NOTE: HIGH COURT ORDER PROHIBITING PUBLICATION OF NAME, ADDRESS OR IDENTIFYING PARTICULARS OF RESPONDENT AND CO-DEFENDANT PURSUANT TO S 200 CRIMINAL PROCEDURE ACT 2011 REMAINS IN FORCE UNTIL SENTENCING. SEE HTTP://WWW.LEGISLATION.GOVT.NZ/ACT/PUBLIC/2011/0081/LATEST/DLM3360346.HTML

IN THE COURT OF APPEAL OF NEW ZEALAND

I TE KŌTI PĪRA O AOTEAROA

CA238/2023
[2025] NZCA 153

BETWEEN	SPARK NEW ZEALAND TRADING LIMITED Appellant
AND	B (CA238/2023) Respondent

Hearing:	21 November 2024
Court:	French P, Collins and Hinton JJ
Counsel:	Z G Kennedy KC and Y Lee for Appellant T J Rainey for Respondent
Judgment:	8 May 2025 at 11.30 am

JUDGMENT OF THE COURT

A **The appellant's application for leave to adduce evidence of the respondent's convictions is granted.**

B **The respondent's application for leave to raise a new arguable limitation defence is granted.**

C **The appeal against the decision of the High Court declining the appellant's application for summary judgment is allowed in part.**

D **Judgment is entered for the appellant against the respondent in the sum of $645,650 together with interest thereon, under s 10 of the Interest on Money Claims Act 2016, until payment is made.**

E **The remainder of the appellant's claim against the respondent is to be determined by the High Court at trial.**

F **Costs in the High Court on the summary judgment application are to be reconsidered in light of this judgment.**

G **The respondent must pay costs on the appeal to the appellant calculated as for a standard appeal on a band A basis, less 10 per cent, together with disbursements.**

H **Costs in relation to the interlocutory applications relating to a new appeal ground and a new defence are to lie where they fall.**

REASONS OF THE COURT

(Given by French P)

Introduction

[1] A company owned and controlled by Mr B (CA238/2023) made secret payments of over $3.5 million to a contractor working for Spark New Zealand Trading Ltd (Spark). In return for the payments, the contractor took steps to secure for the company an ongoing stream of work at inflated prices from Spark.

[2] Spark initiated arbitration proceedings against the dishonest contractor and Mr B's company. Spark was successful and obtained an arbitral award of damages against both.[1] The award was entered as a judgment of the High Court and sealed.

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[1] In an award dated 4 August 2021 [the award].

[3] Spark then issued High Court proceedings against Mr B in his personal capacity and sought summary judgment. The claim against Mr B was based on the same causes of action that had been upheld against his company in the arbitration, and for the same amount of money. Spark contended it was entitled to summary judgment because although Mr B had not himself been a party to the arbitration, he was a privy of his company and accordingly bound by the arbitrator's findings.

[4] Associate Judge Taylor declined to grant summary judgment and directed the claim go to trial.[2] Spark then obtained leave to appeal to this Court.[3]

[5] When the appeal was filed, the key issue was whether Mr B had an arguable defence he was not the privy of his company and therefore not bound by the findings of the arbitral award. However, after the appeal was filed, there were two developments which raised additional issues.

[6] First, on 6 September 2024 Mr B pleaded guilty to, and was convicted of, two criminal offences under the Secret Commissions Act 1910 relating to the bribes that lie at the heart of this civil proceeding.[4] This development prompted Spark to seek leave to adduce evidence of the convictions and amend its appeal grounds so as to include an argument relying on s 47 of the Evidence Act 2006. Section 47(1) provides that when the fact a person has committed an offence is relevant to an issue in a civil proceeding, proof of the conviction is conclusive proof in the civil proceeding that the person committed the offence.

[7] The second development was that Mr B sought leave to raise a new arguable defence, namely that some parts of Spark's claim against him were time-barred under the Limitation Act 2010. This argument (which relates to all payments that pre-date 11 January 2016) had not been raised at the High Court hearing

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2 *Spark New Zealand Trading Ltd v B* [2022] NZHC 2397 [judgment under appeal] at [67].

3 *Spark New Zealand Trading Ltd v B* [2023] NZCA 464 at [13]. Leave to appeal had been declined by the High Court: *Spark New Zealand Trading Ltd v B* [2023] NZHC 759 at [33].

4 In the criminal proceedings against Mr B, the High Court granted him suppression under s 200(2)(a) of the Criminal Procedure Act 2011. Mr L who was a co-defendant in the same criminal proceeding was granted name suppression under s 200(2)(f) of that Act. On 30 October 2024, Mr L pleaded guilty to charges under the Secret Commissions Act 1910. The suppression orders were expressed to continue until sentencing.

of the summary judgment application. It had, however, been pleaded in an amended statement of defence filed by Mr B on 12 June 2023, nine months after the High Court issued its judgment declining summary judgment.

[8] Both parties opposed leave being granted to the other to raise these new matters.

[9] We consider that in the circumstances of this particular case it is desirable for us to address both of the new potentially significant issues rather than remit either or both back to the High Court and so cause further delay. Neither party is unfairly prejudiced by our taking that approach. The matters are capable of being determined by reference to uncontested documents and this Court is in as good a position as the High Court to determine them.

[10] We therefore grant Spark leave to adduce the further evidence of the convictions and to amend its grounds of appeal and also grant Mr B leave to advance a time limitation defence.[5]

Background

[11] Mr B's company was called V (V). He was the sole shareholder and director.

[12] In 2012 Spark embarked on a three-year major upgrade to its customer services IT platform. In August 2013, Spark contracted with a Mr L and his closely held consulting company, S (S), to provide testing services for the purposes of the upgrade. Mr L was given ultimate responsibility for managing all testing services required by Spark, and he also had an active role in the retention of third-party providers.

