

BETWEEN ELECTRIC UTILITES  
COMPANY LIMITED

1782

Plaintiff

A N D SCOPE ENTERPRISES  
LIMITED

**NOT  
RECOMMENDED**

Defendant

Hearing : 10 - 11 November 1986

Counsel : B V MacLean for plaintiff  
B McClelland QC and C A McVeigh for defendant

Judgment : 25 November 1986

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JUDGMENT OF WHITE J (No 2)

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It will be useful, I think, to quote at the head of this judgment the following extract of a memorandum prepared by Barker J (as Executive Judge in Auckland) on 2 September 1986, summing-up briefly the arrangements which have resulted in the present applications being heard by me.

"This action was heard in Auckland over 11 sitting days in 1982 and 1984 by White J. A reserved judgment was issued by him on 13 December 1984 : he found in favour of the defendant on its counterclaim.

In June 1986, the defendant's counsel (Messrs B. McClelland QC and C A McVeigh of Christchurch) sought a fixture to determine the quantum of the defendant's claim. The defendant had not sealed judgment; nor had the plaintiff filed an appeal against White J's decision.

The application for a fixture was referred to me as Executive Judge, Auckland: I held a conference on 15 July 1986, as a result of which I issued Minute (No 1) (copy attached).

I then held discussions with the Rt Hon the Chief Justice and with the Hon Sir John White which resulted in the Chief Justice advising me that Sir John could be reappointed as an Acting Judge to dispose of the quantum claim. The appointment would be for a month which was thought a sufficient period.

Pursuant to the direction contained in Minute (No 1), I held a further conference with counsel on 27 August 1986. I had further discussions with the Acting Chief Justice, Sir John White, and Mr McLeod. The result of all these discussions is that I have issued Minute (No 2) (copy attached). The effect of the minute is to set the matter down for hearing in Wellington before White J on 10 November 1986. The principal application for hearing on that occasion will be a motion for a new trial.

.....  
It may be that if the motion were to be declined, then there would then have to be a hearing to determine quantum which was the original proposal referred to in Minute (No 1). However, that contingency can be faced if and when it arises."

(copies of Minutes No 1 & No 2 are on the Court file)

For completeness I should add counsel informed me at the commencement of the present hearing they were agreed that should the application for a new trial be dismissed a fixture for the assessment of damages on 24 November 1986 would be suitable.

Since Barker J's memorandum was prepared, and since his second minute, a further application was filed on behalf of the plaintiff on 7 October 1986. This was an application to set aside the judgment (delivered on 13 December 1984) which was sealed on 13 August 1986 pursuant to an order of Barker J, but not served on the plaintiff's solicitors. The grounds of the application to set aside were that the judgment was wrong upon the findings of fact. A memorandum of counsel in support of

the application was also filed on 7 October 1986 and the application was set down by the Registrar at Auckland for hearing before me on 10 November.

In the course of the argument on the application to set aside the judgment I was informed that a notice of general appeal to the Court of Appeal had been filed. There was no copy of the notice of appeal among the documents before me but Mr MacLean said the appeal was not intended to be an appeal against the findings determining liability but "as to the manner in which it had been sealed". Nevertheless, an appeal having been filed, and there being no agreement as to rectification of the form of the judgment, I declined to express any view on the application to set aside the judgment.

By consent the argument proceeded on the application for a new trial on the ground that there was a miscarriage of justice in that "material evidence has been discovered since the trial that could not reasonably have been foreseen or known before the trial".

There was no dispute that the principles to be applied in this Court are correctly stated in the headnote to the Court of Appeal's decision in Dragicevich v Martinovich [1969] NZLR 306, as follows :

"The Court has a discretion whether or not it should order a new trial where fresh evidence is sought to be introduced and, in exercise of that discretion, it should apply the following tests; first it must be shown that

the evidence could not have been obtained with reasonable diligence for use at the trial; second, the evidence must be such that if given, it would probably have an important influence on the result of the case although it need not be decisive and, third, the evidence must be such as is presumably to be believed although it need not be incontrovertible."

