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NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP 146/98

BETWEEN AIR CHATHAMS LIMITED & ANOR

Plaintiffs

AND CIVIL AVIATION AUTHORITY OF NEW ZEALAND & ANOR

Defendants

Hearing: 8 April 2003

Counsel: P. Grace with H. Janes for Plaintiffs
K. Murray with R.E. Schmidt for Defendants

Judgment: 14 April 2003

JUDGMENT OF MASTER D I GENDALL

Solicitors:

Rainey Collins Wright & Co. Wellington for Plaintiffs
Crown Law Office Wellington for Defendants

Introduction

[1] There are two applications before the Court:

1. An application by the plaintiffs for split trial and associated directions; and

2. An application by the defendants that the brief of evidence of Stuart McIntyre be ruled inadmissible at trial.

[2] The first application noted above was heard on 8 April 2003. There was insufficient time to consider the second application on that date.

[3] Following further consideration, at a telephone conference between the parties on 10 April 2003, it seemed that the better course to take with respect to the second application was that, as this related to an issue of admissibility of evidence at trial, this should be heard before the trial Judge. Accordingly, the second application was set down for hearing before Justice Hammond at 2.15pm on Tuesday 15 April 2003, and this was noted in my Minute of 10 April 2003.

[4] This judgment, therefore, deals only with the first application.

[5] That application by the plaintiffs is for a separate trial as to liability only and associated directions. The application is made pursuant to Rule 438(3) High Court Rules which states:

> "On the hearing of the application [for an order for directions affecting the trial], the Court may make such orders and give such directions (whether sought by the party applying or not) as appear best adapted to secure the just, expeditious, and economical disposal of the proceeding."

[6] Further, Rule 438(4)(c) and (d) provide:

> "In particular, but without limiting the generality of the foregoing provision, the Court may by its order –

(c) Define the issues to be tried:

(d) Direct that any issue, whether of fact or of law or of both, be tried before any other issue."

[7] Counsel for the plaintiffs referred me to McGechan HR438.08 which states:

> "The power in the rule is general, although detailed particular powers are listed. Outside such particular powers the Court may, for example, order that a trial be divided as between liability and quantum, or that 'holidays' be taken during the course of the trial, both of which are increasingly common in trials of long duration."

[8] In addition, Rule 418 High Court Rules has application here. This rule states:

> "**418. Orders for decision** – The Court may, whether or not the decision will dispose of the proceeding, make orders for –
>
> (a) The decision of any question separately from any other question, before, at, or after any trial or further trial in the proceeding; and
>
> (b) The formulation of the question for decision and, if thought necessary, the statement of a case."

[9] It seems clear that this application may be considered under Rule 418 or under Rule 438. In this regard, in *Clear Communications Limited v Telecom* (1998) 12 PRNZ 333 Justice Fisher stated:

> "Today Telecom applies under Rule 418 of the High Court Rules for an order that 'the defendant's liability be tried separately from and in advance of any questions relating to remedies.' There is of course no difficulty over jurisdiction for such an order, whether founded upon Rule 418 or Rule 438."

[10] The Court's power under these Rules is discretionary. As to Rule 418, guidance is available from a decision of Barker J. in *Rio Beverages Limited v The Golden Circle Cannery* noted at (1992) BCL 569. In exercising the discretion, factors which are relevant include:

1. Delay in finally resolving the proceeding;

2. Length of the hearing of the preliminary question;

3. Whether a decision one way or the other would result in the end of the litigation;

4. Length of any subsequent hearing and in particular whether any subsequent hearing time would be shortened by a preliminary question; and

5. A balancing of the advantages to the parties and the public interest in shortening litigation as against any disadvantages asserted by the defendants.

The underlying objective behind the rule is whether the procedure is likely to expedite a proceeding, saving inconvenience and expense without any countervailing injustice – see McGechan on Procedure HR418.04

[11] In *Strathmore Group v Fraser* [1992] 3 NZLR 385 where an order for a split trial had been made at first instance, Lord Templeman in the Privy Council stated at page 388:

> "It is admitted that the object of the preliminary issue was to save time and money; the compromise issue and the cancellation issue required to be decided in any event and if first decided and in favour of the respondents would render unnecessary any further expenditure of time and money."
>
> And
>
> "A trial in two parts involves the danger of two appeals to the Court of Appeal and two appeals to the Privy Council. On the other hand the second part of the trial may be rendered wholly unnecessary by the decision on the first part. The Judge must decide whether, taking into account the issues involved and the nature of the evidence required for each issue, the disputes between the litigants can best be resolved by a single trial or by a trial in two parts."

[12] I turn now to apply these principles to the facts in the present case.

[13] This proceeding was commenced in 1998 and arises from issues which developed between the parties in early 1996.

[14] It seems that the possibility of a split trial in this proceeding has already been raised in the past by the defendants on two occasions, and now on a third occasion by the plaintiffs.

[15] If a split trial was ordered and the plaintiffs succeeded at trial on liability only, counsel for the defendant noted that the plaintiff would not at that point receive any damages, and the liability decision could well be appealed.

