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IN THE COURT OF APPEAL OF NEW ZEALAND C.A. 82/87

BETWEEN CLUB MEDITERRANEE N.Z. of 18 Commerce Street, Auckland, Resort Hotel Operator, sued as a firm

Appellant

A N D KEITH FREDERICK WENDELL of Auckland, Company Director

Respondent

Coram: Cooke P.
McMullin J.
Somers J.

Hearing: 26 November 1987

Counsel: C.C. Nicholl for Appellant
A.W. Grove for Respondent

Judgment: 26 November 1987

JUDGMENT OF THE COURT DELIVERED BY COOKE P.

This is an appeal from a decision of Hillyer J. ordering that the appellant's protest to jurisdiction be set aside and declaring that the High Court in Auckland is the forum conveniens for the action in which the appeal arises.

That action is brought by a resident of Auckland who went on holiday to New Caledonia and claims that he had the misfortune to contract food poisoning at a hotel resort operated there by an organisation represented in New Zealand by the defendant. The statement of claim pleads that the poisoning was due to negligence of the defendant in failing to provide wholesome food, or as a result of a breach of an implied term of the agreement between the parties - namely,

to provide only wholesome and healthy food at its tourist resort. Counsel for the plaintiff, who is the respondent in this Court, told us that that contractual cause of action is put forward first as breach of a warranty that only wholesome and healthy food would be provided; secondly on the alternative basis that there was at least a contractual obligation to take reasonable care that the food was wholesome and healthy.

The action was commenced in the ordinary way in the High Court at Auckland, the defendant being named as Club Mediterranee N.Z. of 18 Commerce Street, Auckland, Resort Hotel Operator, sued as a firm. For authority enabling the defendant to be sued in that way, the plaintiff relies on r.80 of the High Court Rules:

> 80. **Person trading as a firm** - (1) Any person carrying on business in the name of a firm may be sued in the name of the firm.
> (2) The opposite party may in such case apply to the Court for an order -
> (a) Directing that an affidavit be filed stating the name and address of the person carrying on the business;
>
> ...

It is to be noted that this rule is additional to r.79 relating to persons claiming or alleged to be liable as partners. They too may be sued in the name of the firm, but r.80 is manifestly intended to have a wider scope. We see no reason why it cannot be utilised in a case such as the present.

The defendant is claiming that there is really no such organisation known to the law as Club Mediterranee N.Z. and that this is in effect a trade name used in New Zealand by the French corporation Club Mediterranee Societe Anonyme. That may well be right, but the contract into which the plaintiff entered was on a form or was evidenced by a form headed Club Mediterranee. At the foot of the first page is a statement:

> Please attach your payment here and forward to Club Mediterranee: 18 Commerce Street, P.O. Box 3075, Auckland.

Telephone and telex numbers then are given. Printed on the back are a number of terms and conditions which include many references to Club Mediterranee, including one under the heading Insurance. That reads:

> As a member of Club Mediterranee New Zealand you are covered while in transit up to the value of:
>
> $1000.00 loss of luggage
> $50.00 medical
> $250.00 cancellation
>
> This is subject to the separate terms and conditions of the underwriter.

The telephone and telex numbers are evidently those of the French airline UTA in Auckland. No doubt the staff who dealt with the plaintiff were UTA staff. Nevertheless it is perfectly plain that by these means the French corporation was maintaining a presence and carrying on business in New Zealand under the name Club Mediterranee N.Z. We add that a letter, dated 26 July 1986, to the plaintiff regarding his misfortune was signed by a person

describing herself as 'General Manager, Club Mediterranee N.Z.' In an affidavit she states that she is employed by UTA but 'It is my job to co-ordinate bookings made by persons wishing to take holidays at resorts operated by Club Mediterranee in the Pacific region'.

