

**IN THE DISTRICT COURT
AT WHANGAREI**

**I TE KŌTI-Ā-ROHE
KI WHANGĀREI-TERENGA-PARĀOA**

**CIV-2019-088-000402
[2019] NZDC 20064**

BETWEEN

JAYNE KAREN SENIOR
Plaintiff

AND

ASK THE ARBORIST LTD
Defendant

Hearing: 7 October 2019

Appearances: Mr Browne & Ms Van Beek for the Plaintiff
Ms Elliott and Mr Benton as directors of the Defendant

Judgment: 19 November 2019

**DECISION OF JUDGE J BERGSENG
[Application to transfer the proceedings]**

The proceedings

[1] On 18 June 2019 the plaintiff commenced these proceedings in the District Court at Whangarei. The plaintiff is seeking a declaration that a payment of \$52,000 she made to the defendant was for 12 months' rent in advance. The plaintiff had earlier entered into a lease of the premises at 2753 State Highway Brynderwyn. Additionally, the plaintiff seeks an order to rectify the lease.

[2] The defendant company has chosen not to obtain legal representation in these proceedings, rather its two directors, Ms Elliott and Mr Benton, are appearing.

[3] A statement of defence and counterclaim has been filed, together with a list of documents. The defendant maintains that the \$52,000 paid was not rent in advance,

rather it was a payment to secure the lease. By way of counterclaim, the defendant seeks payment of outstanding rent from 14 April 2018 until 31 March 2019.

The application to transfer

[4] On 18 September 2019 the defendant filed an application pursuant to r 5.1(1) District Court Rules 2014, for the transfer of these proceedings to the Auckland Registry. The defendant's synopsis of argument seeks for the transfer to now be to the North Shore registry. The defendant's grounds for transfer are:

- (a) The defendant's directors both reside and work in Auckland.
- (b) The plaintiff herself does not reside in Whangarei and accordingly she will have to travel regardless of the location.
- (c) The plaintiff has an Auckland residential address, as noted on company office records in relation to a company in which she appears to have an interest.
- (d) The defendant's directors both have concerns for their safety were the matter to remain in Whangarei.
- (e) The plaintiff had originally instructed Auckland lawyers but then changed to her current Whangarei solicitors "without explanation" to the defendant.
- (f) The defendant, not being legally represented, if successful, will not be able to claim costs.
- (g) The defendant's directors are unfamiliar with court proceedings, which will be exacerbated should the proceedings remain in Whangarei.

The defendant's evidence in support of a transfer

[5] In support of the application each of the directors has filed an affidavit.

Affidavit of Ms Elliott

[6] Ms Elliott's affidavit refers to her initial contact with the plaintiff and the breakdown in their relationship. This resulted in subsequent discussions being through the plaintiff's then Auckland based lawyers, Boyle Mathieson.

[7] Part way through these discussions there was then an "unexplained" change of representation by the plaintiff who engaged her current lawyers, Henderson Reeves of Whangarei. Ms Elliott believes this change resulted in unnecessary delay, with the defendant having to repeat much of its earlier discussions to Henderson Reeves.

[8] Ms Elliott notes that the plaintiff has made allegations to her current employer, that she had been using her work email for improper purposes, and that she had also complained to Inland Revenue

[9] Ms Elliott records that she has received derogatory and unpleasant emails from the plaintiff who has threatened to have her trespassed from the Brynderwyn premises.

[10] Ms Elliott also refers to a Georgina Boyes, who was the partner of the plaintiff's son. Ms Elliott describes being left extremely troubled by her exchanges with both the plaintiff and Ms Boyes, to the point that neither she nor Mr Benton feel safe when visiting the premises. The last occasion they attended police were called.

[11] There is also a suggestion that Ms Elliott believes there will be some form of retribution from Ms Boyes after the hearing of these proceedings. In these circumstances Ms Elliott does not feel confident about spending time in Whangarei, a relatively unfamiliar city, without any support.

[12] Ms Elliott believes that if they are unsuccessful in their defence and/or counterclaim, any costs awarded against them could well be greater than if the proceedings were transferred to Auckland.¹

Mr Benton's affidavit

[13] Mr Benton outlines his contact with Georgina Boyes from December 2018, when she emailed him expressing an interest in purchasing the freehold premises. It seems the defendant believed that a sale of the premises would be more viable if the company also owned the plaintiff's café business. Accordingly, Mr Benton arranged to meet with the plaintiff at the premises to see if she would be agreeable to a sale of her business.

[14] Mr Benton describes the meeting taking an unexpected turn of events resulting in his being served with a trespass notice. It also appears the plaintiff complained to the police, alleging Mr Benton had threatened her and punched a wall at the café.

