

MEDIUM
PRIORITY

NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

7/8

M.878/92

1418

UNDER Part IVA of the High Court
Rules 1982

AND UNDER Section 43(6) of the District
Courts Act 1947

BETWEEN HALLENSTEIN BROS LIMITED
First Applicant

AND A. N. WHITE ADVERTISING
LIMITED
Second Applicant

AND CIRCULAR A1 HOME
PUBLICITY DISTRIBUTORS
LIMITED
Respondent

Hearing: 10 July 1992

Counsel: A. R. Gilchrist for Applicants
L. A. Perkins for Respondent

Judgment: 16 July 1992

(RESERVED) JUDGMENT OF MASTER KENNEDY-GRANT

Introduction

This is an originating application for:

1. An order under s.43(6) of the District Courts Act 1947 transferring
Plaint No.1153/91 from the District Court at Auckland into this Court
for determination; and, should that order be made:

2. An order consolidating Plaintiff No.1153/91, once transferred, with CP.508/92 already commenced in this Court.

The application is heard by me by consent of the parties.

The two proceedings arise out of a contract entered into in September 1990 for the nationwide distribution by the respondent ("Circular") of a catalogue for the first applicant ("Hallenstein"). Circular contends that its contract was with the second application ("White"), that it performed it and that it has not been paid. It seeks payment of the contract price and the finance charges incurred by it as a result of non-payment of that price on due date. White, which is an advertising agency, and Hallenstein contend that Circular's contract was with Hallenstein, White having been Hallenstein's agent. On that basis:

- (a) White contends that it is not liable to Circular, alternatively that, if it is liable to Circular because the Court finds that the contract was between Circular and it, then Circular has repudiated the contract and White is not liable to it for that reason. White contends, in the further alternative that, if it is liable to Circular, it is entitled to set off against any liability that it may have to Circular Circular's liability to Hallenstein;
- (b) Hallenstein contends that it is not liable to Circular because of Circular's repudiation of the contract and that it has a claim against Circular for damages arising from that repudiation. Hallenstein contends, in the alternative, that, if Circular's contract was with White and not with Hallenstein either as a direct contracting party or as a party intended to benefit in terms of the Contracts (Privity) Act 1982, then Circular owed it a duty of care in tort, which duty it has breached, and that Hallenstein has a claim for damages as a result.

Principles applicable to applications for transfer of proceedings from District Court to High Court

Counsel are agreed that the proper approach in relation to applications under s.43(6) of the District Courts Act 1947 is as stated by the Court of Appeal in *Fuehrer v Thompson*[1981] 1 NZLR 699 and applied by Smellie, J. in *Diners Club Finance Ltd v Mathewson* (unreported, 19.4.88, CP.289/88 Auckland Registry) and by Master Hansen in *W v W* (unreported, 8.6.90, M.229/90 Christchurch Registry). The first step is to determine whether or not it is desirable that the proceedings be dealt with in the High Court. Matters relevant to the desirability of the proceedings being heard in the High Court include the amount of the claim, its nature and complexity, the type of issues raised by the pleadings, its public or other importance and such other considerations as relate to the proceedings and render it desirable that they be so heard. Once the Court is satisfied of the desirability of removal, it becomes a matter of the Court's discretion. At this second stage, the Court will consider issues relating more directly to the justice of the matter in the particular case. Factors such as delay in making the application, the stage the proceedings have reached, the prejudice, if any, occasioned to the party opposing the application and such other considerations as go on the justice of the case are relevant. The decision whether or not to exercise the discretion in favour of the applicant is to be reached by balancing factors of justice relevant to the particular case against the desirability that the case be heard in the High Court, having regard to the power in s.43(6) to impose terms in the event of making the order.

I apply this two-stage approach to the present application.

Desirability of transfer

Mr Gilchrist, for the applicants, submits that the following matters make it desirable for this matter to be determined in the High Court:

- (a) The quantum of Hallenstein's claim against Circular exceeds the jurisdiction of the District Court even after the recent increase in that jurisdiction;
- (b) The issue of whether or not the contract (whomever it was with) was performed and the question of the assessment of Hallenstein's damages (if it is found to be entitled to recover its loss from Circular) are complex issues, both from a legal and from an evidentiary point of view;
- (c) The questions of admissibility of evidence which will arise in the course of the examination of the question of whether or not the contract was performed are of public or legal importance.

