CITATION: Garry John Nichol v Northern Engines Pty Ltd [2020] NTLC 17

PARTIES:	GARRY JOHN NICHOL PLAINTIFF V NORTHERN ENGINES PTY LTD
TITLE OF COURT:	LOCAL COURT
JURISDICTION:	CIVIL
FILE NO:	21735197
DELIVERED ON:	23 MARCH 2020
DELIVERED AT:	DARWIN
HEARING DATES:	8 JANUARY; 4 FEBRUARY 2020
DECISION OF:	GORDON JR

CATCHWORDS:

ESTOPPEL – BAILMENT – NOTICE AS TO A STATE OF AFFAIRS – IRREVERSIBLE DETRIMENT – PROPORTIONATE REMEDY

REPRESENTATION:

Solicitors:

	Plaintiff:	de Silva Hebron
	Defendant:	Piper Ellis Lawyers
Judgment category classification:	B	
Judgment ID number:	17	
Number of paragraphs:	82	

IN THE LOCAL COURT
AT DARWIN IN THE NORTHERN
TERRITORY OF AUSTRALIA

No. 21735197

BETWEEN:

GARRY JOHN NICHOL
Plaintiff

AND:

NORTHERN ENGINES PTY LTD
Defendant

DECISION OF L GORDON JR

(Delivered 23 March 2020)

1. On 29 October 2019, the Plaintiff filed an Interlocutory Application seeking relief in various and alternate forms in response to the Defendants alleged breach of the Northern Territory Civil and Administrative Tribunal's (NTCAT) Orders, made by consent, on 8 November 2017.

Procedural Background

2. The NTCAT Orders were subsequently registered in the Northern Territory Local Court on 5 December 2017.

3. The proceedings essentially remained in abeyance until late 2019.

4. On 11 November 2019, the parties appeared before the Court in relation to the Application filed 29 October and sought to adjourn the Hearing of the Interlocutory Application, indicating they were negotiating the dispute and discussing the relevant evidence. The matter was adjourned to 25 November with a direction for the filing of further Affidavits.

5. A further adjournment was jointly sought by the parties and the matter adjourned to 9 December 2019. On 9 December, it was confirmed that a decision on whether default of the NTCAT Orders had occurred would be determined first, prior to any determination as to what relief should follow and assessment of any damages. The Hearing on the issue of default was listed for 8 January 2020.

6. On 8 January the Plaintiff confirmed he continued to seek relief under section 23(3) of the Local Court (Civil Procedure) Act 1989 or the deregistration of the NTCAT Orders under the Local Court (Civil Jurisdiction) Rules 1998, but no longer sought Order 4 of his Application in the alternative.

7. The Defendant confirmed he opposed the Orders sought by the Plaintiff and indicated an intention to resist the application by arguing estoppel. In support of this position the Defendant's legal representative tendered a bundle of some 8 documents, including written submissions of 11 pages and 4 cases on which they sought to rely in support of their argument.

8. The Plaintiff confirmed they had been provided with a copy of the Defendants material, although only on or about that date or the day prior.

9. In my view, it was necessary to afford the Plaintiff the opportunity to submit their own written submissions and I further opined it would be appropriate for the issue of Estoppel to be determined, prior to proceeding with a full evidentiary Hearing on the issue of breach of the Orders. Particularly when there were issues in dispute with respect to admissibility of some of the Affidavit material and the necessity for cross-examination.

10. On the understanding that the parties would attempt to resolve the disputes regarding evidence, should the evidentiary hearing be required after the determination as to estoppel, I issued the following Orders:

    a. The Plaintiff to file and serve any written submissions in relation to the Defendant's estoppel argument by close of business 20 January 2020;
    b. The Defendant to file and serve evidence of the date of the sale of the engine within 7 days;
    c. The Defendant to file and serve any written submissions in reply by close of business 24 January 2020.

11. The decision on Estoppel was adjourned to chambers, pending receipt of the written submissions from the parties. The outcome of the estoppel argument would determine how and indeed if, the matter would progress.

12. On 4 February 2020 the Plaintiff contacted the Court and sought to re-open their evidence in relation to the estoppel issue. This was opposed by the Defendant and the application to re-open evidence was listed before me for consideration on 5 February 2020.