[15] Because of these events Mr Benton describes the defendant deciding to undertake an inspection of the premises. When they did so, the police had to be involved before they could complete the inspection. That was the last occasion that either of the directors have attended at the premises.

[16] The discussions with Ms Boyes regarding her purchasing the premises came to an end when she made a threat against them. Subsequently Ms Boyes sent an email to the defendants advising that she was the plaintiff's son's ex-partner but was no longer with him for a number of reasons.

[17] Mr Benton describes "a campaign of intimidation by the plaintiff against himself and Ms Elliott. On 11 March 2019 he received an email from Ms Boyes offering her help in respect of the plaintiff and indicating that some form of retaliation was being considered by the plaintiff against them.

¹ This seems to relate to her belief that additional disbursements could be claimed by Henderson Reeves for attending court in Auckland as opposed to Whangarei.

[18] For all these reasons Mr Benton is not confident that he and Ms Elliott will be safe if the proceedings remain in Whangarei and they have to attend court there.

The plaintiff's opposition to transfer

[19] The plaintiff is opposed to the defendant's application to transfer these proceedings and submits:

- (a) The proceedings were properly commenced in the Whangarei registry of the District Court pursuant to r 5.1 District Court Rules 2014.
- (b) Even if the proceedings were commenced in the wrong registry, which is denied, the defendant by filing a statement of defence without a protest or an application to transfer the proceedings, has waived any irregularity.

[20] It is submitted by the plaintiff that the majority of the witnesses, including any expert witnesses, will be Northland based, the plaintiff's counsel is Whangarei based and given that the trial will be only one to two days in duration it is not a large burden for the defendant to undertake a hearing in Whangarei.

[21] It is submitted that in contrast to any inconvenience that may arise to the defendant, there would be a greater burden for the plaintiff to undertake a hearing in Auckland.

The plaintiff's affidavit

[22] The plaintiff in her affidavit notes she resides some of the time at the café at Brynderwyn and some of the time north of Brynderwyn. She makes the observation that the café, the subject of these proceedings, is closer to the Whangarei registry.

[23] At the time she commenced the proceedings she lived at the property full time. She does not live in Auckland and explains an Auckland address in respect of the company Hogs & Classics Limited was done without her knowledge. She describes

the company as a shell company which she thought had been removed from the register. The Auckland address given is that of her former business partner.

[24] Ms Senior notes that her solicitor is Whangarei based.

[25] Regarding witnesses that she is likely to call at any hearing, two are Northland based while her former business partner Ms Norris, is now based in Auckland although at the relevant time she was living in Northland. Ms Senior is yet to confirm what experts are to be called but has noted that inquiries have been undertaken with Whangarei based commercial real estate agents in this regard.

[26] Exhibit "C" of Ms Senior's affidavit is a letter from the plaintiffs to her solicitors which includes the following:

By all means, please file an application for declaratory judgement in the Whangarei District Court (although the Auckland District Court may be more appropriate, given our company's address for service and where we reside).

[27] In Ms Senior's view this was an invitation, effectively that any claim could proceed in Whangarei or Auckland.

[28] Ms Senior has also responded to some of the issues raised by both Ms Elliott and Mr Benton. I will not deal with all of the issues raised only those that are relevant to the issue of transfer of the proceedings.

[29] The relationship between the parties has deteriorated given the nature of the dispute. In the course of this dispute Ms Senior believes that she has received what she described as "a number of aggressive and snide emails". She accepts that she did complain to Ms Elliott's employer about the fact that emails were being sent from her work address. Ms Senior is not aware of any complaint being made to IRD.

[30] In respect of Mr Benton she disagrees with his interpretation of their meeting as taking a bizarre turn.

[31] Ms Senior confirms that Georgina Boyes was formerly her son's partner. There was a time when Ms Boyes' father was interested in purchasing the property and there were some discussions around this issue. It is Ms Senior's opinion that Ms Boyes has

some health issues, which at times affects her behaviour. She notes that in her view some of Ms Boyes' behaviour can be reflected in abusive emails which do not necessarily reflect what may have happened. Ms Senior notes that she did not have any part in the sending of the emails by Ms Boyes.

[32] Ms Senior denies any connections to gangs or that she has "*arranged gang members to do them over if they come to court*". She notes that she does not have a criminal record and has in the past been able to obtain a liquor licence. She denies threatening violence against Mr Benton.

