IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV-2013-425-310
[2015] NZHC 1283

BETWEEN	HELI HOLDINGS LIMITED Plaintiff
AND	THE HELICOPTER LINE LIMITED First Defendant
AND	TOTALLY TOURISM LIMITED Second Defendant

Appearances: D J Heaney QC, A Hough, S J Wethey for the Plaintiff
T C Weston QC, R Cunliffe, O Wensley for the Defendants

Date of Ruling: 19 May 2015

RULING OF NATION J

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[1] The plaintiff seeks leave to amend its statement of claim; this is opposed by the defendant.

[2] The amended statement of claim was presented to the Court on 18 May 2015 after being foreshadowed in discussions which took place between counsel and the Court at earlier stages during the trial.

[3] The plaintiff seeks to file the amended statement of claim because it is significantly changing the way it calculates its claim for future losses which, it says, it will suffer as a result of the first defendant wrongly repudiating its contractual obligations with the plaintiff.

[4] In these proceedings, the plaintiff has claimed damages in contract for significant sums which, it says, the first defendant was legally required to pay relating to the defendant's lease of eight helicopters from the plaintiff. The second defendant is sued as a guarantor in respect of those obligations.

[5] Pursuant to the contractual arrangements between the parties, the first defendant had to pay the plaintiff an agreed hourly rate for the helicopters for each financial year. It was also part of those arrangements that they would lease and use the helicopters for a minimum total number of hours each financial year. In the event of their not doing so, they would pay to the plaintiff an amount for the shortfall between the agreed minimum and the actual hours leased according to a formula. The liability has been referred to as being for "shortfall hours".

[6] On 24 September 2013 the plaintiff filed a statement of claim seeking judgment for $2,015,724.72 for agreed shortfall hours from 1 July to 30 June for each of the financial years ending 30 June 2009 to 30 June 2013, and for $311,900.32 for a balance of shortfall hours which was in dispute.

[7] The plaintiff also made application for summary judgment for the hours which were not in dispute. Summary judgment was denied in a judgment of Associate Judge Osborne of 3 April 2014.

[8] The defendant filed a statement of defence and counterclaim dated 16 April 2014 in which it claimed damages of $4,899,715.50 based on the plaintiff's alleged breach of contract in failing to meet maintenance obligations under its contracts with the defendant.

[9] On 30 May 2014 Associate Judge Osborne made various timetabling directions in accordance with a comprehensive joint memorandum signed by counsel for all parties. He directed the proceedings were to be set down for trial on the first available date after 5 December 2014. The close of pleadings date was to be 1 October 2014. Counsel for the plaintiff was to serve its briefs by 22 October 2014. The defendant was to file its briefs by 6 November 2014.

[10] In July 2014 the proceedings was set down for hearing in the two weeks beginning 4 May 2015.

[11] There were subsequent changes to that timetable by agreement but the parties were generally making progress. There was, however, a further major change to the

timetable agreed to on 11 December 2014, necessitated primarily by reason of a change in senior counsel for the plaintiff as a result of Mr Muir's appointment to the High Court. The plaintiff's briefs were to be served by 9 January 2015, defendants briefs by 6 February 2015 and reply briefs by 6 March 2015.

[12] On 23 February 2015 the parties agreed to further changes, partly because of delays on the defendants part in being able to complete its briefs and partly also because, with Mr Weston's involvement as senior counsel for the defendant, the defendants wished to amend their statement of defence and counterclaim.

[13] There was also a major development when on 20 February 2015 the defendants in writing cancelled their contracts with the plaintiff, having previously been relying on a claimed cancellation by conduct around July 2013. In a memorandum of 27 February 2015, counsel for the plaintiff advised the Court that the plaintiff was considering its options as a result of the defendants further cancellation of the contract and sought to reserve its right to re-plead its case so as to update its claim.

[14] The defendants filed an amended statement of defence and counterclaim on 23 February 2015. On 2 March 2015 Associate Judge Osborne granted leave for the defendants to file that amended statement of defence and counterclaim. He also directed that the plaintiff's amended defence (if any) and amended statement of claim had to be filed by 16 March 2015.

