

**IN THE DISTRICT COURT
AT QUEENSTOWN**

**CIV-2014-059-000156
[2016] NZDC 2055**

BETWEEN JAMES VELASCO BUENAVENTURA
Plaintiff

AND ROWENA GONZALES BURGESS
Defendant

Hearing: 10 February 2016

Appearances: Plaintiff appears in Person
Defendant appears in Person

Judgment: 16 March 2016

JUDGMENT OF JUDGE K G SMITH

Introduction

[1] On 23 October 2014 Mr Buenaventura issued proceedings against Ms Burgess claiming judgment for \$25,151 arising from an alleged debt said to be due and owing to him because of a loan he made to Ms Burgess. The amount claimed may have reduced to \$22,000 because of payments made by Ms Burgess.

[2] Ms Burgess has filed an Appearance Under Protest to the Court's jurisdiction (appearance), which Mr Buenaventura has applied to set aside.

[3] Both parties are representing themselves but have had some assistance in preparing their respective submissions on Mr Buenaventura's application. In presenting their arguments they have relied on material filed to comply with previous directions by the Court without significant elaboration.

[4] Neither party swore an affidavit, but there is broad agreement that money was paid by Mr Buenaventura to Ms Burgess. The dispute is about the nature of that payment and where that dispute should be litigated.

Background

[5] Both Mr Buenaventura and Ms Burgess live in New Zealand. The proceedings were served on Ms Burgess at her address in Wanaka. Briefly, Mr Buenaventura and Ms Burgess were in a relationship possibly while in Christchurch but certainly while in Manila. At an unspecified time, but possibly during June or July 2014, Mr Buenaventura says he lent money to Ms Burgess to buy a property in the Philippines.

[6] Mr Buenaventura alleges that, in August 2014, Ms Burgess promised to repay that loan by regular instalments but he has not been repaid. Ms Burgess accepts she was paid money but otherwise denies Mr Buenaventura's claim against her.

Ms Burgess' appearance

[7] Ms Burgess' appearance is founded on two bases. First, Ms Burgess denies Mr Buenaventura's claim on the basis that his allegations are fabricated and untrue.

[8] Second, Ms Burgess argues any proceedings should be heard in Manila in the Philippines.

[9] In her appearance, Ms Burgess acknowledges having been in a brief relationship with Mr Buenaventura. She says they were going to invest in a property in Manila and accepts Mr Buenaventura deposited money into her bank account in Manila. Ms Burgess says that the deposit into her bank account was used to buy air tickets for Mr Buenaventura and as part of a deposit for a house he wanted "us to buy". Ms Burgess does not elaborate on this statement but does say the house was to be purchased in her mother's name.

[10] Ms Burgess' appearance is summed up in one passage:

“All of my dealings with the plaintiff happened in Manila. We made an unfortunate mistake and I also lost the money I had saved. The money was originally given to me to buy air tickets and for the deposit on a house, with no mention of repayments. I did begin to say I would pay him back because he was threatening and intimidating me. I borrowed 100,000 php [Philippines currency] from a friend and my mother deposited that in his account in Manila, I am unable to pay any more.”

[11] Ms Burgess’ appearance contains a statement that she could verify everything that had happened, but her support people are in Manila, together with the friend who lent her money to pay Mr Buenaventura the 100,000 php referred to in para [10].

[12] There is no written record of the transaction between Mr Buenaventura and Ms Burgess, but there are emails that, at trial, might shed light on what took place. Aside from Mr Buenaventura and Ms Burgess, there do not appear to be any witnesses to the formation of the arrangement leading to Mr Buenaventura depositing money into Ms Burgess’ bank account.

The application to set aside

[13] Mr Buenaventura’s application to set aside Ms Burgess’ appearance relies on practical matters. Both parties reside in New Zealand. Both parties have jobs in New Zealand. Mr Buenaventura says Ms Burgess has property in New Zealand and intends to relocate her children to New Zealand. These assertions were not challenged by Ms Burgess as inaccurate.

[14] Mr Buenaventura says he will rely on his own evidence and on the material disclosed with his list of documents, which is his reference to the email correspondence mentioned earlier. Both parties accepted the proposition I put to them, which is that this case will turn on what the Court makes of their evidence.

[15] Although Ms Burgess mentioned having witnesses, she did not identify them or describe what they might give evidence about other than in the general way described earlier. However, the impression I have is that two separate matters may have been conflated; payment of money to Ms Burgess and the subsequent use of that money.

Discussion

[16] Rule 5.51 of the District Court Rules 2014 governs appearances of this sort. That rule provides:

5.51 Appearance and objection to jurisdiction

- (1) A defendant who objects to the jurisdiction of the court to hear and determine the proceeding may, within the time allowed for filing a statement of defence and instead of so doing, file and serve an appearance stating the defendant's objection and the grounds for it.

