IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY
COMMERCIAL PANEL

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2022-404-461
[2024] NZHC 1122

BETWEEN	THE FLETCHER CONSTRUCTION COMPANY LIMITED Plaintiff
AND	MPM WATERPROOFING SERVICES LIMITED First Defendant
	JEL WATERPROOFING LIMITED Second Defendant

Hearing: 10 April 2024

Appearances: JE Hodder KC and SR Hiebendaal for the Plaintiff
MAH Macfarlane and CA Robertson for the First Defendant
AL Sherriff and EA Boshier for the Second Defendant

Judgment: 8 May 2024

JUDGMENT OF FITZGERALD J

This judgment was delivered by me on 8 May 2024 at 2.00pm, pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar .....

Solicitors: Bell Gully, Auckland
Hesketh Henry, Auckland
Duncan Cotterill, Wellington
Clyde & Co, Sydney

To: J Hodder KC, Auckland
A Ross KC, Auckland
JWH Little, Auckland

Introduction

[1] In November 2015, The Fletcher Construction Company Limited (FCC), Fletcher Building Ltd, SkyCity Entertainment Group Limited (SkyCity), and New Zealand International Convention Centre Limited (NZICC) entered into a building works contract, pursuant to which FCC was to design and construct an international convention centre adjacent to the existing SkyCity complex (Convention Centre).

[2] In February 2017, FCC entered into a subcontract with MPM Waterproofing Services Limited (MPM) in relation to membrane roofing work at the Convention Centre. MPM in turn entered into a sub-subcontract with JEL Waterproofing Limited (JEL) in September 2018, pursuant to which JEL was to perform some of MPM's membrane works.

[3] On 22 October 2019, a fire started on level 7 of the Convention Centre and quickly spread across the roof. The fire was significant and could not be extinguished by Fire and Emergency New Zealand (FENZ) until 1 November 2019. During that period, and in order to try to bring the fire under control, FENZ inundated the partly built Convention Centre with water and fire-retardant chemicals.

[4] On 5 February 2024, FCC made a market announcement that the project is due to be completed in late 2024.

[5] FCC alleges that the fire was caused by MPM and/or JEL. By these proceedings, FCC seeks recovery of its uninsured losses, which are significant. FCC's claims are advanced in contract and negligence.

[6] The proceeding is set down for a 14-week trial commencing in June 2025. MPM and JEL apply for a split trial. In effect, they seek orders that the liability claims and some other legal aspects of FCC's claims are heard at a stage one trial in June 2025 and, to the extent necessary, all remaining issues, including the quantification of any of FCC's losses able to be claimed from MPM and/or JEL, are heard at a later stage two trial.

[7] MPM and JEL advance slightly different reasons as to why a split trial is appropriate. JEL's focus is on the most effective and efficient means of progressing the claim from its perspective, and its view that a stage one hearing on liability could eliminate the need for it to participate in a lengthy stage two trial on quantum, or at least significantly limit the extent to which it need participate in a stage two hearing. MPM's focus is directed to the fact that the type and quantum of FCC's losses are yet to be finally ascertained, and its concern at the prospect of late evidence and information sought to be advanced by FCC at the June 2025 hearing. MPM suggests that it would be more efficient to determine matters relating to liability first, and then address quantum at a later date, once the full extent of FCC's alleged losses has crystalised.

[8] FCC disputes that there are any efficiencies to be gained by splitting the proceeding into two hearings, suggesting that there is no clear demarcation between the issues arising, particularly in relation to the claims advanced in negligence. Further, while it acknowledges that its total losses will not have fully crystalised by the time of the June 2025 hearing, its position is that they will very largely have done so. FCC also notes that part of its claim is for an inquiry into its total losses, deliberately advanced to cover the quantification of any losses that have not crystalised by the time of the hearing. FCC says that proceeding on all issues in the normal way, and obtaining the Court's rulings on liability for the fire, liability for losses, and the quantification of the large majority of FCC's losses, will provide very clear guidance to the parties in relation to any residual losses that are the subject of the inquiry.