13. After hearing submissions from both parties I granted leave for the Plaintiff to file further Affidavit evidence, over the objection of the Defendant. The Defendant, having seen the draft further Affidavit, characterised the evidence as being evidence of an attempt to bring notice, going to the mind of the Plaintiff only, not that of the Defendant.

14. The Defendant argued the probative value was insufficient to allow the re-opening of the evidence.

15. Unsurprisingly, the Plaintiff asserted that the nature of the evidence was such that it warranted leave to re-open being granted as it had the potential to effect the outcome of the decision on estoppel.

16. Ultimately, I formed a view that, noting the low degree of prejudice to the Defendant, and the pertinence of the question of notice when forming my view on estoppel, the administration of justice required the evidence be admitted. As to the probative value, that would ultimately be a matter of weight – an assessment the Court must undertake when reviewing and applying all evidence in a matter.

17. Further affidavit evidence pertaining to an attendance by the Plaintiff at the Defendants residence on or about 1 February 2018 was filed by both parties. All evidence and final submissions were filed by 17 February 2020.

Factual Background

18. It is necessary to set out the history and timeline of this matter to understand both the allegation of breach of Orders, which returns the matter to the Court, and the argument on estoppel and whether it can be upheld.

19. The facts not in dispute are:

a. In 2013 the Plaintiff provided engine parts to the Defendant and in 2017 invoiced the Plaintiff for the work undertaken for the engine rebuild.
b. The parties are in dispute regarding the amount quoted to undertake the work versus the final amount invoiced, leading to an application by the Plaintiff to NTCAT.
c. On 8 November 2017 the parties entered into consent Orders, which provide the following:
    i. "The Respondent return to the Applicant the following engine parts supplied to the Respondent for the engine rebuild; sump and attaching bolts; harmonic balancer and attaching bolt washer; cam thrust plate attaching bolt and fuel pump electric; heads, head bolts and washers; engine block STD (standard) bare' bearing caps, attaching bolts and washers; inlet manifold' attaching bolts and washers; tappet covers, attaching bolts; flywheel and attaching bolts; dipstick and tube; oil pump attaching bolt and strainer; timing cover and bolts.
    ii. The parts referred to in Order 1 are to be returned to the Applicant in good order.
    iii. The Respondent to pay the sum of $5,000 to the Applicant by bank cheque.
    iv. Both the parts specified in Order 1 and the bank cheque referred to in Order 3 are to be available for collection by the Applicant at 10am on 17 November 2017, at 36 Wedding Road, Tivendale."
d. On 17 November 2017 the Plaintiff attends the Defendants premises and receives a $5,000.00 cheque and the following engine parts:
    i. Sump and attaching bolts;
    ii. Harmonic balancer and attaching bolt washer;
    iii. Cam thrust plate attaching bolt and fuel pump electric;
    iv. Heads head bolts and washers;
    v. Engine Block standard bore bearing caps, attaching bolts and washers;
    vi. Inlet manifold attaching bolts and washers;
    vii. Tappet covers , attaching bolts and washers;
    viii. Flywheel and attaching bolts;
    ix. Dipstick and tube;
    x. Oil pump attaching bolt and strainer;
    xi. Timing cover and bolts.

e. Save for the inlet manifold and tappet covers, the engine parts provided to and taken by the Plaintiff on 17 November 2017 were not the engine parts provided by the Plaintiff in 2013. These were retained by the Defendant in the rebuilt engine.

f. On 5 December 2017 the NTCAT Orders are registered in the Local Court.

g. On 1 February 2018 the Plaintiff attends the Defendants premises, and although he is seen by the Defendant at a driveway entrance, the parties do not engage in any conversation – the Plaintiff departs and the Defendant enters his property.

h. On 19 April 2018 the Defendant sells the rebuilt engine, containing the original parts supplied by the Plaintiff.

i. Mid-February 2019 a Bailiff is engaged by the Plaintiff and attends the Defendants premises seeking return of the original engine parts. The bailiff is informed that the rebuilt engine had been sold some 18 months prior and that the Defendant was of the view he owed nothing further to the Plaintiff.

j. An application to re-opening the NTCAT proceedings in filed by the Plaintiff in August 2018 and subsequently dismissed in October.

k. In August 2019 the Plaintiff files for damages in NTCAT as a result of the failure of the Defendant to return the Plaintiff's original parts.

l. An amended Interlocutory Application seeking damages for breach is filed in the Local Court, 29 October 2019.

