IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV-2006-485-1600

BETWEEN	TODD POHOKURA LIMITED Plaintiff
AND	SHELL EXPLORATION NZ LIMITED First Defendant
AND	OMV NEW ZEALAND LIMITED Second Defendant

Hearing: 5 November 2009

Counsel: A S Olney and I Clarke for plaintiff
L J Taylor for first defendant
D J Goddard QC and K R Hodgson for second defendant

Judgment: 6 November 2009

JUDGMENT OF DOBSON J

Todd application to stay 21 October 2009 judgment requiring further discovery

[1] My judgment dated 21 October 2009 ordered Todd to provide further discovery of defined categories of documents in relation to re-injecting gas at Todd's McKee and Mangahewa Fields, decision-making in respect of what that level of re-injection was to be, assessments of gas reserves and proposed development plans, all in relation to those fields.

[2] Todd is pursuing an appeal from that decision. The terms of the decision required the categories of document to be provided for inspection by 28 October 2009. The present application was stay was filed on 2 November 2009.

[3] By the time the matter was called this morning, counsel had ascertained the high probability that the Court of Appeal could hear both this, and a second appeal Todd is pursuing from an earlier judgment of mine in these proceedings, on 12 November 2009. Given that prospect, Mr Goddard QC proposed, on behalf of OMV, that it would consent to the stay Todd seeks, on terms that the work involved in identifying all the documents within the categories of further discovery ordered in my 21 October 2009 judgment be undertaken, so that inspection could occur as soon as the Court of Appeal decision is available, assuming that the appeal is unsuccessful. For Shell, Mr Taylor concurred with that proposal.

[4] However, Todd would not agree to a stay being imposed on any such condition. Mr Olney indicated that no detailed work has been undertaken to identify and copy the appropriate documents, notwithstanding the terms of the order that required that work to be undertaken between 21 and 28 October 2009, and the absence of any application for stay until 2 November 2009.

[5] Todd pursued its application for an unconditional stay so that if its appeal is unsuccessful, the practicalities would still require Todd to be given a further period of approximately a week to be able to perform, on the basis that it would only begin the task after its appeal was determined against it.

[6] Mr Olney raised numerous arguments in support of an unconditional stay. First, that the further categories of document, if relevant at all, could only assist in cross-examining Todd's witnesses, and could not be relevant to analyses undertaken by experts on behalf of the defendants, into the nature and effect of the conduct as alleged against the defendants.

[7] I do not accept that distinction is justified. For example, in the analysis of potential purposes or effects of conduct by the two joint venturers in relation to exploitation of the Pohokura Field as one part of their respective total gas interests, the approach adopted by Todd in the management of all of its own gas resources is a matter to which economists may attribute some relevance. It does not arise only in challenging Todd's evidence reconstructing what its motivation, conduct and planning was.

[8] It follows that the defendants, having made out the relevance of these additional categories of documents, have a legitimate interest in considering their content before the defendants are required to serve the briefs of evidence from the experts they intend calling.

[9] It was also argued for Todd that its appeal rights would be rendered nugatory if it had been required to produce the documents for inspection in the meantime. That is valid in respect of the time and effort needed to identify and copy the documents, but is not correct in relation to any on-going substantive prejudice in the conduct of the proceedings. If I have erred in acknowledging relevance of these documents and they are found by the Court of Appeal not to be relevant, then they would become inadmissible and the defendants could not rely on them at trial. With respect to the personnel involved in the search for and copying of relevant categories of documents, the prospect that that work may subsequently be held to have been unnecessary does not constitute prejudice, in the context of this exhaustively prepared and argued contest, that could add any material weight to the case for a stay.

[10] A point apparently raised for the first time in the course of argument this morning was that the task of identifying documents covered by the further order is made difficult or unwieldy because of a lack of precision in the definition of the documents required to be discovered. Mr Goddard's rejoinder on this point was that the boundaries of categories of documents ordered in such further discovery situations can often be the subject of constructive dialogue between counsel, that there had been no previous mention of a concern at lack of specificity of the documents to which the orders related, and that in any event what was covered by the terms of the order ought to be plain enough. I agree with Mr Goddard that this concern, should it be valid, is not a justification for a stay.

[11] Mr Olney also argued that Shell and OMV ought to simply "wear" the inconvenience of delay in accessing the documents when the further discovery application had been brought so late in the preparatory stages of the proceedings. Mr Goddard indicated that the documents were first requested in the middle of September 2009, and that a focus on the categories of documents sought arose from the terms of the briefs of evidence recently served on behalf of Todd. Again, dealing with the merits of compliance with the order as against staying the requirement to do so, I am

not persuaded that the timing of Shell and OMV's applications count in favour of a stay of the orders that I have made in their favour.

[12] Accordingly, in formal terms I decline the stay on the unconditional basis on which it was sought. However, given the practical reality that a number of working days will apparently be required to identify and copy the appropriate documents, and contemplating that Todd will now remedy its default by having that work undertaken, I do accept that the close proximity to argument of the appeal ought to entitle Todd to hold the provision of inspection of the documents, once copied, until conclusion of the argument in the Court of Appeal.

[13] OMV and Shell were justifiably concerned that if that preparatory work is not undertaken pending argument of the appeal, then they are likely to be delayed for whatever time would then be taken to complete the task at that stage. It will accordingly be an issue for the Court of Appeal in the course of argument before it, to determine whether, if it reserves its decision, a further stay is warranted. That should be considered in the context that copies of the documents are available for production forthwith, should the Court of Appeal dismiss the appeal on the day, or not be persuaded to grant a stay on any terms.

