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 April 2009

Appearances: B R Latimour, I M Gault, D M Salmon and B M M McKinlay for Plaintiff
T C Weston QC, S W B Foote, C L Bryant and C L Ashby-Koppens for First Defendant
S D Hughes, G J Christie, J A Craig, J R Knight and T Tomlinson for Second Defendant and Third Party

Judgment: 21 April 2009

REASONS FOR JUDGMENT OF COOPER J
ON APPLICATIONS TO FILE AMENDED PLEADINGS

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[1] The plaintiff has sought leave to file an eighth amended statement of claim. The amended claim would, apart from some very minor changes, alter the quantum of the claim by reducing it. The document, dated 20 April 2009, may be filed by consent.

[2] The second defendant sought leave to file an amended statement of defence. It was prepared on the basis of the plaintiff's seventh amended statement of claim. In this judgment, I will refer to this pleading as the amended statement of claim. The changes made by the eighth amended statement of claim are not significant in terms of the issues raised by the application for adjournment. Mr Latimour has opposed the second defendant's application and I heard submissions from Mr Hughes and him yesterday. The first defendant abided the decision of the Court.

[3] Mr Hughes helpfully provided a marked up copy of the proposed amended statement of defence showing those parts of it which he understood were opposed by the plaintiff. After hearing the argument I indicated by reference to the marked up parts of the draft document which new pleadings I would allow and which I would reject. I said that I would give my reasons in this judgment.

[4] I begin by recording the decisions that I made, by reference to the paragraphs in the draft amended statement of claim. I rejected the proposed pleadings in paragraphs 8(a), 9(c)(i) (after the first sentence), 9(c)(ii)(2) (as to the words "where very few systems of monitoring and control ever appear to have been implemented"), 10, 13, 16 (after the first sentence), 30(c) and 30(i) and (j). I held that the second defendant could amend the pleadings as proposed in paragraphs 9(c)(ii)(2) (as to the words "compliant with the Technical Specifications for design fuel, particularly in the case of imported wood waste"), 9(c)(iii), (iv), (v) and (vi), 27(b), 30(d)(ii) and 31.

[5] In the proposed paragraph 8(a), the second defendant was responding to paragraph 13 of the amended statement of claim which contained an allegation that the cogeneration plant fundamentally fails to perform in accordance with the Turnkey Contract. That pleading would be confronted directly by paragraphs 8(b) to (e) of the proposed amended statement of defence. Paragraph 8(a) simply sought to

underline the fact that the statement of claim was about the performance of the cogeneration plant and alleged that in order to justify expenditure on the cogeneration plant claimed as damages the plaintiff would have to establish defects having a demonstrable and material effect on the performance of the plant. Mr Latimour objected on the grounds that the proposed pleading really amounted to legal argument. Mr Hughes pointed out that there would be a significant amount of evidence about performance defects and the proposed pleading was designed to reflect that. However Mr Latimour's point is, in my view, correct and for that reason the amendment should not proceed.

[6] Turning then to paragraph 9(c)(i), I note that the pleading begins by alleging failure by the plaintiff to use wood waste falling within the fuel specification contained in the Turnkey Contract. There follow three sentences to which the plaintiff objects in which the second defendant would plead its reliance on sample data sourced from the plaintiff, and the fact that the data suggested fuel had been used with an ash content exceeding the figures contained in the technical specifications and also exceeding the requirements of the specifications regarding moisture content.

[7] Mr Hughes sought to justify the pleading on the basis that it was an endeavour to give particulars of the basis on which the second defendant would allege failure to comply with the relevant fuel specification. Mr Latimour's complaint was that the sentences in question were evidence or argument. I consider Mr Latimour's objection is valid and that all that is necessary is for the statement of defence to allege failure to use wood waste complying with the specification. That is the pleading in the first sentence of the disputed paragraph. Pleadings should assert relevant matters of fact, but not evidence of those facts. On this basis I upheld the objection to the proposed pleading.

[8] My decision in respect of the disputed words in paragraph 9(c)(ii)(2) was based on the same grounds.

[9] I rejected the proposed pleading in paragraph 10 on the basis that it did not deal directly with any of the paragraphs in the amended statement of claim.

Paragraph 14 of the amended statement of claim alleges (by reference to Appendix 1) the key respects in which the plaintiff says that the cogeneration plant was not designed, installed or constructed in accordance with the Turnkey Contract, or fails to perform in accordance with that contract. Mr Hughes argued that the proposed paragraph 10 was an amplification of the pleading to paragraph 14 of the amended statement of claim, but that paragraph was comprehensively responded to in paragraph 9 of the proposed amended statement of defence.

[10] The opening words of the proposed paragraph 10 were:

> Further, in relation to paragraph 14, there is a factual context in which Cater Holt Harvey's allegations of Defects must be considered. In particular: …

Mr Hughes sought to justify this pleading on the basis that it raised material issues of fact. However, the factual context in which the plaintiff's allegations of defects must be considered consists of matters which will be the subject of evidence and there is no need for them to be pleaded. In the circumstances, I decided to uphold Mr Latimour's objection. As I noted during argument if, at the end of the day, the plaintiff were to suggest that these matters should have been pleaded, the present opposed attempt by the second defendant to do so would likely be an effective basis for an application to amend the pleading.