The Law on Estoppel

20. The Defendant submits that the Plaintiffs application must be dismissed as the Plaintiff is estopped from seeking relief and damages as a result of the alleged breach of the NTCAT Orders.

> "*The general principle governing common law estoppel is that a party who induces another to make an assumption for the purpose of their legal relations that a particular state of affairs exists is estopped from asserting the existence of a different state of affairs if the other has acted in reliance on the assumption and would suffer detriment if departure from the assumption were allowed… The object of the estoppel is to prevent the detriment to the other party that would flow from an un just departure by the first party from the assumption adopted by the other."*[1]

21. The common law principles of estoppel by representation are well established and accepted:

[1] Chapter 4 of Title 109 – Estoppel in Halsbury's Laws of Australia at 190-215 (references removed); attachment 4 to the Defendant's Index of Authorities and Supporting Documents filed 8 January 2020

"*In order that this type of estoppel may arise, it is necessary that (1) by word or conduct (2) reasonably likely to be understood as a representation of fact, (3) a representation of fact, as contracted with a mere expression of intention, should be made to another person, either innocently or fraudulently, (4) in such circumstances that a reasonable man would regard himself as invited to act upon it in a particular way, (5) and that the representation should have been material in inducing the person to whom it was made to act on it in a way (6) so that his position would be altered to his detriment if the fact were otherwise than as represented."*[2]

22. In the matter before the Court, if it can be shown:
    (1) That the Plaintff's conduct;
    (2) Was reasonably understood by the Defendant to represent the current facts or state of affairs;
    (3) Irrespective of whether the Plaintiffs conduct was undertaken innocently or fraudulently;
    (4) Where the Defendant could reasonably be invited to act in a certain way in response to what he understood the state of affairs to be;
    (5) And that it was the Plaintiffs conduct which was material in the Defendants subsequent actions;
    (6) And where the defendant would suffer detriment should the Plaintiff now assert an alternate set of facts / state of affairs;

Then the Defendants defence of estoppel will be made out.

The Plaintiff's Submissions

23. The Plaintiff argues that estoppel cannot be established on two grounds;
    a. The Defendant was on adequate notice that the Plaintiff did not consider that the NTCAT Orders has been complied with due to 1) the registration of the NTCAT Orders in the Local Court in December 2017 and; 2) the Defendant affixing a letter of demand to the Defendants fence in February 2018; and
    b. That estoppel cannot be invoked to permit something prohibited by law or override statutory obligations and that the Defendant, through the sale of the engine containing the Plaintiff's original parts contravened his duties as a bailiee and/or

[2] *Franklin v Manufacturers Mutual Insurance Ltd (1935) NSWSR 76* per Jordan CJ at 82; cited with approval in the Northern Territory Supreme Court in *McCraith v Fraser & Ors (1991) 104 FLR 227.*

acted in contravention of the *Uncollected Goods Act* 2004 (NT) ('Uncollected Goods Act")

The Application of the Facts

24. The Parties entered into a legal relationship at the time the parts were provided to the Defendant, on the understanding he would perform work of a mechanical nature on those parts, in exchange for payment by the Plaintiff.
25. Unfortunately, as we now know, little of that legal relationship was reduced to writing to clarify the key terms of the contract, including the amount to paid, and the legal relationship ultimately ended in dispute.
26. The dispute was of such a nature that it required external determination by a NTCAT Tribunal member to reduce to writing how the transaction between the parties would be finalised.
27. The Plaintiffs characterisation of the initial relationship as a bailment is correct. However in my view, the Orders of NTCAT on 7 November 2019 operated to redefine the legal relationship between the parties. The parties could not mutually agree the terms of the original engagement accordingly, the tribunal was called upon to make findings as to the legal obligations between the parties moving forward.
28. Whilst I note that the Orders made by NTCAT were ultimately by consent and not a determination following a contested hearing, nonetheless, they represent, in my view, a deliberate, structured and enforceable definition of the legal relationship between the parties from that point forward.
29. The newly defined legal relationship between the parties was thus: on 17 November 2017 the Plaintiff was to collect $5,000.00 and the 11 parts listed at paragraph 18(d) above from the Defendant. He did so, thus terminating the legal relationship in accordance with the Orders.
30. Even if the bailment survives at this point, in my view, it is the actions of the Plaintiff which follow which are repugnant to the bailment, thus repudiating the bailment, months prior to the Defendants sale of the engine containing the Plaintiffs parts.

