IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2001-404-001974

	BETWEEN	CARTER HOLT HARVEY LIMITED Plaintiff
	AND	GENESIS POWER LIMITED First Defendant
	AND	ROLLS-ROYCE NEW ZEALAND LIMITED Second Defendant
	AND	ROLLS-ROYCE POWER ENGINEERING PLC Third Party

Hearing: 20 August 2009

Appearances: B R Latimour for Plaintiff
T C Weston QC for First Defendant
S D Hughes, J R Knight and T Tomlinson for Second Defendant and Third Party

Judgment: 27 August 2009

JUDGMENT OF COOPER J ON PLAINTIFF'S APPLICATION UNDER r 9.56 CONCERNING THE PROPOSED EVIDENCE OF NORMAN MAGASINER

This judgment was delivered by Justice Cooper on
27 August 2009 at 3.00 p.m., pursuant to
r 11.5 of the High Court Rules

Registrar/Deputy Registrar
Date:

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[1] One of the experts upon whose evidence the plaintiff intends to rely is Mr Norman Magasiner. Mr Magasiner resides in South Africa. He is elderly and suffers from ill-health. He has advised the plaintiff's solicitors that he will not travel to New Zealand for the purposes of the trial nor, will he submit to the pressures of cross-examination by way of a video link.

[2] In the circumstances, the plaintiff has applied by a memorandum dated 13 August 2009 for an order allowing Mr Magasiner's evidence to be given by way of affidavit. That application is opposed by both the first and second defendants.

Background

[3] In this very long case there are numerous disputes between the parties on matters of fact and on matters of opinion. Mr Magasiner would be called partly as a witness of fact but, mainly as an expert giving evidence of his opinions. Evidence in the former category would concern files which occurred in October and November 2001 in which the performance of the Number 8 Power Boiler was tested in a process upon which the plaintiff relies as indicating that the boiler was unable to maintain the production of 100 tons per hour of steam generation on wood waste required by the turnkey contract. The bulk of Mr Magasiner's evidence would deal with the reasons why the boiler allegedly could not produce steam in the required amounts and modulate on wood waste as required.

[4] In a reply brief of evidence Mr Magasiner would respond to evidence given by experts called by the defendants.

[5] To a significant degree, Mr Magasiner's evidence is couched in terms which support the fuller briefs to be given by his colleague, Mr Misplon. Both Mr Misplon and Mr Magasiner were colleagues in an engineering company, Thermal Energy Systems CC (TES) established by Mr Magasiner. In his brief, Mr Magasiner explains that both the Misplon and he, together with a third person, one Mike Inkson, work together as a team investigating the issues. Mr Magasiner's brief frequently cross-refer to Mr Misplon's evidence, indicating agreement with it. Mr Latimour, in his submissions in support of the application, referred to a number of occasions

where, in dealing with the evidence of a witness to be called by the first defendant, Mr Elliott, Mr Magasiner would give evidence questioning evidence of Mr Elliott from his own personal knowledge and involvement in the November 2001 trials. Otherwise, it has not been explained to me what evidence Mr Magasiner would give which is not either covered by briefs circulated by Mr Misplon or able to be covered by him.

[6] The application is advanced pursuant to s 83(1)(c)(i) and r 9.56 of the High Court Rules. The former sets out the "ordinary way" for witnesses to give evidence in criminal and civil proceedings. Section 83(1)(c) contemplates evidence being given by affidavit in a civil proceeding, if rules of Court permit the giving of evidence in that form. This being an ordinary witness proceeding, I doubt whether s 83(1)(c) has any application; its provisions relate to the giving of evidence in "the ordinary way". However, r 9.56 can operate independently of s 83. So far as is relevant, the rule provides:

> **9.56 Affidavit evidence under order of court**
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> (1) The court may, even though no agreement for the giving of evidence by affidavit has been made, at any time for sufficient reason order, on reasonable conditions, -
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> (a) that any particular fact or facts may be proved by affidavit; or
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> (b) that the evidence of any witness may be given by affidavit read at the trial or on any application for judgment.
>
> (2) Despite subclause (1), an order must not be made authorising the evidence of the witness to be given by affidavit if –
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> (a) an opposite party desires the production of a witness for cross-examination; and
>
> (b) the witness can be produced.

[7] Mr Hughes, supported by Mr Weston QC, submitted that the rule was not intended to authorise the giving of opinion evidence by affidavit. They submitted that r 9.56(1) was intended to be limited to issues of fact, personal to the witness concerned and should not be used to embrace opinion evidence. They noted that sub-part 5 of the Rules, dealing with the evidence of experts, does not contain a provision authorising the giving of such evidence by affidavit in an ordinary civil proceeding. Further, reading r 9.56(1)(a) together with (b) would suggest that what

was contemplated in both cases was an affidavit establishing particular matters of fact.

[8] I doubt whether r 9.56(1) should be confined as the defendants argue. While r 9.56(1)(a) does refer to proving any particular fact or facts by affidavit, different language is adopted in paragraph (b). The wording there refers, broadly and simply, to the evidence of any witness. It does not on its face draw a distinction between fact and opinion evidence. In this context, I do not consider that a distinction between fact and opinion is either necessary or appropriate. It would confine the provision in a way which is not justified by the words, or the apparent intent of the Rules, which, in my view, is to ensure that any evidence can be given by affidavit if there is "sufficient reason". In assessing whether there is "sufficient reason", the Court will ultimately be guided by its perception of where the interests of justice lie: (see r 1.2). I consider that the Court has jurisdiction under r 9.56(1)(b) to authorise the giving of opinion evidence by affidavit.

