IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CIV 2003-454-100

	BETWEEN	R G CLAPPERTON Plaintiff
	AND	ORION NEW ZEALAND LIMITED Defendant

Hearing: 20 November 2009

Counsel: C R Carruthers QC and R Harley for Plaintiff
L Taylor for Defendant

Ruling: 23 November 2009

RULING OF SIMON FRANCE J

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[1] The plaintiff applied on 6 November to file further evidence. It is opposed. A two week trial is scheduled to start on Monday, 30 November 2009.

Background

[2] The case concerns damage to a boiler that occurred on 5 November 1995. The defendant had supplied and installed the boiler.

[3] The proceedings were filed on 2 November 2001. A first fixture was set for 24 November 2008. There was obviously much history leading up to that date. At this point it is sufficient to observe there was a change of counsel in the middle of 2008. That led to reluctance to take the November 2008 fixture. Wild J, then list Judge, maintained pressure for the fixture to be taken by the plaintiff. His minute of 26 June 2008 appended a chronology. It is attached to this Ruling.

[4] Eventually the 24 November fixture was confirmed. The parties had been ready to proceed about a year earlier, at least as the matter was viewed by then counsel for the plaintiff. New counsel considered more work was needed, hence the reluctance to take the November 2008 fixture.

[5] As it happens, the November 2008 fixture was confirmed but vacated because of circumstances personal to the plaintiff's counsel arising near the start of trial.

[6] A new fixture was allocated for 23 March 2009. This was vacated shortly before trial because of health issues arising within the plaintiff's immediate family.

[7] The fixture for 30 November 2009 was then allocated.

[8] As a final background observation, I observe that the history of the file leaves a clear sense that the delays in coming to trial can generally be laid at the door of the plaintiff. That is not at this point to say particularly that there was fault at each stage. It is just to observe that starting with filing the claim just under six years after the event, responsibility generally lies with the plaintiff that on 30 November 2009 the Court will begin to hear evidence about a $5 million claim concerning what happened to a large boiler fourteen years ago.

A preliminary issue

[9] It is preferable to address a preliminary issue which affects the description of the applications in the sense that resolution of this issue will determine whether leave is required concerning some of the evidence.

[10] On 25 July 2005 Faire AJ fixed the setting down day at 9 September 2005. There has been no express change to that. On 20 August 2007 Gendall AJ in a Minute said that the standard trial directions were to apply.

[11] Mr Carruthers QC submits that the effect of the adjournment of the fixtures is that in the absence of a new direction, the default setting down date of sixty days takes over. If this is so, two of the briefs were provided in time.

[12] I do not accept that is the position. I am not aware of authority suggesting that adjournment of a fixture starts the process again. That would mean, for example, parties could file amended pleadings without leave. It would be undesirable and unnecessarily complicate adjournment decisions to visit them with such a consequence.

[13] Rule 7.13(5) is the default provision. It applies if no setting down direction has otherwise been given under paragraph (3). In my view Faire AJ's decision to fix a setting down date remains operative, and the rules concerning the need for leave apply thereafter unless that direction is expressly altered.

[14] The Minute of Gendall AJ would not amount to an express changing of the date. It is to be read as applying to such steps as are not already fixed.

The application

[15] The plaintiff seeks leave to file two groups of evidence:

a) there are briefs from two persons concerning the plaintiff's damages claim for $5.3 million. One is further evidence from the plaintiff's son concerning the company's business plan. The other is expert evidence from an accountant;

b) there are briefs from two experts concerning the cause of the boiler explosion. One expert has previously provided a brief and this is extra evidence. The second expert is new.

Accountancy evidence

[16] This evidence is the most contentious. It has been the constant position of Mr Taylor as counsel for the defendant that the plaintiff's "loss" evidence, until now given solely through the plaintiff's son Carl Clapperton, was inadequate to establish its claim. The plaintiff's advisers disagreed.

