EDITORIAL NOTE: CHANGES MADE TO THIS JUDGMENT APPEAR IN [SQUARE BRACKETS].

IN THE DISTRICT COURT
AT WELLINGTON

CRI-2017-085-001107
[2018] NZDC 4047

MINISTRY OF HEALTH
Prosecutor

v

PHILLIP MORRIS
Defendant

Date of Ruling:	5 March 2018
Appearances:	S Carter and G Abbott for the Prosecutor D Boldt and M Sumpter for the Defendant
Judgment:	5 March 2018

RULING OF JUDGE P J BUTLER

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[1] This is an application by the prosecutor to amend CRN ending 0369 which is a charge of importing HEETs, which in the charging document was alleged as at between 8 December 2016 and 30 December 2016. The prosecution application is based on s 133 Criminal Procedure Act 2011.

[2] The grounds submitted by the prosecution in support of the application in summary form are first that the amendment is made in conformity with the proof which will relate to specific importations of HEETs by the defendant on 16 November 2016 and 1 December 2016. Secondly, that a date is not a material particular of the charge and thirdly, that there would be no prejudice to the defendant if the amendment were made before the trial commenced.

[3] The defendant opposes the application for amendment and makes the following grounds in support of its opposition, first that the prosecution had ample time to get these details right, secondly, that the brief of evidence of [the witness], the prosecution witness whose evidence relates to the importation, was not provided with other disclosure but only on 27 February 2018. By then a trial fixture had been allocated for today, as to say to commence 5 March 2018.

[4] Thirdly, the defence says that the evidence of [the witness] would relate to two importations; the first was on 16 November 2016 and for 60,000 HEETs. The second, although not specified as to quantity, is said to be a much larger shipment on 1 December 2016. The defence expresses fears that the size of the second alleged importation overwhelms the size of the first and should be the subject of a separate charge, rather than coming in by way of amendment and the defence argues that the larger and later import would switch the focus of the enquiry of the Court to that second import, rather than to the first one. In this context, and this is the fourth argument of the defence, there is a limitation period in the Smoke-free Environments Act 1990 under s 37(3), this is for a period of 12 months, "After the date on which the offence was committed."

[5] The defence says it is too late for the prosecution to charge in relation to the larger and later importation, noting that the charge was not laid in representative form in any event but the defence would not oppose an amendment which read, "On or about 16 November 2016", this would allow the prosecution to proceed and for the prosecutor to pursue the smaller importation, that is to say the one on 16 November 2016 but not the second importation.

[6] In considering these matters and competing arguments, I take notice of the following matters: Disclosure in relation to the second importation seems to have been somewhat belated. I note too, the limitation period expressed in s 37(3) Smoke-free Environments Act and also note that the second importation seemingly would be much more serious than the first. I note also that this is a Judge-alone trial and a Judge sitting alone should not be overwhelmed by the bulk or quantity outlined in the second importation but also further that the case is in reality a test case.

[7] My decision is that given the issues which the defendant suggests seem to be fair and the trial could proceed on the basis of the single importation, rather than both of them, and I allow the amendment of the charge to read, "On or about 16 November 2016."

P J Butler
District Court Judge