IN THE HIGH COURT OF NEW ZEALAND
INVERCARGILL REGISTRY

CIV 2007 425 712

BETWEEN	BODY CORPORATE 27017 First Plaintiff
AND	CHARLES PARSONS (PACIFIC) LIMITED & ORS Second Plaintiffs
AND	WENSLEY DEVELOPMENTS LIMITED First Defendant
AND	QUEENSTOWN LAKES DISTRICT COUNCIL Second Defendant
AND	EDWIN ELLIOT First Third Party
AND	DERRILL HOPGOOD Second Third Party
AND	ELLISONS ALUMINIUM LIMITED Third Third Party
AND	CALDER STEWART INDUSTRIES LIMITED Fourth Third Party
AND	WATTYL NZ LIMITED Fifth Third Party
AND	DEAN HAMMOND LIMITED Sixth Third Party
AND	GARRY A HALL Seventh Third Party
AND	JAMES HARDIE NEW ZEALAND LIMITED Eighth Third Party

	AND	ROSS MCGREGOR WENSLEY Ninth Third Party
	AND	JULIE RAEWYN JACK Tenth Third Party
	AND	GARRY MORTON Eleventh Third Party

Hearing: 21 April 2009

Appearances: P J Woods for Plaintiffs
Ms Siave for First Defendant (given leave to withdraw)
A Hitchcock for Fourth Third Party

Judgment: 21 April 2009

JUDGMENT OF ASSOCIATE JUDGE OSBORNE

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[1] This is a claim issued in 2007 by a plaintiff body corporate and subsequently joined by the individual owners of units within the body corporate as second plaintiffs. Initially the first defendant, Wensley, and the second defendant, Queenstown Lakes District Council, were the only other parties, but they have subsequently been joined by eight third parties, and in the last few days by the ninth, tenth and eleventh third parties.

[2] The proceeding relates to a development on Frankton Road, Queenstown, which is said to have significant issues with weather-tightness. The quantum of claim at present stands in the order of $3 million or more.

[3] The plaintiffs had signalled, and in a timely way brought, an application for change of venue in March 2009 which came before me for hearing today. The application is made in reliance on Part 10 of the High Court Rules and the principles set out in the cases to which counsel helpfully referred me in the course of submissions. There is no significant difference between counsel on the legal

principles that are applicable to a matter such as this. The rule itself addresses the requirement in terms of the preponderance of convenience or fairness. In particular r 10(1) gives the Judge a discretion to order that the proceeding be transferred either if the parties consent, which is not the case here, or if it appears that the proceeding can be more conveniently or more fairly tried at another place. In this case the proceeding was commenced correctly in the Invercargill Registry, which is the Registry not only closest to the place of either residence or business of the first defendant, but also nearest to the place where the cause of action arose which is indisputably Queenstown.

[4] Rule 10(1) allows the Court to change venue on the Court's being satisfied of the dual test of more convenience or more fairness. I am of the view that on the facts of this case most of the issues raised relate to convenience. There is one aspect which might be said to go to fairness rather than convenience. To some extent all matters could be said to fit under both headings.

[5] The parties accept that there is an onus on the applicant in an application such as this. While it has been referred to in *Jones v James* (HC Wellington A260/85, 7 October 1985 Greig J) as not being a special onus, but some onus, it is accepted by the applicant in the present case that it is for the applicant to establish that there is greater fairness or convenience in transfer to Christchurch which is the suggested venue.

[6] When one then comes to the exercise of the discretion itself the issues are heavily fact dependent. We are essentially dealing with the matters that go to where witnesses, both factual and expert, and where counsel will have to assemble, together with some issues of timing. There are some broader issues that I will come to.

