IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CIV 2007-404-007044

	BETWEEN	NEW ZEALAND STEEL LIMITED Plaintiff
	AND	INDUCTOTHERM PTY LIMITED Defendant
	AND	HATCH ASSOCIATES PTY LIMITED Third Party

Hearing: 22 and 23 October 2009

Counsel: D Alderslade/B Burt for the Plaintiff
J Billington QC and P Woods for the Defendant
M Eastwick-Field for the Third Party

Judgment: 29 October 2009

JUDGMENT OF
ASSOCIATE JUDGE CHRISTIANSEN

This judgment was delivered by me on
29.10.09 at 4:30pm, pursuant to
Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar
Date……

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[1] On 9 July 2009 the defendant (Inductotherm) filed an application for particular discovery against the plaintiff (NZS) and the third party (Hatch). It attached a list of 30 pages detailing a very extensive list of disclosure sought.

[2] On 26 August 2009 Inductotherm filed its applications for further particulars from the other two parties. In a number of respects the discovery and particulars applications are linked.

[3] Some urgency is required of me to deal with these. The proceeding has a fixture of six weeks beginning in July 2010. Previous timetable orders of mine have required NZS to file and serve briefs of evidence by 5 March 2010. The obligations of the other parties have been timetabled to follow.

[4] If Inductotherm's applications for further discovery succeed compliance for any orders made thereon could conceivably involve a very significant undertaking and effort by NZS in particular and within a short timeframe. That said, in the months, weeks and even in the last few hours prior to my hearing these applications, an accommodation of sorts had been reached between counsel for some further discovery/disclosure to be made. Counsel for NZS and Hatch emphasized to me that this was done not in acknowledgement of any entitlement by Inductotherm but rather for practical considerations and because of expedience. In that outcome the emphasis of Inductotherm's application is focussed upon:

1. A request that NZS further particularize its claim by linking its claim for damages to particular clauses of the agreement it is alleged were breached.

2. Inductotherm has claimed NZS and Hatch have documentation which could underline the integrity of the process by which that product supplied by it was subsequently tested and found to be inadequate.

3. Inductotherm wishes access to documents of contractual arrangements between NZS and others in order to better assess NZS's claim of consequential losses.

[5] The argument between the parties upon these applications is explained by completely opposing views taken in relation to their contract. NZS and its agent Hatch claim this is a straightforward breach of contract claim because Inductotherm failed to provide a product with the capabilities it said it would provide. Inductotherm says it was misled regarding what was to have been supplied and further that the testing process of its product was manipulated to ensure it failed. Factual context is needed to explain this overview. In part I will borrow from a summary provided by Mr Billington.

Background

[6] NZS has a plant at Glenbrook, near Auckland. Within it is contained a significant number of lines of operation. One such was the metallic coating line (MCL) which processed low carbon, cold-rolled steel strip. During 2002 – 2003 NZS planned to upgrade the MCL.

[7] Hatch is a firm of consulting engineers and project and construction managers. It was engaged by NZS as a technical consultant to assist with equipment specifications and commissioning and other matters in respect of the upgrade of the MCL.

[8] In April 2003 Hatch, on behalf of NZS, issued an invitation to tender in respect of one component of the MCL upgrade project. The invitation to tender stated that:

> "The existing MCL at the NZS plant is to be upgraded, with the primary objective of increasing the throughput of the line by at least 20,000 tonnes per annum.
>
> The throughput increase shall be achieved by increasing the strip heating and cooling capacity and improving the strip tracking and tension control to allow the line to operate reliably up to a maximum design speed of 130mpm (meters per minute) for 21 shifts per week.

> This enquiry is for the induction preheat furnace to provide the increased heating capacity."

