and following.

62 *Foskett* at 5.20–5.21.

63 *BCCI*, above n 13, at [8].

in which it was made. As *Foskett* notes in relation to the foregoing passage from

BCCI:64

The release by one party of another from liability arising from whatever state of affairs brought them into dispute is, of course, the very essence of compromise. Usually, parties will wish to see a resolution that wipes the slate clean and indeed that prevents further matters of disputation being added to the slate. Many formulae have been devised to secure this objective, some fairly short, some more extensive. Any such formula may be characterised as a "general release". Releases of this nature have been utilised for very many years in a variety of contexts. In some of the older authorities there emerged the suggestion that there was a particular "rule of construction" applicable to deeds of release confining the ambit of the release to matters within the contemplation of the party making the release and in respect of which he had knowledge. Whatever the historical context in which these statements of principle found expression, the contemporary view is that no special rule of construction applies to a release. In *Bank of Credit and Commercial International SA v Ali*, Lord Nicholls of Birkenhead said this:

"[T]here is no room today for the application of any special 'rules' of interpretation in the case of general releases. There is no room for any special rules because there is now no occasion for them. A general release is a term in a contract. The meaning to be given to the words used in a contract is the meaning which ought reasonably to be ascribed to those words having due regard to the purpose of the contract and the circumstances in which the contract was made. This general principle is as much applicable to a general release as to any other contractual term. Why ever should it not be?"

[226] Next, *Foskett* addresses the contra proferentem rule (which also arises for separate consideration in this case). It notes that this is often referred to simply as a "construction against (the) grantor".65 It was described in the judgment of the UK Court of Appeal in *Lexi Holdings Plc v Stainforth* as one of the "tools" made available by the law to decide on "the intended purpose of the [agreement] as understood by both parties".66 Contra proferentem is a tool for resolving ambiguity which cannot be resolved by ordinary principles of construction: that is that the ambiguity is resolved against the party responsible for the formulation and inclusion in the contract of the impugned provision. *Foskett* notes:67

...

The principle enshrines a pragmatic and workable means of resolving justly an ambiguity in a written document in a way that would appeal to the

64 *Foskett* at 5-23, citing the *BCCI* case at [26].

65 At 5-34.

66 *Lexi Holdings Plc v Stainforth* [2006] EWCA Civ 988 at [17].

67 *Foskett* at 5-35 (footnotes omitted.

hypothetical reasonable man faced with having to choose between two alternative meanings. On that basis the principle has a future.

[227] *Foskett* deals with the position, as in this case, where compromise is alleged to have arisen other than by consent order or judgment (in which cases other principles may apply). It says materially:68

... the court will have a variety of materials to examine: first and foremost, of course, will be the agreement itself, whether comprised in some formal document or merely the one or two communications which crystallised (or evidenced) the agreement. ... However, an agreement's phraseology may not always yield the answer to the question in hand. As observed previously, in the normal course of events the parties' negotiations are inadmissible as an aid to construction of an agreement. However, they are relevant and admissible to assist in resolving any ambiguity of phraseology in the agreement or to identify the disputes the parties intended to resolve. It is axiomatic that the analysis of these materials is an objective one, the subjective intentions of each party being irrelevant. An objective analysis of the "factual matrix" that formed the background to the compromise is required to enable the disputes settled to be identified.

[228] A difficulty arises when, as here (potentially) parties' arguably fail to address a dispute which is subsequently raised and to which the compromise is offered as an absolute defence. On this issue *Foskett* notes:69

There is, at least in principle, a distinction between a compromise of a dispute achieved before the commencement of proceedings and one achieved thereafter. In the former situation (which will be governed solely by the law of contract), unless the court can imply a term that a particular matter was compromised, the agreement as construed must stand: the court will not rewrite the parties' bargain. It may be possible for the agreement to be effective without the matter in question having been embraced within it.

[229] Settlement agreements made in an employment context are subject not only to contractual claims, but also to statutory claims. This requires consideration of "stringent limitations" which may potentially apply. Foskett addresses this specifically in its chapter headed "Employment Contracts and Compromise". The text states:70

In regard to the compromise of claims arising from disputes in the employment setting, important differences exist between the compromise of contractual and common law claims, on the one hand, and the settlement of statutory claims, on the other. In essence, contractual claims (including those

68 At 6-01.

69 At 6-08.

70 At 28-03.

which can be heard by employment tribunals) are subject to the same general principles that apply to compromise agreements in other civil disputes. This is in sharp contrast to the settlement of statutory claims. With regard to the latter, stringent limitations on the ability to settle such claims are in place which are designed to protect employees from entering into ill-advised settlement agreements.

