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N2LR

IN THE HIGH COURT OF NEW ZEALAND 10/9
AUCKLAND REGISTRY

CP.344/93

MEDIUM PRIORITY

1529

BETWEEN: EDGBASTON INVESTMENTS LIMITED a duly incorporated company having its registered office at Rotorua

First Plaintiff

AND STEWART JAMES EDWARD of Rotorua, Dentist
HINE KI HAWAIKI KA IHANGA HIRATAU EDWARD of Rotorua, Teacher
DAVID ROBERT EDWARD of Palmerston North, Bloodstock Agent
JANET ETHYL EDWARD of Palmerston North, Teacher
IAN ALEXANDER EDWARD of Rotorua, Chemist
LINDA JAN LOUISE EDWARD of Rotorua, Business woman
HAROLD STEWART EDWARD of Rotorua, Solicitor
SUSAN MARY EDWARD of Rotorua, Teacher
JOANNA MARY MANNING of Auckland, Lecturer
ANTHONY CHRISTOPHER EDWARD of Auckland, Solicitor

Second Plaintiffs

A N D: BANK OF NEW ZEALAND an incorporated company constituted under and by virtue of the Bank of New Zealand Act 1988 carrying on business in New Zealand as a banker

Defendant

Hearing: 23 August 1993

Judgment: 1 September 1993

Counsel: Ms C F Bradley for plaintiffs
C S Chapman for defendant

JUDGMENT OF HENRY, J.

The statement of claim in this proceeding was filed on 4 June 1993 in the Auckland office of the Court. The relief sought under it is an award of substantial damages for alleged breach of duties owed by the defendant to the plaintiff in respect of an off-shore loan facility agreement entered into about June 1987. On 21 June 1993 the defendant applied under R.107 (4) of the High Court Rules for an order transferring all documents filed in the proceeding to the Wellington office of the Court on the ground that it was the proper office for the purposes of R.106 and R.107. Three grounds of opposition were specified in the appropriate notice :

1. The statement of claim had been filed in the proper office;
2. The Auckland office is most convenient to the parties;
3. An affidavit under R.107 (3) deposing that a material part of the cause of action arose in Auckland had been filed (on 18 June 1993).

The relevant rules are 106 and 107, which provide :

"**106. Proceeding commenced by filing statement of claim -**

(1) Every proceeding (other than a non-contentious application for administration or an appeal from a determination of a District Court or a statutory tribunal) shall be commenced by filing a statement

of claim in the proper office of the Court, as determined in accordance with rule 107 (1)

(2) Notwithstanding subclause (1), the statement of claim may be filed in any office of the Court if the parties agree, by endorsement on the statement of claim, to the filing of the statement of claim in that office.

107. Proper office of the Court -

(1) The proper office of the Court, for the purposes of rule 106 (1), shall, subject to subclauses (2) and (3), be determined as follows :

(a) Where any defendant is resident or has his principal place of business in New Zealand, that office shall be the office of the Court nearest to the residence or principal place of business of the defendant:

Provided that where there are 2 or more defendants, that office shall be determined by reference to the firstnamed defendant who is resident or has his principal place of business in New Zealand:

(b) Where no defendant is resident or has his principal place of business in New Zealand, that office shall be such office as the plaintiff selects:

(c) Notwithstanding paragraphs (a) and (b), where the Crown is a defendant, that office shall be the office nearest to the place where the cause of action or a material part thereof arose.

(2) Notwithstanding subclause (1) (a), if the place where the cause of action sued on, or some material part thereof, arose is nearer to the place where the plaintiff or the plaintiff firstnamed in the statement of claim resides than to the place where the

defendant resides, the proper office of the Court for the purposes of rule 106 (1) shall, at the option of the plaintiff or the plaintiff firstnamed, as the case may be, be the office nearest to the residence of the plaintiff or the plaintiff firstnamed, as the case may be.

(3) Where a plaintiff proposes to exercise the option conferred by subclause (2), he shall file with the statement of claim and notice of proceeding an affidavit by himself or his solicitor showing the place where the cause of action or the material part thereof arose and showing that that place is nearer to the place where the plaintiff or the plaintiff firstnamed in the statement of claim resides than to the place where the defendant resides.

(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 proceeding be transferred to the proper office or, as the case may be, to such other office which shall thereupon be deemed to be the proper office."

