NOT RECOMMENDED

IN THE HIGH COURT OF NEW ZEALAND
WELLINGTON REGISTRY

CP 28/96

BETWEEN HAMED ABDUL KHALIQ AL GHAMDI COMPANY

Plaintiff

AND NEW ZEALAND DAIRY BOARD

Defendant

Hearing: 28 August 1996

Counsel: T G Stapleton for Plaintiff
M J Leggat for Defendant

Judgment: 30 SEP 1996

JUDGMENT OF MASTER J.C.A. THOMSON

Solicitors:
Stapleton Stevens, Wellington
Rudd Watts & Stone, Wellington

The plaintiff sues the Dairy Board. There is no dispute that the defendant is a New Zealand company having been established by the Dairy Board Act 1961. It carries on business at Wellington and elsewhere as a marketer and exporter of dairy products.

The plaintiff pleads that the defendant appointed it its agent to distribute Anchor Instant Full Cream Milk Powder in the Eastern and Central provinces of Saudi Arabia. That agreement was reached in April 1984. In 1986 the plaintiff opened a branch office in Riyadh to facilitate distribution of Anchor milk powder in the Central province of Saudi Arabia. In September 1986 the defendant itself opened an office at Jeddah. In November 1986 the plaintiff pleads that the defendant appointed it its agent to distribute Anchor milk powder throughout Saudi Arabia. By 1988 the plaintiff was distributing Anchor milk powder in Saudi Arabia from its offices at Dammam, Riyadh and Jeddah. In 1988 major changes took place to its distribution system involving direct marketing by the use of vans. The plaintiff claims that on 21 November 1989 without any further discussion or notice the defendant advised the plaintiff that it was relocating its Jeddah office to Bahrain as from 30 November 1989. Between November 1990 to May 1993 the plaintiff also imported Golden Fern butter and Fern ghee from the defendant and resold it to customers in Saudi Arabia. The plaintiff pleads that on 3 November 1991 without any prior discussion or notice the defendant advised the plaintiff that it had decided to change its agent for Anchor milk powder as from 1 April 1992. It further advised that as from that date its agency for Anchor milk powder would be replaced with an agency for Acorn milk powder and the plaintiff would receive compensation from the defendant for the termination of the Anchor

agency. The new agent appointed was called Sadafco. On 22 June 1993 the defendant advised the plaintiff that in view of the position the plaintiff was taking over matters relating to the Anchor agency it was stopping the supply of Golden Fern butter and Fern ghee. The plaintiff pleads that the termination of the Anchor and Acorn agencies and the decision to stop supply of Golden Fern butter and Fern ghee adversely affected the plaintiff's business and it suffered losses. It seeks relief in respect of six causes of action. The first cause of action is one for compensation for termination of the Anchor milk powder agency. The second cause of action seeks compensation for damaged cans of Anchor milk powder. The third cause of action seeks compensation for losses suffered as the result of Sadafco's actions in selling Anchor milk powder at 5 percent less than the plaintiff's prices. The fourth cause of action seeks compensation for late delivery of Acorn milk powder. The fifth cause of action seeks compensation for consignments of Acorn milk powder which the defendant cancelled and failed to deliver. The sixth cause of action seeks compensation for termination of the Acorn milk powder agency.

The defendant has filed an application to dismiss or alternatively stay all the causes of action pursuant to R.477 of the High Court Rules and the inherent jurisdiction of the Court. The basis of the application is that New Zealand is not forum conveniens for the determination of the dispute. Counsel agreed that the principles to be applied in regard to applications relating to forum non conveniens as they relate to New Zealand are as set out in McGechan's commentary to High Court Rules under R.220 (Service out of New Zealand).