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[5] Although Mr B did not file his r 33 memorandum within 10 working days of Spark's notice of appeal, he had already raised the issue before the notice of appeal was filed, including in his submissions in opposition to the application for leave to appeal, as well as in the amended statement of defence. For those reasons we therefore consider it is appropriate to grant Mr B an extension of time for the filing of his memorandum setting out this other ground on which to support the judgment appealed against: Court of Appeal (Civil) Rules 2005, rr 33(2) and 5(2).

[13] Spark was encouraged by Mr L to retain V as a testing service provider, notwithstanding that its rates were significantly higher than its competitors. Mr L justified the premium rates to Spark on the grounds that V's testing services were superior. He strongly recommended V.

[14] On 20 November 2013 Spark entered into what was described as a "letter agreement" with V. Then followed a succession of agreements for the provision of services by V to Spark.

[15] Between June 2014 and May 2017, V made a total of 32 separate payments of varying amounts to S, and Mr L personally. The total amount paid (GST excluded) was $3,578,365. We pause here to note that the figures used throughout the remainder of this judgment should be read as GST exclusive unless indicated otherwise.

[16] An appendix setting out the payments V made to S and Mr L is attached.

[17] In May 2017, Spark discovered irregularities in Mr L's performance of his responsibilities.[6] This led to a wider investigation that resulted in Spark terminating its contract with him and S. After making further inquiries and becoming aware of some of the payments made by V to S, Spark also terminated its contract with V.

[18] Subsequently, on 23 February 2018, Spark initiated arbitration proceedings against V, Mr L and S.[7] We were told the reason Spark went to arbitration was because of an arbitration clause in its contracts.

[19] In its arbitral claim against V, Spark raised several causes of action including, most relevantly to this proceeding, a cause of action in tort for conspiracy to injure by unlawful means and a claim in equity for dishonest assistance.

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6 The irregularities related to Mr L's approval of a purchase order for S.

7 The causes of action alleged against Mr L and S were breach of fiduciary duty, and breach of contract. The allegation against Mr L, S and V was of conspiracy to injure by unlawful means. And, against V, there were additional allegations of dishonest assistance, inducement of breach of contract, and breach of contract.

[20] The elements of the tort action which Spark was required to prove were:[8]

(a) The defendants were parties to a common design.

(b) The common design agreed upon was to be or was carried out by unlawful means.

(c) The defendants knew of the facts which would make the action unlawful.

(d) The defendants intended by carrying out the common design to injure the plaintiff.

(e) The defendants took steps in furtherance of the common design.

(f) The plaintiff suffered loss as a result.

[21] In relation to the claim for dishonest assistance, the necessary elements were the existence of a trust or fiduciary duty, a breach of that trust or duty that resulted in loss, participation by a defendant third party by assisting in the breach, and dishonesty on the part of the defendant.[9]

[22] By the time of the arbitration hearing in May 2021, Spark had become aware of all of the payments made by V to S. V was by then in liquidation, having been put into liquidation by Mr B on 25 August 2019.

[23] On 4 August 2021, the arbitrator issued an award in favour of Spark. Relevantly for present purposes, Spark's claims against Mr L, S and V for conspiracy to injure by unlawful means were upheld. So too was a claim against

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8 *ABC Developmental Learning Centres (NZ) Ltd v Artemis Early Learning Ltd* HC Christchurch CIV-2010-409-1198, 25 June 2010 at [53].

9 *McKay v Sandman* [2018] NZCA 103, [2018] NZAR 707 at [22]. See also *Scott v ANZ Bank New Zealand Ltd* [2020] NZHC 906, [2020] 3 NZLR 145 at [24]; and *Wellington Tenths Trust v Skiffington* [2018] NZHC 1261 at [44].

V for dishonestly assisting breaches of the fiduciary duties owed to Spark by S and Mr L.[10]

[24] The arbitrator's award involved the following findings:

(a) Mr L and S owed fiduciary duties to Spark.[11]

(b) Over the course of three years unauthorised payments totalling some $3,578,365 were made by V to S.[12]

(c) These payments reflected an agreement under which Mr L, in breach of his fiduciary duty to Spark, received secret commissions for delivering an ongoing stream of work from Spark to V at inflated prices.[13]

(d) Mr B and Mr L came to a profit-sharing arrangement pursuant to which a significant share of V's profits went back to Mr L via S.[14]

(e) V acted dishonestly in that its sole director Mr B had knowingly participated in the unlawful scheme.[15]

(f) Mr L's involvement in the procurement process led to the payment by Spark of excessive rates for testing contractors and to Spark incurring losses of no less than the payments made by V to S.[16] Those payments represented approximately 50 per cent of the profits V derived from its work on the project.[17]

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10 The arbitrator dismissed Spark's claims against V for breach of contract and inducement of breach of contract: the award, above n 1, at [112]–[114].
11 At [62]–[67].
12 At [36]–[38].
13 At [51] and [68].
14 At [51].
15 At [102].
16 The arbitrator noted that such losses are assumed in proceedings against the payer of a bribe: the award, above n 1, at [72], citing *Daraydan Holdings Ltd v Solland International Ltd* [2004] EWHC 662 (Ch), [2005] Ch 119 at [53].
17 The award, above n 1, at [102].

[25] The arbitrator ordered V to pay Spark the amount of $2,498,015. That figure represented the payments of $3,578,365 to S and Mr L, less the sum of $1,080,350 awarded on a counter-claim brought by V against Spark for unpaid invoices.[18] V was also ordered to pay interest on the sum of $2,498,015 under s 10 of the Interest on Money Claims Act 2016 from the date that the payments were made to S and Mr L.[19]

[26] As mentioned, the arbitral award was entered as a judgment in the High Court. It was sealed on 19 November 2021 (the sealed judgment).[20]

[27] Spark filed the current proceedings against Mr B personally on 20 December 2021, and applied for summary judgment. The claim against Mr B involves the same two causes of action that were upheld against V in the arbitration. The amount sought in the summary judgment application is $3,219,035.27. That figure is calculated by reference to the amount the arbitrator held to be owing by V, namely $3,578,365, less $1,080,350 awarded on V's counter-claim, plus interest accrued to 30 November 2021, as well as costs. Interest after that date, until payment is made, is also claimed, as are the costs of the High Court proceeding.