The application was heard before a Master on 2 July 1993, who reserved decision. The Master then sought further submissions and also gave the parties the opportunity of adducing fresh evidence on the issue whether the defendant resided in Auckland, that contention not having formed part of the plaintiffs' submissions at the hearing.

The defendant's response was to seek judicial review of the Master's "decision" which was understandably dismissed by Thorp J on 19 July 1993 as being premature.

Further written submissions were received by the Master, but no further evidence was adduced by the defendant and counsel advised that it was not desired to re-argue the application. In a reasoned decision delivered on 2 August 1993 the Master held that the proper office was Auckland because the defendant resided in Auckland for the purposes of the Rules. It is common ground that the head office and principal place of business of the defendant is Wellington, and also that it carries on business at Auckland through a branch office. The Master also held that R.107 (2) was not available to the plaintiffs because the office relevant to the residence of the first-named plaintiff on the evidence was Rotorua, not Auckland. He also observed that in his view there was a gap in R.107 (4) in that if the Court concluded that Auckland was not the proper office but was the more convenient office for the parties, it was not possible in a practical sense to direct a transfer of documents to that office when they were already there. He seemed to be averse in such circumstances to simply dismissing the application because there would then be no designation of the proper office. The Master however went on to say that if he was wrong in holding that Auckland was the proper office, then the filing of the statement of claim could be treated as an irregularity under R.5 (1), and an order deeming Auckland as the proper office could be made under R.5 (2) (b). He expressed the view that "the likely conclusion" would be that Auckland was the more convenient office, although no positive finding to that effect was made. The defendant now applies pursuant to s.26P (1) of the Judicature Act 1908 and R.61C for review of the decision of 2 August.

The issues in the present case are such that it is unnecessary to embark on a consideration of the yet unsettled question whether a review under R.61C is conducted as a *de novo* hearing, as the exercise of an appellate function, or on some intermediate basis. That question, which has recently been addressed by Fisher J in ***Wilson v Neva Holdings Limited & Others*** (CP.1088/89 Auckland Registry 10 August 1993), is not without practical importance particularly in the light of what appears to be an upsurge in the number of review applications relating to what may be termed ordinary interlocutory matters which have been fully argued and are the subject of reasoned judgments.

Residence of the defendant - R.107 (1) (a):

It is accepted that the defendant's principal place of business is at Wellington, and accordingly R.107 (1) (a) is only available if the defendant resides in Auckland. Mr Chapman submitted that for the purposes of the rule a company can have only one residence in a particular jurisdiction, and where it has a head office and branch office the site of the head office is the residence. The authority for that proposition is the long-standing case of ***National Bank of New Zealand Ltd v Dalgety & Co Ltd*** [1922] NZLR 636. It was decided under the old Code of Civil Procedure and in particular Rule 4 which stipulated that the place for filing a statement of defence shall be the office of the Court nearest to the defendant's residence. Under the Code a proceeding could be commenced at any office of the Court. Reed J at p.638 said :

> "These cases are decided solely on the question of jurisdiction, and a company may 'for the purposes of jurisdiction have two domicils' : Per Lord St. Leonards in *Carron Iron Co v McLaren* (5 H.L.C. 416, 449). They are no authority for the proposition that a company with its head office in New Zealand and branches in various centres throughout the Dominion has a separate residence at each of those branches. If the plaintiff's contention, that each of the companies concerned in this case resides where it has a branch be sound, it would mean that the plaintiff 'resides' in probably over a hundred places in New Zealand, and the defendant in at least twenty places. To put a construction upon the rules that would lead to so ridiculous a result would require that the language was so coercive as to admit of no other interpretation. I do not think the language of the rule warrants any such construction."

And at p.640 :

> "I think, both on principle and on authority, that a company with a head office and branches in New Zealand 'resides,' in the sense in which that word is used in the rules, where its head office is and nowhere else in New Zealand."

In holding that the present defendant resided in Auckland, the Master relied primarily on ***Davies v British Geon Ltd*** [1956] 3 All ER 389 and in particular Denning LJ's approval of Atkin LJ's dictum in ***New York Life Insurance Co v Public Trustee*** [1924] 2 Ch. 101, 120:

> ". . . the true view is that the corporation resides for the purposes of suit in as many places as it carries on business . . ."