[230] It may be that the sharp distinction between these two types of claim identified by *Foskett* is not, or at least not so much of, an issue in New Zealand as it is in the United Kingdom, although there are particular safeguards required of settlements under s 149 of the Act where a statutory mediator is involved in this. The distinction is not, however, between the types of case but, rather, puts in place special requirements where statutory mediators are involved. In this case, however, it is clear that what was intended to be compromised included both statutory claims and non-statutory common law proceedings.

[231] Dealing with general releases of statutory claims, *Foskett* again refers to the *BCCI* judgments of the House of Lords, noting that despite their construction of the particular settlement agreement, the majority held that a party is capable of agreeing to release claims of which that party was not, and could not have been, aware. However, it is said that such agreements have to use clear and unambiguous terms to that effect.71 The majority in *BCCI* concluded that the terms of the settlement agreement in the case were not sufficiently clear and unambiguous. Lord Hoffman dissented, concluding that the compromise agreement was sufficiently wide in its

terms to include a claim for stigma damages as was subsequently made in that case. *Foskett* notes, however, that Lord Hoffman did recognise that in the context of a general release, a party should not be allowed to rely on that release when that party has failed to disclose the existence of a claim of which it had knowledge and of which it believed the other party was unaware. This is an issue in this case too, albeit raised belatedly at the hearing in submissions by counsel for the plaintiff.

Lord Hoffman's view was that this exception did not apply in *BCCI*.

71 At 28-05.

[232] *Foskett* warns that the courts are more likely to enforce a general release where the parties make their intention clear using express and comprehensive terms. The text states:72

... At present there is no doubt that those who wish to compromise all possible claims (whether or not known by the parties and/or recognised by the law at the time of the compromise) must be careful to use extremely clear and comprehensive express terms to obtain this effect. Further, a party seeking to obtain a general release from another who is aware of the existence of some possible claim of which the other party is unaware, is at risk of being prevented from relying on that general release on the basis that any such reliance would be unconscionable, unless, of course, the first party informs the other of the potential claim. It is appropriate to add in the above context some comments on the drafting of settlements which seek to apply to, and settle, "future claims" – in other words, claims that do not exist at the time of the settlement, but which might arise at a later date. It appears that, at least in principle, such future claims can be validly and effectively settled. However, whilst such claims can in principle be settled, it was emphasised in [*Royal National Orthopaedic Hospital v Howard*]73 that to obtain such an extreme result would require the clearest express terms to that effect.

[233] Using the compromise clause in *Heaton v Axa Equity and Law Life*,74 *Foskett* postulates that the following may be efficacious to encompass as yet unknown claims:

This agreement is in full and final settlement of all claims and potential claims of whatsoever nature and kind (including interest, costs and any claims that at the date hereof have not or may not have been foreseen or may not have been capable of being foreseen, either factually or legally, by the parties hereto) which the parties have or may have against each other under or in respect of or arising out of or in connection with, whether directly or indirectly, [the specified and identified matters giving rise to the dispute] and without prejudice to the generality of the foregoing, the parties hereto agree not to commence or prosecute any proceedings against one another arising out of or in connection with such matters.

[234] Clearly, the terms of cl 6 of the parties' agreement in this case are less specific and comprehensive than the ideal postulated by *Foskett*. But, in the circumstances, are they nevertheless sufficiently comprehensive to achieve the same aim of including within the prohibition, unforeseen potential claims? Because there

may remain a degree of uncertainty about the parties' intentions in this regard, it will

72 At 28-06.

73 *Royal National Orthopaedic Hospital v Howard* [2002] UKEAT 861_01_1408; [2002] I.R.L.R. 849.

74 *Heaton v Axa Equity and Law Life* [2002] UKHL 15, [2002] 2 AC 329 at [42].

be necessary to examine also the contra proferentem rule of interpretation of contracts.