[28] Spark contended it was entitled to summary judgment because, as a result of being the company's privy, Mr B was estopped from denying the causes of action upheld in the arbitral awards and estopped from denying the questions of law and fact that required determination for the arbitrator to uphold the pleaded causes of action.

[29] As mentioned, the Judge declined to grant summary judgment, holding that Spark had failed to persuade him that Mr B was without an arguable defence.[21] In particular, the Judge considered it was arguable that Mr B was not the privy of V for the purposes of the arbitral award and he also considered it arguable that

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18 At [125]–[127].
19 At [112]–[113].
20 Pursuant to r 26.20 of the High Court Rules 2016.
21 Judgment under appeal, above n 2, at [65]–[66].

not all of the elements of the two causes of action against Mr B had been finally determined by the arbitral award.[22]

[30] For the reasons we now go on to discuss, we have reached the following conclusions:

(a) The High Court erred in finding it was arguable Mr B was not the privy of V and bound by the arbitral award.

(b) Mr B's convictions are conclusive proof of the facts underlying the convictions by virtue of s 47 of the Evidence Act.

(c) Spark is entitled to summary judgment against Mr B on the basis of res judicata and the effect of s 47 of the Evidence Act.

(d) Mr B has an arguable defence that Spark's claim in relation to the payments that pre-date 11 January 2015 is time-barred.

Is Mr B bound by the arbitral award? *The relevant principles*

[31] We begin the analysis with an explanation of the relevant legal principles.

[32] At play is what is called the doctrine of res judicata. It is one of the exceptions to the general rule in s 50 of the Evidence Act that evidence of a judgment or finding of fact in a civil proceeding is not admissible in another civil proceeding to prove the existence of a fact that was in issue in the proceeding in which the judgment was given.[23]

[33] The essence of the doctrine is that where a final judicial decision has been pronounced by a New Zealand judicial tribunal of competent jurisdiction, any party or privy to the litigation is estopped from disputing or questioning the decision on the

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22 At [48] and [55].
23 Evidence Act 2006, s 50(2)(b).

merits in another proceeding as against that party.[24] The underlying policy reasons for the doctrine are the significant public and private interest in the finality of litigation.[25]

[34] The doctrine may be invoked to prevent a party or its privy from re-litigating an issue or a cause of action determined against it, or its privy, in the previous proceeding.[26]

[35] In this case, Spark relies on both cause of action estoppel and issue estoppel. In relation to cause of action estoppel, it says the causes of action in the current proceeding and in the arbitration are the same. It relies on issue estoppel on the basis that the key issues in the current proceeding are identical to the issues already determined in the arbitration and on which the arbitral award against V was founded. As a consequence, Spark says it is entitled to rely upon the findings of the arbitrator without Mr B being able to dispute and re-litigate them again.

[36] The core prerequisites of both cause of action and issue estoppel are:[27]

(a) a final judicial decision;

(b) identity of subject matter or issue with the earlier proceeding; and

(c) identity of parties or their privies.

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24 *Shiels v Blakeley* [1986] 2 NZLR 262 (CA) at 266.

25 *Lockyer v Ferryman* (1877) 2 App Cas 519 (HL) at 530 per Lord Blackburn; and *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1 (HL) at 31 per Lord Bingham. See also *Deliu v New Zealand Lawyers and Conveyancers Disciplinary Tribunal* [2023] NZHC 160 at [36]; and *Lau v Hollis & Scholefield Ltd* [2022] NZHC 3223 at [40].

26 *Thoday v Thoday* [1964] P 181 (CA) at 197–198 per Diplock LJ; and *Fidelitas Shipping Co Ltd v V/O Exportchleb* [1966] 1 QB 630 (CA) at 639–640 per Lord Denning MR.

27 *Shiels v Blakeley*, above n 24, at 266. *Shiels v Blakeley* is routinely cited as the leading authority on issue and cause of action estoppel in New Zealand. See for example *BDM Grange Ltd v Trimex (New Zealand) Ltd* [2017] NZHC 1259 at [18]; *White v Lynch* [2015] NZHC 1020 at [44]; *Krzanic v Sullivan* [2014] NZHC 1375 at [6]; *Attorney-General v Body Corporate 68792* [2007] 2 NZLR 671 (HC) at [95]; *PF Sugrue Ltd v Attorney-General* [2004] 1 NZLR 207 (HC) at [152]; and *X v Y* [1996] 2 NZLR 196 (HC) at 201.

Was Mr B a privy of V?

[37] In this case, it is common ground that an arbitral award is capable of qualifying as a final judicial decision for the purposes of the doctrine.[28] It is also common ground that there having been no appeal against the arbitral award between Spark and V it is a final judicial decision. What is primarily disputed is whether Mr B had sufficient privity of interest with V to be regarded as its privy for the purpose of any estoppel arising from the arbitral award.