[9] Inductotherm manufactures and supplies induction power supply/induction heating. It entered into negotiations with Hatch in respect of the invitation to tender. On 6 May 2003 it supplied a tender which set out the supply of two optional induction power supplies being different in respect of their output operating frequency. The tender explained distinguishing characteristics of the two choices. Inductotherm's contract tender price was in the region of A$1M for the cheaper 6kHz choice with an increase of about A$140,000 for the 30kHz choice.

[10] It is clear from the evidence that Inductotherm recommended the cheaper option.

[11] On 10 June 2003 NZS issued a "notification of acceptance of tender for the design, supply, delivery and commissioning of induction preheated and associated equipment" to Inductotherm. Although this stated that "the consolidated contract documents will shortly be sent to Inductotherm for signature", they were never sent. The contract is comprised in the documents signed and in written correspondence sent between the parties. In all, the contract documents comprise hundreds of pages.

[12] Inductotherm supplied the induction heating equipment (IHS) within the time fixed by the contract. The equipment was to be commissioned by NZS/Hatch with technical assistance by Inductotherm. The contract specified the commission would be carried out in four distinct stages:

a) Pre commissioning;

b) Cold commissioning;

c) Hot commissioning;

d) Post (Performance) commissioning.

[13] Prior to completion of hot commissioning by letter dated 29 March 2004 NZS advised Inductotherm that it considered:

a) The IHS provided by Inductotherm under the agreement had not met the contractual performance requirements during the initial performance tests completed on 11 March 2004 and was not in a state where it could be used;

b) Inductotherm was instructed to determine a complete solution that enabled the IHS to perform to its full capacity as specified in the agreement; and

c) Inductotherm was to supply a detailed proposal for the rectification including a program and scope of work by 5 April 2004 at the latest.

[14] Subsequently the equipment was removed and a more highly specified IHS was later supplied. On 22 April 2005, Hatch issued a certificate of acceptance in relation to the IHS supplied by Inductotherm.

[15] NZS seeks damages for the following alleged losses:

a) Direct losses totaling $469,817.00; and

b) Loss of profits totaling $9,593,028.00.

[16] By its defence Inductotherm:

a) Denies it breached the contract through the supply of the original IHS;

b) Denies that the original IHS did not meet the specification required in the contract;

c) Believes that the “test” results produced by Hatch in March 2004 did not accurately measure the performance of the IHS as against the specification required in the contract.

d) Denies that the performance tests, as specified in the contract, were conducted on the IHS in March 2004;

e) Denies that it failed to meet any milestone dates within the contract;

f) Considers the contract was a research and development project which permitted modification of the equipment once process commissioning was undertaken;

g) Considers that NZS/Hatch realised that the specification in the contract was inadequate for changing product demand (i.e. the specification provided for heating a thicker strip when demand had increased for a thinner strip) and therefore sought a greater specification for the IHS to provide increased heating for the thinner strip. This reason for the change specification was not disclosed to Inductotherm and only became known to Inductotherm through inspection of documents obtained on discovery;

h) Relied upon the "test" results provided by Hatch in March 2004 to modify the IHS; and

i) Relied upon an assurance from NZS that, providing Inductotherm modify the IHS, NZS would not bring a claim for any losses. Inductotherm only became aware through inspection of NZS's discovery that, at the time the assurance was given, NZS had decided to bring a claim but that it would not disclose that it intended to bring a claim, until after the modifications were completed.

[17] It is in light of matters raised by its defence that Inductotherm seeks further particulars and further and better discovery. The claim for further particulars is now only pursued against NZS.

Application for further particulars

[18] The request for further particulars is referenced to particular paragraphs of NZS's amended statement of claim dated 29 July 2009.

[19] In paragraph 5.5 (a) NZS alleged:

> "As part of Inductotherm's tender its Contract Program provided the following dates for commissioning the IHS…"

[20] Inductotherm requests NZS to particularise the document (including its date and origin) by which it is alleged Inductotherm provided the dates set out therein, and under which clause of the agreement it was supplied, and if approved by NZS, by whom and when.