The Master also referred to Harman LJ's dissenting judgment and his observation at p.400 citing ***New York Life Insurance*** that a company

can have more than one residence or place of business. ***Davies v British Geon*** concerned the entry by a defendant company of an appearance in London on a writ issued in Cardiff. The relevant rule required an appearance in the registry of issue if the defendant resided or carried on business within that registry. The company had its head office and registered office in London, and was controlled from London, but had a factory in the Cardiff district. The majority held that as the company carried on business at Cardiff as well as at London, the London appearance should be set aside. It was not contended that the company resided in the Cardiff district, and the case turned on whether it could carry on business in both places for the purpose of the rules.

The references in the judgments to "residence" are therefore not strictly apposite to the decision, but more importantly in my view those references are made in a jurisdictional context. In ***New York Life Insurance*** the question was whether a debt was situated in England, the debtor being a company with its central office in New York, and it was said that a company may have dual residences for the purposes of suit. The judgments make it clear that the context related to territorial jurisdiction. Similar conclusions have been reached in cases concerning the word "residence" in revenue statutes. The jurisdictional concept of dual residency, also expressly noted by Reed J in the ***National Bank*** case, is not in my view of any assistance to the plaintiffs in the present situation. No question of territorial jurisdiction arises, and what is at issue is the construction of R.107 (1) (a). In my judgment the ***National Bank*** principle applies, and this defendant resides and resides only for the purposes of the rule in Wellington where its head office and registered office is situated. This conclusion

is strengthened by the use of the words "or its principal place of business". Those words are superfluous if every branch office of a company is also to be construed as being its residence. It is significant that if the place of business is being relied upon, it must be the principal place of business. The construction sought by the plaintiff would be virtually self-contradictory - it would allow all places of business to qualify because they were residences.

A further consequence would be that these plaintiffs could choose any office of the Court throughout New Zealand as the proper office for filing the statement of claim because the defendant presumably has a branch office in all registries. That consequence cannot be the intention of the rule or its true meaning.

First Plaintiff resides at Auckland - R.107 (2):

The first plaintiff has its registered office at Rotorua. The only evidence adduced as to either its residence or its place of business is contained in the affidavit of Mr A C Edward. Mr Edward states that the loan facility in question was taken out to purchase a property at Penrose, Auckland, and that the first plaintiff's only business is as landlord of that property. He makes no other statement of relevance.

I am satisfied that the first plaintiff resides in Rotorua where it has its registered office. There is nothing in Mr Edward's affidavit to indicate that its residence is elsewhere, and the bald observation without factual detail as to its business operations cannot militate against that conclusion. How the company could "reside" in premises which it has leased and does not occupy is not clear; and no other

place of residence is claimed. My conclusions as to the inability of a company to "reside" in more than one place within the jurisdiction for the purposes of the rule also applies. The evidence does not establish a residence in Auckland, and R.107 (2) is therefore unavailable to the plaintiffs.

Rule 107 (4):

This provision appears to cover different situations. If the statement of claim has been filed in the wrong office, then the Court may direct that all documents be transferred to the proper office. If an office other than the proper office is more convenient to the parties, the Court may direct that a statement of claim be filed in the more convenient office (envisaging an application for directions under R.8 before the statement of claim is filed) or it may direct a transfer to that Court (envisaging existing proceedings filed in the proper office).

It is the first of those situations which applies in the present case. Mr Chapman submitted that the Court has no discretion and must transfer all documents to the proper office, namely Wellington. To support that submission he relied on the absence of any provision deeming or permitting the Court to declare Auckland as the proper office. If correct, the consequence is that even if it now appeared to the Court on due inquiry that Auckland is more convenient to the parties, a transfer direction to Wellington must still be made. To do that, and then require the plaintiffs to apply to the Court in Wellington for a transfer to Auckland under R.107 (4) on the ground of convenience, would seem to me to give the rules a procedural rigidity which is both unsupportable and contrary to the primary object of

achieving the just and expeditious disposal of the proceeding. I can see no reason why in such a situation the Court should not simply in its discretion dismiss a defendant's application and thereby allow the proceeding to remain in the office of filing.

Alternatively if strictly necessary it would be possible to direct a transfer to the proper office, and at the same time to make a further consequential order on what would be the plaintiff's oral application transferring back to the Auckland Court. I doubt whether R.5 (2) (b) could be invoked as suggested by the Master simply to deem Auckland the proper office - that provision enables the Court to exercise its powers under the rules, and none would appear to cover the present situation.