[38] As Mr Rainey emphasised on behalf of Mr B, V was a separate legal entity from its shareholder and, of itself, the mere fact a person is a 100 per cent shareholder of a limited liability company does not make them the company's privy.[29]

[39] We agree. There is a need for particular caution in the company context.[30] We also acknowledge that in Australia the general position appears to be that a director and shareholder of a company is not the company's privy for the purposes of res judicata.[31] That appears to include (albeit more controversially) where the company is a one person company.[32] However, that is not the approach that has been taken in New Zealand and England where several decisions on their particular facts have found privity between a company and a controlling shareholder/director.[33]

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28 *Laughland v Stevenson* [1995] 2 NZLR 474 (HC) at 477, citing *Fidelitas Shipping Co Ltd v V/O Exportchleb*, above n 26, at 643 per Diplock LJ; *Greymouth Petroleum Holdings Ltd v Empresa Nacional Del Petróleo* [2017] NZCA 490, [2017] NZAR 1617 at [49]; *DML Resources Ltd (in liq) v Coeur Gold New Zealand Ltd* HC Auckland CP560/98, 27 July 1999 at [23]; and *Opotiki Packaging & Coolstorage Ltd v Opotiki Fruitgrowers Co-operative Ltd (in rec)* [2003] 1 NZLR 205 (HC) at [24]. See also *Associated Electric and Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] UKPC 11, [2003] 1 WLR 1041 at [14]–[15].

29 *MAD Atelier International BV v Manès* [2020] EWHC 1014 (Comm), [2020] QB 971 at [67]; and *Standard Chartered Bank (Hong Kong) Ltd v Independent Power Tanzania Ltd* [2015] EWHC 1640 (Comm), [2016] 1 All ER (Comm) 233 at [145].

30 *PJSC National Bank Trust v Mints* [2022] EWHC 871 (Comm), [2022] 1 WLR 3099 at [33(iii)]; and *Suppipat v Narongdej* [2023] EWHC 1988 (Comm) at [1071].

31 *Effem Foods Pty Ltd v Trawl Industries of Australia Pty Ltd (in liq)* (1993) 43 FCR 510 (FCAFC) at 542 per Burchett J. This general proposition was also endorsed in *Tomlinson v Ramsey Food Processing Pty Ltd* [2015] HCA 28, (2015) 256 CLR 507 at [35].

32 *Champerslife Pty Ltd v Manojlovski* [2010] NSWCA 33, (2010) 75 NSWLR 245 at [68]–[69] per Giles JA. But the position invites some controversy because Handley AJA took a different view in that case: at [131]. See, however, the dicta in *Ekes v Commonwealth Bank of Australia* [2014] NSWCA 336, (2014) 313 ALR 665 at [126]–[127] per Bathurst CJ.

33 See for example *Secretary of State for Business, Innovation & Skills v Potiwal* [2012] EWHC 3723 (Ch) at [17]; and *Victoria Street Apartments Ltd (in liq) v Sharma* HC Auckland CIV-2009-404-8377, 21 September 2011 at [41].

[40] The different approach in Australia appears to stem from the adoption of a more stringent test as to when privity of interest can arise generally. In the Australian decisions, privity of interest has been held only to arise where someone claims through or under the person of whom they are said to be a privy.[34] This contrasts with the more liberal English approach followed in New Zealand that there need only be a sufficient degree of identification as to make it just to hold a person to a decision.[35] As explained in *Shiels v Blakeley*, there must be:[36]

> … such a union or nexus, such a community or mutuality of interest, such an identity between a party to the first proceeding and the person claimed to be estopped in the subsequent proceeding, that to estop the latter will produce a fair and just result having regard to the purposes of the doctrine of estoppel and its effect on the party estopped.

[41] To similar effect is the statement of the English Court of Appeal in *Resolution Chemicals Ltd v H Lundbeck A/S* that:[37]

> … a court which has the task of assessing whether there is privity of interest between a new party and a party to previous proceedings needs to examine (a) the extent to which the new party had an interest in the subject matter of the previous action; (b) the extent to which the new party can be said to be, in reality, the party to the original proceedings by reason of his relationship with that party, and (c) against this background to ask whether it is just that the new party should be bound by the outcome of the previous litigation.

[42] We are not aware of any reason of principle or policy that would justify our departing from the established New Zealand and English position. Certainly, we are not aware of any problems occasioned by the test postulated in *Shiels* and, provided the necessary degree of caution in cases involving companies is observed, we see no reason why it cannot apply in that context.

[43] Applying the *Shiels* dicta to the circumstances of this case, we consider it unarguable that in the particular circumstances of this case the test for privity of interest is satisfied. We say that for the following reasons.

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34 *Ramsay v Pigram* [1968] HCA 34, (1968) 118 CLR 271 at 279; *Tomlinson v Ramsey Food Processing Pty Ltd*, above n 31, at [17]; and *Timbercorp Finance Pty Ltd (in liq) v Collins* [2016] HCA 44, (2016) 259 CLR 212 at [36].

35 For England: *Gleeson v Whipple & Co Ltd* [1977] 1 WLR 510 (CA) at 515. And, for New Zealand: *Shiels v Blakeley*, above n 24, at 268.

36 *Shiels v Blakeley*, above n 24, at 268.

37 *Resolution Chemicals Ltd v H Lundbeck A/S* [2013] EWCA Civ 924, [2014] RPC 5 at [32]. See also *McGougan v DePuy International Ltd* [2018] NZCA 91, [2018] 2 NZLR 916 at [76].

[44] As noted by Mr Kennedy for Spark, Mr B established V specifically for the Spark project. Spark was V's sole client and Mr B the direct beneficiary of V's dishonest conduct. He had complete control of V and at all material times its relevant decisions and actions were undertaken by him. V could not and did not act other than through him and his knowledge, state of mind and intentions were attributed to it at the arbitration. He was very much its alter ego.

[45] Further, Mr B actively participated in the arbitration hearing. He was the only person through whom V could act in disputing Spark's claim. He was the only person who could explain the payments. He gave extensive evidence at the arbitration hearing, attended throughout, and personally funded V's legal costs (with V being in liquidation at that time). His evidence included a number of explanations for the payments which the arbitrator rejected as being "a complete fabrication".[38]

[46] As to the interests of justice and fairness, we consider these strongly favour Spark. It would, in our view, be unjust, even in the circumstances that existed before the convictions, for Mr B to be able to distance himself from V and require Spark to incur the cost of re-litigation. The convictions reinforce that conclusion.