It was common ground that the length of the trial and the delays were due in large part to the way the evidence unfolded leading to further amendments in the much amended statement of defence, set-off and counterclaim. During the argument on the present application these matters dealt with in the judgment and in a ruling dated 27 October 1982 were referred to. As the ruling sums up the position as it had developed during the 1982 hearings, it will be useful I think to quote the ruling in full.

"During today I have seen counsel on several occasions regarding the course of the hearing. These hearings in Chambers followed objections yesterday by Mr MacLean to Mr McClelland's cross-examination of Mr Allsop Smith on the result of further investigations carried out by experts since the adjournment of the hearing in July and Mr McClelland's application to further amend the counterclaim. This morning Mr MacLean submitted Mr McClelland's applications were too late and that the proper course was for judgment to be entered for the plaintiff on claim and counterclaim unless Mr McClelland elected to be non suited on the latter. Mr McClelland submitted that in the circumstances of the case he should be granted leave to call further evidence and, if necessary, amend. I formally noted Mr MacLean's objection and ruled that the hearing should proceed on that basis. The order of witnesses was agreed to and the trial proceeded. I think I should record my reasons in a little more detail.

The application to amend the third amended statement of defence set-off and counterclaim has only to be referred to to indicate the history of amendment which underlines the uncertainty in the case concerning the reasons for failures in a large number of heaters. The difficulty in discovering the reason is highlighted by the different theories advanced by the parties.

There were special difficulties in the case due to the fact that the plaintiff was an expert in the manufacture of elements and the defendant was an expert in the design and manufacture of heater units. On the other hand I do not overlook that the defendant, whatever the course the evidence will eventually take, failed to obtain independent expert evidence before the hearing, after various issues between the parties became clearer. In the result the defendant, in my view, was largely responsible for the situation that has arisen in that respect.

At this stage, however, it seems to me that it is necessary to obtain available evidence which may throw light on the matter. Matters which have been covered in evidence by Mr Allsop Smith have explained his reports more fully and further investigation by the defendant has led to other possibilities being investigated. In my view the defendant's allegation that the material used for the element was unsuitable should not be restricted to the particular allegation added at the beginning of the trial. In my opinion the matters raised in cross-examination yesterday are within the ambit of the general allegation regarding the composition of the element and if necessary can be the subject of further specific amendment. In my view any prejudice to the plaintiff could be met by an adjournment but as Mr Allsop Smith was still in the witness box at the close of the hearing yesterday I did not anticipate that the new aspect raised by the defence should prove an insuperable difficulty in this case. For these reasons, and in order to reach finality in the matter I came to the conclusion that the evidence which may be important should be received."

In his submissions on the present application Mr MacLean pointed out that the defendant's third amended statement of defence, set-off and counterclaim was amended during the trial to include new sub-paragraphs (d) and (e). It then read as follows :

"5. THAT the serious defects hereinbefore referred to in the elements that failed were as follows :

- (a) In the 1000 watt elements a gauge of wire was installed which was smaller in diameter than had previously been used and was also made from an unsuitable material.

- (b) In the 1500 watt elements the wire installed was made from an unsuitable material
- (c) In the 2000 watt elements the wire installed was made from an unsuitable material.
- (d) In the 1000 watt elements the insulating material contained an unsuitable substance namely zirconium oxide.
- (e) In the 1000 watt elements the element wire contained insufficient zirconium."

Mr MacLean submitted that until the amendment the plaintiff was not aware that "the presence/absence of zirconium was of any significance", and it was noted the amendment related only to the 1000 watt elements. He submitted that the plaintiff was not unduly concerned as "the defence to the counterclaim had always been based on the proposition that there must have been a common defect in all three gauges to cause the failures". As a common defect was not alleged Mr MacLean said the plaintiff had decided against undertaking any further tests on its behalf. This attitude, it was submitted, was in accord with the plaintiff's consistent claim based on Mr Allsop Smith's evidence that the elements were not deficient and that the problems encountered were design faults in the heaters. It would be more precise to say that a design fault was the basis of the plaintiff's case, a stand which was maintained throughout the trial.