[15] The plaintiff filed an amended statement of claim on 26 March 2015. In that amended statement of claim it sought a total of $6,059,666.68 for shortfall hours payment for the period from 1 July 2008 to 24 March 2015 and a total of $16,000,317.29 in respect of claimed future losses for the period from 25 March 2015 to 22 August 2022.

[16] In a telephone conference with counsel for all parties on 14 April 2015, the parties agreed the trial should still proceed on 4 May 2015. While I discussed with counsel the possibility of having to have a separate and later hearing to deal with the plaintiff's claim for future losses, the parties were anxious to avoid that eventuality.

The Court then began making arrangements for a third week of hearing to be available.

[17] Mr Heaney, for the plaintiff, considered that the evidence which the plaintiff would have to call in relation to its claim for future losses would not greatly widen the scope of the hearing. Mr Weston, for the defendants, hoped the defendants would be able to deal with the plaintiff's evidence but reserved his position until he had seen the plaintiff's evidence in relation to this aspect of the claim.

[18] The plaintiff did deal with the claim for future losses in a brief of evidence from a Mr Hart, supplied to the defendants during April 2015. It was apparent, from the plaintiff's amended statement of claim and Mr Hart's evidence, that the plaintiff was calculating its claim for future losses on the basis it could recover the remuneration which it said the defendants were required to pay in terms of the contractual arrangements for the years which the contract would have continued to run if not cancelled by the defendant in February 2015.

[19] In a reply brief for the defendants, their expert, Mr Hagen, said there was a fundamental error in the plaintiff's approach in that it had calculated its claim for future losses based on anticipated remuneration when its loss should have been calculated on the basis of its claimed loss of profits with a proper accounting for the expenses it would have incurred against the remuneration it might have received and an adjustment to allow for the value of receiving a capital sum now for profits which otherwise it would have obtained over a number of years.

[20] When the trial began on 6 May 2016 Mr Heaney, for the plaintiff, indicated that Mr Hart would be recalculating the plaintiff's claim for future losses, accepting that the basis of calculation put forward by Mr Heaney was the correct approach. Mr Weston, for the defendant, said he would oppose such a substantial change to the plaintiff's position at this late stage. He submitted the plaintiff should effectively be stuck with the evidence which Mr Hart had included in his original brief on this issue and that, if that was no longer appropriate, the plaintiff should effectively be in the position of not being able to produce any further evidence in relation to this aspect of its claim.

[21] Mr Weston said that the defendants had prepared for the trial on the basis that the plaintiff's only evidence in support of this claim would be that which is set out in Mr Hart's brief. He said Mr Heaney, for the plaintiff, had confirmed this would be the evidence relied upon by the plaintiff in a telephone conference of 24 April 2015. On that basis, Mr Weston said the defendants had not sought further discovery and, in that telephone conference of 24 April 2015, had confirmed they would be able to deal with the plaintiff's new claim at the trial then scheduled to begin on 4 May 2015.

[22] I indicated that the Court was most unlikely to make any rulings that would effectively deny the plaintiff the opportunity of pursuing this aspect of its claim provided the defendants were not prejudiced in relation to discovery or any matters that might have to be dealt with as a result of the way the plaintiff was intending to change its evidence.

[23] To avoid further delays, it was agreed by counsel that Mr Hart would present his amended evidence as to the basis on which the plaintiff was calculating its claim for future losses but this would be without prejudice to the defendants position that the plaintiff should not be able to amend its claim in this way. It was also agreed that Mr Weston would have the right to cross examine Mr Hart on this new evidence at a later date, after appropriate discovery and after the defendants expert had an opportunity to consider this new evidence.

[24] On Friday 15 May 2015, Mr Weston, for the defendants, reiterated his opposition to the plaintiff being able to amend its claim in the way it proposed and submitted that it should certainly not be able to produce evidence to support its claim without there being a formal amendment to its statement of claim. It was as a result of this discussion that the plaintiff sought to present its amended statement of claim to the Court on 18 May 2015.

[25] This latest amended statement of claim does not add any new cause of action. As in the amended statement of claim dated 26 March 2015, the plaintiff alleges the defendant wrongfully repudiated its contract with the plaintiff by purporting to cancel those contracts on 20 February 2015. The plaintiff claims that, by written

notice on 24 March 2015, it cancelled the agreement by reason of the defendants repudiation.

