

NZLR.

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

CP. 176/87

**NOT
RECOMMENDED**

BETWEEN RICHARD EDWARD JOHANSON of
31 Hopkins Crescent,
Kohimarama, Real Estate
Salesman

Plaintiff

AND ROBERT NEIL HOLLEY of State
Highway 18, Albany, Manager
trading as MARLIN POOLS

Defendant

Hearing: 13 April 1987

Counsel: Mr B. V. Maclean for Plaintiff
Mrs Klisser for Defendant

Judgment: 6 May 1987

JUDGMENT OF WYLIE, J.

The plaintiff seeks summary judgment for \$5,500 damages for non performance by the defendant of a contract to supply and instal a spa pool.

The statement of claim alleges a contract made on or about 12 September 1986 with the defendant trading as "Marlin Pools" for the supply and installation of a pool for \$3,435.59, which sum the plaintiff paid on or about 26 September 1986. It is

alleged that it was a term of the contract that delivery of the pool was to be made to 31 Hopkins Crescent, Kohimarama. Failure to perform is alleged notwithstanding subsequent requests. It is alleged the cost now to instal a similar pool would be \$5,500. The first supporting affidavit of the plaintiff confirms the allegations in the Statement of Claim and the plaintiff's belief that the defendant has no defence. The plaintiff says the premises formerly occupied by Marlin Pools is now occupied by another firm, Cascade World. He says he has frequently spoken to the defendant who has continually promised to supply the pool. The defendant changed his address. The plaintiff discovered and later called at his new address on 15 February when the defendant still asserted he would supply the pool, but claimed he had been prevented from delivering the pool as the result of a "218 notice" - an obvious reference to a notice given to a company (unspecified) under s.218 of the Companies Act 1935.

In essence the defence is twofold - first that the defendant did not contract personally with the plaintiff and second that the plaintiff repudiated the contract by refusing to accept delivery of the spa pool. There is also a subsidiary argument that the damages claimed were not adequately proved.

The defendant filed affidavits in opposition. As to the claim that he did not contract personally, the defendant gives an involved "explanation" in one affidavit which is either

singularly inept in its draughtsmanship or is deliberately designed to confuse. He claims to be a company director of Tamaki Television and Hi-Fi Ltd (in respect of which a winding up order was made on 1 April 1987). This company ("Tamaki") he says leased premises which were occupied by Marlin Pools "a firm supplying swimming pools and associated equipment", and Ace Pools Ltd ("Ace") carrying on business as spa pool suppliers. Marlin Pools was previously the sole occupier but a new spa pool showroom was erected and occupied by Ace in March 1986. The defendant says that in September 1986 Cascade Pool World Ltd took over the premises of Marlin Pools. Yet another company Hot Water Products Ltd took over the Ace premises in October 1986. The defendant claims to believe he has been incorrectly named as defendant and that the proper defendant is either Ace or Tamaki.

He explains the origins of the contract thus. His son-in-law, who did installation work for both Ace and Tamaki, was acquainted with the plaintiff. In June 1986 the son-in-law negotiated a reduced price deal with the plaintiff. The defendant says that agreement was between the son-in-law and the plaintiff. He then claims that a pool was supplied by Hot Water Products Ltd but before "we" were able to supply and instal, the plaintiff advised "us" that he did not wish to proceed. (Who "we" and "us" are is unexplained.) The defendant then says that in September the plaintiff advised that he wanted to go ahead with the purchase, as a result of which the contract was renegotiated on the same

terms. He does not say who was the recipient of the advice, or with whom the contract was renegotiated. However, the plaintiff paid a cheque to the anonymous "us" and "we" delivered the pool by means of a hired carrier to the home address given by the plaintiff in Ngapuhi Road, Remuera, where its delivery was refused. The pool was eventually returned by the carrier to "the company" - whatever that might have been, (although the carrier's delivery note is made out to "Marlin Pool Centre").