The pleaded claims and defences — more detail

[9] As just noted, the total losses suffered by FCC as a result of the fire are yet to fully crystallise. However, as set out in FCC's second amended statement of claim, as at 18 August 2023, the following categories of loss are pleaded, with the quantum estimated as follows:

(a) FCC direct losses, estimated at $252,313,780;

(b) sub-contractor liabilities, estimated at $11,486,219.99;

(c) liquidated damages payments, estimated at $10,343,000;

(d) what is referred to as the "SP1 Claim", being liabilities said to arise from a claim against FCC by SkyCity in relation to delayed delivery of carparks, estimated at $24,969,978;

(e) what is referred to as the "Second Tranche Claim", being a further claim by SkyCity against FCC for alleged delayed delivery of additional carparks, estimated at $17,863,990;[1]

(f) what is referred to as the "MDBI Claim", being another claim by SkyCity against FCC for reimbursement to SkyCity for alleged material damage and business interruption losses caused by the fire, estimated at $4,725,280; and

(g) other unspecified losses or liability to third parties who are not involved in the Convention Centre project (referred to by FCC as "Third Party Liabilities"), not yet subject to any particularisation or estimated quantum in FCC's second amended statement of claim.

[10] FCC advances three causes of action against MPM by way of contractual indemnity, breach of contract, and negligence, and one cause of action against JEL in negligence. Under all causes of action, and as noted, FCC seeks an inquiry as to the quantum of FCC's total losses, as well as various orders as to payment by MPM and/or JEL of those losses.

[11] Each of MPM and JEL deny that they caused the fire. They also take issue with the legal and factual basis for some of the losses claimed by FCC. In addition, each of MPM and JEL plead affirmative defences and, in MPM's case, counterclaims. MPM alleges:

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[1] In February 2024, SkyCity quantified its Second Tranche Claim at $20,931,169 (excl GST), plus accruing interest.

(a) breach by FCC of the Fair Trading Act 1986, in essence alleging misrepresentations by FCC as to the extent of insurance cover for the Convention Centre project, and what is alleged to be a failure on FCC's part to advise MPM of any potential exposure it might have in relation to the project that was not covered by the insurances FCC and SkyCity were providing;

(b) similar claims pursuant to misrepresentation/material non-disclosure;

(c) contributory negligence;

(d) an affirmative defence styled "assumption of responsibility"; and

(e) a further affirmative defence styled "no liability for pure economic loss under [the MPM sub-contract]".

[12] JEL pleads an affirmative defence of contributory negligence by FCC.

[13] The parties have helpfully conferred and agreed on 21 issues arising on the pleadings, split across liability, losses, contributory negligence, quantum, and counterclaims. The issues are set out in Schedule A to this judgment. Of particular relevance to the present applications are those issues concerning whether any breach by MPM of its contractual obligations, or by MPM or JEL of any duty of care owed to FCC, in fact caused FCC's losses and, even if so, whether, as a matter of law, those losses are too remote to warrant recovery.[2]

Legal principles

[14] The relevant legal principles are not in dispute.[3]

[15] The presumption is that all matters in issue in a proceeding are determined in one trial, which is expected to be the most appropriate and efficient way to proceed. The authorities are to the effect that there is a heavy onus on MPM and JEL to displace

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2 Schedule A, issues 10 and 11.

3 The following is taken from the parties' helpful submissions on the applicable legal principles.

the presumption.[4] For example, in *Lepionka & Company Investments Ltd v Gibson Sheat*, the Court said that it "will not make an order for separate trials if there is a real risk" that there may be an overlap in the matters covered in each trial, or issues of res judicata or conflicting findings may result from the trials, or substantially more court time will be taken.[5] To a similar effect, in *KPMG New Zealand v Gemmell*, the Court said "an order should be made only where there are plainly discernible advantages of doing so".[6]

[16] Issues arising for consideration in an application for a split trial include:

(a) whether there is a clear demarcation of the issues to be traversed at the first hearing, and those to be traversed at the second;

(b) whether there is a demarcation in the evidence to be called, or a likelihood of a need to recall some witnesses at a second hearing;

(c) any difficulties of issue estoppel or conflicting findings between the two trials;

(d) whether separate trials will result in substantial savings in time, cost, and court resources;

(e) the prospect of additional appeals and other procedural steps; and

(f) the likelihood of consistency and availability in judicial resources.