It follows that the action was correctly constituted. The proceedings were properly served here on a defendant found within the jurisdiction and carrying on business within the jurisdiction. The application dealt with by Hillyer J. was in terms one of protest to the jurisdiction, but the arguments before the Judge and in this Court have extended more widely so as to import the considerations dealt with under the doctrine forum non conveniens, the contention for the Club being that, even if contrary to its submission the New Zealand Court has jurisdiction, the New Caledonian Courts are the more appropriate forum in all the circumstances.

The question of the proper law of the contract is one material to be considered in determining the forum conveniens. As to that the terms and conditions are elaborate but, in essence, the obligation of the Club was to provide the plaintiff and his wife with a holiday of a certain standard and with certain facilities in New Caledonia and to make arrangements for their passages by air to and from New Caledonia. As the very first paragraph of the conditions stipulates:

> Once a booking is made, a completed and signed booking form, together with a deposit of $100 per person plus membership fee must be received by Club Mediterranee within 10 days of booking to avoid automatic cancellation. Final payment amounts will be advised by Club Mediterranee and are due 40 days prior to departure. All holidays must be prepaid. Bookings made less than 40 days prior to departure must be paid in full.

Rates were quoted in New Zealand dollars. Provision for refund of deposits, less $20 per person handling fee, was made if cancellation was received by the Club 40 days prior to departure, and cancellations enabling lesser refunds were provided for in the event that 40 days' notice was not given. Apart from the charge for the holidays themselves, there was to be payment for membership of the Club - adults and children 12 years and over $30, renewable yearly at $20. No reservation was to be accepted without purchase or proof of membership. Membership fees were in no circumstances refundable.

Reading through the terms and coditions, one cannot avoid the conclusion that, taken as a whole, this was a contract made by parties in New Zealand, to be paid for in New Zealand in New Zealand currency, and that the primary obligations under it must have been intended by the parties to have been governed by New Zealand law. In that sense we think that New Zealand law was the proper law of the contract. It does not follow that that law would govern the performance of every part of the contract. It is a familiar principle, as stated in 8 Halsbury's Laws of England, 4th ed. para. 592:

> **592. Splitting of the contract.** Whilst most contractual issues are governed by the proper law, the parties can agree that different contractual issues may be governed by different laws. There is no authority against the courts deciding that the objectively ascertained proper law shall vary according to the contractual issue involved. However, the courts will not so act readily or without good reason.
> ....

It is enough to add a reference to the House of Lords case, Hamlyn & Co. v. Talisker Distillery [1894] A.C. 202.

Conceivably therefore some of the provisions in this contract could be governed by the law of New Caledonia in certain circumstances. We refer to the clause much relied on for the appellant:

> Club Mediterranee reserves the right to withdraw, alter or otherwise modify tours, itineraries, specific programmes, sports facilities or activities at any time and without notice. All services are subject to the laws of the country in which they are provided.

Despite the careful argument presented by Mr Nicholl, we agree with Hillyer J. that the last sentence just read was evidently not intended to define the proper law applicable to the contract as a whole. Still, an argument remains that, in respect of the provision of a particular service in the course of the performance of the contract, the law of the country of performance might apply. We are not now ruling whether or not that was so, as far as the present case is concerned, because Mr Grove for the plaintiff has told us that he is not relying on any particular provision on the law of New Caledonia in support

of the action. Similarly Mr Nicholl for the defendant has said that, at this stage at all events, the defendant is not invoking any particular provision of the law of New Caledonia. Against that background we can simply put on one side, without in any way deciding it, the possibility that when the action comes to trial one party or the other may seek to rely on some specialty in the local law. That will be a matter for the trial Judge to consider if it is raised.

So far as forum conveniens is affected by the proper law of the contract as a whole, we have already expressed the opinion that such law is the law of New Zealand. So far as the possibility just referred to might arise, it has not been shown at this stage of the proceedings to be likely to arise and consequently it can be of little moment in weighing up the factors relevant to determining the convenient forum. The basic principle was accepted, and rightly accepted, by counsel on both sides as sufficiently appearing from the well-known case The Spiliada [1986] 3 All E.R. 843. It is sufficient for present purposes to say that the task is, as Lord Goff of Chieveley put it at 858:

> ... to identify the forum in which the case can be suitably tried for the interests of all the parties and for the ends of justice.

