IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

M. 307/91

BETWEEN ESSAR (NZ) LIMITED

PLAINTIFF

A N D THE SPA AND POOL FACTORY LIMITED

DEFENDANT

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A N D FERRO PLASTICS (NZ) LIMITED

THIRD PARTY

Hearing: 15 March 1991

Counsel: C.J. Butterworth for Plaintiff
W.J. Spring for Defendant
A.J.H. Coldicutt for Third Party

Judgment: 15 March 1991

(ORAL) JUDGMENT OF PENLINGTON J

This is an application by the defendant in proceedings in the District Court for an order under s 45 of the District Courts Act 1947.

I shall refer to the parties in the same terms as they are described in the District Court proceedings.

The defendant contends that both the claim and the counterclaim should be heard and determined in the District Court. As well, although not prayed for, Mr Spring, counsel

for the defendant, suggested that if I so found I should also order that the matter be transferred from the Otahuhu District Court to the Auckland District Court. In my view that matter is not properly before me. Ultimately, that was accepted by Mr Spring.

The application is opposed by both the plaintiff and the third party to the counterclaim. They desire to have the claim and the counterclaim heard in the High Court.

The origins of the dispute are as follows.

The plaintiff sues for $44,506.26 in contract. This sum is the balance of an amount alleged to be due by the defendant to the plaintiff. The plaintiff supplied fibreglass materials to the defendant for the manufacture of spa pools. The defendant then counterclaimed against the plaintiff for the sum of $204,000 alleging that the materials supplied by the plaintiff were defective. The defendant alleges that they used these materials and that it caused the failure of a number of pools. It seeks to recover from the plaintiff the cost of repairing those defective spa pools as damages.

The third party is the supplier of the material called gelcoat, which is an essential ingredient in the materials supplied by the plaintiff to the defendant. The plaintiff on the Third Party Notice seeks from the third party

indemnity or contribution, and alternatively alleges that there are common issues between defendant, plaintiff and third party.

Section 45 reads as follows:

"45. **Transfer of proceedings where there is a counterclaim** - (1) Where, in any action commenced in a Court, any counterclaim or set-off and counterclaim which involves matter beyond the jurisdiction of a Court has been filed by any defendant, any party to the action may, within such time as may be prescribed by rules of the High Court, apply to the High Court or a Judge thereof for an order that the whole proceedings, or the proceedings on the counterclaim or set-off and counterclaim, be transferred to the High Court.

(2) On any such application the High Court or Judge may, as it or he thinks fit, order either -

(a) That the whole proceedings be transferred to the High Court; or

(b) That the whole proceedings be heard and determined in the Court; or

(c) That the proceedings on the counterclaim or set-off and counterclaim be transferred to the High Court and that the proceedings on the plaintiff's claim and the defence thereto other than the set-off (if any) be heard and determined in the Court:

Provided that, where an order is made under paragraph (c) of this subsection, and judgment on the claim is given for the plaintiff, execution thereon shall, unless the High Court or a Judge thereof at any time otherwise orders, be stayed until the proceedings transferred to the High Court have been determined.

(3) If no application is made under this section within the time prescribed as aforesaid, or if on such an application it is ordered that the whole proceedings be heard and determined in the Court, the Court shall have jurisdiction to hear and determine the whole proceedings, notwithstanding any enactment to the contrary.

(4) Where the High Court makes any order under the provisions of this section, the Registrar of the High Court shall send to the Registrar of the Court a copy of the order so made."

Under s 45(2) on an application being made the High Court or Judge thereof has a discretion either to order that the whole proceedings be transferred to the High Court, or the whole proceedings be heard and determined in the District Court, or that the counterclaim be transferred to the High Court and that the original plaintiff's claim be heard and determined in the District Court.

All parties are agreed that in this case that the third alternative is not to be ordered. I am therefore left to determine the question whether in my discretion the claim and the counterclaim should be heard in the High Court or in the District Court.

There appears to be an absence of reported cases. Counsel were, however, able to refer me to a recent unreported judgment of Wylie J in Bridon New Zealand Limited T/A Gourock New Zealand v Bryan E Williams Marketing Limited (30 November 1990). I have found that judgment helpful in my consideration of this application.

The discretion is unfettered. I must determine what course is more just having regard to all the circumstances of this particular case.

A number of factors were urged before me by counsel. I now consider them in turn.

1. The amount of the counterclaim

Mr Spring argued that merely because the amount of a counterclaim exceeds the jurisdiction of the District Court, which is currently $50,000, that should not per se justify a transfer of the whole proceedings. I agree. I do, however, consider that I am entitled to take into account the amount by which the counterclaim exceeds the jurisdiction of the District Court.