The contra proferentem rule of interpretation of contracts

[235] Where a contractual provision admits of two (or more) possible tenable interpretations, the Court may have to apply this tool to break the impasse to its interpretation and application. It is appropriate to set out the common law rule of interpretation of agreements known by the Latin phrase 'contra proferentem' because its application arises in this case if the parties' relevant contractual intentions are unclear. Contra proferentem is a principle of contract interpretation which assists in breaking the deadlock created by this ambiguity.

[236] This is a rule of construction of contracts applicable where there is a dispute about the interpretation of the words used which were drafted by, or otherwise the responsibility of, one of the parties. The rule arises in this case because the parties disagree on the meaning to be ascribed to the phrase "... potential disputes, grievances, actions or other issues ..." drafted by the Council.

[237] The contra proferentem rule in New Zealand is described in the most recent edition of Burrows, Finn and Todd, *The Law of Contract in New Zealand*:75

If there is any doubt as to the meaning and scope of the excluding or limiting term, the ambiguity will be resolved against the party who had inserted it and who is now relying on it. This is known as the rule of construction contra proferentem. The onus is on the person seeking the protection of the clause to show that the words clearly and accurately describe the contingency that has in fact arisen. But while an exclusion clause is to be construed narrowly, that does not mean a strained interpretation is to be adopted. The overall objective is to ascertain the presumed and mutual intention of the parties.

[238] The text considers the rule in light of the most recent and authoritative examination of it in New Zealand by the Supreme Court in *Vector Gas Ltd v Bay of*

Plenty Energy Ltd:76

75. John Burrows, Jeremy Finn and Stephen Todd, *The Law of Contract in New Zealand* (5th ed, LexisNexis, Wellington, 2016) at 228 (footnotes omitted) (emphasis added).

76 *Vector Gas Ltd v Bay of Plenty Energy Ltd* [2010] NZSC 5, [2010] 2 NZLR 444.

[There may be] difficulty in reconciling recent developments in the field of contractual interpretation, led by the decision of the Supreme Court in *Vector Gas Ltd v Bay of Plenty Energy Ltd*, which seek to ascertain the meaning of contractual provisions on a predetermined or mechanical basis. The difficulty can be seen in *DA Constable Syndicate v Auckland District Law Society*, where the Court of Appeal agreed that the contra proferentem rule was applicable to insurance contracts, determined that there was a genuine ambiguity, and applied the rule in favour of Auckland District Law Society instead of considering explicitly any pointers indicating the true meaning of the contract. Again, in *Trustees Executors Ltd v QBE Insurance (International) Ltd* the Court of Appeal emphasised that in interpreting exclusion clauses, including exclusion clauses in insurance contracts, the overall objective was to determine the mutual intention of the parties, yet the Court did not seek to ascertain the meaning of the relevant rule in accordance with *Vector Gas*, but went on instead to consider the contra proferentem rule. In the words of one commentator, there remains an uneasy tension between the broad *Vector Gas* principles and the interpretation of exclusion clauses. This might be nothing more than a manifestation of the law's distaste for a more powerful party taking advantage of a weaker one, but the rule had ended up being far more general and had become an excuse for not carrying out a normal contractual interpretation exercise in situations where some type of liability had been excluded.

Maybe too much can be made of the suggested difficulty. While the question ultimately is one of interpretation, the courts continue to emphasise the need for special care in determining the meaning of excluding or limiting clauses.

[239] Finally, before turning to recent New Zealand case law on contra proferentem, the authors of the text refer to a passage in the judgment of Asher J in *Dorchester Finance Ltd v Deloitte*:77

Given the premise that an exclusion clause will enable a party to escape liability for a breach of a contractual promise, it will be assumed that a party will not have intended to limit liability unless clear and unambiguous language is used. A Court will ordinarily look for clear language or necessary implication before concluding that the right to claim for damages is extinguished. Such an intention will not be lightly attributed. The ultimate objective is to ascertain what the parties intended their words to mean in the particular factual context in which the contract was made.

[240] Since Burrows, Finn and Todd's text was published in January 2016, there have been some further authoritative judgments issued on the topic. In *New Zealand Fire Service Commission v Legg*, the High Court summarised other rules applied in

New Zealand:78

77 *Dorchester Finance Ltd v Deloitte* [2012] NZCA 226 at [33].

78 *New Zealand Fire Servicer Commission v Legg* [2016] NZHC 1492, [2016] 3 NZLR 685 at

[129].