[21] Under paragraph 5.5 (b) of the amended statement of claim NZS alleged:

> "Between June 2003 and February 2004 the Contract Program was varied…"

[22] Inductotherm requests NZS to particularise all variations of the "Contract Program" alleged including the date of the variation, the nature of the variation and how each variation was recorded and if approved by NZS, by whom and when.

[23] By paragraph 9 of the amended statement of claim the NZS alleged:

> "By letter dated 29 March 2004 NZ Steel advised Inductotherm…"

[24] Inductotherm requests particularisation by reference to the clause of the agreement pursuant to which the letter dated 29 March 2004 was sent by NZS to Inductotherm.

[25] By paragraph 9.1 NZS alleged:

> "… the initial IHS provided by Inductotherm under the agreement had not met the contractual performance requirements during the initial performance test completed…"

[26] Inductotherm requests particularisation by reference to the clause of the agreement, what were the "contractual performance requirements" and what was the "initial performance test".

[27] By paragraph 9.2 of the amended statement of claim NZS alleged:

> "Inductotherm was instructed to determine a complete solution that enables the IHS to perform to its full capacity as specified in the agreement."

[28] Inductotherm requests particularisation regarding by which clause of the agreement Inductotherm was "instructed to determine a complete solution…".

[29] By clause 9.3 of the amended statement of claim NZS alleged:

> "Inductotherm was to supply a detailed proposal for the rectification including a program and scope of work by…"

[30] Inductotherm requests clarification regarding which clause of the agreement it was "to supply a detailed proposal…".

[31] By Paragraph 10 of the amended statement of claim NZS alleged:

> "Between 29 March and 18 May 2004, Inductotherm provided NZ Steel with proposals for a full rectification program in relation to the IHS."

[32] Inductotherm seeks particularisation of each of the "proposals for a full rectification program" alleged to have been provided between 29 March 2004 and 18 May 2004.

[33] By paragraph 11.1 of the amended statement of claim NZS alleged:

> "By letter dated 18 May 2004 from New Zealand Steel to Inductotherm, NZ Steel… accepted Inductotherm's proposal to replace the initial IHS on the basis set out in that letter."

[34] Inductotherm seeks particularisation, by reference to the agreement, of the clause upon which NZS relied when it "accepted Inductotherm's proposal…".

[35] By clause 11.2 of the amended statement of claim NZS alleged:

> "[By letter dated 18 May 2004… NZ Steel] noted that acceptance of this proposal was on the basis that it was without prejudice to NZ Steel's rights under the agreement…"

[36] Inductotherm seeks particularisation by reference to the agreement to identify the "right" which NZS states it acted without prejudice under the agreement.

[37] In paragraph 15 of the amended statement of claim NZS alleged:

> "In designing and providing the initial IHS to NZ Steel, Inductotherm breached the agreement as follows:
>
> 1. It failed to design, supply manufacture, test and deliver an IHS, which was capable of providing the increased heating capacity provided for in the agreement…
>
> 2. It failed to provide an IHS which was capable of heating the product specified at the future line speeds specified in the agreement.
>
> 3. It failed to provide an IHS which was capable of meeting the performance guarantee on the stated product mix in the agreement.
>
> 4. It failed to provide the mechanical equipment necessary for the IHS to meet the performance requirements under the agreement.
>
> …"

[38] Inductotherm seeks particularisation in respect of each of the breaches alleged in paragraphs 15.1 – 15.5 (inclusive) to identify the particular clause of the agreement that is alleged was breach, and concerning paragraph 15.1 seeks particularisation of the manner in which it is alleged Inductotherm's IHS was not "capable of providing the increased heating capacity…".

[39] Paragraph 15.5 (a) – (c) alleges:

> "It breached the revised Contract Program in that the commissioning of the IHS was unable to be completed in accordance with the agreement as follows:
>
> (a) Cold Commissioning by 20/02/04;
>
> (b) Hot Commissioning by 07/03/04; and
>
> (c) Performance Testing by 11/03/04."