[17] Finally, it is not appropriate to base any analysis of the timing of single or split trials solely on an assumption that the first stage issues would be fully resolved in the applicants' favour; the converse assumption must also be considered.[7]

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4 *Clear Communications Ltd v Telecom Corporation of NZ Ltd* (1998) 12 PRNZ 333 (HC) at 335.
5 *Lepionka & Company Investments Ltd v Gibson Sheat* [2022] NZHC 1488 at [18].
6 *KPMG New Zealand v Gemmell* HC Auckland CIV-2008-404-4288, 27 March 2009 at [35]; and at [27], Allan J noted the absence of any obvious and clear demarcation of the issues sought to be split in that case.
7 See *Haden v Attorney-General* (2011) 22 PRNZ 1 (HC) at [50(c)].

JEL's submissions

[18] JEL proposes to demarcate the issues set out in Schedule A on the basis that issues regarding liability and foreseeability (i.e. remoteness) of *categories* of loss are heard and determined first, before hearing and determining causation (in fact), and the quantum of the losses FCC says it has suffered.

[19] In terms of whether any damage suffered by FCC was caused by JEL's breach of duty of care (*if* proved), JEL says that this inquiry has two parts:

(a) first, has JEL's breach of its duty of care caused FCC losses *in fact*; and

(b) second, has that breach also caused each of FCC's losses *in law*, or are the losses too remote to warrant recovery?

[20] JEL says that the second inquiry will require consideration of whether each distinct category of loss claimed by FCC was reasonably foreseeable to a party in the position of JEL.

[21] JEL accordingly proposes that stage one of the trial should effectively deal with events up to and including the fire itself,[8] together with a determination of whether the categories of loss claimed by FCC are too remote as a matter of law to be recoverable from a party in JEL's position, as well as the issues concerning contributory negligence.[9] The proposed second stage trial would determine the remainder of the issues, namely whether any breach by JEL of its duty of care caused FCC's losses in fact and, if so, the quantum of any such losses.

[22] JEL submits that there will be significant time and cost savings to it in particular from a split trial, given its defence is that it will not need to be heard at the second stage trial, or alternatively, that there is a real possibility its role in a stage two trial will be significantly reduced following the determination of the issues at the stage one trial. JEL notes that any assessment of FCC's alleged losses will be a complex

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8 Namely, how did the International Convention centre project progress, and who was liable for the cause of the fire.

9 Essentially, all liability issues set out in Schedule A, together with issues 10(b), 11(b), 13, and 14.

exercise and, in the event it is not liable for causing the fire, or not liable in law for certain categories of those losses, it will be able to make significant efficiencies by either not appearing at the stage two trial or appearing in a substantially lesser role. JEL appears to endorse FCC's earlier estimate that seven weeks would be required for hearing the first part of a split trial, and proposes that part of the June 2025 hearing is used for that purpose.

[23] JEL highlights that it is a very small company and the potential for such a small company to avoid what could be unnecessary cost and time is an issue to be taken into account on the current application. JEL also notes that there is a risk that 14 weeks will be insufficient to determine all of the issues in any event, partly because FCC has pleaded contingent and, as yet, unparticularised losses.

[24] JEL acknowledges that there may be appeals between a stage one and stage two trial, but submits that all trials have the shadow of potential appeal, and the mere fact that an appeal may be possible is no reason itself why the Court should baulk at the idea of a split trial.