The contra proferentem rule is applied in New Zealand in situations where there is uncertainty amounting to ambiguity. The reasonable expectations of the parties are important in New Zealand when the Court is considering what a reasonable and properly informed third party would consider the parties intended the words of their contract to mean.

[241] Prior to *Legg*, there was a brief consideration of contra proferentem by the

Court of Appeal in *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd*.79

The Court of Appeal considered that the rule remains "part of a court's interpretive toolkit" and that:80

The first [proposition] is that the object of interpretation is to ascertain the parties' presumed intention and give effect to it. That remains true when an exclusion clause is in issue. A purposive or contextual interpretation does not require that the court first identify an ambiguity in the language; there may be cases, as in *Shotover Mining*, in which context and purpose make it clear that the general language of an exclusion clause cannot be taken literally. Any doubt may be resolved against the party benefiting from the exclusion. We note that it was not in issue before us that the contra proferentem rule survives as part of a court's interpretive toolkit.

Very recently, the Court of Appeal's judgment in *Prattley* was upheld by the Supreme Court although it saw "no occasion to resort to the contra proferentem principle".81 In addition to these recent and authoritative statements of the New Zealand courts on the rule generally, I will apply also the passage from Foskett cited previously in relation to compromises of litigation in particular: that is, it is a workable means of resolving justly an ambiguity in a written document.82

Interpretation of cl 9 of the settlement agreement

[242] Whether the plaintiff's claims are to be struck out depends first on the interpretation of the parties settlement agreement and its cl 9 in particular. There are two interpretations that the parties advance. They are, first, that they intended to prohibit each other from bringing proceedings related to their employment relationship irrespective of whether the causes of action were known to one or both

of them at 2 August 2011, the date of the agreement. That they did so intend is Mr

79 *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZCA 67, [2016] 2 NZLR

750.

80 At [62] (footnote omitted).

81 *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZSC 158 at [49].

82 See [228] above.

McKerchar's position. He says that further analysis of their respective knowledges

of contemporaneous circumstances is immaterial in these circumstances.

[243] The second interpretation of cl 9 is that they intended to settle and preclude then known or anticipated causes of action. This is the plaintiff's interpretation and, it says that, because its causes of action were unknown to it on 2 August 2011, its present claims fall

outside cl 9.

[244] Mr McKerchar says that even if this is the correct interpretation of the agreement, the Council's causes of action were sufficiently known to it to fall within cl 9's prohibition.

[245] So, first, do the words of cl 9 of the settlement agreement evidence an intended general release of the parties from any future known or unknown liability in litigation? This primary question is one of construction of cl 9, in particular within the context of the settlement agreement as a whole. What did the parties mean by using the phrase at cl 9:

... in full and final settlement of all matters, rights, and obligations arising from the Employee's position of employment with the Employer, and is in full satisfaction of any actual or potential disputes, ... actions or other issues between the Employee and the Employer arising out of the Employee's position of employment with the Employer, whether out of statute, common law, equity, or otherwise.

[246] The phrases and the clause must be read in the context of the whole of the agreement and of the circumstances in which it was entered into.

[247] Addressing the settlement agreement as a whole, another clause affecting the interpretation of cl 9, is cl 10. In addition to recording an acknowledgement that both parties had had an opportunity to take legal advice in the negotiations of the terms of settlement and its execution, this provided that the parties confirmed these as being "a fair and reasonable settlement of *all matters pertaining to the Employee's employment with the Employer*." (my emphasis) There is no reference in cl 10 to whether those "matters" were restricted to those then known to, or even suspected by, the parties.

[248] The words in cl 9, "any actual or potential", governing the following words, "disputes, ... actions or other issues between [the parties] arising out of the Employee's position of employment with the Employer", are significant in determining this question of whether the agreement covered the claims now brought against Mr McKerchar by the Council. What were "actual" disputes, actions or other issues, and what were "potential" disputes, actions or other issues? The parties distinguished these classes of dispute or action or other issues. What did they intend to constitute each class?

