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Jurisdiction	New Zealand
Tribunal	High Court of New Zealand
Date of the decision	31 March 2003
Case no./docket no.	CP 395 SD 01
Case name	*International Housewares (NZ) Ltd v. SEB S.A. et al.*

Introduction

[1] 1
This proceeding was filed on 27 July 2001. At that stage the proceeding was only filed against the first defendant.

[2] 2
The first defendant is a public company incorporated in France. Its registered office is situated at Ecully in France. It is the holding company of eleven manufacturing companies, twenty-six marketing companies and five other companies. All of these companies are collectively known as «Groupe SEB».

[3] 3
The first defendant's subsidiary companies include the third to sixth defendants who are product companies involved in either the manufacturing or the distribution and marketing of the group's products. The second defendant is also a subsidiary of the first defendant, and it is a marketing company based in Sydney. The second defendant acts as the product companies' agent in the Australasian region.

[4] 4
Due to the fact that the first defendant has its registered office in France it was necessary to observe the international protocols as to service and accordingly service was not effected on the first defendant until 14 June 2002.

[5] 5
On 31 July 2002 the first defendant filed an appearance under protest of jurisdiction pursuant to Rule 131 of the High Court Rules. It did not, however, seek to dismiss the proceeding on the basis that the Court had no jurisdiction to hear it. As a result, the plaintiff was required to file an application to set aside the appearance, and it duly did this on 30 August 2002.

[6] 6
That application proceeded to a defended hearing on 8 November 2002. As the hearing progressed it became clear that one of the principal grounds relied upon by the first defendant was that the plaintiff had sued the wrong entity. The first defendant contended that any contractual arrangements which might have been in existence with the plaintiff were between

the plaintiff and other members in the first defendant's group of companies, including particularly the product companies. I shall refer collectively in this judgment to the first defendant and its subsidiaries as «Group SEB».

[7] 7
I was concerned that an injustice may be done if that approach was permitted to continue because I was of the view that a contractual arrangement did exist between the plaintiff and one or more companies within Groupe SEB. My concern arose because of the possibility that the plaintiff might be deprived of its right to judgment by lack of an appropriate defendant. I therefore adjourned the application in order to allow the plaintiff to consider joining other members of the group as parties to this proceeding.

[8] 8
The plaintiff has now joined five other members of the Groupe SEB as defendants in this proceeding. Those defendants have been served by way of substituted service on the solicitors acting for the first defendant. They have all appeared under protest to jurisdiction on the same grounds as those advanced by the plaintiff against the first defendant.

[9] 9
In essence the objection raised by all six defendants is as follows:

a) The plaintiff does not have a good arguable case against the defendants.

b) Such contractual documents as are in existence refer to Courts in France as being the proper Court to hear disputes arising out of those contracts.

c) New Zealand is not the forum conveniens to hear this proceeding.

d) The applicable law may not be New Zealand law.

[10] 10
Before turning to consider these issues it is appropriate to briefly set out the factual background to this matter.

Factual background

[11] 11
In support of the application the Court has received two affidavits by Mr Gary Metzger. He is the plaintiffs managing director and is familiar with the matters which have given rise to this proceeding.

[12] 12
In 1986 Mr Metzger was employed as the manager of a company called Zip Housewares Limited, which was a division of Zip Industries Limited. From 1980 until 1991 that company manufactured under licence a range of Tefal non-stick cookware. These products were marketed and distributed by Zip Housewares Limited.

[13] 13
In or about 1986 Mr Metzger became aware that a number of other electrical products were also available under the Tefal brand. Some of these products (including irons, toasters and heaters) were at that time being imported into New Zealand under the Calor and SEB brands by a company called Jonathan Enterprises Limited («JEL»). JEL had entered into distribution agreement with companies in Groupe SEB which entitled it to distribute throughout New Zealand the products manufactured by those companies.

[14] 14
In November 1986 Mr Metzger was introduced to Mr John Wells, the owner of JEL. He deposes that after some discussion it was agreed that JEL would cease to import products under the Calor and SEB brands. Instead a new company called International Housewares Limited («IHL») would be set up by Mr Metzger and two partners. This company would distribute throughout New Zealand a number of products under the Tefal brand. These included kettles, irons, non-stick frying pans and rice cookers. The products were to be imported by JEL and on-sold to IHL. JEL was to be paid a fee, or commission, at the rate of five per cent on the landed cost of all products imported.

[15] 15
In 1993 the shareholders of IHL decided to wind up the company and the plaintiff was incorporated to take over the distribution role previously carried out by ML.