Representation

[7] The applicants in this case are the first and second plaintiffs. Initially the first defendant, Wensley, filed a notice of opposition (which properly set out grounds of

opposition) and filed an affidavit in opposition. A practical difficulty then arose in that the first defendant's solicitors on the record had previously been granted leave to withdraw, and the notice of opposition and supporting affidavit were filed by other solicitors on behalf of the first defendant. Subsequently those solicitors were not instructed for the purposes of today's hearing. Ms Siave appeared to explain the position of the firm in relation to appearance in this matter, and then by my leave withdrew.

[8] The conduct of the opposition was therefore left solely to the one other party who had filed a notice of opposition and evidence in support of opposition, namely the fourth third party. Accordingly, today submissions were presented to me by Mr Woods for the plaintiffs and Mr Hitchcock for the fourth third party.

Readiness for trial

[9] Another preliminary matter flavours the factual matters which are central to the present application - this relates to the state of this proceeding and its readiness for trial. Although counsel may put it in slightly different ways, it is clear to me that the matter at this point is not ready for trial. The matter came before me as an Associate Judge for the first time when I had a telephone conference of numerous counsel on 25 February 2009 and we discussed a number of interlocutory matters which are the subject of my Minute dated 25 February 2009. At that time, amongst other things, I issued timetable directions for the application which I am dealing with today.

[10] Other interlocutory attendances that were touched on in that conference, and which have been the subject of some discussion today, were the likelihood of one or more strike out applications; the possibility of further discovery and inspection, both of which were being attended to around the time of the last telephone conference; and joinder of further parties. It has transpired that the ninth, tenth and eleventh third parties have indeed now been joined pursuant to leave I reserved at the last conference. The ninth and tenth parties are individuals closely involved with the

first defendant. The degree of contact between the eleventh third party and the first defendant is not clear at this point, but it appears at least possible that he will require representation independently of the Wensley interests.

[11] As of this morning, it appeared to me from discussion with counsel (and I acknowledge the responsible way in which both counsel dealt with the interlocutory issues that still need to be dealt with) that there are significant matters that will have to be disposed of, or dealt with, prior to trial. Perhaps most significant of those is the possibility of strike out applications that have been signalled. On any view of the matter the earliest I could deal with such an application would be likely to be July as to hearing and possibly some weeks afterwards as to a decision. Both counsel recognise that the significance of strike out applications is such that there may then arise issues of appeal.

[12] Of the other interlocutory attendances the attendance that would cause the Court the most concern in terms of potential delay is that relating to the joinder of other parties. At the moment the ninth, tenth and eleventh third parties will have to go through the steps of retaining counsel of their choice if that is their wish, filing defences, and then becoming familiar with the issues in the proceeding and, possibly discharging discovery obligations along the way. In the absence of representation to date, it is difficult to put a precise time frame on those attendances, but in relation to normal civil litigation one would expect the discovery and inspection exercise alone, after pleadings are completed, to take at least three or four months.

[13] Against that background I indicated to Mr Woods at the start of his submissions that the completion of interlocutories loomed as an issue of some significance for me. An emphasis in his submissions was upon the earlier availability of trial in Christchurch as against Invercargill.

[14] I turn to the availability of time in this Registry and in the Christchurch Registry. The Registrar at Christchurch has been able to indicate that he will be able to provide a definite allocation of 16 November 2009 (on the basis of a four week trial). As against that, because of issues with regard to the need of the Invercargill

Registry for the discharge of its District Court trials and the combined problem of the building programme that is being conducted at the Invercargill Court at present, the date for an Invercargill trial of four weeks remains uncertain. The best hope is that it might take place in February or March 2010.