During the argument there was reference, as apparently there was before Wylie J in Bridon, that it is possible, indeed likely, that the jurisdiction of the District Court will be raised. This was an indication, so it was contended by Mr Spring for the defendant, of the extent to which the District Court will be dealing with civil litigation in the future.

Like Wylie J I regard the reference to what might happen in the future as speculative. I am bound to apply the law as it applies at the present time. Accordingly, I disregard the heralded change in the jurisdiction of the District Court.

Having done that it follows that in this case the counterclaim is four times the level of the maximum of the jurisdiction of the District Court. That in my view is a significant distinguishing point between this case and Bridon. In Bridon Wylie J was faced with a case

where the excess was only $8000 odd. Here it is $154,000. I regard that excess as significant.

2. The Nature and Extent of the Matters in Issue

I was urged to have regard to the nature and extent of the matters in issue, be they of fact or law or both.

Mr Spring contended that the case was a simple one; that it was a claim in contract for goods supplied and a counterclaim directed towards the question of whether the materials supplied caused defects. He further submitted that should there be a finding in favour of the defendant, then the damages payable would be a relatively simple determination. In short, he submitted there was no inherent complexity in the claim and counterclaim viewed as a whole; and that there were certainly no novel points of law.

He did accept, however, in his reply that the whole proceedings could be regarded as extensive. I put that term to him in argument because of the submission that was made by Mrs Butterworth for the plaintiff, supported by Mr Coldicutt for the third party.

The counterclaim concerns 20 faulty spa pools, a further 30 in stock, and a further 7 in need of repair, a total of 57 spa pools. The evidence before me comes from a director of the defendant. There was no evidence from

the plaintiff or the third party. In Mr McGurk's affidavit he stated, inter alia:

"The basis of the counterclaim is that the Plaintiff supplied to the Defendant certain materials for the construction of spa pools. The materials supplied caused failures in the spa pools in that the materials were defective and/or otherwise caused serious problems with resultant loss to the Defendant. The material supplied is known as "Light Blue Sanitaryware" and is a form of gelcoat and the defects caused black spot, osmosis and staining problems."

I infer from this evidence that there will be a necessity for the parties to call scientific evidence, possibly chemical engineers or analytical chemists or both, and other persons versed in the manufacture and content of gelcoat who can speak of its properties and so on.

In my view this will be, while not a complex claim, at least an extensive claim. It will certainly take several days, I would have anticipated, to hear.

Neither counsel for the plaintiff or the third party suggested that there were any complex legal issues.

To sum up this factor, I regard this claim as an extensive one. I must therefore give weight to this factor when weighing the competing considerations.

3. The question of relative cost

Wylie J in Bridon adverted to the point that generally the cost of litigation in the High Court was greater than that in the District Court. I agree with that view. I did not understand any counsel to submit otherwise.

4. The time for the disposal of the case

Mr Spring submitted that the case could be dealt with more expeditiously in the District Court than it could be dealt with in the High Court. He referred to the delay in bringing on cases for trial in the High Court in Auckland. He compared four and a half to six months for a case in the District Court with nine months to one year in the High Court.

Mrs Butterworth agreed that the plaintiff too wanted the case heard as quickly as possible, but in the right forum. Her submission was that expedition must sometimes have to yield to other relevant factors. I agree.

5. Other factors

In some applications under this section I can imagine that the relative location of the District Court and the High Court could be a relevant consideration. That is not a factor in this case.

One other factor, however, must be mentioned and that is the submission made by Mr Coldicutt on behalf of the third party, the manufacturer of gelcoat. He contends that the reputation of his client company is at stake in these proceedings. He urges me to take this factor into account in exercising my discretion. He submits that the whole proceedings should be determined in the High Court because, inter alia, that is the proper forum for the defence of the reputation of his client's company.

I am persuaded that this is another factor which I must bring into the scales.

I am conscious that civil cases over a wide field are handled expeditiously and efficiently in the District Court on innumerable occasions. I adopt Casey J in B. Potemkin v Protector Safety Ltd (Unreported, CA 77/87, judgment 7 December 1987).

Having said that, I must nevertheless weigh up all the relevant factors in order to exercise my discretion. Having considered the matters which I have earlier set out in these reasons, I have reached the conclusion that in the circumstances of this case the whole proceeding should be transferred to the High Court. I order accordingly.

Mrs Butterworth opposed any order as to costs. In the circumstances I am not disposed to consider the question of costs at this time. Rather I order that costs be reserved.

P.K. Keane J.

Solicitors

Russell McVeagh McKenzie Bartlett & Co., Auckland for Plaintiff
W.J. Spring, Takapuna: by their agents Creditcorp Agencies Limited, Auckland for Defendant
Knight Coldicutt & Co., Papatoetoe for Third Party