[40] Inductotherm requests particularisation of the clauses of the agreement and all documents by which it is alleged a revised contract program on the dates therein was agreed.

[41] Paragraph 15.6 of the amended statement of claim alleges:

> "[Inductotherm] failed to provide an IHS which was able to complete the Final Acceptance Testing within 12 weeks from the completion of commissioning."

[42] Inductotherm seeks particularisation of the relevant dates in respect of which the 12 week period is calculated in the clause(s) of the agreement relied upon.

[43] Paragraph 16.2 of the amended statement of claim alleges:

> "(As a consequence of the breaches of the agreement by Inductotherm, NZ Steel has suffered the following losses).
>
> Loss of profits through failure of Inductotherm to perform its obligations under the agreement totaling $9,593,028.00."

[44] Inductotherm seeks particularisation of the loss of profits claimed totaling $9,593,028.00.

[45] I will deal with that latter request now because loss of profits issues have largely, albeit temporarily, been resolved by NZS's agreement to provide a copy of its forensic evidence by 27 January 2010, on a without prejudice basis and upon the basis that NZS's expert may not be cross-examined upon it. The purpose of making the report available is to enable Inductotherm's expert to begin his/her/its own inquiries.

[46] Regarding the balance of Inductotherm's request for further particulars it may be said that in general terms these are required, by reference to specific clauses in the contract (including any variations to the contract) which were alleged to be breached and from which the alleged consequential losses flowed. Over all then there is a link between the particulars request and a desire by Inductotherm to require NZS to relate those to particular aspects of the claim of breach of contract. I will deal with those later in my consideration of the nature and terms of the contract between NZS and Inductotherm. In the outcome of that consideration I accept Mr Billington's suggestion that the management of this proceeding would benefit from a further case management conference being scheduled in the first half of December this year, and after that, as frequently as might be considered useful to discuss any outstanding issues. Provision for the scheduling of the next case management conference is provided at the conclusion of this judgment.

Applications for further and better discovery

[47] The request is premised on Inductotherm's claim that there is sufficient evidence to show that the documents Inductotherm seeks do indeed exist in some form or other. Therefore Mr Billington submits a real question of relevance arises. The issue for me at this time is to decide whether the categories of documents sought are relevant.

[48] Inductotherm's request has been refined to the form of a draft order prepared and presented to me at the beginning of this hearing. Its request is premised upon submissions that, in one form or other, they exist. Their relevance is linked to the denials, previously identified, of breach of contract.

[49] I shall endeavour to summarise what is now required by Inductotherm for further and better discovery.

[50] From NZS, Inductotherm requests:

a) Models, calculations and data used to determine the specifications for the IHS required for the MCL upgrade and to assess the efficiency of the IHS during all phases of the upgrade together with all correspondence, agenda, minutes and notes of meetings between NZS and Hatch in respect of the Models, calculations and data from the preparation of the Case 7 as the Model to final acceptance of the IHS on 22 April 2005;

b) Contracts with other subcontractors engaged by NZS in the MCL upgrade and all correspondence with the subcontractors in respect of the timetable for completion of their work and any problems or defects with the equipment supplied by or performance of those subcontractors and NZS's internal documentation in respect of such defects or performance from June 2003 to January 2005 (inclusive);

c) Any timelines or progress plans for the whole of the upgrade project;

d) Complete financial statements of NZS (i.e. profit and loss, balance sheet, notes of the financial statements and directors' statement) for 2003 to 2006;

e) A list of all products produced at the Glenbrook site for the period February 2004 to October 2005;

f) Management and Board Reports on production, production capacities, stock, profit and loss, sales for the period from January 2002 to December 2005 for each of the:

i) Iron and steel plants;

ii) Cold rolling mill; and

iii) Monthly reports for the calendar years 2003 to 2005 detailing operating hours, planned shutdowns, unscheduled shutdowns and any other issues affecting available production hours in respect of the hot and cold-rolling mills as well as the MCL;

g) The documents NZS has previously agreed to supply.