> "*The general principle is that in a simple bailment, repudiation of the bailment brings the bailment to an end… This principle is of ancient origin."*[3]

[3] *Hill v Reglon Pty Ltd* [2007] NSWCA 295 citing with approval *The Anderson Group Pty Ltd v Tynan Motors Pty Ltd* (2006) 65 NSWLR 400; [2006] NSWCA 22 per Yung CJ in Eq and *Penfold's Wines Proprietary Limited v Elliot* (1946) 74 CLR 204 ; [1946] HCA 46.

31. The Plaintiff states at paragraph 6 of his Affidavit[4] "*On this date [17 November 2017] the Defendant handed me parts, but not the parts specified above, but other parts which I had not supplied to the Defendant and which were not in good order. I took these parts as evidence that the Defendant failed to comply with the NTCAT Order and still have these parts in my possession".*
32. To the best of my understanding there was only one business transaction between the parties, the one before the Court. There was no other debt or pending works which would justify or give context to the Plaintiffs decision to take the parts he says he immediately recognised as being inferior and non-compliant with the terms of the NTCAT Orders as he understood them.
33. By taking these items there was little other conclusion that could be drawn by the Defendant other than assuming he had terminated the relationship in terms of the Orders. Whether he thought he'd fooled the Plaintiff into accepting items that were not his own or he believed his actions were a reasonable and genuine attempt to satisfy the terms of the Orders is ultimately immaterial. It is not plausible in my view to suggest that the Defendant could have suspected in any way, that the items were being retained as evidence of non-compliance.
34. Further, given it is extremely unlikely the Defendant gifted these additional parts to the Plaintiff while continuing to hold the Plaintiffs parts as part of the original bailment, in my view the of taking of these parts from the Defendant, with no legal right to do so, save for operating within the context of the NTCAT Orders and purporting to finalise the parties transaction in accordance with same, acts to terminate any bailment which may have survived to that date.
35. I also note that whilst the misguided notion of retaining goods for the purposes of 'evidence' is not necessarily implausible in the context of the parties dispute, to the best of my knowledge the first time the parts were formally appraised as 'evidence' is per the Affidavit of Peter John Erbs filed 2 December 2019.
36. Mr Erbs states:
    1. *I am a Qualified Motor Mechanic, with 32 years' experience and have worked as an engine re-conditioner in amongst those years.*
    2. *In making this Affidavit I have reviewed:*
        a. *The original parts which were provided to the Defendant Mr Nichol in 2013[5]…; and*

[4] Affidavit of Garry John Nichol filed 7 November 2019.
[5] No explanation is given as to how or why Mr Erbs was called upon to inspect the original parts in 2013, prior to the dispute.

b. *The current parts in Mr Nichol's possession…*

3. *On 19 November 2019 I was asked by Mr Nichol to review the quality and value of the Parts he had received from the defendant. I make this Affidavit following a review of the Parts.*"

37. Mr Erbs is no stranger to the dispute, having attended the NTCAT Hearing in November 2017, with the Plaintiff, explaining his involvement in the following exchange with the member:

> "*Member*: *You're Mr Nichol, Okay. And who you have there* (sic) *Mr Nichol?*
>
> *Nichol:* *Uh Mr Peter Erbes* (sic)
>
> *Member:* *And what's Peter, what's Peter's interest to it?*
>
> *Nichol*: *He's witness to it and he handles all the computer side of it"*[6]

38. Although I understand the Plaintiff explored alternate legal remedies prior to his Application to the Local Court, nonetheless it seems odd that the only evidentiary appraisal of the value of the parts which the Plaintiff claimed he identified as being inferior immediately upon receipt, was apparently not undertaken for over 2 years after receiving the parts.