[9] Before such an order can be made there is a threshold issue. Under r 9.56(2), in this case the defendants clearly wish to cross-examine Mr Magasiner if his evidence is to be before the Court. In those circumstances, the plaintiff must show that the witness cannot be produced. Here, Mr Hughes argued that the affidavit of Mr Magasiner fell short of what was required. In his affidavit of 12 August, Mr Magasiner referred to the stresses and demands which would accompany cross-examination, even if a video link were arranged so that he could give the evidence in South Africa, where he resides. Mr Magasiner is 76 years of age and in paragraph 4 of his affidavit he referred to a medical history including radiotherapy for prostate cancer. He also attached a letter from a specialist physician, Mr Brian Sarembock, which stated:

> The above has been my patient since 29.11.1995. He has numerous medical conditions namely
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> 1) Hypertension
>
> 2) Hypercholesterolaemia
>
> 3) Severe chronic degenerative arthritis of his spine
>
> 4) Chronic anxiety/stress disorder.

> I have examined him today (4.8.2009) and in my opinion it would be very unwise for him to be subjected to any form of Court procedures.

[10] Mr Weston pointed out that in his own affidavit, Mr Magasiner while referring to radiotherapy for prostate cancer did not state when such therapy had been undergone. Further, cancer had not been referred to in the list of ailments given by Dr Sarembock. While that is true, I nevertheless consider that the opinion of a specialist physician that it "would be very unwise" for him to give evidence ought, in the absence of any evidence to the contrary, to be sufficient to establish that the plaintiff cannot produce Mr Magasiner. I also accept that the situation is not of the plaintiff's making.

[11] The question then remains as to whether or not the Court should exercise its discretion to authorise the giving of his evidence by affidavit. Mr Latimour argued that the Court should so order given the significance of Mr Magasiner's evidence, his involvement as an advisor to the plaintiff from a comparatively early stage and the practical consideration that many of the briefs of evidence in the proceeding have cross-referenced to Mr Magasiner's briefs on the assumption that they would be in evidence. He submitted that allowing Mr Magasiner's evidence to be given by affidavit would result in a "more coherent" picture for the Court. He also argued that the Court was not in a position at this stage to decide that it would not derive substantial help from the evidence.

[12] He accepted that much of Mr Magasiner's evidence would be subject to challenge, and indeed had been challenged in the briefs already circulated. This meant that the areas of dispute had effectively already been identified. The defendants then were already in a position of being able to make submissions directed to the weight of Mr Magasiner's opinions. While conceding that the weight to be given to Mr Magasiner's opinions would be very much an issue for the Court, he argued that the assessment of its weight would be best left to the deliberative process at the end of the trial rather than being made at this stage.

[13] Both Mr Hughes and Mr Weston argued that there were dangers in such an approach. Mr Hughes submitted that where a relevant opinion expressed by Mr Magasiner was challenged, the Court could only reasonably be guided by it in

circumstances where some other witness had also given similar evidence and been subjected to cross-examination. Then, if the other witness had shifted his position in cross-examination, that must inevitably cast doubt about Mr Magasiner's opinion. Confusion could be caused if the plaintiff purported to rely on Mr Magasiner in circumstances where others had made concessions in cross-examination.

[14] Mr Weston added that had Mr Magasiner been available for cross-examination, the extent of his expertise would have been the subject of challenge. In his absence, such a challenge could not be mounted. To the extent that Mr Magasiner's evidence involved issues of fact concerning the November 2001 trials, points of difference between Mr Magasiner and Mr Elliott, could be put to Mr Ellioitt by the plaintiff in cross-examination, relying on Mr Magasiner's circulated briefs, under r 9.9(2).

[15] Section 25(1) of the Evidence Act provides that an opinion by an expert is admissible "if the fact-finder is likely to obtain substantial help from the opinion in understanding other evidence in the proceeding or in ascertaining any fact that is of consequence to the determination of the proceeding". That is a rule going to admissibility, and I do not understand the defendants to argue that this section would justify excluding Mr Magasiner's evidence were he present and able to be cross-examined in the normal way.

[16] Nevertheless, I think it is legitimate to consider whether or not the Court is likely to be assisted in reaching a just disposition of the case by allowing Mr Magasiner's evidence to be given by affidavit. Here, it is relevant to emphasise that the evidence would go to issues which are at the heart of the dispute between the plaintiff and the defendants as to the ability of the Number 8 Primary Boiler to generate wood-waste steam in accordance with the requirements of the Turnkey Contract. So far, every witness called has been the subject of vigorous cross-examination by the defendants. I have no doubt that the defendants' witnesses also will be extensively cross-examined. In those circumstances, I am inclined to the view that it would be very difficult on any significant matter to accord any weight to the opinion of Mr Magasiner who would not have been tested in the same process.

[17] It appears that Mr Magasiner is effectively in a position of supporting and agreeing with evidence of more extensive ambit that has been given by Mr Misplon who is presently giving evidence. He is ostensibly well qualified to do so. But, on all main issues, it seems to me that the plaintiff's position has been, or will be, adequately addressed by other experts called on its behalf.

[18] In these circumstances, I have reached the view that the better course to follow is not to read Mr Magasiner's evidence in affidavit form. I infer from the argument that the defendants would not oppose the use of Mr Magasiner's briefs under r 9.9(2). However, that question has not yet arisen and I will consider an application for leave under that rule if and when it is made.

Result

[19] The plaintiff's application is declined.