[51] From Hatch, Inductotherm requires further and better discovery of those same documents sought above from NZS as detailed in sub paragraphs (a), (b) and (f) of the preceding paragraph herein.

Considerations

[52] NZS's claim is for loss allegedly occurred during a specific period of time i.e. from that time that it says Inductotherm's IHS failed the hot commissioning test through until Inductotherm's replacement system was installed and approved. Inductotherm's concern is to identify the alleged breaches of contract. It challenges the testing process. It says there is a question mark over allegations of time delays involved. It says insufficient account has been taken of other possible contributing factors i.e. related to the performance of other contractors who have been engaged in

the upgrade. Inductotherm's contract price was in the region of A$1M. The overall upgrade cost involved a sum of approximately $15M. Inductotherm is being sued for approximately $10M, 95% of which claim is related to an alleged loss of profits. In this overview of matters Inductotherm can reasonably raise the challenge it has to NZS's claim.

[53] Inductotherm's IHS was required to heat steel product in association with the application of a metal coating process. The MCL operated seven days a week, 24 hours a day i.e. it ran continuously. The gauge of the steel product involved varied in thickness from .3 millimeters (0.3mm) to 2.25mm, over metal of varying widths.

[54] I was informed that more heating was required of the thinner gauge than the thicker gauge metal, and therefore more energy provided by a higher frequency of power, was required to heat that thinner gauge.

[55] When Inductotherm submitted its tender it provided two heating options, one requiring 6kHz and the other 30kHz.

[56] Inductotherm claims that NZS and Hatch selected the less powerful (and it is claimed less expensive) option of a 6kHz system. Inductotherm claims, at least as much can be implied, that its 6kHz IHS would have been sufficient to meet contractual specifications for the supply of a system to cope with the demand required to heat steel product across the range of gauge material indicated by the contractual documents as was needed. However, Inductotherm says the documents already provided by discovery indicate that in late 2003 and in early 2004 and prior to commission of its IHS there was change in market demand, moving the emphasis of product requirements from a thicker gauge steel to a thinner one i.e. to one required to be treated by a higher energy output system than NZS/Hatch had determined it would require.

[57] Further, Inductotherm says that documents it has discovered showed that NZS and Hatch were aware of the change of demand for the thinner gauge material, and did not inform Inductotherm of this.

[58] In that outcome Inductotherm says NZS and Hatch were aware of factors which clearly indicated the IHS supplied by Inductotherm would be incapable of producing the additional 20,000 tonnes additional product the upgrade had been designed to achieve. Inductotherm goes further and says that even prior to acceptance of Inductotherm's 6kHz IHS system NZS and Hatch used data, in the form of Hatch's Models indicating their expectations of a production increase and focussed on the utilisation of thicker rather than thinner gauge materials. Therefore NZS and Hatch were in possession of information that Inductotherm's 6kHz IHS would not perform as expected, even before it says NZS/Hatch settled on the supply of a 6kHz system.

[59] As much is evidenced, says Inductotherm, because the system it subsequently and satisfactorily substituted comprised a hybrid of the 6kHz and 30kHz systems initially independently recommended. Therefore and critically to the applications for further particulars and further and better discovery, Inductotherm wants more information about who knew what at the time when its IHS was commissioned and it wants to know what its equipment did and did not do during that testing. As is pointed out, the equipment was a one off designed product i.e. it was not something that could have been purchased off the shelf. As much is obvious from the installation and testing program prescribed by the contract of supply. Inductotherm says that testing program indicates an element of research and development involved. That process concluded only with the subsequent installation of Inductotherm's replacement system. In that context of things Mr Billington submits the following questions arise – where considerations of relevance assume importance:

a) What did the parties know and expect when they negotiated their contract in 2003?

b) What changed, in terms of the requirements regarding testing?

c) Did those changes impact on the expected performance?

d) Who knew what about those changes?

e) What are the legal consequences of taking equipment away and redesigning it?

f) Who was responsible for the delay for the final delivery of the IHS?