Grounds of application

[15] Against that background I turn to the basis of the plaintiffs' application which is set out in their notice of application dated 13 March 2009 in paragraphs 1 and 2 of Mr Woods' application:

> 1. The Applicants, Body Corporate 27017 and others, will on 21 April 2009 apply for orders that:
>
> (a) The trial venue be changed from Invercargill to Christchurch; and
>
> (b) That all subsequent steps in the proceeding be taken in Christchurch.
>
> 2. The grounds on which the orders are sought is that Christchurch is where the proceedings can be more conveniently or more fairly tried as:
>
> (a) The earliest date that may be available for a 20 day fixture in Invercargill is February or March 2010. However, the availability of this date range is still subject to confirmation;
>
> (b) The Christchurch High Court can accommodate a 20 day fixture commencing on 16 November 2009;
>
> (c) A number of the parties, counsel and witnesses will:
>
> (i) Be travelling from the North Island or overseas and will need to fly into Christchurch to get connecting flights to Invercargill;

(A) Incurring additional travel time; and

(B) Incurring additional airfare costs;

(ii) Be required to travel on the day prior to the trial date so as to be in Invercargill in time for the trial, incurring additional costs and expenses;

(d) Christchurch has a wider range of accommodation options; and

(e) Upon the grounds set out in the affidavit of Lisa Marie Taylor sworn and filed herein.

Grounds of opposition

[16] The notice of opposition by the fourth third party were set out in paragraph 3 of the notice of opposition and were as follows:

3.1 The Fourth Third Party has its registered office in Milton but its roofing division which provided the work and materials part of the subject of this claim has its principal place of business in Invercargill.

3.2 The Fourth Third Party's witnesses of fact and its expert witness all reside in Invercargill of Queenstown.

3.3 The cause of action arose in Queenstown and this proceeding is properly brought in the Invercargill Registry of this Court.

3.4 The proceeding is more conveniently or fairly tried in Invercargill on the basis that:

3.4.1 The dates on which the trial could be heard in Invercargill are not materially later than those available in Christchurch (February/March 2010 as compared to November 2009) and the number of parties involved and the likelihood of various activities prior to trial such as striking-out applications, joinder of additional parties and settlement negotiations the February/March date is a more realistic date for trial.

3.4.2 There are numerous parties to these proceedings. A significant proportion of whom are based in and about Southland and Queenstown.

3.4.3 The vast bulk of the participants in this proceeding will need to travel to attend the trial regardless of whether it is held in Invercargill or Christchurch.

3.4.4 The transfer of these proceedings from Invercargill to Christchurch would cause significant additional expense to the Fourth Third Party in terms of travel and accommodation for its witness and Counsel.

3.5 Upon the further grounds set out in the affidavit of Michael Jason Tou sworn and filed herein.

[17] The first defendant in its notice of opposition relied on similar but not quite so extensive grounds.

[18] In his submissions to the Court Mr Hitchcock for the fourth third party also addressed issues of fairness arising from the cost and uncertainty of the litigation for his client over the period of remediation which has occurred on the subject properties. He asked the Court to take account of the fact that the fourth third party had not been able to inspect all of the work complained about because a substantial portion had been demolished before the opportunity arose to inspect, and because there had been no opportunity to be involved in the exploration of what the problem was and what the appropriate rectification was.

Convenience and fairness

Timing of trial

[19] The availability of a significantly earlier fixture at a proposed (changed) venue is clearly a factor going to convenience and fairness. In this case, the later date and in any event uncertainty relating to the possible trial at Invercargill is an important factor to be weighed. At the same time, the Court has to balance the fact that for the reasons already discussed, it cannot be said that the case is ready for a fixture in November. At least until the Court has heard from the third parties most recently joined, the Court would not be prepared to allocate November as a firm fixture.

Parties/persons attending Court

[20] The Court has been provided with estimated numbers of the parties, witnesses (including experts) and counsel who are likely to attend the trial.

[21] Since the estimates were prepared, there have been three additional third parties joined. That may have some impact on the total numbers, although it is likely that at least two of the additional third parties (the ninth and tenth) will be the same people as are already involved with the first defendant's defence.

[22] The plaintiff had endeavoured to conduct an assessment of the numbers involved and had in the supporting affidavit provided a schedule with numbers and other comments. Those were then related to any preference expressed by a particular party as to venue.