MPM's submissions

[25] MPM broadly (though not wholly) agrees with JEL's proposed split of the issues.[10]

[26] MPM notes FCC's contention that there is no clear demarcation between the stage one and stage two issues, and in particular notes JEL's proposal that causation in law is determined in a stage one hearing, with causation in fact to be dealt with at stage two. MPM candidly accepts that there may be some force to FCC's position, namely that it is arguable that foreseeability and remoteness will turn on the specifics of the many constituent claims falling under each of the generalised heads of loss claimed by FCC. MPM accepts that if the Court were to take that view, it may follow that questions of the remoteness of those losses should more properly form part of the stage

[10] Its application for a split trial proposes the same issues as JEL to be determined in a stage one hearing, together with the issues arising on its counterclaims, set out at 16 to 21 of Schedule A.

two hearing, along with consideration of causation in fact and the quantum of such losses as may not be too remote.

[27] Even if the Court were not satisfied that remoteness in law could or ought to be dealt with at a stage one hearing, MPM submits that the foreseeability of the losses allegedly suffered by SkyCity, and sought to be passed on to FCC pursuant to confidential terms of a concession agreement between SkyCity and Macquarie in relation to carparks, could readily be determined in a stage one hearing. MPM says that these are pure economic losses not recoverable from MPM under the arrangements between it and FCC. MPM notes that, given these claims together are estimated at around $43,000,000, determination of this issue in a stage one trial, and potential disposal of that issue without requiring further inquiry, could result in the disposal of a significant aspect of the stage two hearing.

[28] MPM accordingly proposes the stage one hearing deal with issues of liability, as well as the foreseeability of any losses arising out of the SkyCity/Macquarie concession agreement, and the stage two hearing address causation, both in fact and in law, and the quantum of FCC's recoverable losses.

[29] A particular focus of MPM's submissions is its concern that some of FCC's losses have not been quantified, and that FCC itself apprehends both additional claims made against it which are yet to be determined, and the accruing of additional losses in the various categories of loss which have already been quantified to the date of the second amended statement of claim. MPM highlights in particular the pleaded losses in relation to third parties, which are not particularised at all in the statement of claim. MPM raises concerns about FCC seeking to introduce further claims, and evidence of losses in the lead up to, and potentially during, the June 2025 hearing itself, and the prejudice to the defendants from having to deal with any such late evidence and materials. MPM says that, given that the alleged losses FCC seeks to recover from the defendants are ongoing, splitting liability from the other issues would avoid the disruption otherwise likely to be caused.

[30] MPM further submits that if the issues to be determined in a stage one hearing are found in favour of MPM and JEL, it could bring the proceeding to an end, or at least narrow the areas of potential liability. It highlights that this is not a case where time savings would only result if the applicant for a split trial was fully successful at a stage one hearing. MPM submits that allowing further time for the quantum aspects of the claim in particular to crystalise and to be properly and carefully particularised will result in the parties being able to have a clear understanding as to where the disputes lie, rather than having to address new and amended claims shortly before, or during, the June 2025 hearing.

FCC's submissions

[31] FCC submits that MPM and JEL have not discharged the heavy burden on them to demonstrate that a split trial is appropriate in this case. Indeed, FCC submits that the difference in approaches taken by JEL and MPM, and MPM's acknowledgement of the force in FCC's position that causation in fact and causation in law cannot sensibly be split, highlights the real difficulties in clearly demarcating the issues arising, particularly on the negligence causes of action. It refers to Kós J's statement in *Haden v Attorney-General* that there are "particular difficulties" in "fragmenting issues" in negligence cases.[11]

[32] Consistent with this, FCC submits that none of the issues that JEL and MPM say should be addressed at the first hearing can be divorced from the factual evidence of the damage caused by the fire, and the losses that FCC suffered as a result. For example, on the issue of the scope of a duty of care, FCC says this should not be isolated from the damage caused by its breach.