39. Having found that the bailment was terminated by the collection of the parts, irrespective of the dispute regarding whether the Orders required the original parts be provided, and the Defendant having formed the reasonable view that the transaction and any ongoing obligations arising to the Plaintiff had been fulfilled, the defendant was in, in my view, not bound by section 5 of the Uncollected Goods Act after 17 November 2017.

40. I have found that the Plaintiffs conduct in removing those items in apparent compliance with the NTCAT Orders, created a representation to the Defendant that their business dealing were at an end, resulting (some 5 months later) in the sale of the rebuilt engine containing the Plaintiffs parts.

41. I must now consider whether, at any stage of those 5 months, the Defendant was effectively 'put on notice' that the Plaintiff did not in fact, consider that the Defendant had fulfilled his obligations under the NTCAT Orders and that the Plaintiff still wished to assert a legal right to possession of his original engine parts.

42. It follows that If he was indeed 'on notice' it is unlikely that a claim for estoppel could succeed on points 4 & 5 at paragraph 23 above.

43. The Plaintiff asserts notice occurred in one of two ways.

[6] Transcript of proceedings annexure "KAS3" of the Affidavit of Kelly Ann Stephenson filed 2 December 2019.

44. The first being the registration of the NTCAT order in the Local Court. There is no dispute that the NTCAT Order was registered in the Local Court and that the Defendant received a copy of the Registered Order.

45. NTCAT Orders are registered in the Local Court pursuant to Part 35 Division 2 of the *Local Court (Civil Jurisdiction) Rules 1998* ('the Rules'). Rule 35.08 provides that the Division applies:

    a. *If an Act permits an application to be made to the Court for the registration of the Order; or*

    b. *If a person applies, or intends to apply, to the Court for a warrant of execution or other enforcement process to enforce the order.* (my emphasis).

46. In relation to the registration of the Order, the Defendant deposes[7]:

    "17. In December 2017 I received a notification from the Local Court that an order had been registered with them.

    18. At the time I was waiting on instructions from the tribunal member Sally Gearin at NTCAT to know if there was anything further that needed to happen.

    19. I did not understand what the Local Court order meant, but as I had already complied with the NTCAT order I thought nothing more of it."

47. The Defendants submissions in relation to this notice are as follows[8]:

    a. "*For it to be considered reasonable notice, the defendant submits that it must be a representation that an ordinary person would have understood to mean the assumed state of affairs – that he had complied with the order – no longer existed.*

    b. *The order that was registered was the whole of the NTCAT judgment. There has never been any question regarding the defendant's compliance with order 3 – to deliver a cheque in the amount of $5,000.*

    c. *The defendant is a lay person. He has given evidence that when he received the registration of the notice, he did not know what it meant, but, as he had already complied with the order, he thought nothing more of it.*

    d. *It is entirely reasonable that the defendant, without any further information or explanation from the plaintiff or the Court, having paid the amount required by order 3 and having provided the plaintiff with the parts as listed in order 1, considered the notice of registration from the Local Court to be a mere formality. "*

48. I accept those submissions. There is nothing on the face of a Form 35D Registration of Order that indicates a breach is being alleged. The Form 35D Notice of Registration of Order states:

[7] Affidavit of Steven Cupo (Sole Director of the Defendant) filed 15 November 2018 at paras 17-19.
[8] Defendants Submissions in Reply filed 24 January 2020 at paras 3 -6.

"THE COURT GIVES NOTICE THAT AN ORDER HAS BEEN REGISTRED IN THIS COURT AND MAY BE ENFORCED AS IF IT WERE MADE BY THIS COURT".