[16] 16
Mr Metzger says that by the mid 1990s the plaintiff was paying JEL in excess of $60,000 per annum for the products which it was importing. However, no formal written agreement was ever signed by JEL and either IHL or the plaintiff The contractual arrangements between the parties appear to have been entirely oral, with the terms of the arrangements being agreed upon by Mr Metzger and Mr Wells.

[17] 17
In or about September 1997 the arrangement between JEL and Groupe SEB ceased. At that time the plaintiff agreed to purchase products directly from Groupe SEB. The change in arrangements was brought about as a result of oral discussions between the parties. The end result of those discussions was that the plaintiff would continue to distribute Tefal electrical products throughout New Zealand. It would, however, purchase those products directly from Groupe SEB rather than through JEL.

[18] 18
The defendants contend that thereafter the same contractual relationship existed between the plaintiff and Groupe SEB as that which had previously existed between JEL and members of the group. There is, however, no evidence to suggest that the plaintiff has ever seen the various distribution agreements which the individual companies within Groupe SEB had entered into with JEL. There is certainly no suggestion that JEL ever formally assigned its rights and obligations under those agreements to the plaintiff.

[19] 19
Mr Metzger deposes that from time to time he received catalogues describing the range of Tefal products which were available. Until 1998 he placed all orders with the first defendant in France. Thereafter he placed orders with the second defendant in Sydney. In both cases, however, the products would be manufactured by one of the product companies, and those companies would deliver the products to the plaintiff and render invoices in respect of them. The plaintiff would deal directly with the product companies in relation to issues such as the timing of delivery of orders and the quality of the products received.

[20] 20
Between 1987 and 1993 IHL documented a failure rate of approximately four per cent in products supplied to it by the defendant. Between 1993 and August 1999 the failure of products continued to occur, and in fact the failure rate increased significantly in relation to some products.

[21] 21
By way of example, in or about the month of March 1996 the level of product failure had exceeded 19 per cent for some products whilst it remained at approximately four per cent in respect of others. By September 1998 a failure rate of 18.2 per cent continued to exist in relation to some products.

[22] 22
The plaintiff was responsible for dealing with warranty issues which arose as a result of the supply of faulty appliances to retail customers. The defendants were, however, prepared to assist in cases where the level of faulty appliances rose to endemic proportions. In those situations the defendants would supply replacement appliances and would also reimburse the plaintiff in respect of losses which it incurred as a result of having to refund monies to its customers. Mr Metzger accepts, however, that these arrangements were put into place on an ad hoc basis as and when problems arose in relation to particular products.

[23] 23
Mr Metzger says that on or about 13 May 1999 he learned through reading a brief article in the New Zealand Herald newspaper that Groupe SEB had decided to terminate its trading relationship with the plaintiff. This was because Groupe SEB wished to appoint a new company to distribute its products in New Zealand.

[24] 24
During July 1999 correspondence passed between Mr Metzger and Mr de Veyrac (the managing director of the second defendant) regarding transitional arrangements. Ultimately the parties reach agreement regarding the repurchase by Groupe SEB of unsold new products and spare parts. Mr de Veyrac also agreed to compensate the plaintiff in respect of 121 Avanti toasters, 104 rice cookers and 76 kettles which had been returned by customers because they were faulty. These had in fact been the subject of discussions in September 1998, at which time Mr de Veyrac had agreed to replace the products free of charge with the plaintiffs next order for those products. The plaintiff had never placed any

further order for those products and as a result it was necessary for this issue to be addressed when the distribution arrangement was terminated in 1999.

[25] 25
It is important to note, however, that when settlement was reached in September 1999 Mr Metzger declined to sign a statement to the effect that the payment which the plaintiff received at that time was in full and final settlement of all 6 business dealings with Groupe SEB. Instead he signed an acknowledgement that the plaintiff accepted that the payment of compensation was received in full and final settlement of the specific items listed in a schedule annexed to the agreement. These included the toasters, rice cookers and kettles which had been the subject of the discussions in 1998.

[26] 26
Mr Metzger deposes, however, that Groupe SEB has refused to deal with the plaintiff since late 1999 and that it has failed to pay the plaintiff a further sum of $244,903.26 in respect of other refunds which the plaintiff has been obliged to make to its retail customers in respect of faulty products.

[27] 27
Before turning to consider the issues which arise in this case it is useful to summarise the evidence relating to the basis upon which Group SEB arranges for the distribution of its products. This evidence comes from an affidavit which has been filed by Mr de Veyrac.

Groupe SEB's distribution arrangements

[28] 28
Mr de Veyrac deposes that the only member of Groupe SEB which has ever opened an office in New Zealand is a company called SEB Developpement S.A. Notwithstanding this fact, Mr de Veyrac accepts that Groupe SEB has been able to distribute and market its products in this country for a number of years. It has been able to do this through the arrangements which it initially entered into with JEL and, more recently, with IHL and the plaintiff.