[23] To summarise the preferences as understood:

(a) Plaintiff applies for Christchurch.

(b) First defendant opposes Christchurch – wants Invercargill.

(c) Second defendant prefers Christchurch.

(d) First third party prefers Invercargill.

(e) Second third party not known.

(f) Third third party abides the decision of the Court.

(g) Fourth third party – wants Invercargill – opposes application.

(h) Fifth third party abides the decision of the Court.

(i) Sixth third party not known.

(j) Seventh third party – Christchurch consented to.

(k) Eighth third party – Christchurch consented to.

(l) Ninth third party – presumed to want Invercargill.

(m) Tenth third party – presumed to want Invercargill.

(n) Eleventh third party not known.

[24] Mr Woods for the plaintiff estimated a total of forty-seven people by way of parties, witnesses and counsel who are involved in the litigation and support in varying measures, the change of venue to Christchurch. He estimated some ten or eleven parties/witnesses/counsel involved for those who are in favour of Invercargill.

[25] When matters are addressed in terms of convenience, it is appropriate that the Court take into account the numbers of individuals affected by the current venue, or change of venue, but it is, as both counsel conceded, not simply a numbers exercise. It is nevertheless clearly a significant matter in the balancing exercise that approximately 80% of the individuals involved may take the view because of their own circumstances that a trial at Invercargill will inconvenience them. This is a factor to be taken into account in the balancing exercise.

[26] It is then appropriate to consider the convenience as between different categories of people, and in particular as between parties, witnesses and counsel. The affidavit of Lisa Marie Taylor attempted – where the information was known – to summarise matters within those categories. Her affidavit also referred to an exercise of estimating the difference in timing and cost of air travel to Christchurch and Invercargill respectively. Her evidence discloses that in many cases people will have to travel to Invercargill through Christchurch. Clearly, that will add to the hours of travel involved for individuals and cumulatively there will be an affect on the trial as a whole. The deponent did not attempt to break down figures for specific

individuals, but her evidence does build a picture of a significant inconvenience to a large number of parties attending the hearing.

[27] I noted also from the evidence filed that there is a tendency amongst some of the parties supporting a change of venue (to Christchurch) to do so notwithstanding the fact that some of those parties involved are based in Southland or Otago. This indicates that there are practical attractions for those parties in relation to Christchurch. Part of that will undoubtedly be based on the fact that their preferred counsel, or solicitors, are Christchurch based, or are travelling from north of Christchurch and prefer Christchurch. Furthermore, the Court has been referred in submissions to a proposition that there may be practical benefits in having the trial proceed at Christchurch on account of matters such as the availability of accommodation or other facilities. There is no proper evidence to support the latter proposition and the Court takes it that both venues are capable of providing appropriate facilities.

[28] I take into account the less prominence that is accorded to the travel of counsel than that of witnesses or parties, (which both counsel accepted) as referred in decisions such as *Mosaed v Mosaed* (1990) 2 PRNZ 327 and *Prudential Assurance Co. New Zealand Ltd v Slater* (1990) 4 PRNZ 639.

[29] Standing back, it appears to me that there are significant issues of inconvenience for a number of parties in travelling to Invercargill for the trial of this matter, both through the parties themselves, witnesses, and counsel all having to attend. It is a factor and one that I have to take into account. As against that I must weigh the convenience of those from the Southland/Lakes area and Invercargill itself where this proceeding was commenced and which is the Registry closest to the place where the cause of action arose.

Fairness

[30] The matters that have been raised in this regard appear to me to be matters that go to convenience or greater convenience. I did inquire of counsel what matters

might be said to raise issues of fairness, or greater fairness, and I understood there to be some common ground that most of the issues in this case were really issues of convenience, although they could be categorised under both heads. Of the cases that counsel were able to refer me to in the course submissions it emerged that issues of fairness have not infrequently arisen where there are issues such as defamation. There may be a reasonable expectation of parties to have the case disposed of in the same town as the town in which the issues had originally arisen. The plaintiff may want publicity of the trial in the same area as the alleged defamation had its effect.