Although the issue of convenience was clearly signalled in the plaintiffs' notice of opposition to the application to transfer, and was considered briefly in the decision of the Master, Mr Chapman has taken the high ground, elected to adduce no evidence on the issue and relied on a submission that convenience was irrelevant. On the other hand the evidence on behalf of the plaintiffs is quite meagre and markedly less than would be expected in an application under either R.107 (4) or R.479.

All that is disclosed is that negotiations for the loan facility took place with the defendant's officers at the Auckland branch, that all moneys (although apparently this may not be correct) were drawn through Auckland bankers of the defendant; and a surmise without a stated basis that the defendant's witnesses "will be drawn from the defendant's Auckland branches". There is no reference to the number

or residences of the plaintiffs' witnesses, or to any other factors of the relative convenience or inconvenience of the two offices. Most of the plaintiffs appear to be resident outside Auckland. On that evidence, albeit with a measure of reluctance, I am unable to conclude that the Auckland office of the Court is more convenient to the parties than the Wellington office and there is accordingly no cause to refuse the defendant the discretionary order sought. In this regard I have given consideration to Mr Chapman's contention that the ability to plead the Limitation Act 1950 (not presently available) may arise if the order is made because in that event no action would have been commenced (R.106). Such a draconian result would appear unjust, but the plea would seemingly have little prospect of success. Sub-rules (1) and (2) of R.5 provides :

> "**5. Non-compliance with Rules -**
>
> (1) Where, in beginning or purporting to begin any proceeding or at any stage in the course of or in connection with any proceeding there has, by reason of any thing done or left undone, been a failure to comply with the requirements of these rules, whether in respect of time, place, manner, form, or content or in any other respect, the failure -
>
> (a) Shall be treated as an irregularity; and
> (b) Shall not nullify -
> (i) The proceeding; or
> (ii) Any step taken in the proceeding; or
> (iii) Any document, judgment, or order in the proceeding.
>
> (2) Subject to subclauses (3) and (4), the Court may, on the ground that there has been such a failure as is mentioned in subclause (1), and on such terms as to costs or otherwise as it thinks just, -

(a) Set aside, either wholly or in part, -
  (i) The proceeding; or
  (ii) Any step taken in the proceeding in which the failure occurred; or
  (iii) Any document, judgment, or order in the proceeding in which the failure occurred; or
(b) Exercise its powers under these rules to allow such amendments (if any) to be made and to make such order (if any) dealing with the proceeding generally as it thinks fit."

Non-compliance with R.106 is therefore an irregularity, not a nullity. Furthermore the effect of the order I am making on the defendant's own application is simply to transfer existing documents to Wellington. The statement of claim remains as having been filed on 4 June 1993.

In ***Davies v British Geon Ltd*** Harman LJ commenced his judgment with the words "this is a storm in a teacup". The same comment could perhaps be made in the present case, despite the claim that a matter of important principle is involved. At this stage of the proceeding the trial venue is not the primary issue, and that can always be addressed under R.479. There is unlikely to be disadvantage of any significance to the defendant resulting from interlocutory matters being conducted through the Auckland office. Its solicitors have a strong presence in Auckland and the availability of experienced Auckland counsel. There is ease of travel and of communication between Auckland and Wellington. It seems highly likely that much of the material and documentation relevant to interlocutory matters will be in Auckland where the loan facility was negotiated and processed.

It can also be observed that the defendant did not see fit to invoke the alternative argument of convenience available to it under R.107 (4). There has now been a hearing before a Master, with a call by him for further submissions after that had been completed, and two applications for review. On the material presently before the Court the need for this case to establish a matter of principle is a little difficult to discern, and the value of the whole exercise must be somewhat doubtful.

In the result the decision of the Master is set aside, and there will be an order directing the transfer of all documents to the Wellington office of the Court. The defendant is entitled to costs, which in the particular circumstances of the case are fixed at $750.00.

Solicitors:

McElroy Milne, Auckland, for plaintiffs
Buddle Findlay, Wellington, for defendant

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First Plaintiff

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Second Plaintiffs

A N D: BANK OF NEW ZEALAND an incorporated company constituted under and by virtue of the Bank of New Zealand Act 1988 carrying on business in New Zealand as a banker

Defendant

JUDGMENT OF HENRY J.