[29] 29
Mr de Veyrac deposes that the group's usual practice is for each product company to enter into individual distribution agreements with distributors in appropriate markets. This is, in fact, what happened when the group distributed its products through JEL. Mr de Veyrac emphasises, however, that the distribution agreements are not agency agreements. The distributors are Groupe SEB's direct clients. The products are sold by Groupe SEB to the distributors, and the distributors on-sell the products to their retail customers. As a result, the distributors must deal with any warranty issues which arise with their customers.

[30] 30
The defendants accept that from April 1998 the second defendant acted as agent for the product companies in respect of issues relating to the marketing of Groupe SEB products in the Australasian area. They also accept that the second defendant dealt with the plaintiff when issues in relation to faulty products arose in New Zealand.

[31] 31
I now turn to consider the nature of the contractual relationship between the plaintiff and Groupe SEB.

Contractual relationship between plaintiff and Groupe SEB

[32] 32
It appears clear that until 1997 there was no direct contractual relationship between the plaintiff and the defendants. Up until that time the plaintiff purchased products exclusively from JEL, although it did deal with Groupe SEB when problems arose in relation to faulty products. By way of example, a problem arose in 1993 with Tefal irons. As a result, an arrangement was entered into between ML and Groupe SEB which involved the issuing of a credit note for some products and the supply of new equipment to resolve the problem which had arisen.

[33] 33
It is obvious from the material which has been placed before the Court that the interpolation of JEL in the sale process eroded the attractiveness of the arrangement for the plaintiff. In a letter to Mr Christian Grob (the manager of Groupe SEB Asia) on or about 3 March 1997, Mr Metzger alluded to the fact that the fee which was paid to JEL represented in most cases the difference as to whether or not it was worthwhile to market a product. In that letter he put forward the following proposal:

> «Zip Industries only ever had an agreement for Tefal Cookware and this agreement when cancelled was never assigned to any other company, nor has any company in New Zealand ever been assigned the agency agreement for Tefal Electrical products. The solution therefore is simple. Assign the Tefal Agency agreement for all Tefal branded products to International Housewares NZ Ltd. With an opportunity now to concentrate on the Tefal brand we can make the brand strong but I'm loathe to do it without an agreement.»

[34] 34
Notwithstanding Mr Metzger's entreaty there is no evidence to suggest that a formal assignment to the plaintiff of the so-called «Tefal Agency Agreement» was ever undertaken. In fact no written agreement was ever concluded between the plaintiff and the defendants.

[35] 35
Mr de Veyrac deposes that «in 1997 the product companies entered into distribution agreements with the plaintiff on the same basis as the earlier agreements with JEL.» There is no evidence to support that proposition. It also contradicts to some extent the defendants' collateral argument (with which I shall deal shortly) that the terms of the contractual relationship between the plaintiff and the defendants were contained in invoices which were sent to the plaintiff by the product companies when products were supplied.

[36] 36
Mr de Veyrac is of the view that the letter dated 3 March 1997 «makes it clear that [the plaintiff] intended to enter into distribution agreements with the product companies on the same basis as JEL's agreements with the product companies.» I do not agree. Mr Metzger's letter refers to the possibility of the plaintiff entering into an agency relationship which encompassed &l Tefal products, and not just those which were the subject of the JEL agreements. Moreover, regardless of what the plaintiffs intentions may have been, there is simply no evidence that any such assignment (or indeed an assignment of any type) occurred. There is, in fact, no evidence to suggest that after the relationship with JEL was terminated the plaintiff began to distribute any Tefal products which it had not previously distributed.

[37] 37
The defendants argue also that the terms contained on the invoices rendered by the product companies to the plaintiff formed part of the contractual relationship between the parties. I have only been provided with copies of four invoices, each of which contains different terms. I am not prepared to find, on that evidence alone, that the terms contained on the invoices formed part of that contractual relationship.

There is no evidence to support the proposition that the parties ever agreed that this was to be the case, or even as to the point at which the individual invoices were sent to the plaintiff. Given that even these four invoices differ in form, I would find it difficult to accept that the terms contained on an individual invoice could be said to apply, for example, to a delivery of products which had occurred some weeks earlier.

[38] 38
Moreover, this proposition also directly contradicts the defendants' primary argument, which is that the contractual terms which existed between JEL and Groupe SEB also applied to the dealings between the plaintiff and the group. The JEL distribution agreements which have been placed before the Court do not make any reference at all to additional contractual terms being contained in invoices. They appear to be self-contained or «stand alone» arguments.