[47] It follows we consider the Judge erred in finding it was arguable that Mr B was not a privy of V thereby precluding the operation of res judicata in the summary judgment context.

[48] Turning then to the third pre-requisite for res judicata.

Was there identity of subject matter or issue?

[49] As indicated above, it is well established that in order for there to be an estoppel, the causes of action or the issues must be identical as between the final judgment and the current proceeding.

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[38] The award, above n 1, at [45].

[50] In this case, the Judge accepted a submission made on behalf of Mr B that the causes of action against him in this proceeding are arguably different from those determined in the arbitration.[39] That was said to be so because the arbitration did not address whether Mr B was personally involved in all the elements of the cause of action.[40] In particular, the liability found by the arbitrator in respect of both causes of action was founded on V being the payer.[41]

[51] The submission endorsed by the Judge also included the associated point that in respect of both causes of action, the arbitrator had found that Spark had not proven any loss other than the presumed loss arising from the payments made by V.[42] In relation to the unlawful means conspiracy claim, V was found liable due to the common law principle that when a bribe has been paid the claimant may recover the amount of the payment from the payer as well as from the payee on the basis of money had and received. Mr B not having made any of the payments could not therefore be held liable on that basis.[43] Similarly, in relation to the equitable claim for dishonest assistance, V was found liable on the basis that loss was assumed against the payer of the bribe.[44]

[52] This does not strike us as a very attractive argument given the reality that it was nothing else but Mr B's conduct, including the making of the payments, that rendered V liable in the arbitration and given that it is exactly that same conduct that is being alleged against him in the current proceeding. We note too that as will be apparent from our discussion of the elements of both causes of action at [20] and [21], it is not accurate to say the identity of the payer is an element of either. Nor is it accurate to say the arbitrator found Spark had failed to prove any loss and sole reliance was placed on the presumed loss. As mentioned at [24], what the arbitrator found was that Spark had suffered losses equivalent to the amount of the secret payments because those payments reflected the excessive rates it was charged by V.

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39 Judgment under appeal, above n 2, at [49]–[55].
40 At [55(a)].
41 At [56].
42 At [56]–[58].
43 At [56(a)].
44 At [56(b)].

[53] In any event, even if cause of action estoppel does not arise, there is in our view unquestionable identity of issues. The underlying issues of fact and law that required determination by the arbitrator in order to establish the two causes of action against V are the same as are required against Mr B. In order to render V liable, the arbitrator had to make findings about the purpose of the payments, the inflated rates, Mr L's conduct, Mr B's conduct, Mr B's participation in the conspiracy, his knowledge and his dishonest intentions. In relation to those issues, Mr B is undeniably estopped from now disputing or questioning the findings listed above at [24]. The combined effect of those findings renders him liable to summary judgment.

[54] Further, and again, in any event, any technical arguments relying on the formal identity of the payer are no longer available to Mr B because of his criminal convictions. We now turn to those.

Section 47 of the Evidence Act

[55] The two charges to which Mr B pleaded guilty both concerned the offence of giving a gift to an agent under s 3(1) of the Secret Commissions Act.

[56] Section 3(1) provides that:

> Every person is guilty of an offence who corruptly gives, or agrees or offers to give, to any agent any gift or other consideration as an inducement or reward for doing or forbearing to do, or for having done or forborne to do, any act in relation to the principal's affairs or business (whether such act is within the scope of the agent's authority or the course of his employment as agent or not), or for showing or having shown favour or disfavour to any person in relation to the principal's affairs or business.

[57] Both charges to which he pleaded guilty were representative charges. Charge one was that Mr B:

> … between 5 June 2014 and 6 November 2015 … corruptly gave to an agent any gift or other consideration as a reward for doing, or having done, any act in relation to the principal's affairs or business, or for showing or having shown favour to any person in relation to the principal's affairs or business.

[58] The particulars of that charge set out in the Crown Charge Notice were to the following effect:

> Payment of $2,049,720.00 … made to L (agent), consultant to Spark … (principal), from V … in relation to Mr L's acts in promoting V's interests, and/or showing favour, in respect of contracting between Spark and V.

[59] Charge two was to similar effect except that it related to payments made during the period between 8 December 2015 and 3 May 2017. For that reason, charge two also concerned a different amount, namely $2,065,400.

[60] The payments alleged were detailed in an appendix annexed to the summary of facts to which Mr B pleaded guilty. This appendix is largely the same as the appendix that is relied on by Spark in the civil proceedings against Mr B.

[61] The summary of facts states:

> Mr B made these payments in return for Mr L's acts in promoting V's interests, and/or showing favour, in respect of contracting between Spark and V. Mr L accepted the payments on the same basis. Neither Mr L not Mr B disclosed their relationship or these payments to Spark.

[62] As mentioned, the effect of s 47 of the Evidence Act is that in civil proceedings proof that a person has been convicted of an offence is conclusive proof that the person committed the offence.

[63] As proof of Mr B's convictions Spark has provided us with a certified copy of them. In the absence of exceptional circumstances, that amounts to conclusive proof of the facts constituting the elements of the offence. In particular, it is proof that:

(a) Mr B made the payments to Mr L.

(b) He did so knowing they were unauthorised by Spark.

(c) He knew the payments were in return for Mr L's acts in promoting V's interest and for obtaining favours for V in respect of contracting between V and Spark.

(c) He made the payments corruptly.

[64] As Mr B's counsel put it, Mr B does have to accept as a matter of fact that the undisclosed payments were made by him using the vehicle of his company and that those payments were made in order for V to obtain a lucrative work stream from Spark.