At the hearing counsel for the defendant sought leave to file a further affidavit which counsel for the plaintiff did not oppose. It purports to show that Tamaki purchased the swimming pool business of Marlin Pools 1979 (NZ) Ltd in August 1985, and that Tamaki retained the name "Marlin Pools" because of the existing goodwill. A copy of an unstamped and only partly executed Deed of Covenant in Restraint of Trade was exhibited. This refers by way of recital only to the sale of the "business of swimming pools and accessories distributors.....under the name of 'Marlin Pools'". The second affidavit also purports to show that the plaintiff's cheque was banked to the account of Tamaki, although it is not clear why the deposit slip annexed (which does not show the name of the account) should be dated 29 September and stamped by the bank on what appears to be the same day, yet the credit is not posted to the Tamaki account until 8 October as shown on a copy bank statement.

A second affidavit of the plaintiff denies that there was ever any mention of either Tamaki or Ace in his dealings and exhibits the invoice given to him for the purchase price. That invoice is on a printed form bearing prominently the name "Marlin Pools" with no mention of that entity (if such it is) being a branch of, or otherwise associated with, any other company or trading entity.

Counsel for the plaintiff argues that on the defendant's own affidavit the original contract in June 1986 was between the plaintiff and the defendant's son-in-law, not with either Tamaki or Ace. Therefore, the "we" and "us" in the next succeeding paragraphs, relating to the renegotiated contract cannot refer to either Tamaki or Ace, but must have some relationship to the son-in-law and the defendant. Further the defendant's first affidavit recognises Marlin Pools as a firm and as a trading entity separate from either Tamaki or Ace. That is contradicted to some extent by the second affidavit of the defendant. The various invoices and delivery notes attached to the defendant's affidavit do nothing to dispel the confusion, but the invoice received by the plaintiff is plainly from Marlin Pools. Further, counsel argues, if Marlin Pools was not the true contracting party, then it was an undisclosed agent and thus liable in any event. That, however, begs the question as to the real identity of Marlin Pools.

If there were any onus on the defendant to show that he was not the contracting party I would have to hold, on the very unsatisfactory affidavits filed on his behalf, that he had failed to discharge that onus. However, r.136 is clear. The onus is on the plaintiff to satisfy the Court that the defendant has no defence. On the evidence I cannot be satisfied that the defendant was in fact trading as Marlin Pools. That he was personally involved in discussions and made promises I do not doubt, but there is not sufficient in the evidence to preclude the possibility that at all times he was acting as an officer or employee of one of the companies mentioned and that Marlin Pools was simply the trading name of a division or branch of that company. Such statements as appear in the defendant's affidavits as might lead one to discount that possibility cannot be read in isolation from the remainder of the affidavits which support it. I have to conclude that either the defendant himself or his draughtsman did not clearly differentiate between the various possibilities as to the identity of the contracting party. There was a lack of precision both of thought and of language in the preparation of the affidavits. Nevertheless they contain enough to raise the possibility I have mentioned, viz, that the defendant was acting on behalf of a trading division or branch of a limited liability company. The plaintiff has failed to satisfy me that the defendant himself was in fact Marlin Pools, and contracting on his own behalf.

As to the defence of repudiation, had that stood on its own I would have held that the plaintiff was entitled to judgment. There is a specific allegation that a term of the contract required delivery to Hopkins Crescent in Kohimarama. There was not a word of denial of that in the defendant's affidavits. The supplying by the plaintiff of his residential address in Ngapuhi Road does not in my view indicate a possible defence, and on the face of the plaintiff's undisputed case, he was perfectly entitled to refuse delivery at Ngapuhi Road.

As to the subsidiary argument as to the inadequacy of proof of damage, I need say no more than that again there was no denial or dispute by the defendant in his affidavits, and on the face of the plaintiff's case I would have held him entitled to succeed.

Because the plaintiff has failed to satisfy me on the principal issue the application for summary judgment is refused. The case will take its place in the ordinary lists. I fix a period of 14 days from the date of delivery of this judgment for the defendant to file a statement of defence. Thereafter the ordinary rules will apply. I reserve costs on this application to be dealt with by the Judge who hears the case in due course.



Solicitors: Davenports, Auckland for Plaintiff
Turner Hopkins, Auckland for Defendant