Such principles are taken from the leading English case of ***Spiliada Maritime Corporation v. Cansulex Limited*** (The "Spiliada") [1987] AC 460 and are:

> "(a) A stay will only be granted for forum non conveniens where the Court is satisfied there is some other available forum having competent jurisdiction, and which is the appropriate forum for the trial of the action, ie the forum in which the case may be tried more suitably for the interests of all the parties and the ends of justice.
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> (b) In general, the burden of proof rests on the defendant to persuade the Court to exercise its jurisdiction to grant a stay. Each party will seek to establish the existence of certain matters which will assist them in persuading the Court to exercise its discretion in their favour, and in respect of any such matter, the evidential burden will rest on the party asserting its existence. If the Court is satisfied there is another available forum which is prima facie the appropriate forum for the trial of the proceeding, the burden will then shift to the plaintiff to show there are special circumstances indicating that justice requires the trial should take place in New Zealand.
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> (c) In determining the appropriate forum, it is pertinent to ask whether the plaintiff has founded jurisdiction as of right in accordance with the law of New Zealand.
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> (d) Since the question is whether there exists some other forum more clearly appropriate for the trial of the proceeding, the Court will first look at what factors point in the direction of another forum. These include the questions of comparative cost and convenience referred to at HR220.04(1)(d).
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> (e) If the Court concludes at that stage there is no other available forum which is clearly more appropriate for the trial of the proceeding, it will ordinarily refuse a stay.
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> (f) If, however, the Court concludes at that stage there is some other available forum which prima facie is clearly more appropriate for the trial of the proceeding, it will ordinarily grant a stay unless there are circumstances indicating that justice requires a stay should not be granted. In this inquiry, the Court will consider all the circumstances of the case, including circumstances which go beyond those taken into account when considering connecting factors with other jurisdiction. One example given by Lord Goff was the fact (if established objectively by cogent evidence) that the plaintiff would not obtain justice in the foreign jurisdiction."

The starting point I think in respect of this application is principle (c) above, namely that in determining the appropriate forum one must ask whether the

plaintiff has found a jurisdiction as of right in accordance with the law of New Zealand. The defendant accepts that such is the case here because the defendant is a New Zealand company.

Spiliada held that because a company was resident or domiciled in England and thus could be sued there as of right, that did not necessarily mean that England was forum conveniens. As to that issue Lord Goff at page 477 said:

> "I can see no reason why the English court should not refuse to grant a stay in such a case, where jurisdiction has been founded as of right. It is significant that, in all the leading English cases where a stay has been granted, there has been another clearly more appropriate forum - in *The Atlantic Star* [1974] A.C. 436 (Belgium); in *MacShannon's* case [1978] A.C. 795. (Scotland); in *Trendtex* [1982] A.C. 679 (Switzerland); and in the *The Abidin Daver* [1984] A.C. 398 (Turkey). In my opinion, the burden resting on the defendant is not just to show that England is not the natural or appropriate forum for the trial, but to establish that there is another available forum which is clearly or distinctly more appropriate than the English forum. In this way, proper regard is paid to the fact that jurisdiction has been founded in England as of right (see *MacShannon's* case [1978] A.C. 795, *per* Lord Salmon); and there is the further advantage that, on a subject where comity is of importance, it appears that there will be a broad consensus among major common law jurisdictions. I may add that if, in any case, the connection of the defendant with the English forum is a fragile one (for example, if he is served with proceedings during a short visit to this country), it should be all the easier for him to prove that there is another clearly more appropriate forum for the trial overseas." (emphasis added)

Whether or not the contract was technically made in Saudi Arabia I think it reasonably clear that it was to be partly performed in Saudi Arabia and partly in New Zealand. It is to be noted that although the defendant set up an agent company of its own in Saudi Arabia payment was still required to be made for products exported to the plaintiff from New Zealand, directly to the defendant here.