[17] To the extent I understand it, not having seen the previous evidence, Mr Carl Clapperton was to testify as to the business plan of the company. The purpose was to establish the profits that would have been made but for the incident. Mr Carruthers from the bar advises that it was not appreciated until recently that the business plan Mr Clapperton was relying on was incomplete. At that point it became apparent more was needed.

[18] The point can be shortly dealt with. Both counsel accept, in broad terms, that the plaintiff needs this evidence to advance its case. I am proceeding on an understanding that effectively without this evidence being admitted and accepted, the plaintiff cannot succeed. Mr Carruthers accepts in a normal situation it would justify an adjournment.

[19] The choice I face is stark. There are bases to refuse leave to file further evidence. Indeed my view is this; but for the fact that it is essential to the plaintiff's case, given the history of this matter, the proximity to trial and the fact that it could cause another adjournment, I would not countenance its admission. There is indeed nothing on which I could act to grant leave. But to deny leave is probably to determine the case.

[20] This dilemma seldom arises in this form because normally adjournment and costs are an available remedy. But here the case is already fourteen years old, the pleadings were filed eight years ago, there have been two lost fixtures, there have been several "unless" orders, and the present application itself did not meet the timetable set at the telephone conference only a month ago. Another adjournment undoubtedly undermines the principles underlying the Rules and case management.

[21] The reality is that any decision other than to decline leave will create a sense of frustration and injustice in the defendant that would be legitimate. But in the end I consider it is the necessary decision.

[22] The Rules are there for the orderly conduct of proceedings and to ensure fairness to both parties; it is important to encourage compliance with them, but ultimately the determinant of a matter should be the evidence and the law.

[23] An adjournment will not create any prejudice that cannot be addressed by full costs. It is not a case of evidence being lost by the adjournment and the reality is that memories will not be dimmed any more than they already have been. The plaintiff is not avoiding trial; with this evidence it is ready. Mr Taylor says there may be issues as to the plaintiff's capacity to meet costs but, if that is a legitimate concern, orders can be made to require payment by a certain date and before a further fixture is confirmed.

[24] The losers in such a decision are the defendant and, arguably, the Rules but in my discretion I choose correct decision making in the particular case on a claim for $5.3 million over the wider interests, and because adjournment and costs is an adequate remedy for the defendant. It is not necessarily a choice all will agree with, although it is not often that a decision to exclude evidence because of timing issue will be known to be so potentially determinative of the case.

[25] During discussion, Mr Taylor indicated his client would not seek adjournment, but would seek accommodations in the order of witnesses and the like. Mr Carruthers indicated that would be facilitated.

[26] Notwithstanding Mr Taylor's advice at the hearing, I confirm:

a) leave is given to all the evidence of Mr Goldie and the supplementary evidence of Mr Carl Clapperton;

b) the defendant is entitled to adjournment of the fixture if it wishes. It would be entitled to full costs on such an adjournment;

c) if the defendant does not wish to take that option, there will be flexibility accorded the defendant to enable it to best respond to the new evidence. It is anticipated counsel will be able to agree on that, but of course the court will determine matters if necessary.

The cause of the explosion

[27] Two witnesses are proposed. Mr Dippie's is a supplementary brief. Mr de Bernado is new. Ultimately there was not a great contest about Mr Dippie, but much more so about Mr de Bernado.

[28] The explanation for these briefs is that once the plaintiff's original expert saw the defendant's briefs, he sought assistance and advice on matters. It is those matters which the briefs address. The defendant's evidence has been available for a long time.

[29] I do not have the briefs of either side other than those that are the subject of this application. I am in no position to assess the claim that they are reply briefs. Nor can I assess the dispute as to whether they are not new but just bolstering the plaintiff's case (the defendant's position) or new and in response to the defendant's evidence (the plaintiff's position).

[30] These briefs are filed far too late given the context of the case. However, I have offered the defendant an adjournment and remain of the view that that is the appropriate remedy. Leave to file the evidence is given.

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Simon France J

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