[60] Mr Billington then took me carefully through the discovered documents and through those documents which identify the contract between the parties. I will not traverse these in detail for time does not permit. It is sufficient to say that Inductotherm, through its principal officer Mr Stone, has conducted an examination in considerable depth to link discovered documents to support the conclusions which arise upon these applications. Although acknowledging that, I have reason in some respects to doubt some of the assumptions made. In overall analysis, to which I will shortly refer, I am unable to agree there is the degree of relevance asserted to exist.

[61] There is no doubt about the extent of the documents that comprise the contract with Inductotherm. I accept that a review of those does not support a claim that the supply of the IHS was a research and development kind of project. Rather the contract contained clear specifications about what the system was required to do and the invitation contract made it clear that Inductotherm's knowledge and expertise was required to recommend a system sufficient for the purpose. Inductotherm was to provide a product heater capable of meeting NZS's increased tonnage expectation. The contract required Inductotherm to provide an IHS capable of heating a wide range of product to sufficient temperatures. Inductotherm's product was designed and manufactured in Melbourne and later installed at Glenbrook for the purpose of testing and to measure performance. A careful commissioning program was set out to review the performance of the 6kHz system that had been recommended by Inductotherm i.e. over that range of product required to be treated when Inductotherm made its recommendation of an appropriate system. Inductotherm had been provided with full details of information regarding the range of product for processing. Correspondence and communication addressed the need for accurate information to be provided to enable product line speeds to be met.

[62] The unchallenged evidence is that when during the Hot Commissioning phase it was apparent the IHS was not performing, the parties met. It is reported that

Inductotherm's representatives tried several ways of resolving the problems, but without success. NZS's letter of 29 March 2004 recording its concerns, then followed. Discussions between NZS, Hatch and Inductotherm continued. It was agreed the latest modifications to the IHS had not resulted in the performance improvements anticipated. An email between Inductotherm representatives stated:

> "… the results were an improvement but less than hoped for and the inverters interfere, also bolts get red and it will really not be a good idea for [NZS] to try to run…
>
> I copied Gary Doyen so he may ask you what the problem is. I thought we need to use all our resources since we must get it right next time."

[63] In summary the parties' contract provided a clear program of acceptance of design, commitment to manufacture a suitable product and commitment to a program for testing over a range of product. It is seriously questionable whether in that outcome Hatch's report suggests support for Inductotherm's conclusions that testing was selective, much less designed to procure an adverse result.

[64] Rather the correspondence could better support a claim that the testing program was openly conducted with Inductotherm being provided with information regarding details of factors relevant to that process. Inductotherm were advised about material for use in the testing process and raised no concern with that information. In the subsequent report produced with the assistance of Hatch, I am satisfied that the product tested was within the range to by the parties. NZS says that in the result if the IHS was going to work then it should have tested close to what it was required to do i.e. by reference to the criteria specified for and agreed to be supplied. Rather the tests showed that performance failed well short of what was promised.

[65] In that outcome NZS advised Inductotherm that they were not happy with the results. The parties then agreed to find out what had gone on. NZS and Hatch wanted it to work. The suggestion of any other commercial outcome seems, with respect, unrealistic. Also and importantly Inductotherm acknowledged the claims of lack of performance and agreed to recover the system and to work on a better outcome.

[66] The contract material includes documents which will test Inductotherm's claim of waiver.