[249] By use of the word "actual" in relation to "disputes, grievances, actions or other issues", I conclude that the parties meant such events as were, and known to be, in existence. There were then no "actions" (in the sense of court proceedings) between the parties. Did the dissatisfactions about Mr McKerchar's performance of his role, with which he disagreed, amount to an "actual ... dispute"? Even if they did not, were the events known at the time of entering into the agreement "actual ... other issues"? Although the meaning of the word "issues" is less clear than that of the words "disputes" and "actions", some indication of what was meant by the parties by the use of the word "issues" can be taken from the meaning of the preceding words in the phrase "disputes, ... actions or other issues".

[250] Assuming that "actual" "disputes, ... actions or other issues" refers to ones in existence and known to the parties at the time of entering into the agreement, what were those same sorts of events that the parties classified as "potential"?

[251] Although the essential exercise is to determine what the parties meant by the words they used, an objective analysis of these is also required. Dictionary definitions assist in clarifying the meaning of the word "potential" in relation to "disputes, grievances, actions or other issues" and in contradistinction to the word "actual". Such definitions are not, however, the determinative element: interpreting the parties' words and phrases illustrating their intentions can only be assisted by dictionaries.

[252] The *Shorter Oxford English Dictionary* ascribes as its meanings: "Possible as opp. to actual; capable of coming into being; latent; ... That which is possible

...".83 Other dictionary definitions include:

• *Collins Concise Dictionary*: "possible but not yet actual; capable of

being or becoming; latent.. expressing possibility...".84

- *Cambridge Dictionary* (online ed): "Possible when the necessary conditions exist".

• *Merriam-Webster* (online ed): "capable of developing into actuality;

expressing possibility"

[253] The final words of cl 9 which are descriptive of those "disputes, grievances, actions or other issues between [the parties]" are said to include those arising "out of statute, common law, equity or otherwise". Those words are not entirely helpful in interpreting the clause, although they do illustrate a focus on legal rights and obligations, and litigation. That is because although the Council's claims against Mr McKerchar are causes of action for breach of contract, (that is, at common law), these descriptions of the basis of a claim could apply potentially to other legal claims brought by each party against the other.

[254] Assuming, for the purpose of this strike-out application, that the Council was not aware of the losses suffered or likely to be suffered by it as a result of alleged breaches of his contract of employment by Mr McKerchar, were these nevertheless covered by the use of the adjective "potential" in cl 9?

[255] Clause 9 contains several phrases relevant to the question at issue in the defendant's strike-out application. The first is that the "Deed" was executed by the parties "... in full and final settlement of all matters, rights, ... arising from the Employee's position of employment with the Employer ...". The Council's

proceedings against Mr McKerchar are either or both "matters" and/or "rights"

83 *Shorter Oxford English Dictionary* (6th ed, Oxford University Press, Oxford, 2007).

84 *Collins Concise Dictionary; 21at century edition* (Collins, Great Britain, 2003).

arising from their employment relationship. That relationship itself created a right in law for the parties to bring proceedings against one another.

[256] Next, cl 9 says that it "... is in full satisfaction of any actual or potential ... actions or other issues between [the parties] arising out of [the parties' employment relationship], whether [such proceedings are based on] statute, common law, equity, or otherwise." So, cl 9 repeats the elements of fullness and finality in relation to claims or proceedings between the parties arising out of their employment relationship and includes a very broad basis of the source in law of any such claim or claims. As already noted, there is no question that the rights and obligations arising under cl 9 are reciprocal.

[257] For completeness, there is no suggestion that either party is not entitled to issue proceedings for breach or non-performance of the deed of settlement, as indeed Mr McKerchar has in relation to the non-publication of information provisions in the agreement. In any event, enforcement is of the settlement agreement and not of an element of the parties' employment agreement or employment relationship.

Fulfilment of general requirements for a lawful compromise?

[258] Aside from the vital question of interpretation in this case of what were intended to be covered by the phrase "potential ... actions" between the parties, I am satisfied that the general requirements establishing a lawful compromise of litigation set out at [197]-[219], exist in this case.

[259] First, there was a "dispute" (as broadly defined now in New Zealand

employment law) between the parties which was able to be compromised lawfully.

[260] Second, by using the adjective "potential" in relation to "actions" that could be brought by either party against the other, it is clear that claims not then made by the Council against Mr McKerchar were, nevertheless, compromised by it. As I have just noted, this decision turns, however, on whether the plaintiff 's claims in the current litigation fall within the category of potential actions settled by the

agreement of 2 August 2011. The defendant's strike-out action will be determined by the interpretation and application of these words to the pleadings and the evidence.