[26] The plaintiff says that, as a result of that wrongful repudiation of the contract, it is entitled to damages for the loss it will suffer through not receiving the income that it would have received if the contract had run its course until 2022. Its claim is, however, amended so that, instead of simply seeking to recover damages for the total amount of the remuneration that it says it would have received from the defendant for that period, it has claimed $8,049,790 in respect of pre-tax profit, adjusted for net present value for the remaining 7.42 years of the term, and $2,097,307.52 for expenses that it says it will incur as a result of the defendants wrongful repudiation of the contract. Details of those expenses have been particularised in the brief of evidence of Mr Hart.

[27] The total claim for losses suffered as a result of the claimed wrongful repudiation of the contract is thus reduced from some $16,000,000 to some $9,050,000.

[28] I consider the amendment is required to allow the Court and the parties to fairly resolve an issue that, by agreement, has been before the Court since the plaintiff filed its amended statement of claim on 26 March 2015, namely, whether the defendant is liable to the plaintiff in contract for damages which the plaintiff says it has suffered by reason of the defendants wrongful repudiation of the contract in February 2015 and, if so, the extent of that loss.

[29] In the particular circumstances of this case, I do not consider that the prejudice the defendant will suffer, as a result of the late change in the plaintiff's evidence, is of such a nature or degree that the plaintiff should effectively be denied the opportunity to adjust its evidence to recognise the validity of the criticisms which were made by the defendants expert, Mr Hagen.

[30] Potentially, there may have been prejudice to the defendants in that the calculation of future losses must take account of the expenses that the plaintiff would

have incurred in continuing to maintain and lease to the defendant the eight helicopters that are the subject of its contractual arrangements with the defendant.

[31] The defendant is entitled to have discovery of the documents which will be relevant in assessing what those costs might have been. The plaintiff has agreed it will make such documents available to the defendants expert, Mr Hagen. That should not necessarily result in any further delay to the resolution of these proceedings.

[32] For reasons that are unrelated to this change in the plaintiff's evidence as to quantum, the hearing of these proceedings is not now going to finish, as had been anticipated, on 22 May 2015. Further time will be required, primarily for experts to give evidence in relation to maintenance issues and for submissions. Arrangements have been made for the hearing to continue for the week beginning 15 June 2015. It has been agreed that the defendants expert will have access to all the plaintiff's documents which may be relevant to his assessment of the losses which the plaintiff may be entitled to claim. Potentially, whether or not such documents have to be discovered beyond Mr Hagen, may depend on the nature of those documents but, if there are any issues in this regard, it is anticipated they will be discussed with me and resolved in time for the hearing to deal with all quantum issues, with the defendants having the benefit of proper discovery when the case resumes on 15 June.

[33] It is also relevant that all parties have benefitted at various stages from a number of changes that were made to the timetabling directions that have been made by the Court. There were major changes in the way the defendant has formulated its case with its amended statement of defence filed on 23 February 2015. From the plaintiff's point of view, there was a significant change to the legal situation it had to deal with as a result of the defendants formal cancellation of its contract with the plaintiff through a letter of 20 February 2015.

[34] Those changes have been accommodated by the parties and by the Court recognising various difficulties the parties or counsel have faced in preparing for trial. Although there have been delays, it appears to me that the parties and counsel

have worked conscientiously in a practical sense to ensure the hearing of these proceedings could begin as originally scheduled in May 2015.

[35] Given the way the Court has accommodated the changes that both parties have been involved in as a result of those developments, in my view, it would be wrong for the Court now to say the plaintiff should not be able to recognise the validity of criticisms made by the defendants expert and to alter the basis on which it calculates its claim for future losses so that its methodology would be consistent with that recommended by the defendants expert.

[36] In the particular circumstances of this case, I do not consider the amendments to the statement of claim will significantly prejudice the defendants or cause delay. I consider it is in the interests of justice that the plaintiff be able to amend its claim so the Court can properly determine an issue that has been before the Court since 26 March 2014.

[37] Pursuant to rule 7.7, I accordingly grant leave to the plaintiff to file its amended statement of claim in the form presented to the Court on 18 May 2015.

[38] All issues as to costs in relation to this are reserved.

Solicitors:
Heaney & Partners, Auckland
Macalister Todd Phillips, Queenstown