Referring to Professor Erasmus' evidence in July 1984 that the presence of zirconium could be relevant to 1500 and 2000 watt elements in that defective wire could be

"concentrated in a single order" Mr MacLean pointed out no application was ever made to amend the defendant's pleadings to include the allegations in sub paras (d) and (e) to 1500 and 2000 watt elements.

Mr MacLean submitted that on the pleadings and the evidence of Professor Erasmus the plaintiff was entitled to adopt the attitude that the nichrome wire was not "unsuitable" merely because a particular batch or batches suffered from a defect, bearing in mind that it was "impossible" in the words of Mr Nicholson, for the defect to occur across three gauges, there being no allegation or evidence up to July 1984 that it was "possible". It was submitted that if it was impossible for the wire to come from a common source then serious doubts were cast on the evidence of Professor Erasmus.

Mr McClelland submitted there was no miscarriage of justice, and that it was incorrect to claim that the scientific evidence "could not reasonably have been foreseen or known before the trial" concluded. He submitted that no objection had been raised to the evidence, which was the result of the defendant's continuing endeavours to establish that the nichrome was unsuitable and that the breakdown of the heaters was not due to defendant's design specification. Mr McClelland stressed that the defendant's stand was based on the fact that the plaintiff and its advisers had not been able to explain why the breakdowns ceased when "hermetic" elements were substituted. What Mr McClelland described as the "simplistic

view", or the respective stands of the parties, had changed through the need for expert scientific evidence regarding the composition of the elements. The scientific evidence had been introduced at the second hearing in 1982 and continued in the final hearing in 1984. It is clear that the question of the wire being imperfect as to its composition was raised by Mr McClelland in the cross-examination of Mr Allsop Smith on 26 October 1982 and zirconium was referred to - (see notes of evidence p 65.) And Professor Erasmus was called on 27 October 1982, his evidence and that of Mr Edward being interpolated so that Mr Allsop Smith could hear it before his evidence was completed. During their evidence the reports prepared by Professor Erasmus and Mr Edward were produced. Mr McClelland submitted the composition of the wire was clearly a critical element in the case when the hearing was adjourned on 28 October 1982. At that time the evidence of Professor Erasmus and Mr Allsop Smith was incomplete. When the trial resumed on 9 July 1984 Professor Erasmus was the first witness. It was on 9 July 1984, (see notes of evidence p 105 l 30) that Professor Erasmus said his tests showed "that fracture was predominantly by creep but with nevertheless a substantial amount of intergranular oxidation failure". And he added; "Either could cause fracture on its own or the two could combine to cause failure". These matters were dealt with in detail by Professor Erasmus in examination-in-chief and he was cross-examined by Mr MacLean.

Mr McClelland drew attention to questions put in



cross-examination regarding 23, 25, and 29 gauge wire. Professor Erasmus had answered that he did not think it improbable that the defects would have "occurred across 23, 25 and 29 gauge nichrome 5 wire". Mr McClelland submitted it was clear that the composition of the wire of all those gauges was in issue and that there was ample evidence to alert the plaintiff and justify a request for an adjournment to call further evidence.