49. What the Defendant received was in essence a reiteration of the NTCAT Orders, which consisted of 2 elements; 1. return of parts and 2. payment of money. Parts had been collected and money had been paid.
50. In my view, there is nothing on the face of registration which would cause the Defendant to doubt the state of affairs between the parties. Perhaps, noting there has never been any dispute with respect to the payment of the $5,000 (meaning there was never any cause of action to enforce that portion of the Orders under Chapter 2 of the Rules), had the Plaintiff elected to register the Orders in relation to the return of the parts only, then this may have 'sounded the alarm' to the Defendant that something had gone awry with the parts provided.
51. This not being the case however, I concur with the submission of the Defendant "*the registration of the order cannot be taken as reasonable notice that the plaintiff sought to enforce any proprietary rights over the original parts provided to him by the defendant."*[9]
52. The second attempt to put the Defendant on notice as to the alleged non-compliance took place in February 2018. It appears that the Plaintiff attended the Defendants residence (and place of business) on or about 1 February 2018 for the purposes of delivering a letter of demand[10] in relation to the original engine parts.
53. Both parties recall the incident[11] and agree that Mr Nichol attended and was at the properties fence line taking a photo as Mr Cupo arrived home. The parties did not have a conversation, Mr Nichol returned to his vehicle and Mr Cupo proceeded down his driveway.
54. The parties differ on various other facts of the incident, which are, in my view, immaterial. The key questions is – did the clipping of the letter of demand onto the chain-link fence of the Defendants premises result in the Defendant becoming aware of the dispute regarding the original parts?
55. On balance, I am not satisfied that it did.
56. The evidence of Mr Cupo[12] is as follows:
    a. *There are two driveways at my property… One driveway is for my workshop, and the other driveway is for my private residence where I live with my wife. I arrived home*

[9] Ibid at para 7
[10] Annexure 'A' of the Affidavit of Garry John Nichol filed 5 February 2020.
[11] Affidavit of Garry John Nichol filed 5 February 2020 and Affidavit of Steven Cupo filed 11 February 2020.
[12] Affidavit of Steven Cupo Affirmed 11 February 2020 paras 7 – 12.

in early 2018 and I saw the plaintiff at my property. He was taking photos on his phone down the residential driveway of my house.

b. *I was immediately concerned about what he was doing at my house and whether or not he had been trespassing. I saw the plaintiff's car was parked about 50 metres away from my residential driveway. The plaintiff saw me approaching, and as he did he began to mve quickly back to his vehicle.*

c. *At that point I was extremely concerned about the welfare of my wife and property. I got out of my car in the driveway, opened the gate and drove in. Once inside I got out of my car and went to lock the gate behind me. I then went straight inside to check on my wife and to see if anything had been stolen or moved.*

d. *After about 30 minutes I went back outside to see if the plaintiff was still there. I could not see him and assumed he had left.*

e. *The plaintiff did not speak to me at all during this incident. I had no idea why he was there or what he was doing.*

f. *I did not leave my house again until the next morning. That morning I left through the workshop driveway on the other side of the property. Leaving through that driveway meant I drove past the entire front of my property. I did not see anything attached to my gate or fence. I did not receive any letter."*

57. Mrs Cupo, who was a director of the Defendant company until February 2018 and to whom the letter of demand was addressed, deposed the following[13]:

a. *I have been asked about whether or not I received any communication from the plaintiff about the claim.*

b. *I have not. Not from the plaintiff directly, and never from our accountant.*

c. *I understand the plaintiff says he left a letter addressed to me on our fence in early 2018.*

d. *Our house number is located on our fence but not on our gate.*

e. *We sometimes get pamphlets from politicians and that type of thing on our gate at home, but we do not normally get letters. I do not look on our front gate or fence for letters.*

f. *In early 2018 I remember Steve came home and told me the plaintiff had been hanging around outside our house, I did not know that he had been there, I had been inside the house and had not left all day.*

[13] Affidavit of Rosalie Maree Cupo Affirmed 13 February 2020 at paras 6 - 13

g. *I did not see anything on our gate or on our fence, but I did not go out to the fence that day.*

h. *At no time after that did I ever see the letter the plaintiff says he left on the fence in early 2018."*

58. The Defendant submits[14] that at best, the events which took place in February 2018 "*can be summarised as [the plaintiff's] relaying to the court, an attempt by him, on or about 1 February 2018 to serve a letter of demand on the defendant."* But there is "*no evidence given to the effect that the attempt at service was successful."*

