Set 3

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

A.1652/85

BETWEEN SODAMASTER INC.

First Plaintiff

AND ATLANTA INTERNATIONAL INC.

Second Plaintiff

AND TRUST COMPANY OF GEORGIA

Third Plaintiff

AND P.A. MICALLEF

Defendant

UNIVERSITY OF OTAGO
16 MAR 1987
LAW LIBRARY

Hearing: 12 May 1986

Counsel: M.P. Crew for Defendant in support
R.H. Fee for Plaintiffs to oppose

Judgment: 19 June 1986

JUDGMENT OF BARKER J

On 19 December 1985, the above three plaintiffs issued proceedings in this Court against the defendant. The statement of claim alleged that all three plaintiffs were bodies corporate under the laws of the State of Georgia, USA. They claim that, at all material times, the defendant, who is resident in New Zealand, was an officer of the plaintiffs and that, at various times in 1982 and 1983, in the State of Georgia, he converted to his own use bills of exchange which right fully belonged to one or other of the plaintiffs.

The statement of claim alleges various provisions of the law of Georgia which appear to resembe the tort of conversion; there is also pleaded a cause of action based on breach of fiduciary duty to a corporation, plus various

breaches of the Georgian law on bills of exchange. It is not necessary, for the purposes of this judgment, to go into details of these allegations; the statement of claim and affidavits filed in connection with the present application establish:

(a) The plaintiffs were all created under the laws of the State of Georgia; they are all domiciled in that State; (the second plaintif has now been struck off the register of corporations).

(b) The allegations against the defendant concern his conduct as an officer or responsible employee of one or other of the just two plaintiffs;

(c) The defendant's conduct of which the plaintiffs complain all took place in the State of Georgia; and

(d) The case must be determined by the law of the State of Georgia.

(e) Apart from the defendant and two witnesses for the plaintiffs, all witnesses are resident in the State of Georgia.

The defendant entered an appearance under protest to jurisdiction; he has applied for an order dismissing or staying the proceedings in this Court.

The plaintiffs seek orders dismissing the first and second plaintiffs from the proceedings on the basis that they are improperly and mistakenly joined, and for a change of name of the third plaintiff to "Trust Company Bank". The affidavit in support of the application to dismiss two of the plaintiffs came from a staff solicitor employed by the plaintiffs' New Zealand solicitors; he stated that his employers had originally received instructions from the third plaintiff to issue proceedings on behalf of all

three plaintiffs. His employers have now received instructions that the proceedings were issued without the authority of the first and second plaintiffs. This was done despite a written declaration from the solicitor issuing the proceedings, that he was authorised to do so. No draft amended statement of claim was lodged to show how the pleadings proposed to cope with the loss of two plaintiffs.

In his affidavit in opposition, the defendant stated that the proceedings arise out of his usiness dealings with the plaintiffs whilst he was resident in the State of Georgia. The first and second plaintiffs were corporations in which the shares were held by a Mr Ansley and himself. He states that, so far as he is aware, he is still a director, president and treasurer of the first plaintiff and a director of the second plaintiff; he considers that these plaintiffs could not bring these proceedings without his consent which he has not given. The proceedings relate to his endorsement, as an officer of the first and second plaintiffs, of certain letters of credit or bills of exchange payable to the first plaintiff; the endorsement enabled funds to be paid into his personal bank account. He claims that the letters of credit, although made out to one or other of the plaintiffs, represented money belonging to him, he had discussed the particular manner of endorsement used with staff of the third plaintiff - the first plaintiff's bank - before he made the endorsements.

The defendant alleges that Mr Ansley took over control of the first and second plaintiffs; Mr Ansley will assert that the endorsements were unlawful. The defendant lists numerous witnesses in Georgia who could not be available to come to New Zealand, or who would only come at vast expense to him; all of these persons would be compellable to give evidence before a Court of competent jurisdiction

in the State of Georgia. It is acknowledged that such a Court exists.

The defendant claims that he has incurred considerable legal costs in Georgia in attempting to resolve the dispute. Should the proceedings continue in New Zealand, he would have to bring an expert in Georgian law to New Zealand to give evidence at the trial. Essentially, what the defendant asserts is that this Court is forum non conveniens for this dispute.