[16] In this event, Mr Murray contended that a trial as to liability only would open up the possibility that the liability stage of the litigation might not be resolved until 2004 or 2005, depending upon whether one or two appeals proceeded. After the resolution of all appeals, counsel for the defendants noted that the proceedings might then have to come back for further trial as to damages. Delay in finally resolving the proceeding is likely to occur.

[17] As to the issue of any possible timesaving, counsel for the defendants argued that damages issues here are unlikely to involve much trial time in any event. Mr Murray contended that each side would call an accountant, and if the accountants conferred prior to trial, then only residual issues would be left for evidence and argument.

[18] Counsel for the plaintiffs contended that the time saved in a liability only trial could be up to one week of the trial, which is presently set down for a total of six weeks. Counsel for the defendants argued that any time saving would be considerably less than this.

[19] Counsel for the plaintiffs noted that the defendants have not filed any expert evidence at this stage in rebuttal of the plaintiffs' quantum expert. The plaintiffs are of the view, however, that the defendants may take a very extensive approach to any damages enquiry.

[20] Nevertheless, it seems to me from the indications put before the Court that the maximum timesaving which might arise from ordering a split trial would be between two and five days. This is in the context of a trial set down for six weeks.

[21] If a trial on liability only was to take place, then in the event that this was decided in favour of the defendant, this would end the proceeding. This is, of course, subject to the caveat that any appeals on that decision would need to be first exhausted, and as I have noted at paragraph [16] of this judgment, counsel for the defendants have signalled the possibility of appeals.

[22] If, alternatively, the plaintiffs were to succeed upon the liability issue, then of course the litigation would not be ended, as the quantum trial would need to follow.

[23] These proceedings have now been on foot for some five years. As I understand it, fixtures had been allocated in November 2001 and June 2002, both of which have been vacated. It seems that this was at the behest of the plaintiff.

[24] A firm fixture has been allocated in July of this year, with an adequate allocation of Court time to hear all issues in this proceeding.

[25] I am satisfied that these proceedings need to be brought on for a substantive hearing of all issues, and that this would best secure the just, expeditious and economical disposal of the proceeding in terms of Rule 438(3) High Court Rules.

[26] In my view the procedure to have a trial as to liability only sought by the plaintiffs here is not likely to expedite the proceedings. As McGechan states in HR418.05:

> "…from time to time the cases sound a cautionary note that while Rule 418 is intended as a liberalising provision one must still bear in mind the potential perils involved in attempting to short-cut litigation by dividing off issues and attempting to decide them as preliminary points – see, for example, the comments of Eichelbaum J (as he then was) in *Innes v Ewing* (1986) 4 PRNZ 10 and Barker J in *Levis Strauss & Co v Kimbyr Investments Limited* (1992) 5 PRNZ 577 affirmed on appeal…"

[27] Weighing up all the discretionary factors noted above, therefore, I am satisfied that the plaintiffs' application for an order directing that this proceeding be tried on the issue of liability only must fail.

[28] There is a further matter, however, which the plaintiffs raise, which I now deal with.

[29] In the plaintiffs' application for an order directing trial as to liability only, they seek as order "(b)" the following:

> "Such further or other orders or directions as are considered appropriate to give effect to (a) above."

[30] Wild J reserved the plaintiffs the right to apply for orders relating to the scope of evidence at trial in his Minute No. 9 dated 10 October 2002.

[31] The plaintiffs are endeavouring to seek a ruling as to the scope of evidence at trial which broadly relates to a *res judicata* matter.

[32] In part, this is outlined in paragraph 33 of the submissions before me by counsel for the plaintiffs, where it is stated:

> "The plaintiffs therefore seek an order that the defendants be required to provide a statement within a specified time identifying the purpose of leading evidence relevant to the initial suspensions (the brief of evidence of Mr Bartlett and Mr Dunne) and how and/or why it is germane to the claims pleaded."

[33] There was a certain amount of argument before me from both counsel for the plaintiffs and counsel for the defendants as to this issue.

[34] Upon reflection, I am of the view that this is not an appropriate matter for me to deal with. It is an evidential matter which also is best addressed by the trial Judge, and it is convenient that this might occur at the hearing before Justice Hammond on Tuesday 15 April 2003.

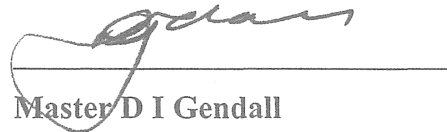
[35] Accordingly, I make no ruling with respect to this issue.

[36] I direct that it is a matter which should be put before Justice Hammond when he considers the application as to the admissibility of Mr Stuart McIntyre's evidence at 2.15pm on Tuesday 15 April 2003.

Conclusion

[37] As I have noted above, the plaintiffs' application for a split trial on the issue of liability only is unsuccessful.

[38] Costs are reserved.



Master D I Gendall

Delivered at 2.00pm on 14 April 2003.