59. Although the Plaintiff is assisted by the lower burden of proof "*the standard of proof, being a civil claim, is 'what is more than likely than not' to have occurred"*[15] there are still a myriad of alternate explanations;

a. the Defendant, more concerned with the integrity of the interior of the property after seeing the Plaintiff in attendance, did not look pay attention to the fence when driving in;

b. the letter pegged to the fence was subsequently blown down or somehow dislodged prior to it being noticed;

c. the Defendant, not being accustomed to receiving notices or mail on the fence line, either generally, or from the Plaintiff specifically (who further, did not avail himself of the opportunity to verbally alert Mr Cupo as to the existence of the letter, or by follow up email or other communication), had no reason to be watchful for communications delivered via the fence;

60. Accordingly, on the evidence before the Court I cannot be satisfied that 'it is more likely than not' that the letter and ergo notice of the dispute regarding the original parts was given to the Defendant prior to the sale of the engine.

61. I am satisfied therefore that the elements of estoppel set out paragraph 23 above 1 – 5 are met; I must now consider whether the defendant would suffer detriment should the Plaintiff now assert an alternate set of facts / state of affairs.

62. The Defendant asserts '*substantial and irreversible detriment*'[16], which cannot be remedied on 2 grounds:

[14] Further submissions of the Defendant filed 14 February 2020 at paras 2 - 3

[15] Applicants further written submissions in response to the Respondents submissions on estoppel filed 17 February 2020

[16] Written Submissions of the Respondent filed 8 January 2020

a. The original parts, now sold, are no longer available for inspection – which had they been, may have allowed an expert, independent comparative analysis of the original parts vs the parts provided in November 2017; and
b. The defendant is no longer able to resolve the dispute &/or alleged breach by simply returning the original parts.

63. On the issue of establishing detriment, Justice Gray in the Supreme Court of the Northern Territory decision of *McCraith v Fraser & Ors*[17] noted:

> "*It is not necessary to speculate endlessly about what steps Adlington might have taken if he had been told in May 1985 that he was uninsured. He might have approached the plaintiff and sought to extricate himself from the action on the basis of his lack of means. He may, at that early stage, have persuaded the plaintiff to accept a small sum in settlement of the claim against him. He may have involved his partner in some arrangement. It is not necessary to go further. The repeat the words of Fullagar J*[18]*: "there was sufficient prejudice in being deprived of the opportunity to do better.""*

64. Likewise I will not endlessly speculate on the possible conduct of the Defendant in response to the situation he finds himself in. Irrespective of whether he carried an genuine misapprehension as to the intention of the NTCAT Orders to provide for the return of the original parts, regardless of the further cost or inconvenience to him in dismantling the completed engine, or there was an element of deceit in the provision of alternate parts, the defendant cannot now, make good on the original Orders by returning the original parts.
65. He finds himself facing breach allegations and an application for damages which includes, in part, a claim for almost $13,000.00 in replacement parts, freight, machining and travel. And, had he not relied on the representations of the Plaintiff, to assume there had been satisfactory compliance, he may have been in a position to negate any detriment arising from a finding of breach, by providing the original parts or offset any damages via an independent and contemporaneous valuation of the respective parts.
66. Although, it my view, that is enough to establish the detriment required for the doctrine of estoppel, I will note also, the impact of the delay of the Plaintiff in bringing these proceedings.
67. Almost two years passed from the return of the alternate parts on 17 November 2017 and the Plaintiff formally pressing the application for damages in October 2019.

[17] (1991) 104 FLR 227
[18] In *Hansen v Macro Engineering (Aust) Pty Ltd* [194] VLR 198

68. Although I certainly do not hold myself to have any great expertise in the area of engine parts, I think it reasonable to assume they would be subject to some level of deterioration over time. And factors such as maintenance and storage (of which the Defendant has no knowledge or control in relation to the parts retained by the Plaintiff) would affect their value.

69. Had the Plaintiff pressed his claim for breach and damages in 2017, even after the engine had been sold, there may have been some opportunity for the parties to negotiate some access to the sold engine, for the purposes of an expert report comparing the value of the alternate and original parts, at a time where the impact of the effluxion of time could be minimised or adequately accounted for by a expert report.

