

**IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY**

**CIV-2011-404-008046
[2014] NZHC 463**

BETWEEN

ENDEAVOUR GLASS PACKAGING
LTD
First Plaintiff

ENDEAVOUR PACKAGING PTY LTD
Second Plaintiff

AND

ANDREW MALCOLM FRASER
First Defendant

GATEWAY CARGO SYSTEMS LTD
Second Defendant

Hearing: 13 March 2014 (by telephone)

Counsel: A Barker for the Plaintiffs
D C S Morris and S E Cameron for Defendants

Judgment: 13 March 2014

**JUDGMENT OF VENNING J
on adjournment application**

This judgment was delivered by me on 13 March 2014 at 3.00 pm, pursuant to Rule 11.5 of the High Court Rules.

Registrar/Deputy Registrar

Date.....

Solicitors: H Kelly, Wellsford
Cook Morris Quinn, Auckland
Copy to: A Barker, Auckland

[1] This case has a five day trial scheduled to commence on 17 March 2014.

[2] On 12 March 2014 the defendants filed a memorandum seeking to vacate the fixture.

[3] The application is advanced on the basis of material in a reply brief from a Mr McNeillage. The plaintiffs have also increased the quantum claimed.

[4] The defendants submit that the defendants, particularly Mr Fraser require time to respond to the matters raised in the reply brief which, on one view of it, could amount to an allegation of fraud against Mr Fraser. It is suggested there is no prejudice to an adjournment. Ms Cameron submitted a month would be required for Mr Fraser to review the second defendant's accounting software, ledger and bank statements and raised the possibility of non party discovery against Mr McNeillage.

[5] Mr Barker opposes the application for adjournment. He submits that the defendants should have had the information which has been provided in Mr McNeillage's reply brief.

[6] To put the application for adjournment in context it is necessary to refer to aspects of the procedural background to this case. The case was initially allocated a fixture to commence on 8 July 2013. There were issues in relation to discovery. The plaintiffs sought further and better discovery. The defendants sought further particulars of the claim and the plaintiffs sought to join the second plaintiff to the claim. The fixture for 8 July 2013 was adjourned accordingly.

[7] The alternative fixture date of 17 March 2014 was fixed in the middle of last year. The parties then addressed discovery. On 17 July 2013 a number of orders were made by consent on the plaintiffs' application for further and better discovery. By that order the defendants were directed inter alia:

(a) By 31 August 2013, the defendants are to provide the plaintiffs with copies of:

(i) Bank statements for all accounts operated by the second defendant from 2001 to November 2011;

- (ii) All electronic copies of the Deskbank system operated for Endeavour and GCS together with all necessary passwords to access these systems for the period 2001 to November 2011;
- (iii) All financial information for GCS for the period of 2001 through to present day, that relates either directly or indirectly to advances or inter-company debits or credits between GCS, EGP and/or EPP, including but without limit general summary financial information such as financial statements, trial balances or other similar financial material that summarises GCS's financial position and which would ordinarily be expected to refer to assets and liabilities, loans and advances, debtors and creditors, or inter-company debits or credits of GCS, either individually or in summary form;
- (iv) If documents within any of these categories formerly existed but no longer exist, or were formerly within the possession or control of the defendants but are no longer, then the defendants will provide an affidavit describing those documents and what has happened to them.

[8] The plaintiffs consider that the defendants failed to comply with those obligations but nevertheless have proceeded to prepare for trial.

[9] The plaintiffs were late in exchanging their witness statements (due 17 January, exchanged 3 February). The defendants then exchanged their witness statements on 4 March. In response to the defendants' witness statements the plaintiffs reinterviewed Mr McNeilage (he had formerly been employed by the second defendant). Mr McNeilage considered there were errors in a ledger provided by the defendants' discovery. The ledger in issue is the second plaintiff's ledger with the second defendant.

[10] In short, the point is that instead of a zero balance as at 1 July 2008, Mr McNeilage's reconciliation of the ledger discloses a balance of \$2.650m. It has led to the plaintiffs increasing the quantum claimed. That is the issue which has arisen which has led to the informal (by way of memorandum rather than application) application for adjournment of the trial.

[11] It is unsatisfactory that the matter has arisen in the way it has. Both parties have failed to comply with directions of the Court. However, I consider that in large part the present issue has arisen because of the defendants' failure to fully comply

with the orders for discovery. The documents in issue and which Ms Cameron submitted Mr Fraser needed time to review are documents which should have been under the control of the second defendant. They are the second defendant's ledger statements. Even accepting there were orders for preservation of property, the defendants could and should have had access to them. Indeed, they should have located them in the course of complying with their discovery obligations. The ledger entries should be supported by the second defendant's bank statements. The ledgers were prepared by Mr McNeilage and/or other employees of the second defendant.

[12] Next, there are only a limited number of transactions predating 1 July 2008. Mr Barker suggested there were 10 to a dozen at most and confirmed that the figures referred to in the ledger now produced matched the entries in the plaintiffs' bank statements. There are likely to be corresponding entries in the defendants' bank accounts.

[13] On my review of the pleadings this case has always been about the reconciliation of the ledger balances. The matter now raised suggests a different starting point for the reconciliation but involves a similar exercise to that which the defendants will already have gone through.

[14] As noted the fixture has been vacated once before. The plaintiffs will be prejudiced if the fixture is vacated. The Court allocates resources to fixtures on the basis parties will comply with directions and orders of the Court. If the current fixture is vacated an alternative date would be several months away.

[15] As noted, the documents that Mr Fraser wishes to access to review are largely documents which the defendants were required to discover to satisfy their discovery obligations. There can be no issue of third party discovery against Mr McNeilage as suggested. The second defendants could have called for the documents in the possession of Mr McNeilage in the course of satisfying their discovery obligations. He was a former employee.

[16] The pleadings have not changed. The increased quantum simply follows from the reconciliation exercise which was always going to be the focus of this case.

[17] For the above reasons I am not satisfied that the interests of justice support an adjournment of the fixture. The application for adjournment is declined.

[18] Costs to the plaintiffs on a 2B basis in relation to the memorandum and conference.

Venning J