Mr MacLean called Mr Nicholson, managing director of the plaintiff and Mr Sharp, as well as recalling Mr Allsop Smith, in rebuttal. The evidence of Mr Nicholson, based on records was insufficient to establish precisely whether particular rods were manufactured out of one or more purchases of wire. The evidence of Professor Erasmus that the plaintiff could have been supplied with a defective batch of both 23, 25 and 29 gauge wire was put to Mr Nicholson. His answer was that that would be most unlikely because if the plaintiff had faulty wire across 3 major gauges they would have had a disaster on their hands. But Professor Erasmus had said that "substantial differences in composition "were possible even within a single ingot", so that "consequently only part of an ingot may produce defective wire". (see notes of evidence p 139) Having regard to the evidence, Mr McClelland submitted the composition of the wire in all three gauges was in issue. Further there was evidence that the plaintiff had obtained nichrome wire from a supplier described as Driver-Harris, a company operating in Australia, Great Britain and the United States. The position,

however, was not clear on the evidence then available. As Mr Nicholson put it (notes of evidence p 183 l 23) "our control is we only order from reputable worldwide wire manufacturers".

Mr McClelland referred also to Mr Allsop Smith's evidence in rebuttal so far as it related to enquiries he had made regarding the use of zirconium. It was submitted the evidence generally in rebuttal as to zirconium, zirconia, and the source of the wire, showed that the matters were in issue and could have been further investigated by the plaintiff, but the plaintiff continued to rely on its original assertion that the design of the heater was the cause of the failures.

Mr McClelland pointed out that after the judgment was delivered in December 1984 there had been no notice of appeal or motion for a new trial within the time limit regarding further evidence. Further, after the question of damages was raised no question of an application for a new trial arose until the August conference in 1986. It was submitted that while time to apply can be extended it was totally unacceptable to expect leave to be granted at this date in the circumstances of this case.

In his reply Mr MacLean submitted that the evidence on which the defendant had relied simply reinforced the plaintiff's case, and it was submitted that the plaintiff was entitled to conduct its case on the pleadings. Reviewing the course of the trial on which the original allegation was that

nichrome was unsuitable, the allegations regarding zirconium and zirconia in respect of 1000 watt elements reflected the defendant's case. Thus, it was submitted, the plaintiff was entitled to place no great significance on the evidence given on 9 July 1984. Mr MacLean submitted that (without any deliberate intention) the effect of the defendant proceeding on the pleadings as amended at the trial was to lull the plaintiff into believing the Professor's evidence concerning zirconium and zirconia related only to 1000 watt elements. Mr MacLean contended that it was not until Professor Erasmus gave evidence in July 1984 that the added paragraphs 5 (d) and (e) were made relevant to the 1500 and 2000 watt elements. The particular evidence to which Mr MacLean referred was the following :

"Is it customary in your experience to have the whole of the metal in an ingot drawn into a particular gauge or does the gauge vary or what? Usually a batch or cast would be processed through to the rod stage as a single unit. At that point the coils of rod are stored and since there may be anything from 2 to 6 or 8 coils of rod from a single ingot, and since individual coils may be selected for drawing down into different sizes of wire, the material from one batch and from one ingot may end up in a range of wire sizes."

There was further evidence, as already noted in considering Mr McClelland's argument that substantial differences in composition were possible "even within a single ingot" and consequently "only a part of an ingot may produce defective wire". Professor Erasmus agreed that while defective element wire "could be spread over a considerable area of the globe", it "could also be concentrated in a simple order". Although that was the evidence Mr MacLean submitted the fact

was that no application was made to amend the pleadings to extend the allegations to the 1500 and 2000 watt elements.

Mr MacLean conceded that the evidence of Professor Erasmus was "like a beacon" at that stage of the trial but nevertheless the pleadings remained unaltered. He submitted that while it could not be properly claimed in 1982 that the plaintiff should have been aware of the true nature of the defendant's case it was clear in 1984 the defendant was relying on "the failure of all those gauges of wire". To meet that, Mr MacLean said, Mr Nicholson had been called to give evidence as to the source of supply and assert that what Professor Erasmus said could have occurred was not possible. The Court having accepted the evidence of Professor Erasmus, the plaintiff sought to call the new evidence of a Mr Timson which, it was submitted, supported the evidence of Mr Nicholson and was "a complete answer to the defendant's counterclaim". The second witness the plaintiff sought to call was a Mr Majesko to dispute Professor Erasmus' conclusion that it was a lack of zirconium which was responsible for the presence of chromium carbides held to be the cause of the failures.