Commencement of proceedings and filing of documents

[33] Rule 5.1 of the DRC 2014 provides:

5.1 How to determine proper registry

- (1) Documents that are required by these rules to be filed in the court must be filed in the registry –
 - (a) either –
 - (i) nearest to the residence or principal place of business of the defendant; or
 - (ii) if the defendant is neither resident nor has a principal place of business in New Zealand, selected by the plaintiff; or
 - (b) nearest to the place where the actions or omissions that led to the claim happened; or
 - (c) nearest to the place where the property that is the subject of the claim is located; or
 - (d) determined by the court or Registrar on the court's or Registrar's own initiative or on application.
- (2) If it appears to a Judge or Registrar, on application by either of the parties, that the statement of claim has been filed in the wrong registry, he or she may direct that the statement of claim and all documents be transferred to the proper registry.
- (3) If it appears to the Judge or Registrar, on application by either of the parties, that a different registry would be more convenient to the parties, he or she may direct that the statement of claim or all documents be transferred to that registry, and that registry becomes the proper registry.

[34] The filing of the proceedings by the plaintiff does not comply with r 5.1(a) as it is not the court nearest to the residence or principal place of business of the defendant. The defendant's registered office is 45 Garnet Road, Westmere, Auckland and likewise it is the address for service. The addresses of both directors is also 45 Garnet Road, Westmere.

[35] It is unclear if it is the nearest to the place where the actions or omissions that led to the claim happened. The submission of the defendant is that negotiations in relation to the lease took place in Auckland. Rule 5.1(b) allows for the proceedings to be filed nearest to the place where the actions or omissions that led to the claim happened.

[36] There is simply insufficient information for the court at this stage to decide where the actions or omissions that led to the claim happening being determined with any certainty.

[37] It would appear that r 5.1(c) applies in that the Whangarei registry is nearest to the place where the property that is the subject of the claim is located.

[38] It is most likely that the defendant has relied on r 5.1(c) in that the Whangarei Registry is the court nearest to the place where the café, that is the subject of the claim, is located. However, this is somewhat tenuous given that the issue is not per se about the café rather what is the nature of the payment it was made by the plaintiff constitutes.

Has the defendant waived the benefit of r 5.1?

[39] It may not be necessary to determine which provision of r 5.1 the plaintiff relies on as the defendant filed a notice of defence and counterclaim in the Whangarei District Court and did not at the same time make any application for change of venue. On this basis the plaintiff argues the defendant has waived its right to challenge the proceedings being heard in Whangarei

[40] As was noted by Hardie Boys J in *AG and LA Thomson v Victor Industries Ltd*:
If a defendant files a statement of defence he cannot complain that the proceeding should have been commenced elsewhere.²

[41] Additionally, the defendant, in earlier correspondence noted the possibility of proceedings being filed in the Whangarei District Court, even though at the time they believed the Auckland District Court may be the more appropriate registry, given the

² *A G & L A Thomson Ltd v Victor Industries Ltd* [1989] 3 PRNZ 581.

defendants' address for service and where the directors resided.³ The defendant was on notice that the plaintiff was considering issuing proceedings and doing so in Whangarei. Given this knowledge and its recorded view that Auckland was the nearest court, its failure to raise the issue of location at the time of filing its defence is consistent with waiving its right to challenge Whangarei as the correct registry.

[42] Exhibit C was a response to a letter received from the plaintiff's then Auckland based solicitors who had advised that they would be advising their client to file proceedings in the Whangarei District Court.

[43] The defendant's synopsis of argument filed in respect of this application provides at 12:

The filing of a statement of defence and counterclaim by the Defendant should not be deemed a waiver of any issues regarding the appropriate Registry. The defendant, who is not represented by a solicitor, was advised on filing those documents, that an application for transfer could be made at a later date.

[44] This submission is not supported by any evidence as it is not referred to either of the affidavits from Ms Elliott or Mr Benton. There is simply no evidence before me as to what the defendant may have been told at the time of filing.

[45] The application to transfer the proceedings is declined.

[46] Once the matter is ready for trial an application could be made pursuant to r 10.9, for an order that it be heard at a place that the parties consent to or where the proceedings can be more conveniently or more fairly tried.

[47] If such an application was made the court would then be able to be consider issues of convenience in a more considered way. As matters currently stand it is difficult to properly assess which court would be more convenient to the parties pursuant to r 5.1(3), given the early stage of preparation and when it is unclear what witnesses, including any expert witnesses, may ultimately be called.

³ Affidavit of JK Senior dated 1 October 2019 Exhibit C.

[48] The defendant having failed in its application is liable for costs on a 2B basis. I invite the parties to agree on the issue of costs however the absence of agreement, memorandum no more than three pages in length may be filed within 14 days.

J Bergseng
District Court Judge