70. The circumstances echo that of the Third Defendant in *McCraith v Fraser & Ors*[19] where Justice Gray noted:

> "*But by 1987 a great deal of water had flowed under the bridge. The litigation had assumed a cumbersome form. Substantial costs had doubtless been incurred by parties with a consequential reduction in the chances of settlement… In my view, it is impossible to equate Adlington's position in early 1987 to his position in May 1985."*

71. Finally citing *Considine v Citicorp Australia Ltd*[20] and *Beesly v Hallwood Estates Ltd,* the Plaintiff submits that estoppel shall not be invoked against the public interest or social policy. In this instance I am not dissuaded from the application of estoppel, rather would conclude that it is in the interests of public policy that alleged breaches of Court or tribunal Orders be rectified in timely manner, lest the opportunity to overturn or remedy such wrongdoing be lost with the passage of time, as is be the case here.

A Proportionate Remedy

72. Having found that the Plaintiff is estopped from bringing an action for breach against the Defendant I must now consider an appropriate remedy. The law with respect to remedy is clear.

> "*… a Court of common law or equity may do what is required, but not more, to prevent a person who has relied upon an assumption as to a past or future state of affairs (including a legal state of affairs), which assumption the party estopped has induced him to hold, from suffering detriment in reliance upon the assumption as a result of the denial of its correctness. A central element of the doctrine is that there must be proportionality between the remedy and the detriment which is its purpose to avoid. It would be wholly inequitable and unjust to insist upon a disproportionate making good of the relevant assumption."*[21]

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[19] 1991) 104 FLR 227

[20] [1981] 1 NSWLR 657 at 652; [1960] 1 WLR 549 at 561

[21] *The Commonwealth of Australia v Bernard Leonardus Verwayen* (1990) 170 CLR 394 at p 7

73. The detriment which I have found that the Defendant would suffer should the Plaintiff not be estopped from claiming a breach of the NTCAT Orders, is the inability adequately defend such an allegation.
74. By issuing an Order whereby the Plaintiff is estopped from pursuing his action for damages arising out of the alleged breach, the Defendant is relived of that burden.
75. I have considered further whether any further adjustment should take place in relation to the engine parts retained by the Plaintiff, however such Orders may well "exceed any requirements of good conscience and be unduly oppressive of the other party."22
76. It is clear that the NTCAT Orders, made by consent, were intended to put the parties back into the position they were in (to the extent possible) before their business relations commenced, that is, the Plaintiff's deposit and engine parts be returned to the Plaintiff.
77. A finding of the intention of NTCAT on the question of orginal versus like parts, need not be made – the Plaintiff now being estopped from alleging a breach of the Orders on that ground.
78. I am satisfied then, that the appropriate remedy is to maintain the state of affairs asserted by the Plaintiff on 17 November 2017, that the Orders have been complied with, and the legal relationship between the parties is at an end.

Costs

79. It is clear that the Defendant has been wholly successful in arguing estoppel and in my view, there are no circumstances of this matter which would detract from the ordinary course of 'costs to follow the event'.
80. The Defendant seeks orders that the "application be dismissed with an order for indemnity costs in his favour"23. I do not share that view and whilst the application will be dismissed, I would not characterise either the substantive application nor the opposition to the claim for estoppel as having no reasonable chance of success.
81. Further, while the Plaintiffs decision to retain the engine parts for 'evidence' was certainly misguided I have not formed a view that it was an act designed to bring about an abuse of process, nor was it likely that he had any ability to foreshadow the legal consequences of his actions nor any awareness that he had awakened doctrine of estoppel.
82. In the circumstances, costs will not be awarded on an indemnity basis.

ORDERS

[22] Ibid at p 21
[23] Submissions of the Respondent filed 8 January 2020

1. The Plaintiff's Application filed 29 October 2019 is dismissed.
2. The Plaintiff is estopped from any claim arising from an alleged breach of NTCAT orders dated 7 November 2017.
3. The Plaintiff to pay the Defendants costs of and incidental to the Application filed 29 October 2019 to be agreed and taxed in default of agreement.