I consider each of these matters in turn.

(a) Amount of Hallenstein's counterclaim

Hallenstein's counterclaim is for an amount of \$242,442 plus GST. In December 1990, when Hallenstein's counterclaim was first outlined in detail to Circular, the counterclaim was for an amount almost five times that within the jurisdiction of the District Court. Even after the increase in the jurisdiction of the Court to \$200,000, Hallenstein's claim is for an amount of just over 20 per cent more than the Court's jurisdiction.

I consider that it is the excess over the increased jurisdiction of the District Court to which I should have regard in deciding whether or not it is desirable for this matter to be transferred to the High Court. Given that the dividing line between the jurisdiction of the District Court and the jurisdiction of the High Court in this type of case is determined by the monetary value

of the claim, it seems to me that it must be desirable, within the meaning of the section, that a claim which exceeds the jurisdiction of the District Court by more than 20 per cent should be heard in the High Court.

(b) Complexity of evidence

(i) Introduction

Mr Gilchrist advised me that there are three issues on which the evidence is likely to be complex:

- (a) The extent to which Circular achieved the level of distribution of the catalogue required of it in terms of its contract;
- (b) The extent to which Circular distributed the catalogue within the period required by the contract and the effect (if any) of Circular's failure (if any) to distribute it within that period;
- (c) The quality of the catalogue and the effect (if any) of the catalogue being inferior in quality compared with catalogues issued previously by Hallenstein.

(ii) Level of distribution achieved

So far as this issue is concerned, there is a dispute between the parties as to the relevant terms of the contract. Circular alleges that its obligation was to deliver 1,325,017 pamphlets and that it did so. Hallenstein and White contend that Circular's obligation was to deliver pamphlets to 97 per cent of New Zealand households and that it delivered them to only 57 per cent of New Zealand households. To prove their contention as to the level of distribution actually achieved by Circular, White and Hallenstein will rely on the results of a survey conducted of Hallenstein's employees nationwide. Mr Gilchrist had no knowledge of the manner in which Circular intended to prove that it had performed its contract (whichever are the correct terms) and Mrs Perkins, for Circular, did

not enlighten me. Mr Gilchrist submitted that Circular would either have to rely on some form of statistical survey, such as White and Hallenstein rely on, or attempt to establish the fact of performance by calling evidence from persons involved in the organisation and execution of the distribution. Statistical evidence is likely to raise difficult questions of fact relating to the validity of the sample and may possibly involve a consideration of the limits of the admissibility of statistical evidence. (See for example *Auckland Regional Authority v Mutual Rental Cars (Auckland Airport) Ltd* [1987] 2 NZLR 647). Proof by evidence such as Mr Gilchrist suggested Circular may alternatively rely on must clearly involve questions of the admissibility of the evidence. For example, if the distribution were sought to be established by the evidence of regional controllers, their evidence as to actual distribution would be hearsay.

I accept Mr Gilchrist's submissions on this aspect.

(iii) Period within which distribution effected

The success of a promotional campaign such as is involved in this case depends, according to Mr Gilchrist, not only on the achievement of the designed level of distribution, but also on the achievement of distribution within the designed period. Distribution was intended to be achieved within a five day period. This, apparently, would result in a substantial increase in sales in the first week after the distribution and a lesser increase in sales in the second week. To the extent that distribution takes place before or after the specified period, the impact is diluted and there are, in addition, adverse effects suffered by the merchant because customers arrive either before the goods are in stock and available for sale or after they have already been sold. Mr Gilchrist stated that proof of the extent to which delivery took place outside the five day period contracted for will involve direct evidence

and extrapolation from that direct evidence and that proof of the effect of the breach will involve evidence from marketing experts. Mrs Perkins, for Circular, gave me no indication of the nature of the evidence that Circular would present on this aspect.

I accept Mr Gilchrist's submissions.

