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IN THE HIGH COURT OF NEW ZEALAND
HAMILTON REGISTRY

A 4/83

1206

Appeal result

BETWEEN TWENTIETH CENTURY-FOX FILM CORP

First plaintiff

VIDEO ASSOCIATION OF NZ LTD

Second plaintiff

AND COLONIAL ARMS MOTOR INN LTD

First defendant

YOU DRIVE (NZ) LTD

Second defendant

BRUCE WILLIAM MUNDY

Third defendant

VALERIE MUNDY

Fourth defendant

Hearing: 4 October 1984

Counsel: Mr Faire for plaintiffs
Mr Ingram for defendants

Judgment: 4 October 1984

ORAL JUDGMENT OF HILLYER J

This is a motion by the first and second plaintiffs for an order that in effect a motion be heard in Wellington. The writ was issued on 15 December 1982, and on that day an Anton Piller order was obtained by the plaintiffs. To some extent that order was complied with until on 11 February 1983 a motion by the defendants to discharge the Anton Piller order was filed. The plaintiffs did not attempt to proceed with the order, anticipating no doubt that they would be met by a motion for an immediate stay pending the hearing of the order to discharge, and that motion to discharge is still pending. It was suggested that until a case No.55/83 Kitching v Busby and ors was heard in the Court of Appeal, neither party was anxious to bring the motion to discharge on for hearing.

There is some doubt about that, but certainly since judgment in that case was given on 23 May 1984, the parties have tried to bring the defendants' motion on for hearing. The closest it got was being put in the list at Hamilton on Friday 28 September, but it was not reached that day. The Court did not have time to hear it and counsel in any event may have had difficulty in being present.

The motion before me, however, has been brought because the state of the list in Hamilton is such that there is no chance of the defendants' motion being heard this year. It appears that there are cases set down for hearing before a Judge alone which would take an estimated 97 sitting days and there are 8 sitting days available before the end of the year. It is clear that no matter what sort of priority might be accorded to this case, realistically there is no chance of it being heard before next year. In those circumstances, counsel for the plaintiff, who is anxious to get on with executing the Anton Piller order, has made inquiry in Wellington and has been advised by the Registrar there that it would be possible to hear the defendants' motion before the end of November. On that basis therefore, the plaintiff submits that the action can more conveniently or more fairly be tried in Wellington, and has brought the motion for change of venue under rule 249 of the Code of Civil Procedure.

In opposition to the submissions put forward by Mr Faire on behalf of the plaintiffs, Mr Ingram for the defendants made a number of submissions. The first was that under Rule 249 it is the action that can be removed, not an individual motion in the course of the action. He pointed to the case of Meates v News Media Ownership Ltd (1974) 2NZLR.77 for an illustration of what is meant by conveniently or fairly tried, and indeed that case was referred to by Mr Faire also in support of his proposition that the new rule had made the burden on an applicant somewhat lighter,

It now has to be established that the action could more conveniently or more fairly be tried in another place, not that it could not be conveniently or fairly tried in the place where it was set down.

Mr Ingram said that action is defined in s.2 of the Judicature Act as meaning a civil proceeding commenced by writ or in such other manner as may be prescribed by rules of Court. That refers therefore to the whole of the proceeding. I agree with him. An action is the whole proceeding, not any part of it, and I agree also that a motion in the course of an action is not the action. That however, in my view, is not the end of the matter because rule 249 does provide that a Judge, when making any order for change of venue, may direct that all proceedings subsequent to the order shall be taken and heard in the Court where the trial is to take place.

Effectively therefore, the court can, by making an order for change of venue at this stage, make an order that the motion to discharge the Anton Piller order be heard in Wellington. Once the motion has been heard and disposed of, it may be that the action could then more conveniently and fairly be heard back in Hamilton. It would be open to a party to contend at that stage that the situation was changed and to move for the action to be heard in Hamilton. I do not therefore find that Mr Ingram's point that it is only the trial which can be ordered to be heard in Wellington would be sufficient to prevent my making the order sought.

It is clear that rule 249 over-rides the provisions of rule 6 to which Mr Ingram pointed. Other matters of expense, convenience for individual parties or witnesses might all eventually result in the action finally being heard in Hamilton. That however, is not a matter with which I am immediately concerned.

Here is an order of the Court which has been delayed in execution since February of last year. If the defendant's motion is not heard this year a period of more than two years will have gone by during which the Anton Piller order has been frustrated, and in my view it is therefore necessary for fairness and convenience sake that the motion be heard without further delay. The only way in which that can be done is by making the order for change of venue to Wellington, and I therefore make the order sought.

The matter has been fully argued before me and there is no good reason, in my view, why costs should be reserved. I therefore allow costs to the plaintiffs in the sum of $150 with disbursements on this motion for an order for a change of venue.

At Mr Ingram's request, I specifically order that either party may have leave to apply for other orders under rule 249 after the motion to discharge or set aside the Anton Piller order has been heard and determined.

P.G. Hillyer J

Solicitors:

Stace Hammond & Co for plaintiffs
Harkness Henry & Co for defendants