[11] Mr Hughes effectively accepted during argument that the proposed paragraph 13 ought not to proceed because it was not related to any of the pleadings in the statement of claim. Effectively, the proposed pleading amounted to a summary of the second defendant's case on the plaintiff's cause of action based on *Hedley Byrne*. Although at one stage he claimed that the proposed pleading was a response to paragraph 73 of the statement of claim, plainly that is not the case. I indicated during argument that the pleading had the appearance of a submission and Mr Hughes was inclined not to press for its inclusion.

[12] A similar reasoning process was behind my rejection of the pleading at paragraph 30(c) of the proposed amended statement of defence and paragraphs 30(i) and (j). Those paragraphs are really in the nature of submissions as to costs of work

that has been carried out by the plaintiff on the Plant, duplication and overlap in the damages claimed and causation issues concerning quantum.

[13] As to paragraph 16 of the proposed amended statement of defence the pleading responds to the allegation at paragraph 75 of the amended statement of claim where the plaintiff alleges that the context of dealings that had taken place between the parties prior to the establishment of a contractual relationship was a competitive tender process, in which the second defendant participated, for the design, manufacture, construction, installation, erection and commissioning of the cogeneration plant. In the proposed amended statement of defence, the second defendant seeks to raise other matters of "context". Mr Latimour again argued that the proposed pleading was in the nature of submissions. When he indicated that he would not suggest that the matters sought to be pleaded could not be the subject of a submission if established on the evidence, Mr Hughes indicated that he would not pursue this proposed pleading.

[14] I indicated that I would allow the proposed pleading in paragraph 9(c)(ii)(2) insofar as the words that I have quoted in [4] above were concerned. Mr Latimour had confined his objection to the latter part of that paragraph. The first part of it is plainly an appropriate pleading.

[15] In paragraphs 9(c)(iii) to (vi) of the proposed pleading, the second defendant seeks to set out reasons why it contends that the cogeneration plant may not have complied with or performed in accordance with the requirements of the Turnkey Contract (if that is established by the plaintiff). They are directly related to the defects which the plaintiff has pleaded in paragraph 14 of the amended statement of claim by reference to Appendix 1. The issues raised are an alleged failure by the plaintiff to properly manage and/or prepare fuel entering the cogeneration plant, failure properly to maintain the plant, failure to ensure that suitably experienced personnel attended to important activities at the plant and use of Boiler No.8 outside the terms of the specifications.

[16] Mr Latimour's complaint was that the pleadings consisted of new affirmative allegations, although at one point he appeared to concede that the second defendant

was “re-characterising” matters that had previously been pleaded in a different way. He was not in a position to point to any specific prejudice or to state that the matters now sought to be raised by the second defendant had not been the subject of evidence exchanged by the parties. He argued generally, however, that the Court should not allow amendments to the defendant’s pleadings after the evidence has been exchanged.

[17] Under r 7.18(2) of the High Court Rules no amended pleading may be filed after the setting down date without leave. In applying the rule the Court must obviously adopt the path best calculated to meet the interests of justice. Where a pleading is concerned, the object should be to ensure that the pleadings define the real issues between the parties. In the absence of any real suggestion that the amended pleading would prejudice the plaintiff or that it would raise issues not addressed by the evidence already circulated, I concluded that the amendments should be allowed.

[18] In paragraph 27 of the proposed amended statement of defence, the second defendant pleads to paragraph 86 of the amended statement of claim in which the plaintiff asserts that the second defendant owed it a duty of care to design the cogeneration plant in a way that would not cause or allow dangerous defects or defects that would cause damage to other parts of the plant or other parts of the plaintiff’s property. By paragraph 27(b) of the proposed statement of defence the second defendant denies that it had a common law duty to use reasonable skill and care not to cause defects which would in turn cause damage to “other parts” of the plaintiff’s property. There is a reference to clause 42.3 of the general conditions of contract, followed by the words “of which Carter Holt Harvey had clear notice” in parentheses. Under clause 42.3, as Mr Hughes summarised the position, the risk of damage passed to the employer.

[19] Mr Latimour objected to the words in parentheses. He submitted that they raised issues not previously raised on the pleadings and not traversed in the evidence that had been circulated. However, there was no objection (and could not be) to the earlier part of paragraph 27(b), including the reference to clause 42.3. The defence that the second defendant wishes to mount on this point is dependant on the plaintiff

having had notice of that clause. Mr Hughes submitted that it must have, given the fact that it was able to approve the Turnkey Contract prior to its execution. Be that as it may, I doubt that the evidence on this issue would be extensive, or cause any real logistical difficulties for the plaintiff even if it has not already been covered in the evidence exchanged to date.

[20] I considered that the fair course to follow is to allow the amended pleading to go forward, but I reserved leave to the plaintiff to adduce further evidence on this issue if its existing briefs do not adequately deal with it.

[21] Although initially raising an objection to paragraph 30(d)(ii) of the proposed amended statement of claim, Mr Latimour in the end did not pursue it. Mr Hughes argued that the pleading was intended to reflect the decision of the House of Lords in *Ruxley Electronics & Construction Ltd v Forsyth* [1996] AC 344. Strictly speaking, however, it is not necessary to plead an argument which simply goes to the reasonableness of damages. However, in the absence of objection, there is no reason to disallow the pleading.

[22] Paragraph 31 of the proposed amended statement of defence raised issues of mitigation and contributory negligence. Although Mr Latimour evidently indicated some difficulty with this pleading in discussions with Mr Hughes, in the end he did not pursue it.

[23] For these reasons I dealt with the second defendant's application in the manner summarised in [4] above.