[33] Further, FCC submits that issues of contributory negligence can only be determined in light of the losses claimed and proven, and thus whether FCC's conduct contributed to those losses. FCC also submits that it would give rise to unnecessary complication and difficulty if questions of whether losses had been caused as a matter of law were to be heard before the Court had considered the evidence as to whether the losses had even occurred in fact. In this context, FCC refer to recent authority

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11 *Haden v Attorney-General,* above n 7, at [50(e)].

from the United Kingdom Supreme Court, *Armstead v Royal & Sun Alliance Insurance Company Ltd*, in which the Supreme Court states that the orthodox approach to determining issues of remoteness and contributory negligence is first to consider whether losses have been caused in fact, before turning to consider whether there is some legal reason (such as the scope of the duty, remoteness, or contributory negligence) that should preclude recovery of that loss.[12] FCC submits that the approach proposed, at least by JEL, attempts to reverse that analysis.

[34] Further, FCC says it will be able to rebut MPM's argument that some of its losses are pure economic loss, by proving that those losses were consequent on the property damage caused by the fire. FCC submits that this legal argument cannot therefore be divorced from the factual evidence.

[35] FCC submits that neither JEL nor MPM convincingly argues that a first hearing would end the litigation, and that the most that has been raised is JEL's argument that there is a reasonable prospect that a split trial would result in JEL having a substantially lesser role at a second trial. Any suggestion that the stage one trial would be dispositive should, in FCC's view, be viewed with scepticism. It refers to the High Court of England and Wales' observations in *Binstead v Zytronic Displays Limited*, that the Court "must not be overly enthusiastic in assuming that the best outcome will occur should a preliminary trial take place", rather, "a realistic approach to the likely outcome" is warranted.[13] FCC submits that it is unrealistic to assume that JEL or MPM could significantly limit the scope of their liability at a stage one hearing, given that they were the only contractors with responsibility for the hot works on the roof and who were performing hot works on the roof prior to it catching fire, and that there were no other parties in the vicinity.

[36] Finally, MPM submits that the prospect of further losses yet to crystalise is not itself a reason for a split trial. It notes that the parties will need to cooperate and engage on any updating evidence, much of which, it is submitted, will simply be updating the quantum of already identified categories of loss. Further, FCC accepts that it may well need to draw a "line in the sand" in advance of trial as to what will be

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12 *Armstead v Royal & Sun Alliance Insurance Company Ltd* [2024] UKSC 6 at [23].
13 *Binstead v Zytronic Displays Limited* [2018] EWHC 2182 (Ch) at [16].

considered and determined at trial, and emphasises its claim for an inquiry as to its total losses, which is pleaded for the very reason that the total extent of the losses may not be crystalised for some time. FCC nevertheless submits that the large "body" of its losses will be able to be dealt with at the 2025 hearing, with a much smaller "rump" being the subject of the inquiry. FCC does not anticipate any issues relating to remoteness or causation being determined through the pleaded inquiry, but rather that being a method for quantifying any further losses that may crystalise. It says this is particularly so in the context of the Convention Centre being completed later this year, and SkyCity already having quantified its claims against FCC, and at least one of those claims being referred to arbitration during the course of this year.

[37] FCC also points to the real possibility of significant appeals between a stage one and stage two trial, submitting that in those circumstances, there is a very real prospect of the proceedings not being finally determined until some time after 2030. FCC notes that even on the basis the full trial proceeds in 2025, this will still be some six years after the events in question, and addressing the large majority of questions of causation in fact and quantum of losses will become more difficult as time passes, particularly once the project has finished and relevant witnesses become unavailable to it.

Discussion

[38] Earlier in these proceedings, FCC itself proposed a split trial. Despite this, I have come to the conclusion that the appropriate outcome is to decline JEL and MPM's applications.

[39] I agree with FCC that in a case of this kind, and particularly in relation to the negligence causes of action, it is difficult to truly and fairly separate out the issues for determination between a stage one and a stage two hearing. As the authors of *Todd on Torts* observe, there is an overlap between defending the scope of a defendant's duty and the loss for which he or she should be liable, whether by the application of the rules of causation or of remoteness, or both.[14] Further, I am concerned at the suggestion that causation in law (i.e. remoteness) could and should precede

[14] Stephen Todd (ed) *Todd on Torts* (9th ed, Thomson Reuters, Wellington, 2023) at [4.1].

determining whether the defendants' conduct was in fact a cause of the plaintiff's loss. Again, the authors of *Todd on Torts* describe causation in fact as the first matter to be determined once liability has been established. If that causal factual link can be made, it is then necessary to consider whether the conduct can be seen as a cause in law, and then to address the question of the remoteness of the damage. The authors state:[15]

> Assuming that the conduct was a cause, it must be sufficiently closely connected with the damage so as to justify the imposition of liability. The three stages are analytically distinct, although the line between the second and third questions frequently can be obscure. They both involve evaluation and judgment, and the one can shade into the other.