[65] Section 47(2) provides that in exceptional circumstances the judge may permit evidence to be called to prove the convicted person did not in fact commit the offence. However, having regard to the guilty plea and the available evidence, we are satisfied that in this case there is no arguable basis for thinking the convictions may have been wrongly entered and no reason why it would be unfair to treat the convictions as conclusive. Mr Rainey did not suggest otherwise.

[66] For completeness, we record that Mr L was also prosecuted and also pleaded guilty to offences under the Secret Commissions Act.

The time limitation defence

[67] For the purposes of the Limitation Act, Spark's claims against Mr B are money claims.[45] The primary limitation period for such claims is six years from the date of the act or omission on which the claim is based.[46] The six-year period is, however, subject to both a late knowledge extension period and a 15 year longstop period.[47]

[68] A late knowledge extension applies where a claimant is able to prove that, at the commencement date of the claim's primary period, they did not have knowledge, nor ought reasonably to have known, of certain facts relating to the claim.[48] Once they

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45 Limitation Act 2010, s 12(1).
46 Section 11(1).
47 Section 11(3).
48 Sections 11(3)(a) and 14(2).

acquire the necessary knowledge or ought to have acquired it (the late knowledge date), the claimant must then file the proceeding within three years, otherwise the claim is time-barred.[49] In the event they continue in blameless ignorance of the relevant facts for nine years after the expiry of the primary period, the 15 year longstop provision will kick in, and any claim filed thereafter will be out of time.[50]

[69] It follows that, for claims filed outside the six-year primary period, it is crucial to determine the late knowledge date. That date is defined in the Limitation Act in the following terms:

> **14 Late knowledge date (when claimant has late knowledge) defined**
>
> (1) A claim's **late knowledge date** is the date (after the close of the start date of the claim's primary period) on which the claimant gained knowledge (or, if earlier, the date on which the claimant ought reasonably to have gained knowledge) of all of the following facts:
>
> (a) the fact that the act or omission on which the claim is based had occurred:
>
> (b) the fact that the act or omission on which the claim is based was attributable (wholly or in part) to, or involved, the defendant:
>
> (c) if the defendant's liability or alleged liability is dependent on the claimant suffering damage or loss, the fact that the claimant had suffered damage or loss:
>
> (d) if the defendant's liability or alleged liability is dependent on the claimant not having consented to the act or omission on which the claim is based, the fact that the claimant did not consent to that act or omission:
>
> (e) if the defendant's liability or alleged liability is dependent on the act or omission on which the claim is based having been induced by fraud or, as the case may be, by a mistaken belief, the fact that the act or omission on which the claim is based is one that was induced by fraud or, as the case may be, by a mistaken belief.

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49 Section 11(3)(a).
50 Section 11(3)(b).

> (2) A claimant does not have late knowledge of a claim unless the claimant proves that, at the close of the start date of the claim's primary period, the claimant neither knew, nor ought reasonably to have known, all of the facts specified in subsection (1)(a) to (e).
>
> (3) The fact that a claimant did not know (or had not gained knowledge), nor ought reasonably to have known (or to have gained knowledge), of a particular fact may be attributable to causes that are or include fraud or a mistake of fact or law (other than a mistake of law as to the effect of this Act).

[70] As to when a claimant ought reasonably to have gained knowledge of all the facts specified in s 14(1), this Court held in *Rea and Rea as Trustees of the Waiatarua Trust v Auckland Council* that a claimant will have constructive knowledge of the requisite facts if they have "information that would lead a reasonable person to begin investigating whether a right to claim exists".[51] They cannot close their eyes to the obvious. They cannot postpone taking action if a reasonable person in their circumstances would have taken action.

[71] Applying the above law to Spark's claim against Mr B, the parties agreed that the act or omission on which the claim is based is the making of the dishonest payments.

[72] The statement of claim was filed on 20 December 2021. It follows that claims in respect of payments made before 20 December 2015 are outside the primary six-year limitation period. In turn, that means, in relation to the payments made on, and between, 5 June 2014 and 8 December 2015 (totalling some $1,852,365), Spark needs to rely on late knowledge.

[73] It was common ground that, in the circumstances of this case, the late knowledge date will be the date when Spark knew or ought reasonably to have known the payments were made as a secret commission and not in return for genuine services. What is not agreed is when that knowledge was acquired, or ought to have been acquired.

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[51] *Rea and Rea as Trustees of the Waiatarua Trust v Auckland Council* [2024] NZCA 313, [2024] 3 NZLR 242 at [67].

[74] Mr Rainey says the correct late knowledge date is May 2017. According to the evidence given at the arbitration, that was the month a routine Spark audit disclosed that Mr L had approved a purchase order of over $600,000 for the benefit of his own company, S. That was said to have raised a red flag and resulted in further investigations into Mr L's dealings. In the course of these investigations, it was discovered that during the period 31 August 2013 to 30 April 2017 Mr L and S had duplicated invoices to Spark as a result of which Spark had overpaid them by a total of $116,955 (including GST). On 29 May 2017, Spark terminated its contract with Mr L and S.

[75] Sometime after the termination of its contract with Mr L and S, Spark discovered that Mr L and S had received four payments from V between August 2015 and May 2016. These payments totalled $223,520. By solicitor's letter dated 18 July 2017, Spark then terminated its contract with V and withheld payment of some $1,080,350 in unpaid invoices.

[76] Mr Rainey says that if developments in 2017 prompted Spark to take those steps then it clearly knew enough to be put on inquiry about dishonest dealings between Mr B and Mr L.

[77] Mr Rainey further contended that even if he is wrong about a date in 2017 being the late knowledge date, the date the arbitration claim was filed in February 2018 must surely qualify.

