IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY CP 192/99

BETWEEN TECHNIC BITUMEN PACIFIC LIMITED

Plaintiff

AND SHELL NEW ZEALAND LIMITED

First Defendant

AND W H GROVE & SONS LIMITED

Second Defendant

Hearing: 29 September 2000

Counsel: J B M Smith and A Olney for the Plaintiff
J E Sutton for the First Defendant
S M Callender for the Second Defendant

Judgment: - 3 OCT 2000

JUDGMENT OF WILD J

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[1] Five further interlocutory applications are for decision:

[a] An application by the plaintiff ("Technic") filed on 13 September for enlargement of time to apply for leave to appeal, and for leave to appeal, against my judgment of 31 August. That application is pursuant to rr 6 and 61C(6). It is formally opposed by the first defendant ("Shell").

[b] An application by the second defendant ("Grove") filed on 21 September for judgment against the plaintiff. That application is made in reliance on rr 9 and 465, and is consequent upon a suggestion I made in my 31 August judgment. It is opposed by Shell.

[c] An application by Shell filed on 22 September for security for costs against the plaintiff. It is unopposed.

[d] An application by Technic filed on 27 September for orders that Shell produce documents for inspection. This application and the following one are not opposed.

[e] An application made orally this morning by Shell for orders that Technic produce documents for inspection.

[2] I deal first with the uncontested applications, which are those for security for costs and orders for inspection.

[3] On 22 September Technic filed an undertaking as to costs. This undertaking is given by its New Zealand parent company, Pyrotechnic Holdings Limited. It is acceptable to Shell as providing appropriate security for its costs of this proceeding. Shell's application for security is accordingly dismissed. I allow Shell costs against Technic on that application of $795 (.6 of a day on 2B), plus the $100 filing fee on its application, a total of $895, because the undertaking followed the application.

[4] On the applications of Technic and Shell that documents be produced for inspection I make the following orders. These are consent orders, save that I have extended the time in orders [b] and [d] because of my delay in giving this judgment. The orders are:

[a] Subject to the terms outlined in Appendix 1 to Technic's application of 27 September, but subject to the amendments mentioned in [e] below, Shell is to produce for inspection by Technic all the documents in the first part of Shell's verified List of Documents dated 4 November 1999.

[b] Shell is to appoint a time between 2 and 11 October 2000, and a place, where those documents will be available for inspection by Technic.

[c] Subject to the terms outlined in Appendix 1 to Technic's application of 27 September, but amended as detailed in [e] below, Technic is to produce for inspection by Shell, documents 66 and 78 in its verified List of Documents dated 11 November 1999.

[d] Technic is to appoint a time between 2 and 11 October 2000, and a place, where those two documents will be available for inspection by Shell.

[e] Paragraphs (3)(d) and (4)(d) of Appendix 1 to Technic's application of 27 September are amended so that they read "... and any copies of any Category B document in a secure place and ..."

[f] I reserve to Technic and to Shell leave to apply further in relation to inspection of documents, if need be.

[5] Technic seeks costs of $1,040 (.6 of a day for preparation, and .2 of a day for argument, both on 2B). Shell strongly opposes the award of costs. Ms Sutton points out that no notice of opposition was filed by Shell which, as long ago as 7 December 1999, offered inspection, and on substantially the terms now agreed.

[6] While conceding that, Mr Smith for Technic responds that Technic has nevertheless had to go to the trouble of preparing the form of the orders now made.

[7] I do not intend to spend any time weighing these opposing arguments, both of which have some force. I allow Technic against Shell costs of $650 (.5 of a day of preparation) plus the $100 filing fee on its application, a total of $750.

[8] Next, Grove's application for judgment against Technic. Supporting this application, Ms Callender submitted that, despite Grove being joined as a defendant, Technic has confirmed that it has no intention of making a claim against Grove, and there is accordingly no reason for Grove to remain as a defendant in the proceeding. Grove sought its costs of the proceeding against Shell, on whose application it was joined.

[9] Mr Smith indicated that Technic had no objection to Grove having judgment against it.

[10] Strong opposition to this application came from Shell. All Ms Sutton's arguments led back to her basic contention that Master Thomson had joined Grove as a defendant, that I had upheld his decision, and that Grove's status as a defendant should remain unless and until it was overturned on appeal.