[40] Further, establishing liability pursuant to a duty of care in negligence requires a claimant to do more than prove that the defendant has failed to comply with any such duty, but "must show that the duty was owed to him and that it was a duty in respect of the kind of loss which he has suffered".[16] Accordingly, and as Kós J noted in *Haden*, some proceedings are "simply ill-suited to split trial procedure", referring, as noted, to negligence cases in particular.[17] It is also difficult to see how affirmative defences of contributory negligence by FCC could be determined at a stage one hearing when the losses to which FCC is alleged to have contributed would not have been established at that hearing.

[41] I acknowledge that split trials have been ordered in some significant negligence cases, for example, in some of the leaky or defective building representative proceedings.[18] In those cases, what was in dispute was the distinction between what were common or individual issues to be determined at a first and second hearing respectively. Each case will, however, turn on its own facts and, in cases such as those large representative proceedings, there were powerful case management benefits in splitting the trial and issues in the manner in which they were.[19]

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15 At [19.1].

16 *Banque Bruxelles v Eagle Star* [1997] AC 191 (HL) at 211 per Lord Hoffman.

17 *Haden v Attorney-General*, above n 7, at [50(e)].

18 See, for example, *Minister of Education v James Hardie Ltd* [2018] NZHC 1481, and the cases discussed therein.

19 For example, in *Minister of Education v James Hardie Ltd* it was accepted by all parties that the traditional approach to determining the claims was not feasible (at [4]).

[42] Here, while the quantum of the losses claimed by FCC is very large, in some senses the scope of the proceedings is confined. There is a limited suite of contractual arrangements between the parties that will be required to be considered in the context of issues such as duty of care and remoteness in law. There is only one specific event in issue, namely the fire, rather than what is often seen in similar large proceedings, namely a significant number of alleged defects. There are only three parties to the proceeding. These factors further persuade me that there would need to be clear and compelling reasons to order a split trial between liability and the other issues in this case.

[43] I also accept FCC's concern as to the likelihood of appeals in between a stage one and stage two trial, and the significant delay which could result in the hearing of the proposed stage two issues. Given a stage two trial on causation in fact and quantum would itself be several weeks in duration, the time to hearing for such a trial, following determination of all stage one appeals, could well mean that the proceedings would not be resolved at first instance for many years to come.

[44] The point that has troubled me the most is that some of FCC's losses continue to accrue and are yet to be quantified. However, I do not consider this weighs in favour of a split trial, but rather gives rise to consideration of whether a trial on all issues should be delayed pending full crystallisation and quantification of FCC's claimed losses. In a matter of this kind, however, and even if the trial were adjourned to, say, the first half of 2026, it seems highly unlikely that FCC's total losses would have fully crystalised by then in any event. FCC's prayer for relief seeking an inquiry as to its total losses recognises these practical factors. Further, I have taken into account FCC's oral submissions that the very large body of its losses will be able to be determined and quantified at the hearing, with a much smaller rump being reserved for the inquiry. I also take into account FCC's confirmation that it is not suggested that matters such as causation and remoteness would form part of the inquiry process.

[45] I make these observations in the context of what is, and is not, appropriately the subject of an inquiry. An inquiry, while widely expressed under High Court Rule 16.2,[20] is not to be used as a means of establishing liability.[21] An inquiry will ordinarily be as to damages. As the Court of Appeal in *Rod Milner Motors* stated:[22]

> The importance of finality in litigation requires that where damages are capable of straightforward assessment the appropriate evidence should be called and the issue resolved at trial. The jurisdiction to order an inquiry is to be used where complex issues arise which require the application of expertise not available to the Court. In particular, the jurisdiction … should not be used as a method of obtaining separate hearings on liability and damages.