[31] The significant issue of fairness which arises in this case concerns Wensley. The evidence discloses that the first defendant is a small corporate family controlled business, apparently with four active persons, two of whom intend to be present throughout the case. The evidence for Wensley is that there will be difficulty for them, or as they put it, significant difficulties in the operation of their business with only four staff members, all of whom are based in Invercargill. I accept that it can be possible to continue to run aspects of a business from a distance, but it is clearly a matter going to fairness or justice if a party has difficulty committing its resources to a trial in another centre because that commitment will cut across the ability to properly run its normal living or business circumstances in its own place of residence.

Balancing convenience and fairness

[32] That is a summary of the matters that have been dealt with in considerably more detail in evidence and throughout submissions. I then come to the balancing exercise that is required of me, bearing in mind that the onus is on the applicant to substantiate greater fairness or greater convenience through a change of venue. I am not satisfied that the applicant has made out its case for change of venue. I do not suggest that this decision was one which was clearly indicated either way on the facts of this case. It is a finely balanced matter. It does involve the Court ultimately in the balancing exercise that is required under Part 10 of the High Court Rules. While on "numbers" alone, the balancing exercise might be thought to favour the

application for change of venue, the joint considerations of convenience and fairness ultimately lean just in favour of Invercargill.

[33] Had there been a demonstrable and significant benefit of timing through a Christchurch trial, my conclusion might well have been otherwise. It weighs with me strongly, as Mr Hitchcock emphasised in his submissions, that the case is not ready for trial. Cases involving weather-tightness are notoriously time consuming to bring to hearing and I do not see this case as being any different. Indeed, to some extent the fact that it has made this much progress within approximately a year and a half of issue is some credit to the parties involved. But it is not uncommon in cases such as this which occur much more commonly in the Auckland Registry that the time taken to trial is significantly longer than would be the case if a trial occurred in early 2010 in this case.

[34] A number of interlocutory matters of significance and importance (particularly the striking out issues) remain to be dealt with. I accept that only one application to date has been filed and that that has been informally filed and has been rejected, but it is clear that there will be at least one, and possibly as many as three strike out applications. I also have to take into account the fact that three parties have recently been joined and are entitled to take a full part in getting to understand what the case is about and in completing the discovery and inspection exercises that will be part of that. What the applicant saw as a significant benefit of transfer, namely the November trial available in Christchurch, is not something which will happen – the trial will in any event have to be later than that.

Future direction of trial

[35] What I propose to do in the circumstances is to direct the Registrar in Invercargill to identify a date which can be a firm date for trial as soon as possible in or after February 2010. I believe that that period offers those parties recently joined and those parties still wishing to consider strike out applications sufficient time to have their issues justly disposed of and their cases properly prepared. It also offers

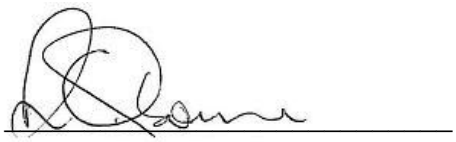
the Associate Judge the opportunity if there are interlocutory applications to properly deal with those, including if necessary by way of reserved judgment. I note that both counsel have fairly indicated that both a successful and an unsuccessful strike out application could result in an appeal, given the importance of that sort of application.

Costs and disbursements

[36] I am able to deal with costs now thanks to the positions adopted by both counsel. By consent I direct that costs be costs in the cause, and I fix them on a 2B basis. So far as disbursements are concerned I confirm that Mr Woods had appropriately travelled to Invercargill for this hearing and that those are proper disbursements.

Further case management conference – 4 July 2009

[37] I confirm that the next case management conference is at *9am, 4 June 2009* by telephone. I remind counsel of the requirements in that regard (see paragraph [12](h) Minute dated 25 February 2009).



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