[261] Third, I am satisfied that the other requirements for a lawful compromise of litigation have been met. There was consideration. The agreement was complete and, subject to the interpretation of the words "potential ... actions", certain. Penultimately, the parties intended to create legal relations between themselves by entering into the settlement agreement of 2 August 2011. Fourth and finally, no necessary formalities were required which were not present.

[262] These findings lead, therefore, to the vital interpretation of the words "potential ... actions" set out in cl 9 of the parties' agreement. As noted already in the judgment, these words are susceptible of two meanings, but even if the plaintiff's narrower interpretation is adopted, it will nevertheless be necessary to consider whether the established facts bring the case within that narrower meaning advanced for the Council.

Decision of defendant's application to strike out plaintiff's proceeding

[263] I consider that in these circumstances (both the relevant events leading up to the signing of the deed and the contents of the document as a whole), both parties intended not only to end the employment relationship between them but also to ensure that there would be no subsequent litigation between them arising out of that relationship. Although it is not appropriate to reach any conclusion about this and I do not do so, it may have been arguable in the circumstances of mid-2011 that Mr McKerchar was dismissed constructively by the Council, although the end came about by resignation. It would have no doubt wished to insure against such litigation by concluding a binding agreement such as this.

[264] Further, had Mr McKerchar been dismissed constructively and not been paid for the balance of his fixed-term contract, he may have had a claim to compensation for the equivalent amount, especially in circumstances in which it may have been difficult, if not impossible, to obtain alternative equivalent employment. On the

other hand, Mr McKerchar was, on his own evidence, well aware of elements of dissatisfaction by the Council with his performance over time, even though he had been reappointed sequentially to a number of fixed-term positions as Chief Executive. He was also aware that blame was being attributed to him by some ratepayers and some councillors for the circumstances in which the Council then found itself concerning particularly its Mangawhai water scheme. I conclude that Mr McKerchar wished to ensure that there could be no comeback by the Council against him if he was liable to any extent for losses which the Council may have incurred, even although denying that he may have been so liable.

[265] Finally, as Mr McKerchar said in evidence, there were significant political dimensions to the state in which he and the Council both found themselves at that time. There was other litigation, either actual or impending, involving the Council over the Mangawhai water scheme brought by ratepayers collectively. No doubt Mr McKerchar wanted to distance himself from this and the Council, to minimise his risk as a potential defendant or third party in such litigation.

[266] I am satisfied that the deed of settlement between the parties and, in particular, cls 9 and 10, provides an absolute defence to Mr McKerchar in respect of the Council's claims now brought against him. There has been an accord and satisfaction entered into between the parties, with the benefit of, or at least of having had the opportunity for, legal advice, which precludes the Council from suing Mr McKerchar for alleged breaches by him of his employment agreement. In these circumstances, the plaintiff's claims must be and are struck out and its proceeding dismissed.

[267] Even if I have misinterpreted cl 9, the parties' cases on its interpretation would otherwise be so finely balanced that it is an appropriate case to resolve that dispute by the application of the contra proferentem rule of interpretation. Clause 9 of the settlement agreement having been proposed and prepared by the Council, it is not open to it now to argue for the meaning it contends should be given to cl 9 where there is a cogent, respectable and tenable meaning established by Mr McKerchar.

[268] Although I have reached this conclusion about the interpretation of cl 9 of the settlement agreement as the expression of the mutual intention of the parties, to the extent that there may be ambiguity, I would also resolve this by application of the contra proferentem rule finding against the Council's interpretation of its own document.

[269] From the evidence adduced by the parties I conclude that cl 9 of their settlement agreement was the expression of their intention that there would be a clean ending of their employment relationship including by preventing each from bringing claims arising out of that relationship against the other. Although cl 9 is not worded as fully and tightly as it might have been and as some other cases illustrate it could have been, I am satisfied that cl 9 was not intended to be limited to claims of which either party was aware it could bring against the other. Clause 9 contemplated expressly "potential" claims which I interpret to mean, in addition to "actual" claims which were then available to the parties to bring, claims that they might bring in future. The evidence satisfies me on the balance of probabilities that the Council was aware of, and itself held, serious concerns about the performance by Mr McKerchar of his contractual duties as its Chief Executive when it entered into that settlement agreement on 2 August 2011. Such knowledge was encompassed within the parties' use of the phrase "potential ... actions".