[17] Under r 5.51(3) a defendant who has filed an appearance may apply to dismiss the proceeding. Under r 5.51(5), at any time after an appearance has been filed, the plaintiff may apply to the Court to set aside the appearance.

[18] Under rule 5.51(6) the Court hearing an application to set aside the appearance must –

- (a) if it is satisfied that it has jurisdiction to hear and determine the proceeding, set aside the appearance; but
- (b) if it is satisfied that it has no jurisdiction to hear and determine the proceeding, dismiss both the application and the proceeding.

[19] Finally, under r 5.51(9) –

The Court, in exercising its powers under this rule, may do so on any terms and conditions that the Court thinks just and, in particular, on setting aside the appearance it may extend the time within which the defendant may file and serve a statement of defence and may give any directions that appears necessary regarding any further steps in the proceeding.

[20] Under s 29 of the District Courts Act 1947 this Court has jurisdiction to hear and determine any claim for a debt where the amount sought by way of judgment does not exceed \$200,000. Mr Buenaventura is claiming a debt within the monetary limit fixed for this Court's jurisdiction. Consequently, this Court has jurisdiction to hear and consider his claim.

[21] What is really involved in Ms Burgess' appearance is an argument that this case would be more appropriately tried in the Philippines.

[22] Ms Burgess supported her argument by making four points.

- (a) No contract or agreement was entered into in New Zealand.
- (b) No agent trading or residing in New Zealand was used.
- (c) She had no dealings with Mr Buenaventura in New Zealand before or after their relationship in Manila.
- (d) There has been no contract or agreement, written or otherwise, to suggest the dealings between her and Mr Buenaventura should be governed by New Zealand law.

[23] Ms Burgess' points seem to correctly summarise what happened insofar as the payment transaction is concerned. Those points would support a *forum non conveniens* argument.

Forum non conveniens

[24] The approach to *forum non conveniens* in New Zealand follows a decision of the House of Lords in *Spiliada Maritime Corporation v Cansulex Limited*.¹

[25] That case has been applied in New Zealand.² In *Spiliada*, the House of Lords described the fundamental principle about jurisdiction in the following way:

“In cases where jurisdiction has been founded as of right, ie, where in this country the defendant has been served with proceedings within the jurisdiction, the defendant may now apply to the Court to exercise its discretion to stay the proceedings on the ground which is usually called “*forum non conveniens*”.

...

¹ [1987] AC 460.

² *Gilmore v Gilmore* [1993] NZFLR 561 (HC).

I feel bound to say that I doubt whether the Latin tag *forum non conveniens* is apt to describe this principle. For the question is not one of convenience, but of the suitability or appropriateness of the relevant jurisdictions.”

[26] Six steps were considered by the House of Lords to address the *forum non conveniens* issue:

- (a) A stay will only be granted on the ground of *forum non conveniens* where the Court is satisfied there is some other available forum, having competent jurisdiction, which is the appropriate forum for the trial of the action; ie, in which the case may be tried more suitably for the interests of all the parties and the ends of justice.
- (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 that will assist in persuading the Court to exercise its jurisdiction in their favour. The evidential burden will rest on the party who asserts its existence. If the Court is satisfied there is another available forum, which is *prima facie* the appropriate forum for the trial of the action, the burden will shift to the plaintiff to show there are special circumstances by reason of which justice requires the trial should nevertheless take place in this jurisdiction.
- (c) In considering whether there is some other forum that is the appropriate forum for the trial of the action, it is pertinent to ask whether the fact the plaintiff has found a jurisdiction as of right in accordance with the law of New Zealand, of itself gives the plaintiff an advantage in the sense that the Courts will not lightly disturb jurisdiction so established.
- (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, such factors may even include convenience or expense.

- (e) If a Court concludes at that stage there is no available forum that is clearly more appropriate for the trial of the proceeding, it will normally refuse a stay.
- (f) If, however, the Court concludes at that stage there is some other available forum prima facie that is clearly more appropriate for trying the proceeding, it will ordinarily grant a stay unless there are circumstances by reason of which justice requires a stay should nevertheless not be granted.

[27] While those propositions are directed towards an application made to stay proceedings, they are equally appropriate where a protest and an application to set aside that protest are being considered.

Test applied

[28] A helpful summary of factors to be taken into account in applying the *Spiliada* test is contained in *Jefferson v Jefferson*³ as follows.