It is clear as North P pointed out in Draqicevich's case (supra) at p 309 that "the rule places no restriction on the right of a Judge to grant a new trial on the ground that material evidence has been discovered since the trial, provided that he is satisfied it could not have been foreseen or known

before the trial". But he also points out that once the required condition is satisfied "the matter is one for the discretion of the Judge who will be guided by that overriding consideration of the interests of justice". He went on to say there was "no doubt at all that a Court will be very reluctant to grant a new trial simply on the ground that one of the parties has found a new witness whose evidence, if given, might have influenced the result for it is desirable that in the public interest there should be an end to litigation..." He then adopted the three conditions proposed by Lord Denning in Ladd v Marshall [1954] 3 All ER 735 quoted above from the headnote in Dragicevich's case.

Turner and Haslam JJ in separate judgments agreed. In agreeing the Court should "relax in some measure the rigidity of the rule laid down in Orbell v Mossman [1927] NZLR 353". Turner J observed that the Court's discretion "is one to be exercised in each case as the interests of justice seem to dictate". And he added, "No doubt the cases in which new evidence will lead to the granting of a new trial will continue in the nature of things to be rare; no doubt the discretion will continue to be exercised with conservative caution."

I propose to deal first with the nature of the proposed evidence as required under the second condition, namely, that "the evidence must be such that, if given, it would probably have an important influence on the result of the case although it need not be decisive".

The proposed witness, Mr Timson, is Managing Director of Driver-Harris Australia Pty Ltd of Victoria, Australia. In his affidavit Mr Timson deposes that his company was responsible for drawing electrical wire from rolled rods supplied by an associated American Company. From wire so drawn Driver-Harris Australia supplied the plaintiff. Mr Timson stated that any defect in composition would have occurred before the drawing process. The object of Mr Timson's evidence, based on records of his company supplying the plaintiff, was to establish, as he concluded, that it "would be virtually impossible for the same spool of wire to have been stored" for the period he calculated the relevant wire had been supplied to the plaintiff. It must be noted, however, that as in the case of Mr Nicholson who gave evidence on behalf of the plaintiff regarding the source of the wire, Mr Timson's company records are not sufficiently detailed to be precise. While no doubt confident in basing his opinion in support of Mr Nicholson's evidence on the records available it is significant that he qualified his conclusion using the words "virtually impossible". Further, Professor Erasmus in his affidavit refers to specific evidence given at the trial the effect of which, no doubt understandably, was not fully appreciated by Mr Timson, and which showed that Mr Timson's evidence is not "a complete answer to the defendant's counterclaim". As was pointed out by Turner J in (Sulco v Redit & Co Ltd [1959] NZLR 45, "the Court, before putting the successful party to the expense of a new trial, must have something definite before it to show that the evidence is of a

weighty character and would have an important bearing on the matter". (The quoted words come from the judgment of Lord Sterndale in the Court of Appeal in Brown v Dean 1909 2 KB 573, affirmed by the House of Lords 1910 AC 373, 375). Having regard to the nature of Mr Timson's evidence and the weight of the evidence before the Court I am unable to agree that it has been shown that the evidence of the proposed witness "would probably have an important influence" (without needing to be decisive) "on the result of the case".