(iv) Quality of catalogue

The issue as to the quality of the catalogue and the impact of that on the sales promotion has apparently been raised by Circular. White and Hallenstein contend that the quality of the brochure was the same as the quality of the brochures distributed on two previous occasions; but, in addition to leading evidence of the comparative quality of the catalogue on each of the three occasions on which they have used this type of marketing, they will lead evidence from marketing experts as to the effect on the impact of the promotion of a variation in the quality of the printed material used. Again, Mrs Perkins has given the Court no idea of the nature of the evidence intended to be called by Circular.

Again I accept Mr Gilchrist's submissions.

(v) Conclusion

I consider that the complexity of the evidence makes it desirable that the matter should be determined by the High Court.

(c) Importance of issues

Sales promotions of this kind are common. When conducted on a nationwide basis they are expensive and, on the figures provided by Hallensteins, potentially very worthwhile. Even in the case of local

On 6 April 1992 Hallenstein filed a third party statement of defence to the plaintiff's claim against the defendant and a third party statement of defence to the defendant's claim against the third party in the District Court proceedings under cover of a letter advising of the intention to apply for the transfer of the District Court proceedings into the High Court.

On 9 April 1992, CP. 508/92 was filed in the High Court. The notice of proceeding and statement of claim in this matter were served on Circular's solicitors under cover of a letter 27 April 1992 from Hallenstein's solicitors. The intention to apply for transfer of the District Court proceeding to the High Court was reiterated. Consent was sought as it had been earlier in the month but was not forthcoming.

The present application was filed on 2 July 1992.

Given the joinder of Hallenstein as second defendant in the District Court proceeding in May 1991 and the delay until 29 July 1991 in the making of any challenge to the appropriateness of that status, the longest period of delay that could possibly be blamed on Hallenstein and White is the period of seven and a half months between 29 July 1991 and 9 April 1992. I do not consider it is appropriate to lay the responsibility for this delay at the door of Hallenstein and White solely. It is apparent that nothing happened between 23 August 1991 and 17 December 1991. In view of Circular's failure to take any steps during that time to progress the matter, the explanation of Hallenstein and White's inaction during that period contained in their solicitors' letter of 24 December 1991 is understandable. The effect of this finding is to reduce the period of delay to approximately three and a half months, one month of which was during the summer vacation.

I do not consider that Hallenstein and White have been shown to be guilty of undue delay. I am certainly not satisfied that they have been guilty of such delay as to constitute an abuse of the process of the Court.

(iii) Financial implications for Circular of further delay

There is no reason to doubt that Circular will continue to accrue bank costs and interest costs. It is equally certain that there will be further delay before this matter is disposed of. The question is, Will that delay be increased if the matter is transferred to the High Court? There is no evidence before me that it will.

(iv) Circular's inability to withstand the high costs involved in a High Court hearing

I do not consider that the costs of a High Court hearing will be substantially higher than the costs of a District Court hearing. Court filing fees may be higher; but they are not the real cost. The real cost is the cost of the hearing and preparation for it. That is going to be the same in whichever Court the matter is heard. The issues are such that Hallenstein and White, at least, are going to prepare for this matter with care and thoroughness. Circular is going to have to make and meet the same case, whether it is in the High Court or the District Court.

(v) Vagueness of Hallenstein's claim

I do not consider Hallenstein's claim to be vague.

(vi) Conclusion

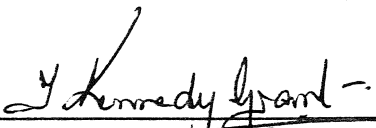
I do not consider that there is any matter relevant to the justice of the case which requires me to exercise my discretion against making the order sought.

Orders

I therefore make an order pursuant to s.43(6) of the District Courts Act 1947 that the proceedings issued in the District Court at Auckland under Plaintiff No.1153/91 be removed into the High Court for determination.

I also make an order that Plaintiff No.1153/91, once removed into the High Court, be consolidated with Civil Proceeding No. 508/92.

I reserve the costs of this application for determination by the trial Judge.


Master T. Kennedy Grant

Solicitors: Hesketh Henry, Auckland for Applicants
McElroy Milne, Auckland for Respondent