IN THE HIGH COURT OF NEW ZEALAND
NEW PLYMOUTH REGISTRY

CIV-2007-443-000289

BETWEEN	NEIL STUART JOHNSTON Plaintiff
AND	CHRISTOPHER FREDERICK SCHURR First Defendant
	DEEM & SHEARER Second Defendant

Hearing: 27-30 October and 2-5 November 2009

Appearances: E J Hudson and D G Chesterman for the Plaintiff
P J Mooney for the First Defendant
J M Morrison for the Second Defendant

Judgment: 5 November 2009

(ORAL) JUDGMENT OF DUFFY J

Counsel: E J Hudson P O Box 19252 Hamilton 3244 and D G Chesterman Bankside Chambers Level 22 Lumley Centre 88 Shortland Street Auckland 1010 for the Plaintiff
J M Morrison P O Box 5029 Lambton Quay Wellington 6145 for the Second Defendant

Solicitors: Mooney and Webb P O Box 999 Taranaki Mail Centre New Plymouth 4340 for the First Defendant

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[1] At the close of the first defendant's case, I invited the second defendant to commence its case. I was advised by Mr Morrison for the second defendant that it would be calling no evidence. An issue then arose regarding the order of closing addresses.

[2] The second defendant contends that in circumstances where it does not call evidence, the order of closing addresses is:

a) First defendant, since he called evidence;

b) Plaintiff; and

c) Second defendant.

This is consistent with what is provided for in r 10.10(4).

[3] The plaintiff contends, however, that the second defendant is still required to give an opening address. The plaintiff argues that unless the second defendant opens, the plaintiff will be ambushed and will not know the defence he has to address. The second defendant's response to the plaintiff's argument is that the plaintiff's concerns can be addressed by the plaintiff being given a right of reply on matters he could not have anticipated the second defendant would rely upon in its closing address.

[4] Having heard from the parties at the end of the day, I advised that I would deliver a ruling the following morning.

[5] This morning, I have been advised by the plaintiff that he would consider a pragmatic approach whereby closing addresses finished with the second defendant, but with a right of reply reserved for the plaintiff. As there may be arguments about the scope of the right of reply, I would prefer to deal with the order of addresses in accordance with the law as I have found it to be.

[6] I have considered the parties' arguments, and I have also considered the relevant material to reaching a view on how matters should be dealt with.

[7] The order of addresses was always of particular concern in civil jury trials, because it was believed that the party which closed last had an advantage. This perceived advantage is likely to be less relevant to a judge alone trial. The traditional view has always been that if a defendant called evidence, the order of closing addresses was defendant first, then plaintiff. If the defendant did not call evidence, the order was reversed, with the defendant closing last. The order of addresses was determined by whether or not the defendant had called evidence.

[8] Traditionally, a defendant could be said to have called evidence if it cross-examined another party's witness and, as a result of the cross-examination, produced a document in evidence: see *Boracure (NZ) Ltd v Meads* [1946] NZLR 192. Indeed, one of the perils of cross-examination on documents for a defendant was that the plaintiff might then require the production of the document on which the cross-examination had occurred, and so force the defendant into evidence: see *Senat v Senat* [1965] 2 All ER 505. This, in turn, precluded the defendant from, either seeking a non-suit of the plaintiff's case, or from closing last.

[9] The move to common bundles of documents has altered the process for the production of documentary evidence. This is now provided for in rr 9.12 to 9.15 of the High Court Rules. Documentary evidence is now treated as admitted into evidence when the requirements of those rules have been fulfilled.

[10] Before considering the order of addresses, I considered it necessary, first, to satisfy myself that the second defendant was in the position where it could say that it had not offered evidence and, therefore, in accordance with r 10.10.(4), it was entitled to address the Court last.

[11] I have, therefore, considered the agreed bundle of documents. In this case, it comprises five volumes. At the beginning of the first volume, in accordance with r 9.13, there is a list of contents, which sets out the date, document identification number, nature of the document, the party producing the document, and the page number. The list of contents reveals that documents 157, 158, 210, 266, 281, 282 and 928 were produced by the second defendant.

[12] Rule 9.14 sets out the consequences of incorporating a document into the common bundle. Under r 9.14(4), a document is received into evidence when a witness refers to it in evidence, or when counsel refers to it in submissions made otherwise than in a closing address. Under r 9.14(6), the Court has a discretion to direct that r 9.14 not apply to any document.

[13] Section 132(2) of the Evidence Act 2006 provides that a document in a common bundle is received into evidence when the relevant conditions in the rules of Court have been complied with.

[14] I have gone through the transcript and discovered that at p 66 of the notes of evidence, the first defendant cross-examined the plaintiff's witness, Shaun Gifford, on document 266, which is recorded in the bundle as having been produced by the second defendant. Then, at p 68 of the notes of evidence, the second defendant cross-examined Mr Gifford on document 210, which is also recorded in the bundle as having been produced by the second defendant. The result is that two documents listed in the common bundle as having been produced by the second defendant have been referred to a witness. In one instance, the referral was as a result of the first defendant's cross-examination, and, in the second instance, the referral was as a result of the second defendant's cross-examination. In terms of r 9.14(4) and s 132(2) of the Evidence Act, these documents have now been received into evidence. This means that, in terms of r 10.10 (4), the second defendant can be treated as having already offered evidence through the process I have described. Consequently, it would no longer be open to the defendant to contend that it was entitled to a final address.

[15] There remains the issue of the exercise of the discretion in r 9.14(6). As the issues that I have raised today were not covered by counsel, it seems to me only proper that the second defendant have the opportunity, if it so wishes, to avail itself of the opportunity to invite the Court to exercise the discretion in r 9.14(6). The preliminary view I have reached is that the second defendant has offered evidence, and, therefore, in accordance with r 10.10(4), the order of addresses would be:

a) First defendant;

b) Second defendant; and

c) Plaintiff.

I will leave it with the parties to take instructions and decide what they want to do in relation to r 9.14(6).

Duffy J

Addendum

[16] Following the delivery of this ruling, I was later advised by the second defendant that it would not be applying to the Court for an order under r 9.14(6) directing that r 9.14(4) should not be applied to documents 266 and 210, so that the second defendant could avoid being treated as having offered evidence in support of its case. That being so, the order of addresses is that set out in [15] herein.

Duffy J