[78] The initial notice of claim filed in the arbitration by Spark against V on 23 February 2018 recites that, after discovering the payments made by V to Mr L and S, it (Spark) sought an explanation for the payments from V and Mr L on several occasions throughout the remainder of 2017. However, they refused to give one. The claim then goes on to relevantly plead a cause of action of conspiracy to injure relating to the unexplained payments in the following terms:

> **FIRST CAUSE OF ACTION: Conspiracy to injure**
>
> 36. V conspired with S and Mr L to:

> (a) [alleged overpayments by Spark to V as the result of V's over over-inflated invoices — not directly relevant to the current proceeding]; and
>
> (b) receive benefits currently unknown to Spark in return for the payment [by V to S/L] of $223,520 …
>
> 37. The conspiracy was made with the intent to injure Spark for the benefit of V.

[79] On the basis of a February 2018 late knowledge date, the filing of the High Court civil proceedings more than three years later, on 20 December 2021, would still furnish Mr B a limitation defence.

[80] For his part, Mr Kennedy says the critical thing which Spark did not know at the dates posited by Mr Rainey was that payments had been made to S for the purpose of directing work back to V. It did not know the payments were a secret commission.

[81] Mr Kennedy points out that all the way through the arbitration right up to and including the arbitral hearing itself, the evidence of both Mr L and Mr B was that the payments had been made for legitimate purposes which they detailed. They also resisted discovery of documentation for the arbitration necessitating applications for court orders. In Mr Kennedy's submission, they in effect perpetuated the fraud. It was not, he contends, until late 2019 or early 2020 when Spark finally obtained access to their bank accounts as a result of a court order that Spark had reason to suspect the existence of a secret commission scheme. That was because the bank accounts revealed a series of payments totalling $3,578,365.

[82] Mr Kennedy further submitted that the initial notice of claim in the arbitration demonstrated Spark's limited knowledge as at February 2018. All it knew was there appeared to be four payments and that it appeared V must have obtained some benefit. In those circumstances, February 2018 could not properly be the start date with respect to a commission scheme that Spark did not know about, and could not know about, by dint of the joint concealment engaged in by Mr B and Mr L.

[83] In response, Mr Rainey argued that it is not necessary for Spark to know every aspect of the fact the payment represented a secret commission. The test is whether they knew enough to begin making an inquiry.[52]

[84] As will be apparent, there is some force in Mr Kennedy's submissions, especially when it appears it was Mr B who was deliberately impeding the investigation.[53] However, in a summary judgment context, we need only be satisfied this is an arguable defence.

[85] As at February 2018, it is clear that Spark knew the following:

(a) Mr B was the sole shareholder and director of V.

(b) Mr L was instrumental in procuring V as a service provider. He had actively promoted it over Spark's established IT providers and it was on his strong recommendation that it was engaged.

(c) V's rates were materially higher than other providers.

(d) Mr L had advised Spark that V's expertise warranted payment at above market level and, on the basis of that advice, Spark had paid V premium rates.

(e) V had made the following unexplained payments (including GST) to Mr L:

(i) $28,750 on 6 August 2015;

(ii) $28,750 on 28 August 2015;

(iii) $155,020 on 30 September 2015; and

(iv) $11,000 on 23 May 2016.[54]

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52 At [67].
53 Limitation Act, s 14(3).
54 It should be noted that the $11,000 has not been included in the appendix of payments.

(f) It was Mr B who had in effect made these payments. He was V's alter ego.

(g) Both Mr B and Mr L were refusing to provide an explanation for the payments and disclose relevant documentation.

(h) Mr B and Mr L had conspired through the vehicles of their respective companies to provide a benefit to Mr L to injure Spark.

[86] The combined effect of those facts might, we consider, have been enough to put Spark on notice that the payments may well have been some form of bribe or secret commission. Applying the *Rea* test for constructive knowledge, we are, therefore, satisfied it is at least arguable that 23 February 2018 is the correct late knowledge date and that, accordingly, there is an arguable limitation defence relating to payments pre-dating 20 December 2015 (totalling $1,852,365).[55]

[87] We are not, of course, saying the limitation defence will necessarily succeed. Much may turn, for example, on evidence about the obstructive tactics deployed by the wrongdoers to conceal the secret commissions and the impact that had on Spark's knowledge in terms of s 14(3) of the Limitation Act. All we can say at this juncture is that the defence is arguable.

[88] For the avoidance of doubt, we also again confirm that the rest of the payments made from 11 January 2016 onwards are not affected by this finding, being within the six year primary limitation period. Spark is entitled to summary judgment for those payments (which total $1,726,000).

[89] In the event we were to hold there was an arguable limitation defence precluding the entry of summary judgment in relation to the pre-December 2015 payments, Mr Kennedy told us Spark would then be entitled to set off some $1,080,350 which it owes V against the proportion of its own claim that is now arguably out of time. This was raised for the first time in submissions.

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55 *Rea and Rea as Trustees of the Waiatarua Trust v Auckland Council*, above n 51, at [67].

[90] At the arbitration, V sought to recover by way of counter-claim unpaid invoices for contractor's services totalling $1,080,350. The arbitrator found that V was entitled to recover the $1,080,350, which was to be set off against the damages it had to pay Spark by reason of its conspiracy with S and Mr L to injure Spark by unlawful means, and for also dishonestly assisting the breaches of fiduciary duty by S and Mr L.[56]

[91] Mr Kennedy sought leave to adduce evidence in this Court of the terms of engagement between Spark and V which he said conferred a contractual entitlement for Spark to set off against amounts owing to it, any amount it owes as it sees fit. That would, he told us, have the practical effect of essentially zeroing out the proportion of the payments that Mr Rainey argues, and which we have accepted, are arguably time-barred.

[92] However, in our view, the calling of such evidence and the arguments relating to it are properly matters for trial and not for this Court.

[93] We turn now to a further issue regarding liability for the arbitrator's costs award.

The arbitrator's costs award

[94] Spark's application for summary judgment included a claim for payment of the costs and disbursements awarded against V in the arbitration. The award amounted to some $232,488.53.