[67] I draw this conclusion of the contract documents only for the purposes of those applications I have to deal with at this time. I am inclined to the view that the Court is dealing with a relatively straightforward contract to product equipment capable of certain performance levels. Following testing of its product Inductotherm was given an opportunity to go away and fix the problem. It did fix that problem. Issues about whether that fixing occurred within the period for supply are matters for interpretation in due course. Likewise are issues concerning whether NZS's forensic evidence has made appropriate allowance for the possible interference of contributing factors. I mention this in order to state the obvious i.e. that obligations of discovery work around the existence and the reasonableness of arguments that are raised in relation thereto. Here although the contract is a compilation of various documents spanning many pages, it is I think a document in simple terms of allegations of contractual breaches. Inductotherm claims that it should have access to documents which might show the performance of other contractors has not adequately been taken into account by NZS in its calculation of the cause of delay. As Mr Stone asserted in his affidavit on behalf of Inductotherm:

> "NZS have not provided Inductotherm with any proof to-date that in any shortfall in the performance of other subcontractors have not been wrongly attributed to Inductotherm. Accordingly, all documents, including data, calculations and models, within NZS's possession which relate to the work undertaken by all subcontractors, shall be discovered."

[68] Of that, I accept Mr Alderslade's submission that what is required thereby is that NZS should be providing information and discovery to prove a negative. I think there is an insufficient reason in this case to require discovery of the extent sought by Inductotherm save for the identity of documentation identifying disruption to the operation of the MCL beyond the allowance provided by NZS in its forensic accountant's calculations.

[69] Inductotherm has sought discovery in connection with Hatch's Model calculations both from Hatch as to its process of calculation and from NZS concerning data it provided for use by Hatch. My view on this request is clear,

namely that what NZS or Hatch thought about what they wanted in connection with the utilisation of those Models, is irrelevant. The use of those Models was to assess requirements and factors relevant to an assessment of those. Inductotherm claims that market emphasis shifted and thereby its requirement of contractible performance would have been affected. But nothing in the testing process suggests the influence of market performance (about which evidence is equivocal) that would have affected the requirement of market performance. I am far from satisfied that there is any relevance to the information sought by Inductotherm in this respect.

[70] In final analysis the performance of Inductotherm's IHS will likely be assessed on the basis of a difference between what was produced and what could have been produced, remembering that the plant in question operated full time save in those instances, documented, when it did not operate. The reasons for non-operation ought to be subject of sufficient disclosure. In the absence of there being disclosure of reasons associated with the performance of other contractors, no disclosure is required.

[71] Rather than this exercise being one of the provision of information by which Inductotherm itself could make some assessment, the Court ought to be content with NZS's own assessment unless satisfactory evidence is given to question the self assessment made.

[72] I am also concerned about the extent of further discovery required. It seems to indicate a wish to examine all information over a period of about three years regarding all aspects of NZS's operations a Glenbrook. As I have previously noted the MCL upgrade was but a relatively small part of those operations which involved a limited number of other contractors as well. I am certain that a forensic accountant could identify the significance if any of the influence of other operations or other contractors with which to test the basis of NZS's claim for consequential losses in this case. None such is readily apparent from the information or material that I have been provided with. Accordingly any requirement for the production of that information would in my view be oppressive and is unacceptable.

[73] NZS's approach to calculating its claim for loss appears, with respect, straightforward. I am certain Inductotherm's own experts will have little difficulty in challenging that basis if such is available. Meanwhile, the Court has no evidence from an expert as to why Inductotherm's claim of a more expansive basis for discovery is justified. In short there is no evidence from an expert as to why it is relevant. There is no good reason to justify a claim of further and better discovery – save for which I have already acknowledged.

I earlier noted the link between Inductotherm's applications for discovery and for particulars. It follows from the views I have expressed regarding the discovery claims that I consider its application for orders requiring NZS to plead what parts of the contract it considers have been breached, that these are matters for trial and after a consideration of evidence in due course.