It is argued for the present appellant that Hillyer J. did not approach the case in that way, but rather gave too much weight to the question of oppression, which perhaps before The Spiliada had tended to figure more

prominently in judicial statements in this field. It seems to us that the Judge, although not referring specifically to The Spiliada, did have in mind the general question of the overall balance of convenience; and that the reference made by him to oppression was not intended as an exhaustive test. Nevertheless, because he did not specifically express his decision in terms of the Spiliada principle, we have looked at the issue afresh in this Court, notwithstanding that it is an appeal from the exercise of a discretion. Having done so, we are satisfied that, applying the proper test and on the material before the Court, the conclusion reached in the High Court was the right one.

It is true that the case has some features tending prima facie towards trial in Noumea. After all, the illness began there and the breach of contract alleged and the negligence alleged also occurred there. But, when one looks into the matter a little more deeply, it emerges that the prima facie case for New Caledonia is not as strong as might have been expected. We can only approach the matter in the light of such affidavits as there are. Those filed for the Club are not notable for detail in the factual information which they proffer.

There is reference to a medical man, a doctor who is said to have treated the plaintiff. He is said to be resident in Noumea and so is the analyst who reported on diagnostic samples taken from the two children of Mr and Mrs Carlsen, who were other tourists affected by this food

poisoning or allegedly so. But it is not stated whether or not Dr Carron or the analyst have anything to say contrary to the opinions of the Auckland medical advisers of the plaintiff who are intended to be called to establish a diagnosis of salmonella poisoning. To what extent there is a conflict on any medical issue is quite uncertain.

The affidavit containing the references to the doctor and the analyst goes on to say that the person in charge of catering and the purchase of food at the Noumea resort and the head chef, Didier Teysseire and Andre Pelardy respectively, 'whose evidence would be essential on the trial of this action', are both resident outside New Zealand. It has been drawn to our attention that this does not go as far as to say that they are resident in Noumea and there is other material before the Court which leaves that matter in doubt, having regard to the possibility of working holidays and the like and to the tendency of hotel staff to move from job to job. So the extent to which the Club would need to call witnesses resident in Noumea is far from clear on the affidavits.

On the other hand it is clear that the plaintiff and his wife are both almost certain to be called. As well the plaintiff asserts that he wishes to call other New Zealand-based tourists who suffered the same trouble at the material time or can speak as to the circumstances; his medical advisers in Auckland; and such witnesses as are necessary to support his claims for financial loss.

On the balance as to the evidence the defendant has failed to show that there is any advantage on the side of trial in Noumea. No doubt from the point of view of the defendant that would be so, but it is a question of balancing the relevant advantages and disadvantages on both sides and in that respect the defendant's case falls far short of discharging an onus. As already mentioned, the possibility of some special feature of New Caledonian law affecting the decision of the case has likewise not been made out. If that aspect is to arise, it can of course be dealt with by expert evidence in New Zealand. Admittedly that is not as satisfactory a way of dealing with important questions of foreign law, as has been pointed out, for instance, by Brandon J., as he then was, in The Eleftheria [1970] P. 94, 105; but the weight that one can give to that is greatly diminished by the absence of any specific allegation that the law of New Caledonia is going to turn out to be important.

In short, there is an onus on the defendant, properly sued in New Zealand, to show that the case ought nevertheless to be tried in New Caledonia because of its greater connection with that country; and the defendant has failed to produce sufficiently cogent material to discharge that onus. For these reasons we dismiss the appeal.

Costs should follow the event. There will be an order that the appellant pay the respondent $1000 for this

hearing, together with travelling and accommodation expenses of counsel to be settled by the Registrar.

R.B. Cooke P.

Solicitors:
McVeagh Fleming, Auckland, for Appellant
Grove Darlow & Partners, Auckland, for Respondent