[270] Even if, however, the plaintiff is correct that cl 9 did not preclude proceedings against Mr McKerchar of which the Council was not, or was insufficiently, aware at the time of entering into the compromise, I would find for the defendant on this issue also. On the evidence adduced to the Court, I conclude that the Council was aware sufficiently of "potential" claims against Mr McKerchar as at

2 August 2011 and, therefore, that these claims are caught by cl 9. Again on the evidence adduced to the Court, I am not satisfied that subsequent events (including in particular the receipt by the Council of the Auditor-General's report) only then brought about the existence of "potential" proceedings covered by cl 9. Even, therefore, on the plaintiff's interpretation and application of cl 9, its claims are precluded by the parties' compromise and must be struck out.

[271] The Council's proceeding claiming damages for breach by Mr McKerchar of his employment contractual obligations is subject to cl 9 and must therefore be and is struck out.

[272] A separate strike-out sub-claim arises in respect of penalty claims made by the Council against Mr McKerchar. These claims are for breaches by Mr McKerchar of his individual employment agreement "and good faith" (I presume under s 4A of the Act) and the plaintiff asks that such penalties as may be awarded should be paid entirely to it. These are penal claims rather than compensatory ones.

[273] The event which the plaintiff says made it aware of what it contends were breaches by Mr McKerchar of his employment agreement, was its receipt of the report of the Auditor-General into the MCWS. This report was dated 26 November

2013 and was "released" on 3 December 2013. I take it that "released" means released formally to the Council if not more generally to the public at large. The Council also concedes that a draft of this final report was made available to it on 26

November 2013 before the final report was signed by the Comptroller and Auditor- General.

[274] The plaintiff had the period of one year after the latter of the breaches or becoming aware of them, within which to bring a claim for penalties.85 Even on the best case for the Council, that 12-month limitation period began to run, at the latest, on 3 December 2013, and more probably at an earlier date of the Council becoming aware of the evidence which it says it needed, to make a claim for penalties against Mr McKerchar. The one-year limitation period therefore expired on 3 December

2014 at the latest, 16 days before claims for penalties were brought.

[275] The plaintiff has not asserted that this irregularity could be ameliorated by re- pleading and indeed simply left the Court to make the best that it can from this information. No application to extend this 12-month time limit has been made or

intimated.

85 See Employment Relations Act 2000, s 135(5).

[276] Accordingly, I have concluded that the plaintiff's claims for statutory penalties against Mr McKerchar were brought out of time and must also therefore be struck out. Costs on Mr McKerchar's successful strike-out application are reserved.

Decision of plaintiff's application to strike out defendant's counterclaim

[277] The case for striking out Mr McKerchar's counterclaim against the Council for breach of their agreement which ended his employment, is less complex than his strike-out application.

[278] The August 2011 settlement agreement was not made pursuant to s 149 of the Act, which may have made enforcement of it justiciable in the Authority. The relevant facts are materially identical to those which underpinned the recent judgment of the Court of Appeal in *JP Morgan Chase* and the principles enunciated in that case must be followed in this.

[279] The judgment of the Court of Appeal in the *JP Morgan Chase* case means that proceedings for breach of a contract settling the terms on which an employee's employment ends, and which contract is not subject to the mediator certification procedure under s 149 of the Act, cannot be heard by the specialist employment institutions (the Authority and this Court). These rest, rather, with the courts of ordinary jurisdiction.

[280] Although the plaintiff concedes that Mr McKerchar may rely upon the settlement agreement both in support of his strike-out application and as an affirmative defence to the substantive proceeding, the Court needs, nevertheless, to be sure of this jurisdictionally, if it is to endorse this fundamental conclusion.

[281] It is necessary to examine closely what the Court of Appeal said about the enforceability of such an agreement in *JP Morgan Chase*. The relevant passages of

the Court of Appeal's judgment are as follows:[86]

86 *JP Morgan Chase*, above n 2, at [74], [83].

... Since the settlement agreement cannot be regarded as an "employment agreement" for the purposes of the definition in s 5 of the Act, the Authority did not have jurisdiction to deal with the dispute under s 161(1)(a) or (b) of the Act.