[95] Mr Rainey argued that Mr B was not a party to the arbitration agreement and did not agree to be jointly and severally liable to costs in the arbitration. In his submission, there was no arguable basis for Mr B to be held liable to pay those costs. Spark itself, he contended, had failed to provide any explanation in its written submissions as to how Mr B could be liable including how an estoppel could arise.

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56 The award, above n 1, at [119]–[121] and [127].

[96] In response during oral submissions, Mr Kennedy submitted that in seeking recovery of the arbitration costs, Spark relied on the established proposition that a director who procures their company to commit an intentional tort is concurrently liable with the company for losses caused to the wronged claimant.[57] The losses in this case, Mr Kennedy submitted, must include the costs incurred at the arbitration.

[97] For the purposes of a summary judgment application primarily based on issue and cause of action estoppel we consider it is arguable that the arbitration costs are in a different legal and factual category to the wrongful payments. We therefore consider that recovery of these costs is also properly a matter for trial.

Summary of conclusions

[98] Spark is entitled to summary judgment against Mr B for all the secret commissions paid by V to Mr L and S after December 2015, which (after deducting the amount of V's counter-claim of $1,726,000) amounts to $645,650, together with interest thereon. Whether Spark can also recover the amount of the deduction as a result of the new argument raised before us is a matter for trial.

[99] We consider that disbursements are also best left for resolution at trial.

[100] The remainder of Spark's claim against Mr B, namely the claim relating to secret commissions paid on, and before, 8 December 2015, as well as the arbitration costs award, and the deduction on account of the counter-claim is to be determined by the High Court at trial.

[101] Any costs award made in the High Court on Spark's summary judgment application is to be reconsidered by that Court in light of this judgment.

[102] As regards costs in this Court, counsel agreed that they should follow the event and be calculated as for a standard appeal, on a band A basis. Spark has, of course, not been entirely successful in its appeal. In recognition of that fact, we therefore reduce the

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[57] See for example *Ivan Weavers Tyre Centre Ltd v Gill Construction Co Ltd* [2008] NZCA 167 at [48]; *Winchester International (NZ) Ltd v Cropmark Seeds Ltd* CA226/04 5 December 2005 at [54]; and *Standard Chartered Bank v Pakistan National Shipping Corp (Nos 2 and 4)* [2002] UKHL 43, [2003] 1 AC 959 at [21]–[22] per Lord Hoffmann.

costs that would otherwise be payable by 10 per cent. We do not consider, however, that it would be in the interests of justice to reduce the amount of the disbursements.

[103] Given that both parties succeeded in their respective applications to raise new points on appeal, we make no award of costs in relation to them.

Outcome

[104] The appellant's application for leave to adduce evidence of the respondent's convictions is granted.

[105] The respondent's application for leave to raise a new arguable limitation defence is granted.

[106] The appeal against the decision of the High Court declining the appellant's application for summary judgment is allowed in part.

[107] Judgment is entered for the appellant against the respondent in the sum of $645,650 together with interest thereon, under s 10 of the Interest On Money Claims Act 2016, until payment is made.

[108] The remainder of the appellant's claim against the respondent is to be determined by the High Court at trial.

[109] Costs in the High Court on the summary judgment application are to be reconsidered in light of this judgment.

[110] The respondent must pay costs on the appeal to the appellant calculated as for a standard appeal on a band A basis, less 10 per cent, together with disbursements.

[111] Costs in relation to the interlocutory applications relating to a new appeal ground and a new defence are to lie where they fall.

Solicitors:
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Stainton Chellew, Auckland for Respondent

Appendix: Payments from V to S and Mr L

Reference	Date	Unauthorised payment including GST	Unauthorised payment excluding GST	Cumulative total excluding GST
1	5 June 2014	$345,000	$300,000	$300,000
2	4 August 2014	$57,500	$50,000	$350,000
3	21 October 2014	$124,200	$108,000	$458,000
4	22 January 2015	$57,500	$50,000	$508,000
5	26 February 2015	$23,000	$20,000	$528,000
6	30 March 2015	$379,500	$330,000	$858,000
7	28 April 2015	$80,000	$69,565	$927,565
8	3 June 2015	$230,000	$200,000	$1,127,565
9	22 June 2015	$230,000	$200,000	$1,327,565
10	22 June 2015	$230,000	$200,000	$1,527,565
11	6 August 2015	$28,750	$25,000	$1,552,565
12	28 August 2015	$28,750	$25,000	$1,577,565
13	30 September 2015	$155,020	$134,800	$1,712,365
14	6 November 2015	$80,500	$70,000	$1,782,365
15	8 December 2015	$80,500	$70,000	$1,852,365
16	11 January 2016	$70,000	$60,870	$1,913,235
17	14 January 2016	$10,500	$9,130	$1,922,365
18	10 February 2016	$80,500	$70,000	$1,992,365
19	18 April 2016	$57,500	$50,000	$2,042,365
20	9 May 2016	$120,750	$105,000	$2,147,365
21	7 June 2016	$120,750	$105,000	$2,252,365
22	13 June 2016	$120,750	$105,000	$2,357,365
23	6 September 2016	$126,500	$110,000	$2,467,365
24	15 September 2016	$149,500	$130,000	$2,597,365
25	7 October 2016	$109,250	$95,000	$2,692,365
26	4 November 2016	$57,500	$50,000	$2,742,365
27	9 January 2017	$126,500	$110,000	$2,852,365
28	26 January 2017	$207,000	$180,000	$3,032,365
29	7 February 2017	$143,750	$125,000	$3,157,365
30	8 March 2017	$24,150	$21,000	$3,178,365
31	23 March 2017	$218,500	$190,000	$3,368,365
32	3 May 2017	$241,500	$210,000	$3,578,365
Total		**$4,115,120**	**$3,578,365**	**$3,578,365**