Although the defendant's affidavit was filed on 26 February 1986 and although I made an order that any affidavits in opposition be filed by the plaintiffs within 30 days (i.e. by 28 March 1986) that order was not complied with; affidavits in opposition were not filed until 9 May 1986. I did not receive any satisfactory explanation for this disregard of the Court's order.

Mr Ansley, who is an attorney, made an affidavit stating that the second defendant has now been dissolved under Georgian law; the first two plaintiffs assigned their causes of action to the third plaintiff; no action was commenced against the defendant in their names without the authority of either of them. He claims that the defendant lacked the authority to endorse the bills that the defendant claims.

A Mr J. Kevin Buster, a practising attorney in the litigation department of a law firm in Atlanta, Georgia, swore an affidavit. Whilst there is a Court of competent jurisdiction, available in Georgia to hear the dispute, this deponent contends that there is no counterpart under Georgian rules of procedure to the New Zealand procedure whereby a plaintiff may obtain against a defendant an order for particulars of a defence and may subsequently seek an order striking out the defence in the event of non-compliance with the order for particulars. This

defect, if defect it be, in the Georgian procedure must be counterbalanced by the ability of a party in that State to conduct extensive pre-trial discovery which includes the taking of depositions.

Mr Buster also states that, whereas in New Zealand a bankruptcy notice can be issued on a judgment debt in the United States, a request for bankruptcy adjudication may not be made in a State Court; it may only be made in a Federal Court and only if the debtor is a resident of the United States or has property in the United States. Moreover, unlike the situation in New Zealand, a single creditor may file a bankruptcy petition, only if there are fewer than 12 creditors who hold claims of $US5000 or more against a judgment debtor. Mr Buster considers that bankruptcy or various enforcement procedures in Georgia are, practically speaking, unavailable to the plaintiffs unless the defendant has assets within the jurisdiction. He believes that the defendant has no assets in Georgia. A copy of certificates of title were exhibited by the plaintiffs, showing that the defendant owns land in this country. Clearly the plaintiffs' desire is to issue execution against the defendant's land in this country if successful in the action.

There are no reciprocal enforcement of judgments arrangments between the United States and New Zealand, no doubt because of the 50 different jurisdictions in that country. However, there is still the right at common law to sue in this country on a foreign judgment. For details of this right, see Halsbury (14th ed.) Vol. 8, para.715 et seq and Cheshire's Private International Law (9th ed.) Chapter XIX.

The third plaintiff instructed its New Zealand solicitors in August 1984. They wrote to the defendant and his solicitor, threatening proceedings, on 23 August 1984. The defendants solicitor replied promptly, denying

liability and intimating that the proceedings would be defended. However, the proceedings were not issued for some 15 months later. No reason for this delay was advanced.

A Mr Fung, an officer of the third plaintiff, deposes that the plaintiff wishes to call two witnesses resident in New Zealand; he does not say what evidence these witnesses will give, or how relevant their evidence will be. He exhibits a number of documents from the Secretary of State and Commissioner of Corporations for the State of Georgia, exhibiting certified copies of documents registered in the Georgian equivalent of the New Zealand Companies Office. He also exhibits undertakings by 3 of the witnesses named by the defendant as relevant witnesses; each undertakes to appear before a Commissioner in Georgia to give evidence should this Court make an order for evidence be taken in commission. However, Mr Ansley, who is one of the key witnesses, is only prepared to make a voluntary appearance to give evidence that there was no corporate authority for any personal endorsement by the defendant of the cheques or bills of exchange in question; he states that he had no knowledge of the transactions until some months later. The defendant alleges that the Court determining this dispute will be faced with a straight conflict between Mr Ansley and the defendant.

Evidence of key witnesses taken on commission is of little use to a Court determining matters of credibility, whether that Court is in Georgia or in New Zealand.

Against this background, Mr Crew for the defendant submitted that the forum conveniens was New Zealand. He relied on a judgment I had delivered on 9 July 1985 in Carberry Exports (NZ) Limited v Krazzy Price Discount Limited & Another (A.488/84, Auckland Registry) on the topic of forum non conveniens. However, that case was rather different in that the plaintiff had already

previously issued proceedings in Fiji. The ques
whether it should be allowed to continue the pr
in this Court or the proceedings in Fiji. On the
held that the Supreme Court of Fiji was the app...
Court for trying a dispute; most of the witnesses were in that country and the law of Fiji was applicable to the plaintiff's cause of action. This case is different in that there are not two competing sets of proceedings. My decision in Carberry was followed by Hillyer J in Kingsway Industries Ltd v John Holland Engineering Pty Ltd (A.1586/85, Auckland Registry, Judgment 14 May 1986.

