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NZLR

IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

8/12

C.P. 259/90

BETWEEN FRANK GASSER NOMINEES PTY LIMITED

Plaintiff

1738

AND MOUNTAIN ROAD (NO 9) LIMITED formerly NYLEX NEW ZEALAND LIMITED

First Defendant

AND BAY TEXTILES LIMITED

Second Defendant

C.P. 540/90

MEDIUM PRIORITY

BETWEEN THE MICHAEL EDGLEY CORPORATION PTY LIMITED

Plaintiff

AND MOUNTAIN ROAD (NO 9) LIMITED formerly NYLEX NEW ZEALAND LIMITED

First Defendant

AND BAY TEXTILES LIMITED

Second Defendant

Hearing: 27 November 1995

Counsel: G.M. Harrison for plaintiffs
R.W. Worth and G.D. Palmer for first defendant
P.K. McGrath for second defendant

Judgment: 27 November 1995

(ORAL) JUDGMENT OF BARKER J

Solicitors: Lovegrove Finn & Harborne, St Heliers, for plaintiffs
Simpson Grierson, Auckland, for first defendant
Shieff Angland, Auckland, for second defendant

These two proceedings were ordered to be heard together by Anderson J on 6 October 1994. The reason for heard together is that they are both concerned with claims by two different plaintiffs against the manufacturer of a large tent, the second defendant and its supplier of tenting material, the first defendant.

In each case, the plaintiff claims that the second defendant made the tent at its request from materials supplied by the first defendant. The tent for the plaintiff Michael Edgley Corporation Pty Limited ('Edgley') was used for various performances in the United Kingdom and elsewhere - notably for the ice-skaters Torvill and Dean. This tent was of a very large capacity and was completed in 1985. The tent for the plaintiff Frank Gasser Nominees Pty Limited ('Gasser') was smaller and was designed to accommodate circus performances in Australia.

Both plaintiffs allege that the tents supplied were defective in various ways - both as to manufacture and as to quality of materials. Both seek large amounts of damages for loss of profits.

When both proceedings came before Anderson J at the conference in October 1994 the Edgley statement of claim alleged that the first defendant supplied the material for a marquee to be constructed by the second defendant for the plaintiff. After a further conference before

Henry J on 16 March 1995 an amended statement of claim was filed in the Edgley litigation which for the first time alleged as follows in paragraph 4 -

> "In or about the month of April 1985, the first defendant supplied camlon F/R, a polyester reinforced PVC ('the material') as the main roof material for a marquee to be constructed by the second defendant for the plaintiff."

The first defendant, supported by the second defendant, seeks an order under R.418 in the Edgley claim that a preliminary question be decided before trial. After discussion with counsel this preliminary question is framed: "Does the Michael Edgley Corporation Pty Limited have the right to sue the defendants?"

That this is a question requiring serious consideration appears clear from the following matters elicited from discussion with counsel and also from consideration of some of the discovered material.

The contract to supply the Edgley tent was effectuated in New Zealand by a Mr Bullen. There was minimal documentation at the time. It seems the defendants thought that they were dealing with a representative of the Edgley organisation. Although I have not sighted the invoices, it appears that they were addressed by the second defendant to the Edgley organisation and that some progress payments were made by an Edgley company. However, the invoices for the final two payments were addressed to Venue Enterprise Limited ('Venue') by the

second defendant at Mr Bullen's direction.. Venue was a company incorporated in Guernsey in the Channel Islands. Its incorporation was arranged by an international entrepreneur in Amsterdam called Hanover International Services BV ('Hanover'). The main shareholder in Venue was Sherwood Productions Limited, a company registered in Cyprus. The Channel Islands company was duly de-registered on 7 September 1990 under the provisions of Guernsey law. There is no evidence of any notice of this dissolution being given to either of the defendants.

The present plaintiff claims to be the successor of Venue as assignee from Venue of any causes of action Venue might have had against the defendants. It is not clear whether there was any valid instruction from Hanover to procure the de-registration of Venue since there seems to have been no reference to the major shareholder of Venue, namely the Cyprus company.

The whole position seems very confused; it will involve a number of paper trails before the present plaintiff in the Edgley proceedings is able to prove that it has the right to maintain causes of action against these defendants, having previously divested itself of any involvement with the contract.

There is no such complication attending the claim by Gasser. The issues as to the suitability of the tenting material and the construction of the tent are similar in

that action, although of course the claim for loss of profits etc may well be easier for the plaintiff and the Court (if necessary) to assess. The Edgley loss of profits claims, according to counsel, are difficult to quantify because of the use of tax minimisation strategies, some of which can be inferred from the tortured narrative just mentioned.

Counsel for all defendants support the preliminary hearing under R.418 to determine the right of the present Edgley plaintiff to sue. If this matter were resolved in favour of the defendants and it was shown that the Edgley plaintiff had no right to sue, then no proceeding need be heard against the defendants. However, the Gasser claim would have to languish whilst this preliminary matter was determined.

It is not for me to speculate as to what evidence will have to be called to substantiate the right of the present Edgley plaintiff to maintain those proceedings; but whatever evidence would have to be filed in any event before the case got on for hearing by way of written briefs etc.

Having considered the numerous authorities under R.418, I consider this is a proper case for the determination of a preliminary question; if the question were determined one way, that would be the end of the litigation. I am mindful that this order will retard the Gasser

litigation. I do not think that the determination of the preliminary point in the Edgley litigation should take more than a day, otherwise the hearing of the two cases together could take at least two weeks, if not more, of the Court's time.

I therefore grant the order as moved as amended. I direct that the plaintiff file affidavits on this point exhibiting relevant documentation by 1 March 1996. Originals should be filed under the best evidence rule where possible. The defendants are at liberty to file affidavits in reply within a further month. Liberty to apply is reserved in case there is some difficulty in complying with these time limits.

The Registrar is to direct a conference before me as soon as possible after 1 April 1996. At that conference, one would hope to be able to order a fixture for the hearing of the preliminary point.

I have sympathy with the plaintiff in the Gasser matter whose claim is being delayed through no fault of that plaintiff. However, it does seem to me that the saving of Court time in having this preliminary question determined in the Edgley matter with a possibility of there being no subsequent claim in the Edgley matter is so important that any delay to the Gasser case could be compensated by an early fixture once the outcome of the R.418 application is known.

Mr Harrison considers that the Gasser case alone would take a week. I would certainly do all in my power to accelerate the hearing of the Gasser case with or without the Edgley case as soon as possible after the conference that I suggest.

The defendants, particularly the first defendant whose application this was, will have to realise that, should they require for cross-examination deponents on the R.418 matter and it transpires the R.418 application is unsuccessful and the present plaintiff in the Edgley proceedings is entitled to sue in that capacity, then regardless of the ultimate fate of the proceedings, the defendants, particularly the first defendant, may have to bear the cost of bringing witnesses from abroad for cross-examination. Alternatively, there are other strategies such as a long distance television hearing before the trial Judge.

The costs of today's hearing are reserved.

R D Barker J.