Conclusion

[74] Largely I have discounted the basis for Inductotherm's applications, as they remain. I do not discount the value of those applications to the extent they have elicited the cooperation of NZS and Hatch and the acceptance by those parties of an obligation to provide further discovery. Also, they may have provided impetus to NZS's decision to file its amended statement of claim. In core respects these applications otherwise fail. Insofar as they have relied upon Mr Stone's assessment of reasons to challenge my conclusions about the essential contract terms, and a basis for challenging the results of contractual performance I believe a sufficient claim of relevance is lacking. Insofar as it has sought further information to challenge the claim for consequential loss it seems to me Inductotherm has largely been successful in securing access to relevant foundation documents in NZS's possession. Insofar as it has sought access to the Models i.e. the process and methodology for the testing of Inductotherm's HIS, I am not satisfied there is sufficient reasons to require discovery. I believe considerations of relevance, oppression and confidentiality combine to avoid any responsibility to discover, beyond that already provided, versions of Hatch's Model. The acceptable evidence is that it was not used by Inductotherm to calculate and agree the guaranteed temperatures for the IHS under the agreement. Although the Model was initially used by Hatch to derive the

minimum temperatures required from the IHS to achieve the desired tonnage increases, Inductotherm subsequently carried out its own calculations as to the achievable temperatures from the IHS before agreeing to the performance guarantee requirements under the agreement.

[75] The acceptable evidence is that the Model was not capable of calculating how the IHS might perform with various modifications made to its design. Rather, Inductotherm's performance guarantee was based purely on achieving specific temperature increases through the IHS for various products. Further, that the performance of the IHS was never measured or assessed by reference to tonnage increased. NZS's claim does not allege that the IHS failed to achieve any particular tonnage increase. Rather, that the IHS was not capable of providing the increased heating capacity which in turn would enable the throughput of the MCL to be increased.

[76] NZS's claim for consequential losses was not based on a failure to meet any particular "production target" provided by the Model, but on the difference between the product tonnage achieved without the induction heater during the loss of period and the product tonnage achieved with the new induction heater during the comparison period.

[77] There is no evidence that the Model was used to assess the performance of the IHS as initially installed. The "Case 7 Model" does not show that expected achievable tonnage increases could never be met. I accept that none of the arguments advanced by Mr Stone's analysis provides a sufficient basis for the discovery of Hatch's Model in this proceeding. Regardless there are acceptable considerations of intellectual property interests on the one hand and oppression on the other hand to mitigate against further discovery in the outcome.

Summary

[78] In important respects Inductotherm's claims for further particulars and further and better discovery have failed. On the other hand the applications have served to provide, in the outcome of counsels' considerations and discussions, for the orderly

disclosure in particular of further discovery. My inclination is against awarding costs in favour of one party or the other. However I will reserve costs in the event any payment order thereon is pursued.

[79] In the outcome it was agreed and I direct by way of variation to previous timetable orders as follows:

a) Further verified lists of documents, and NZS's amended statement of claim are/is to be filed and served by 27 November 2009;

b) NZS's available expert's report identifying its forensic evidence in support of its claim for consequential losses is, subject to the conditions previously identified herein, to be filed and served by 27 January 2010. In respect thereto Inductotherm will request and expect assistance in relation to arranging inspection of that documentation;

c) Service of the NZS's briefs of evidence and its index to the proposed bundle of documents is to be filed and served by 5 March 2010;

d) Service of the Inductotherm's briefs of evidence against both NZS and Hatch, its index and its proposed bundle of documents are to be filed and served by 23 April 2010;

e) All other timetable orders made by me on 18 August 2009 will continue to apply;

f) Leave is reserved to the parties to apply:

    i) For clarification of any orders made herein.

    ii) Otherwise, for any purpose at all for the purpose of further case management.

[80] As earlier indicated in this judgment I am directing a further case management conference be convened by telephone before me at any time at all but no later than the first half of December 2009 for the purposes of review or alteration to existing timetable obligations.

Associate Judge Christiansen