...

... To the extent that case [*Kerr v Associated Aviation Wellington Ltd*]

implies that enactment of s 161(1)(r) meant it was no longer necessary to differentiate between an employment agreement and a settlement agreement

that terminates the former we consider it is wrongly decided.

[282] The focus for the purpose of this case is the reference set out above to the Authority not having jurisdiction to deal with a dispute about an agreement that is not an employment agreement under s 161(1)(b). That subsection gives the Authority exclusive jurisdiction to make determinations about employment relationship problems generally including "matters related to a breach of an employment agreement". Given that the Council's claims against Mr McKerchar are matters related to a breach of an employment agreement (indeed they are not just related to, but are founded on, breach of an employment agreement), can a party rely in such proceedings on an agreement that is not an employment agreement, as a defence to them?

[283] Turning from the categorisation of the settlement agreement or accord and satisfaction in *JP Morgan Chase*, the Court of Appeal considered the interpretation of s 161 and, in particular, subs 1(r); in this case before me, this is the relevant issue.

[284] To consider whether the terms of a settlement agreement may be called upon as an affirmative defence, it is also necessary to understand exactly what the Court of appeal stated in JP Morgan. Again quoting the relevant conclusions of the Court of Appeal, it held:

[92] ... we do not consider the matter before the Authority was one that either arose from or was related to the employment relationship. In essence it was a claim under the settlement agreement, and concerned the alleged breach of post-employment obligations. Of course the claim would not have arisen but for the fact that Mr Lewis was once the Bank's employee, but the claim is founded on the settlement agreement. That is necessarily so, not only because the settlement agreement now constitutes the entire agreement between the parties, but also because other claims, "arising out of or in connection with the subject matter" were specifically barred by clause 16 of the settlement agreement.

...

[107] ... Since the settlement agreement was not an employment agreement

and a claim based on it is not able to be brought within the ambit of s

161(1)(r), Mr Lewis' claim was not within the Authority's jurisdiction at all.

That is the position regardless of any obstacles arising under ss 149 and 151.

(footnotes omitted).

[285] It is clear from the judgment of the Court of Appeal that a breach of a settlement agreement such as between the parties in this case cannot found a cause of action in the specialist employment institutions. However, I do not understand the Court of Appeal to have gone so far as to say that such an agreement cannot be used as a defence to a proceeding which is within jurisdiction, that is invoked as a shield as opposed to a sword. To extend the Court's judgment and reasoning to prohibit Mr McKerchar from invoking the

settlement agreement would produce the absurd and unjust position that he would be unable effectively to advance a positive defence to the Council's claims against him, whether in the proceedings brought by the Council validly before the Employment Court or indeed somehow in other proceedings before the ordinary courts.

[286] The Council cannot launch its claim for damages for breach of the parties' employment agreement in any other forum: the Authority and now this Court have exclusive jurisdiction in this regard. Mr McKerchar himself could not bring a proceeding in the ordinary courts which would amount to an affirmative defence in the proceedings brought against him by the Council in this Court. The Court of Appeal's judgment in *JP Morgan Chase* is therefore authority only for the proposition that damages proceedings for breach cannot be brought by a plaintiff in reliance on the settlement agreement in the specialist institutions. However, the settlement agreement can be used to defend those proceedings that are within the jurisdiction including, logically, in support of this strike-out application. As I have already noted, the Council has conceded as much.

[287] The plaintiff accepts that the judgment of the Court of Appeal in *JP Morgan Chase* does not preclude Mr McKerchar from asserting that the parties' accord and settlement can either be an affirmative defence to the substantive proceedings or the basis of his strike-out application.

Summary of judgment

[288] For the foregoing reasons: the plaintiff's claims for penalties for breaches of Mr McKerchar's employment agreement are struck out for limitation reasons; the plaintiffs proceedings for damages for breaches of the defendant's employment agreement are struck out as being in breach of the parties' contract not to sue each other; and the defendant's counterclaims against the plaintiff are struck out for want of jurisdiction.

[289] Costs are reserved with the parties encouraged to settle these between them but with leave being reserved to apply by memorandum for the Court to fix these if application is made within 30 days of this judgment, following which a respondent may have 14 days within which to reply by memorandum.

GL Colgan

Chief Judge

Judgment signed at 4.30 on 12 May 2017