[11] I allow Grove's application and enter judgment in Grove's favour against Technic. My reasons for doing so are essentially these:

[a] Having had Shell joined as a defendant to its proceeding, Technic has stated clearly that still it does not wish to make any claim against Grove, and declines to do so.

[b] As there is no claim for Grove to defend, it is inappropriate that it remain as a defendant.

[c] The appropriate course is for Shell, if it wishes to claim indemnity or contribution from Grove, to seek leave to file an appropriate third party notice and claim against Grove. I record Mr Smith's indication that Technic will not oppose the granting of leave. In the circumstances leave, if sought, should be granted.

[d] Ms Sutton relies on my judgment of 31 August upholding the Master's joinder of Grove as supporting her basic contention that Grove should remain a defendant. However, I mention two aspects of my judgment. First, in paragraphs [15] and [16] I state why I consider the Master was correct in joining Grove. I point out that, if Grove is not joined, any claim Technic may have against it will fail. Then, in paragraphs [17] and [18], I suggest the course which might be followed in the interests of all parties if, despite Grove's joinder, Technic nevertheless declines to make any claim against Grove. That is what has happened, and that course is now being pursued by Grove.

> Technic has now been required, once and for all, to decide whether it wishes to make a claim against Grove. It has decided not to and will not hereafter be able to pursue a claim. In those circumstances, Grove is entitled to exit the proceeding as a defendant.

[12] Ms Sutton argued, although I think without much conviction, that Shell could not issue such a third party notice, because Grove would remain a party to the proceeding, notwithstanding the entry of judgment against Technic in its favour. She pointed to the words in r 75(1):

> "Where in any proceeding a defendant claims against **any person not already a party to the proceeding** ..." (my emphasis)

[13] I reject this submission. Claims in a proceeding, and the parties to them, merge in and upon a judgment. As I have now entered judgment against Technic in Grove's favour, Grove ceases to be a party to this proceeding and is amenable to a third party notice issued against it by Shell, with leave.

[14] I do not intend doing more than noting that I was referred by Ms Sutton to *Turners & Growers Ltd v Westpac Merchant Finance Ltd* [1998] 2 NZLR 365, as being authority against the course I am adopting. I do not accept that. *Turners & Growers* deals with an altogether different situation, namely purported discontinuance by the plaintiff against one of several defendants after a proceeding has been set down for trial, and without leave of the Court. If anything, *Turners & Growers* supports the course I am adopting. That is because Salmon J granted the first defendant leave to file a cross-notice against the second defendant and, once that cross-notice had been filed, granted the plaintiff leave to discontinue against the second defendant. In other words, the Judge adopted a course which did not require the plaintiff to pursue against one of the two defendants a claim which it wished to discontinue.

[15] I decline to allow Grove costs against Shell on its application for judgment against Technic. As Shell has indicated that it will now seek leave to join Grove as a third party to the proceeding, costs as between Grove and Shell are best left to await

further developments in this proceeding. I appreciate that the Rules now call for the awarding of costs at each interlocutory stage, but I see the unusual situation here as an appropriate exception to the general rule.

[16] There remains Technic's application for an enlargement of time to apply for leave to appeal and for leave to appeal. Despite a formal notice of opposition to Technic's application for an enlargement of time to appeal and for leave to appeal, Ms Sutton indicated that Shell in fact opposed neither application. Notwithstanding this lack of opposition, I think the wise course is to adjourn that application sine die. I do that against the possibility that Shell may now appeal against my decision to enter judgment against Technic in favour of Grove. In that event, Technic may wish also to pursue its appeal against my judgment of 31 August. If not, I intend dismissing the application, as one overtaken by events.

[17] I reiterate my indication that, if necessary, I will enlarge time and will grant Technic leave to appeal. My reasons are two-fold. Firstly, the application was only some six days out of time. Although the time limit is strict and is there with the intention of moving interlocutories smartly on, Technic's delay is hardly inordinate, the prejudice to Shell (which does not oppose leave) is minimal, and the reason is simply oversight. Secondly, there is no appellate guidance on r 97, in particular as to whether the Court should ever join a defendant against the wishes of a plaintiff and, if so, in what circumstances. There is only an array of High Court judgments expressing differing views, in varying fact situations.

J. R. Ellis J.

Signed at 2.15 pm on Tuesday 3 October 2000

Solicitors

Russell McVeagh, Wellington for the Plaintiff

Rudd Watts & Stone, Wellington for the First Defendant

KPMG Legal, Auckland for the Second Defendant