[46] In addition, an application for an inquiry is not a vehicle to adduce evidence of a head of damages not addressed at trial.[23]

[47] Obviously, FCC will need to satisfy itself that any remaining "rump" of claimed losses that are not capable of being quantified and determined at trial are appropriately the subject of the inquiry it seeks. Further, given FCC advocates for the full trial to commence in June 2025, care will need to be taken in case management so that the defendants are not prejudiced by any attempt by FCC to introduce further heads or categories of losses into evidence "late in the day". On the flip side, however, there may be little to no prejudice arising from simply updated quantification of already identified and pleaded heads of loss, and which are already addressed in the parties' evidence.

[48] For these reasons, I do not consider that the defendants have discharged the onus on them to satisfy me that a split hearing is the appropriate manner in which to progress this proceeding.

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20 High Court Rules 2016, r 16.2.
21 *Hau v Saulala* [2013] NZHC 1622 at [45].
22 *Rod Milner Motors Ltd v AG* [1999] 2 NZLR 568 (CA) at 581.
23 *Hodge v Apple Fields Ltd* (1999) 4 NZ ConvC 193,084 (CA) at [42].

Result

[49] The applications for a split trial are declined.

[50] There appears to be no reason why FCC should not receive costs of the applications on a scale 2B basis. I would likely certify for second counsel. If the parties are unable to agree costs, FCC may file a costs memorandum within 15 working days of the date of this judgment, with any memoranda in reply to be filed within a further 10 working days. No memoranda are to be longer than five pages in length. I will thereafter determine costs on the papers.

Fitzgerald J

SCHEDULE A

Issues in the proceeding:

Liability

1. What were the contractual obligations of MPM, including:
    a. What was required by the definition of Good Industry Practices?
    b. What standards, practices, methods, procedures, law and regulations MPM was required to follow?
    c. What is the scope of the indemnities in the MPM subcontract?
2. What was the duty of care owed by MPM to FCC?
3. What was the duty of care owed by JEL to FCC?
4. What caused the fire that started on 22 October 2019 to ignite?
5. Was the cause of the fire reasonably foreseeable?
6. Did MPM's actions breach its contractual obligations?
7. Did MPM's actions breach its duty of care?
8. Did JEL's actions breach its duty of care?

Losses

9. What are the losses and/or liabilities suffered by FCC as a result of the fire?
10. Were FCC's losses caused by any breach by MPM?
    a. Did any breach by MPM of its contractual obligations and/or its duty of care <u>in fact</u> cause FCC's losses?
    b. Did any breach by MPM of its contractual obligations and/or its duty of care cause FCC's losses <u>in law</u> or are those losses too remote to warrant recovery?
11. Were FCC's losses caused by any breach by JEL?
    a. Did any breach by JEL of its duty of care <u>in fact</u> cause FCC's losses?

b. Did any breach by JEL of its duty of care cause FCC's losses in law or are those losses too remote to warrant recovery?

12. Do any losses claimed by FCC amount to pure economic loss? If so, do such losses fall outside the scope of the indemnity of clause 2(a) of the MPM Subcontract?

Contributory negligence

13. Did FCC negligently cause or contribute to some or all of the losses it claims from MPM and/or JEL?

14. Did FCC assume any responsibility for the risk of the fire occurring?

Quantum

15. What is the quantum of FCC's losses as a result of the fire?

Counterclaims

16. Did the Fair Trading Act 1986 (FTA) apply in the pleaded circumstances?

17. Did FCC fail to disclose to MPM material information relating to the MPM Subcontract and/or the insurance policies being provided by FCC?

18. Did FCC make representations to MPM in relation to its insurance cover that were false and/or misleading?

19. Did FCC breach the FTA?

20. What loss, if any, was caused as a result of any breach by FCC of the FTA?

21. What remedy, if any, should be ordered as a result of any breach by FCC of the FTA?