Revision of timetable

[14] By joint Memorandum of Counsel for the first and second defendants dated 4 November 2009, they seek an extension to the time within which the briefs of evidence for defendants' witnesses are to be served, and consequential amendment to the remaining steps down to commencement of the substantive hearing on 15 February 2010.

[15] The defendants' briefs are presently due to be served on 6 November 2009, and after I had given an indication of the likely outcome on the stay application, Mr Goddard proposed that the extension be until 27 November 2009. Two grounds are raised for an extension of time. The first is that the defendants perceive there to be relatively substantial changes pleaded for the first time in a Third Amended Statement of Claim, served on 23 October 2009. They describe it as, for the first time, seeking removal of Shell as the operator of the Pohokura Joint Venture, and containing the first pleading of

allegations of bad faith against Shell. These and other new factual allegations give a relevance not previously appreciated to some of the content of Todd's briefs of evidence. The defendants say they need to be considered with a view to their being reflected in the main factual briefs being prepared for the defendants.

[16] Secondly, both defendants perceive it as important that the experts retained by them have an opportunity to consider the documents ordered to be discovered in my 21 October 2009 judgment, but which they will not get access to, if at all, until the determination of the appeal that is hopefully to be argued in the Court of Appeal on 12 November 2009. Mr Goddard argued that it was unreasonable to afford those experts any less than a fortnight after they will hopefully get access to the further documents, to settle the final form of their views in their briefs.

[17] Accordingly, on the assumption that Todd's appeal would be unsuccessful and that the Court of Appeal would indicate the outcome at the conclusion of the hearing, Mr Goddard proposed that the briefs, at least from the defendants' experts, be deferred so that they are to be served on 27 November 2009.

[18] Mr Taylor resisted any variation to the timetable that required the briefs of factual witnesses to be served before those of their experts, arguing for Shell to have the ability to reflect on the totality of its evidence, before being required to commit to the terms of some of it, by serving the factual briefs on Todd's solicitors.

[19] I sense there is some justification in Mr Olney's rejoinder that the extent of new material in Todd's Third Amended Statement of Claim has been overstated in support of more time, and Todd can also make a point as to proportionality between the scale of the task to be undertaken by expert economists retained on behalf of the defendants, and the modest incremental increase in the scope of that task if indeed they get access to Todd's McKee and Mangahewa documents as previously ordered by me, but which Todd seeks to resist in the appeal that the parties contemplate will be argued on 12 November 2009.

[20] In the immediate context, there is no point in attempting to attribute responsibility for the pressure that is no doubt building on the respective teams of legal advisers to adequately prepare for the fixture commencing in mid-February next year.

Having regard to the relevant interests, I accept that a measure of variation from the present timetable is justified, but not as much as the defendants seek.

[21] In all the circumstances, I vary the timetable by ordering that:

a) the defendants' factual briefs are to be served no later than ***noon on 20 November 2009***;

b) the defendants' briefs from all experts are to be served no later than ***noon on 27 November 2009*** subject to extension as provided for in [22] below;

c) the plaintiff's reply evidence is to be served no later than ***noon on 23 December 2009***;

d) thereafter a complete index of the common bundle is to be served on ***15 January 2010*** and the indexed common bundle and chronology are to be filed and served on ***22 January 2010***;

e) the opening submissions for the plaintiff are to be filed and served on ***10 February 2010***.

[22] The time for service of the defendants' experts' briefs is subject to the following qualification. If the outcome of Todd's appeal from my 21 October 2009 judgment requires Todd to provide discovery of any of the documents I ordered, then copies of all such documents required to be discovered in terms of the Court of Appeal's judgment are to be made available to solicitors for both defendants within 24 hours of the delivery of the Court of Appeal judgment (subject to any variation of this stipulation ordered by the Court of Appeal). If there is any default in timely performance of this condition, then the time for service of the defendants' experts' briefs will be extended by the same length of time as the delay in provision of the copies of those documents, starting from 24 hours after delivery of the Court of Appeal judgment. Any such extension is not to affect the time within which Todd's reply evidence is to be served.

[23] Deferral of the obligation on Todd to provide a complete index of the common bundle until 15 January 2010 is on condition that any documents referred to in any reply

evidence served on behalf of Todd are to be readily identifiable by reference to discovery numbers or other means of ready identification.

[24] These amendments to the timetable require reconsideration of two other matters. First, my Minute of 4 November 2009 directing there to be discussions about the sequence of evidence contemplated such discussions in the week following the service of the defendants' evidence. That is now directed to occur, provisionally in the week of ***30 November to 4 December 2009***, but accepting a case for some slippage if there is any justified delay in service of those briefs beyond 27 November 2009. The production of a Memorandum or Memoranda would then occur in the week of ***7 December 2009*** (subject to the same prospect of slippage) with a view to a telephone conference as soon as possible thereafter. As discussed with counsel, the outcome on those proposals will affect the timing for evidence of experts whose time is likely to be heavily committed. Counsel are accordingly encouraged to accord it priority, as soon as possible.

[25] The second consequence is that my judgment of 21 October 2009 (relating to application for recusal of Lay Member) imposed a deadline of 12 November 2009 by which any application that I consider recusing myself on account of my disclosed friendship with Mr Hazeldine (a former Shell executive) was to be filed. That was intended to afford Todd a period after receipt of the defendants' briefs. I am not prepared to compromise that opportunity so that the new date by which any such application would need to be filed will become ***25 November 2009***.

Dobson J

Solicitors:
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Minter Ellison Rudd Watts, Wellington for first defendant
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