The modern test in situations where it is sought to stay proceedings on the basis that the defendant should be sued elsewhere, is found in recent decisions of the House of Lords. The former chauvinistic test has been discarded in favour of the following: A defendant must show (a) that there is another forum, to the jurisdiction to which he is amenable in which justice can be done between the parties at substantially less inconvenience or expense and (b) the plaintiff must not be deprived of a legitimate personal or juridical advantage which would be available to him if he invoked the jurisdiction of this Court. See "The Atlantic Star" (1974) AC 468 and Castanho v Brown & Root (UK) Limited, (1981) AC 55.

In the numerous cases reported, reference is frequently made to the "natural forum" for a dispute; this term was defined by Lord Keith in "The Abidin Daver", (1984) AC 398, 415 as "that with which the action has the most real and substantial connection". In "The Atlantic Star", Lord Reid at p.454 drew distinction between those cases where England was the natural forum from those cases where the plaintiff merely came to the English Court to "serve his own ends". Lord Reid pointed out that, as a general rule, there is no injustice in telling a plaintiff that he should go back to his own Courts.

I should have thought it clear that Georgia provides the natural forum for this particular dispute. All with which the case is concerned happened in that jurisdiction; its law is applicable. The only thing which justifies the plaintiffs' proceeding in this country is the presence of the defendant. I have no details in the affidavits as to the expense of litigation in Georgia. However, the cost to the defendant of having to bring his witnesses from the United States to New Zealand must outweigh the cost of his travelling to Georgia to defend the case there.

However, I am concerned that the defendant does not state that he is amenable to the dispute being resolved in the Courts of Georgia. The formulation of the rule above indicates that, before a defendant can successfully stay the case in this Court to have it determined elsewhere, he should indicate that he is prepared to have the case litigated in that other forum. The acceptance of or at least the non-opposition to the jurisdiction is important, should the plaintiffs succeed in Georgia and then, for the purposes of obtaining execution, sue on the foreign judgment in New Zealand. One imagines that if the defendant, having asserted in this application that Georgia provided the appropriate forum, then lost the case in Georgia, he would receive scant sympathy in this Court if he were to oppose entry of summary judgment here on the basis of a Georgian judgment.

As to the deprivation of a legitimate, personal or juridical advantage, I do not think there is much in the point about pretrial procedure. For what the Georgian Rules of Court lack as to enforcing applications for further particulars, they more than make up with the right to a party to seek extensive depositions pretrial.

The question of enforcement may be a factor; it does not loom large in the authorities. I do not think it sufficient to overcome the clear indicators that Georgia

is the forum conveniens for this dispute. As indicated, there exists in New Zealand a cause of action based on a foreign judgment; one should have thought that the defendant would be hard put to defend a claim based on that judgment in this Court either if the defendant had gone to Georgia and participated in a hearing and been unsuccessful, or if he had ignored Georgian process served on him in this country and allowed judgment to go by default.

The approach that I have taken appears to accord with that taken by the House of Lords in "The Abidin Daver" (1984) AC 308 which I considered at length in the Carberry Exports case. See also an article published in (1985) 101 LQR "Forum Non Conveniens - Where do we go from here?".

In my view, Georgia is the place where the evidence is more readily available and where it must, of necessity, be cheaper and easier to litigate because of the presence of the bulk of the witnesses in that jurisdiction; the law of that State applies; the plaintiffs are closely connected with the State; the plaintiffs may be prejudiced in suing there only because they might be unable to obtain recovery from the defendant. There is no suggestion - found in some of the cases - that the quality of justice in that State is other than satisfactory.

Accordingly, I am of the view that the Courts of Georgia provide the appropriate forum for this dispute. Before the judgment is sealed, the defendant must file an affidavit within 28 days saying that he will accept the jurisdiction of that Court should proceedings be brought against him there.

On that condition, the present action is stayed. Costs to the defendant $500 and disbursements.

R. I. Barker J.

SOLICITORS:

Bell Gully Buddle Weir, Auckland, for Plaintiffs.

B.M. Laird, Orewa, for Defendant.