

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

NZLR
(Green)
C.P. NO. 940/87

BETWEEN THOMAS NORMAN FLETCHER
of Auckland, Company Manager

Plaintiff

A N D NATIONAL MUTUAL LIFE NOMINEES
LIMITED

Defendant



Hearing: September 18, 1987.

Counsel: Mr. Muir for Plaintiff
Mr. Moody for Defendant

Judgment: 21 SEP 1987

JUDGMENT OF MASTER GAMBRILL

This is an application under Rule 107 of the High Court Rules for the transfer of the proceedings issued in the Auckland Registry by Mr. T.N. Fletcher against the National Mutual Life Nominees Limited (the Defendant).

On 30th June 1987 the Plaintiff issued proceedings against the Defendant, a duly incorporated company having its registered office in Victoria, Australia. The company has been approved by the Securities Commission to act in New Zealand as a trustee and supervisor for the Securities Act, 1978.

On 27th August 1987 a Statement of Defence on behalf of the Defendant and a Declaration of Authority to Act by the solicitor authorised in the proceedings was filed in this Court.

I am advised by Counsel because of a possible conflict of interest that Messrs. Buddle Finlay of Wellington and Auckland ~~were then~~ appointed solicitors ^{for the Defendant} and a notice of change of solicitor was filed on September 10, 1987.

On 10th September 1987 the present application, supported by an affidavit of Mr. G.J. Fuller the Manager of the Defendant company, was filed.

On 8th September 1987 the Plaintiff applied under Rule 446D for a transfer of these proceedings to the Commercial List, this application to be heard at Auckland on 25th September 1987.

Although Mr. Fletcher's claim is for \$114,429.33, both Counsel informed the Court of the basis and history of this litigation.

On 5th March 1985 the Defendant company executed a Deed of Trust (drawn up by Auckland solicitors) with A.I.C. Finance Limited (now A.I.C. Corporation in liquidation) for a consideration. The Defendant was appointed as trustee and supervisor for the depositors. The Plaintiff is one of such depositors who lost money in the liquidation of A.I.C. Corporation. Losses of depositors may exceed 25 million dollars. The liquidation is being carried out by the Auckland Branch of Messrs. Coopers & Lybrand. I am also informed that apart from the company having operated principally in Auckland many of the unsecured depositors live in the Auckland region and if the Plaintiff's application is granted, this action will probably become a representative action.

It is clear from the affidavit filed in support of the application for the change of venue that the solicitor then acting was aware of a possible change of solicitors. I set out details from Exhibit "B" of the Defendant's Manager's affidavit:

"RUDD WATTS & STONE

10 August 1987

Messrs. Holmden Horrocks & Co.,
Solicitors,
FAX 389.990

Attention Mr. Hassell/Mr. Muir

Dear Sirs,

re: Fletcher v. National Mutual

As you know we act for National Mutual. We have been asked to file an appearance in the proceedings commenced by Mr. Fletcher, although it is by no means certain that we will continue to act as solicitors for the defendant in the proceedings."

Prior to the forwarding of this letter to Messrs. Holmden Horrocks & Co., Mr. Hassell, solicitor for the Plaintiff, had telephone Mr. Allan of Messrs. Rudd Watts & Stone, the solicitors then acting for the Defendant, on several occasions. Mr. Hassell deposes he made available to that firm a copy of the proposed Statement of Claim intituled in the Auckland Registry. He further deposes that after a conversation with Mr. Allan, he believed that Mr. Allan could accept service of the proceedings. Throughout the preceding months Mr. Hassell deposes also that significant meetings had been held in Auckland with representatives of A.I.C. Securities Limited and the Defendant company, such meetings being more particularly referred to in paragraphs 8 (k) and (l) of the Statement of Claim.

When filing the Statement of Claim on 30th June 1987, the Plaintiff failed to file an affidavit showing the place where the cause of action or a material part thereof arose. Whilst the Plaintiff contended that the provisions of Rule 107(1)(b) "where no Defendant is resident or has his principal place of business in New Zealand, that office shall be such as the Plaintiffs select" could be applicable, I am satisfied that the Defendant's place of business is at the office in Wellington. The address given for Douglas Clive Ashenden, as the person authorised to accept service,

is 70 The Terrace, Wellington, which is the address for the National Mutual Centre.

The Defendant urges on me that the wording of Rule 107 subclause (3) referring to the affidavit, is mandatory, the wording being that "the Plaintiff shall file with the Statement of Claim an affidavit showing the place of the cause of action".

My jurisdiction to direct that this matter be transferred to the Wellington Registry as the Defendant seeks, is found in Rule 107(4):

"Where it appears to the Court on application made to it that the Statement of claim has been filed in the wrong office of the Court or that any other office of the Court would be more convenient to the parties, it may direct that the Statement of Claim be filed in such other office, or that all documents filed in the proceedings be transferred to the proper office or, as the case may be, to such other office which shall thereupon be determined to be the proper office."

The Plaintiff urges that, on the evidence before me, the Defendant was fully aware of the steps the Plaintiff proposed to take in filing in Auckland, that a copy of the Statement of Claim was made available prior to filing showing the intituling as the Auckland Registry and that the Plaintiff and other parties ultimately involved in this action would be greatly inconvenienced by the transfer of the proceedings to Wellington.