- (a) Whether there is jurisdiction to hear the matter in this Court in the first place.
- (b) Comparative cost and convenience to the parties of proceeding in each jurisdiction.
- (c) The location and availability of documents and witnesses.
- (d) A question of whether the proceedings have been issued in another country and the state of those proceedings.
- (e) Whether all the relevant parties are subject to a foreign jurisdiction enabling all of the issues to be resolved at one hearing.
- (f) Whether the law applicable to the proceeding is that of the forum.
- (g) The similarity of laws to those of New Zealand.

³ CIV-2009-004-001541, 3 February 2010.

- (h) Any agreement submitting to this jurisdiction or any other jurisdiction.
- (i) The strength of the plaintiff's case.
- (j) The place of enforcement of the judgment.
- (k) The defendant's motives in objecting to the jurisdiction; for example tactical advantages.
- (l) Procedural advantages in one jurisdiction or the other.

[29] Comments about those factors that are relevant follow. I have already noted the proceeding was served in New Zealand and that Mr Buenaventura and Ms Burgess both live here.

[30] Proceedings have not been filed in the Philippines, so that Mr Buenaventura would have to go to the expense of starting again there if the appearance succeeds. Although there was no evidence about the comparative cost of proceedings in New Zealand as compared to the Philippines, I consider it would be more cost-effective for the parties to litigate here.

[31] If the present proceeding continues there will be a cost saving in not having to issue new proceedings in the Philippines. Neither party will incur litigation-related expense in the Philippines. Not having to travel to the Philippines must represent a significant saving, especially where both parties acknowledged they have limited funds and said they could not afford legal representation for the present argument. Finally, the New Zealand proceeding will be disposed of sooner than would be the case if fresh proceedings had to be issued in the Philippines. Given both parties live in New Zealand, and are the main witnesses, the convenience of litigating here favours New Zealand.

[32] The location of documents and witnesses favours New Zealand. There are no documents recording this transaction, but there are emails that, even if written after the event, may tend to show what happened. Those emails are readily available in New Zealand. As has already been noted, the main witnesses will be Mr Buenaventura and Ms Burgess and they are both here.

[33] Even if some relevant evidence needs to be taken from witnesses in the Philippines, I am not convinced that task will be difficult, or is enough to sway this decision in favour of the Philippines as the appropriate forum.

[34] No evidence or submissions were provided about the similarities, or dissimilarities, between the law in the Philippines and the law in New Zealand. In those circumstances it is reasonable, in my view, to consider that the relevant law is the same or essentially the same. It is difficult to see that there would be material differences in the law of the Philippines compared to New Zealand law that would impact on determining whether a loan was made and, if it was made, any obligation for repayment. Consequently, Ms Burgess is not in any worse legal position if proceedings are allowed to continue here.

[35] The next factor is to consider the strength of Mr Buenaventura's case. Not too much should be said about the strength of his case in the absence of evidence from both parties and the opportunity to explore the issues, including Ms Burgess' statement that the claim is fabricated and untrue. However, there is no dispute money changed hands and a part repayment occurred. In that respect, Mr Buenaventura has an advantage.

[36] As to enforcement, if Mr Buenaventura obtains judgment against Ms Burgess, any enforcement action will probably be taken in New Zealand. While Ms Burgess' protest touched on the possibility her stay in New Zealand might be temporary, I have noted she remains here and all indications, from the materials provided, suggest she anticipates being here for some time. There is no dispute Ms Burgess is in a relationship in New Zealand, owns or may be acquiring assets in New Zealand, and may be bringing her family to New Zealand. If Mr Buenaventura is successful, the place of enforcement of any judgment he obtains is most likely to be New Zealand.

[37] There is no basis for requiring Mr Buenaventura to issue proceedings in the Philippines and, if he succeeds, having to go to the time, effort and cost of attempting to transfer a judgment from the Philippines to New Zealand to be enforced.

[38] Ms Burgess may have apprehended a tactical advantage if Mr Buenaventura is unsuccessful in this application because he may be dissuaded from issuing new proceedings in the Philippines. Ms Burgess' motives in filing an appearance may be relevant but not much weight should be given to this factor.

Conclusion

[39] Weighing these matters up, I am satisfied New Zealand is the most appropriate place for this dispute to be decided. Ms Burgess has not persuaded me that the Philippines is a more appropriate place for this claim to be tried.

[40] In making that decision I have imposed an onus on Ms Burgess to show why this Court is not the most appropriate forum for a trial, where the Court clearly has jurisdiction and the plaintiff and defendant are both in New Zealand.

[41] In case I am wrong about Ms Burgess having that onus, I would have reached the same conclusion, for the same reasons, if Mr Buenaventura had to establish New Zealand is the most appropriate forum.

[42] Mr Buenaventura's application to set aside Ms Burgess' protest is granted.

[43] Ms Burgess has 15 working days from the date of this decision to file and serve her statement of defence.

[44] There is no order for costs.

K G Smith
District Court Judge