The second proposed witness, Mr Majesko, is the Director of planning and development at Harrison Alloys (inc) New Jersey, United States of America. He was asked to consider the notes of Professor Erasmus' evidence. In a very brief affidavit he states that he has formed "a preliminary view concerning zirconium (or the lack thereof) in the failure of the alloy". He then says he accepts the mechanism of failure as described by Professor Erasmus but not his conclusion as to the lack of zirconium. As has been submitted the precis of Mr Majesko's qualifications do not suggest outstanding expertise for the purposes of this case. Apart from that, however, the affidavit fails to make clear the extent of Mr Majesko's investigation in order to reach a preliminary view. There is nothing to show that he was able to carry out experiments such as were carried out on the wire in question by Dr Erasmus. Quite understandably, Mr Majesko has had to consider the problem at a disadvantage. This is underlined by Dr Erasmus in his affidavit where he points out that figures of carbon

content given by Mr Majesko and on which, in part, he based his conclusion differ from the actual carbon content reported by Dr Erasmus in an appendix to his report Exhibit DD in the case. In my opinion the evidence of Mr Majesko, like the evidence of Mr Timson, is insufficient to satisfy me that it "would probably have an important influence" (without needing to be decisive) "on the result of the case". In reaching that conclusion in respect of both proposed witnesses I bear in mind the general rule stated by North P in Dragicevich's case, referred to above, that the Court will be "very reluctant to grant a new trial simply on the ground that one of the parties has found a new witness whose evidence, if given, might have influenced the result". And bearing in mind the stage at which both applications were made I repeat the rule that the evidence sought to be introduced must be "of a weighty character".

I turn now to deal briefly with the first condition stated in Dragicevich's case, that "it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial".

Rule 494 (3) (e) provides that the Court may hold that there has been a miscarriage of justice that justifies a new trial...if :

(e) Material evidence has been discovered since the trial which could not reasonably have been foreseen or known before the trial.



Mr MacLean submitted that the overall consideration was whether there had been "a miscarriage of justice", and he relied on the fact that the defendant had not amended the pleadings to allege defects in the 1500 and 2000 watt gauges of wire. In those circumstances it was submitted the plaintiff was entitled to conduct its case on the pleadings whereas, had the amendment been made the plaintiff would then have had to decide whether to apply for an adjournment to call further evidence.

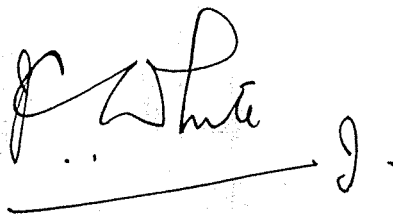
I am unable to agree that was the position. In my view, bearing in mind the course of the trial and the evidence brought before the Court first in 1982 and then specifically in 1984 the plaintiff was well aware of the basis of the defendant's case. In 1982 it is clear, in my opinion, the evidence of the proposed witnesses could reasonably have been forseen and could have been obtained. Certainly that was the position in 1984. While the plaintiff was entitled to maintain its consistent stand on the question of liability the question whether the plaintiff needed to introduce evidence to counter the defendant's evidence arose. Mr MacLean accepted the plaintiff was alerted in 1984 but no application was made to call new evidence until long after the trial and after judgment was delivered.

Mr MacLean described that delay as "a pragmatic one". He explained that the plaintiff's claim was relatively small, that the plaintiff did not intend to appeal, and that the defendant did not seal the judgment. As I understood it, Mr MacLean

considered the defendant faced "procedural difficulties", namely, those which had led to the application to set aside the judgment and the notice of appeal to the Court of Appeal. He said the plaintiff not having any economic interests in having the matter pursued any further, was content to allow matters to develop. I should add that the application for new trial pursuant to R 494 (3) (e), and the later application to set aside the judgment, were filed after arrangements had been made for a fixture to determine quantum. While time may be extended the principles as to the application of R 495 make it abundantly clear that an application for a new trial is intended to be lodged without undue delay.

In all the circumstances which I must take into account in exercising the Court's discretion according to the general principles to be applied I am not satisfied that there has been a miscarriage of justice justifying a new trial in this case.

For the foregoing reasons the application for a new trial is refused with costs reserved.

A handwritten signature in cursive script, appearing to read 'J. White', is written above a horizontal line. The signature is written in dark ink on a light background.

Solicitors :

Davenports (Auckland) for plaintiff

Hensley Mortlock & Co (Christchurch) for defendant