The question of what is the 'proper law' of the contract has relevance in determining this application. The defendant says Saudi Arabian law is 'the proper law'. However in terms of ***Bongthon v. Commonwealth of Australia*** [1951] A.C. 201 I would have thought it quite arguable that the transaction had "its closest and most real connection" with New Zealand. Be that as it may the 'proper law' of the contract is not determinative of this application. For example ***Amin Rasheed Shipping Corporation v. Kuwait Insurance Co*** [1984] I AC the House of Lords held that the 'proper law' of the contract was English law but still held that the forum conveniens was Kuwait.

The plaintiff's case is based on agency. It claims that an agency agreement was drawn up by the defendant but after objection was taken to some parts of the agreement by the plaintiff a final agreement, for whatever reason, was never completed and signed by the parties although the plaintiff says, (as appears in the correspondence), the plaintiff and defendant in respect of their trading relationship treated each other as being "married".

The defendant denies agency and says New Zealand law is as appears in Bowstead on Agency at p.24, namely that a supplier of the goods of the manufacturer, whether on a retail or wholesale basis, who has some form of concession as a regular stockist, distributor or franchisee, is often described as an "agent", "selling agent", "main agent" and the like, for the manufacturer of the goods which he supplies. Although it is possible that he is an agent in the common law sense it is nowadays much more likely that he actually buys from

the manufacturer and resells to his customer and further that in general such relationship is an adverse commercial relationship quite different from agency and the author says such relationship is not dealt with in the book except for the purpose of distinguishing it from agency. The defendant says such was the trading relationship here between the plaintiff and defendant and agency cannot be established. The defendant further argues that it is probably not necessary for the Court to determine that issue finally for the purposes of disposing of its application. The Master finds it somewhat ironic that the defendant wishes to rely on New Zealand law to help support its argument that for the substantive hearing New Zealand is forum non conveniens and the case should be heard in Saudi Arabia.

The defendant has not put before the Court any evidence as to what law would be applied in Saudi Arabia regarding the dispute and in particular whether the law of agency is recognised in that jurisdiction. Also the defendant has not put before the Court any evidence that the remedies sought in New Zealand against the defendant would also be available in Saudi Arabia, particularly the claim for exemplary damages. I think the defendant must not only show that there is another available forum which is clearly or distinctly more appropriate than the New Zealand forum, but also that it can grant the relief sought by the plaintiff if it is successful. If no court other than New Zealand Court can grant the relief sought no question of forum conveniens it seems can arise. See Laws of New Zealand para 29:

> "Foreign Court must be able to grant relief sought. A foreign Court cannot be forum conveniens unless it has jurisdiction to hear and determine the claim, and grant the relief sought by the plaintiff. If no Court other than the New Zealand Court can grant the relief sought, no question of forum conveniens can arise."

Here Mr Leggat for defendant acknowledged quite frankly that the defendant has no knowledge of what the law in Saudi Arabia would be in respect of the plaintiff's causes of action and the relief sought. That being the case it seems to me extraordinary that it does not wish to submit the jurisdiction of our New Zealand Courts but is happy to have the case tried in a jurisdiction where it has not the faintest idea what the law is and therefore what the outcome might be. I was told from the Bar by Mr Stapleton that the new agents Sadafco are members of the Royal Family of Saudi Arabia and it was suggested that that might be a good reason for the plaintiff wishing to pursue the defendant in New Zealand. The defendant however disavows any suggestion that it wishes to be sued in Saudi Arabia for that reason. It emphasises that in respect of the first two causes of action that the plaintiff has already attempted to sue the defendant in the Saudi Arabian jurisdiction without success and submits that is a factor which the Court should take into account, and I think it is. As submitted by Mr Leggat I do not put any weight on the fact that the Royal Family apparently has some association with Sadafco. However I return to the point that this is a defendant lawfully sued in New Zealand and accordingly has the onus of persuading me that it should be sued elsewhere. Its task is not made easier by reason of the fact that it is seeking to be sued in other than a common law jurisdiction. I think it was encumbent on the defendant to put expert evidence before the Court to establish whether or not if New Zealand law was found to be the proper law of

the contract that the Saudi Arabian Courts would apply it and also evidence as to whether or not if Saudi Arabian law was held to be the proper law of the contract that their Courts would, or could, grant the plaintiff, if successful, the relief it seeks. In ***Amin Rasheed Shipping Corporation v. Kuwait Insurance Co*** [1984] I AC 50 the Judge at first instance set aside an ex parte application to issue a writ in England and serve notice of it on the defendant who resided and carried on business in Kuwait. That decision was overturned in the Court of Appeal but restored in the House of Lords. Lord Diplock said at p. 67:

> "Although the issues would appear to be primarily issues of fact, questions of law will also be involved relating to notice of abandonment and constructive total loss which are governed by ss.60-63 of the Marine Insurance Act 1906. But as already mentioned it is common ground between the expert witnesses on Kuwait law that Kuwaiti Judges in deciding those questions would under the Kuwait Code of Conflict of Laws apply English law as the proper law of any policy of marine insurance entered into in Kuwait before August 15 1980, if it were in the terms of the Standard Form of English Marine Policy with Institute War and Strike clauses attached. Like Bigham J I see no reason why a Kuwaiti Court should find any difficulty in applying the relevant English law to the facts once they had been found."

I also think it is significant that the defendant has only been able to come up with one case where a Court has found that a defendant properly sued within the jurisdiction has held that the dispute should nevertheless be determined in a foreign court. That case is ***Credit Chimique v. James Scott Engineering Group Limited*** [1982] SLT 131 where Lord Jauncey said in respect of the principles applicable to forum non conveniens (a concept apparently developed in the Scottish Courts) at page 133:

> "These principles may be summarised as follows: (1) that the burden of satisfying the tribunal that the case submitted to it for decision should not be allowed to proceed lies upon the defender who tables the plea; (2) that this burden can only be discharged where weighty reasons are alleged why an admitted jurisdiction should not be exercised, mere balance of convenience being insufficient; (3) that there is another court of competent jurisdiction in which the matter in question can be litigated; and (4) that consideration of these reasons leads to the conclusion that the interests of the parties can more appropriately be served and the ends of justice can more appropriately be served in that other court. In *Clements v. Macaulay* Lord Justice-Clerk Inglis at p.592 stated: "The contention involved in such a plea is rather that for the interest of all the parties, and for the ends of justice, the cause may more suitably be tried elsewhere". This passage from the Lord Justice-Clerk's judgment was described by Lord Shaw of Dunfermline as: "the foundation of the whole doctrine"."
> (emphasis added)

In that case the defendant was being sued on a guarantee. It was held that the domicile of the defendants, the accessory nature of the alleged guarantee to a purely French contract, and the extent and complexity of the questions of French law likely to be involved, were all matters of importance. In the circumstances of the case no injustice would be occasioned to the pursuers if the plea were upheld. The Court held that the ends of justice would best be served if the litigation was pursued in a French Court. Given the circumstances disclosed in that case one can well understand why the Court came to the conclusion it did.

However here I certainly do not think it has been shown here that there is a court of competent jurisdiction in Saudi Arabia which could settle this dispute. Secondly I do not think it has been shown that it would be in the interests of all parties, and satisfy the ends of justice, that the case be heard in Saudi Arabia rather than in New Zealand.

Finally one of the factors to be taken into account here is the issue of witnesses. As to that neither party relied on this as a ground to persuade the Court one way or the other as to where the case should be heard. It seems that wherever the case is tried both parties will have to bring witnesses from overseas and in any event it does not seem that the number of witnesses involved will be great on either side.

All in all I conclude that the defendant has not advanced the weighty reasons required to persuade me that this defendant who is sued in a New Zealand Court as of right has made out a case that our jurisdiction is forum non conveniens.

The application is therefore refused. I will receive a timetable memorandum to progress the case. Costs reserved.

Master J.C.A. Thomson