The Defendant claims that it holds certain records in Wellington though, on the files before me already, it is apparent that the company now in liquidation, for which it is the trustee for the unsecured depositors, carried on business primarily in Auckland, and a large proportion of the depositors are in fact in Auckland.

In hindsight it would have been prudent for the Plaintiff to have obtained a written consent from the Defendant before

the issue of proceedings or else sought direction from the Court as to the place where the proceedings should issue.

I direct my consideration of the application before me with the statement of Rule 5 "Non-Compliance with Rules":

"Non-compliance with any of these Rules shall not render void the proceeding or interlocutory application or document in which or in respect of which non-compliance has occurred, but the proceeding interlocutory application or the document may be set aside either wholly or in part as irregular or amended or otherwise dealt with in such manner on such terms (if any) as the Court thinks just."

I believe that it would be unjust and inequitable to order a transfer of these proceedings on the basis of the failure of the Plaintiff to file the necessary affidavit when notice had been given to the Defendant's solicitors, consideration had been given to the matter and it is clear that the parties were aware of the step that was to be taken.

I adopt a statement in McGechan on Procedure under Rule 107, "Waiver by Statement of Defence":

"(14) Under former rules it was considered that the filing of a Statement of Defence amounted to a waiver of any irregularity in place of commencement. Former r 1 permitted a Plaintiff to commence in any office of the Court; but the place for filing a Statement of Defence and trial under former r 6 was the office nearest to the residence of the Defendant. The latter right under rr 4 and 6 was regarded as being for the benefit of the Defendant, and therefore a matter which could be waived. Filing a Statement of Defence was such a waiver: Richards v. N.Z. Newspapers [1930] N.Z.L.R. 623. Present r 107 requires the Plaintiff to file his Statement of Claim in the office nearest to the place of residence or principal place of business of the Defendant, which also through rr 122 and 123 will be the place for filing the Statement of Defence and trial. The three rules likewise appear to be for the benefit of the Defendant, and open to waiver with like result. Rule 107(4) is silent on the point. The safer course for a Defendant will be to apply for transfer under r 107(4) before filing a Statement of Defence. Where necessary, the same interlocutory

application could seek an additional order extending time for filing a Statement of Defence. Any Plaintiff bold enough to enter judgment by default in the face of such application still pending could hardly expect to hold onto such default judgment."

The Statement of Defence with Declaration of Authority to Act was filed although it was indicated that the solicitors who filed the document may not continue to act as solicitors for the Defendant. I consider that there has been a waiver of the Defendant's position by the filing, at that point in time, there being no application for a transfer on Rule 107(4) either prior to or associated with the filing of the Statement of Defence and the filing of an affidavit is no longer necessary. The Defendant has accepted the Auckland Registry as the proper Court for the proceedings.

I do not consider the argument that the Defendant has now changed the solicitors acting for it is necessarily sufficient ground for recognising the application to transfer the proceedings.

The Defendant urged on me the inconvenience to the Defendant as deposed to in the affidavit of Mr. G.J. Fuller. I turn to the notation in McGechan on Procedure under Rule 479 which, of course, is in relation to the application for a change of venue of the trial, not the total transfer of the proceedings. Under that note reference is made to the case Consumer Council v. Pest Free Services Limited [1978] 2 N.Z.L.R. 15 at page 19 and it is stated that "convenience" is:

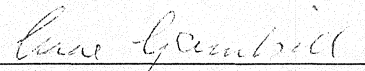
"Having regard to the case in all its bearings"

It would appear to follow that the convenient administration of justice from the view point of the Court system itself should not be overlooked. The notation continues and refers to factors commonly under consideration:

- (a) Required absence of senior staff....
- (b) Convenience of legal representatives....
- (c) Convenience of witnesses is commonly a factor of predominant importance.

In Jones v. Jones, unreported High Court Wellington, 7th October 1985, the distance between Auckland and Wellington was not regarded as inconvenient to Counsel in the light of modern air travel and communication. I cannot be persuaded by an argument as to convenience in the light of the affidavit filed. There is no doubt that the cause of action and a material part of it did arise at Auckland, the Plaintiff and a multitude of other Plaintiffs who, both parties are aware, will be ultimately joined in the action, reside in or around the Auckland area. The company that has gone into liquidation and has lost the unsecured deposits of the Plaintiff, operated mainly in the Auckland area, the liquidation of the company itself was carried out in the Auckland area and the records on which this was based were made and kept in Auckland, the inspections of the company by the Defendant's representatives were made in Auckland, the original trust deed between the Defendant and the A.I.C. Corporation (in liquidation) was drawn up in Auckland and, whilst I recognise the convenience that would exist to the Defendant and its Manager in having the action heard in Wellington, I believe there are other considerations that prevent me being swayed by that argument. Furthermore, the original cause of action arose here where, as alleged, the Defendant failed to carry out supervision and inspection of the records of A.I.C. Corporation. The Defendant was originally prepared to accept a fee to make an officer available to carry out supervision of a company operating in Auckland.

Counsel are aware the application for entry of proceedings on the Commercial List under Rule 446(D)(1) will remain extant for hearing on 25th September 1987. By giving this decision now, Counsel accept it will enable either party to seek review without effectively delaying the application under Rule 446(D)(1).


MASTER ANNE GAMBRILL

Solicitors:

Holmden Horrocks & Co., Auckland, for Plaintiff

Buddle Finlay, Wellington, for Defendant