[39] 39
The conclusion which I have reached is that the arrangement which was entered into by the plaintiff and Groupe SEB in 1997 was an oral agreement reached between Mr Metzger and Mr Grob. In broad terms the arrangement was to be that the plaintiff would continue to distribute the same products that it had previously distributed. It would, however, purchase those products directly from Groupe SEB rather than from JEL. It would therefore pay the amounts claimed in invoices rendered to it by members of the group rather than by JEL. In other respects and in practical terms, however, the arrangements relating to the distribution of Tefal products remained unchanged.

[40] 40
It is now appropriate to consider in further detail the basis upon which the plaintiff brings its claim.

The plaintiff's claim

[41] 41
The plaintiffs claim is brought on a number of alternative bases. In each case, however, the plaintiff seeks judgment in the sum of $244,903.26. That figure represents the amount which the plaintiff alleges it has been required to refund to its customers following the return of faulty appliances.

[42] 42
First, it contends that the distribution arrangement contained an express and/or implied term that the defendants would indemnify the plaintiff in respect of any losses which it incurred through the supply of products which were not of merchantable quality. It alleges that the defendants breached that term by failing to indemnify it in respect of the payments made by the plaintiff to its customers in respect of faulty appliances.

[43] 43
Alternatively, the plaintiff alleges that it was an express and/or implied term of the arrangement that the products to be supplied by the defendants would be of merchantable quality. It alleges that the defendants breached that term by failing to supply appliances of such quality and that it has suffered loss as a result of that breach.

[44] 44
Thirdly, the plaintiff alleges that both New Zealand and France are signatories to the United Nations Convention on Contracts for the International Sale of Goods which is administered by the Sale of Goods (United Nations Covenant) Act 1994. Article 35 of the Convention provides that a seller of goods must deliver goods which are of the quantity, quality and description required by the contract. Except where the parties have agreed otherwise, such goods will not conform with the contract unless they are, inter alia, fit for the purposes for which goods of the same description would ordinarily be used. The plaintiff alleges that this Article was implied into the distribution arrangement as a term by virtue of the provisions of the Convention.

[45] 45
It alleges that, in breach of Article 35, the first defendant has failed to deliver appliances which were of the quality required by the distribution arrangement, namely that they would be of merchantable quality.

[46] 46
The plaintiffs primary claim is against the first defendant on the basis that, until 1998 at least, orders were placed directly with the first defendant. As a result, the plaintiff contends that the first defendant is liable to it in respect of all of the faulty products which it has received up until 1998. A similar claim is made against the second defendant in respect of products purchased since 1998. The amended statement of claim contains alternative claims against the third to sixth defendants in relation to the individual products manufactured by those defendants.

[47] 47
It is now appropriate to examine the issues which require determination in the context of the present application.

Issues

[48] 48
Three principal issues arise for determination in the present case. They are:

1. Whether there is prima facie jurisdiction for service abroad under Rules 219 or 220 of the High Court Rules.

2. Whether the plaintiff has a good arguable case.

3. Whether in any event New Zealand is the appropriate forum for the determination of the claim.

1. Prima facie jurisdiction for service abroad under either Rules 219 or 220

[49] 49
In the present case the plaintiff has served the proceeding abroad without leave pursuant to Rule 219. Rule 219(b)(i) permits proceedings to be served outside New Zealand without leave where those proceedings relate to a contract that was made or entered into in New Zealand.

[50] 50
The plaintiff is resident in New Zealand and all discussions which gave rise to the contractual arrangements were held on its behalf by Mr Metzger, who was also based in New Zealand. To that extent therefore the contract was plainly entered into in New Zealand. I agree, however, that the defendants in this proceeding have no office in this country and that, other than the fact that their products are distributed here, they do not appear to have any real connection with New Zealand. To that extent therefore I accept MS Troup's submission that service of the proceeding without leave should not be a significant factor in the Court's assessment as to whether it should accept jurisdiction.

2. Does the plaintiff have a good arguable case?

[51] 51
In considering this issue I bear in mind the principle that if a defendant satisfies the Court that there is no good arguable case, the New Zealand proceeding should be dismissed regardless of other discretionary considerations: *Biddulph v Wyeth Australia Pty Limited* [1994] 3 NZLR 49 at p 57. Whether a plaintiff has a good arguable case is to be assessed at the time the application is heard and on the admissible evidence then adduced to the Court. What is required is a provisional or tentative conclusion on all the admissible material before the Court that the plaintiff is probably right: *Ellison Trading Limited v Liebherr Export - AG* (Unreported, High Court Hamilton, CP 76/99,20 December 2001, Master Faire at p 12).

[52] 52
The amended statement of claim seeks judgment against the defendant in the sum of $244,903.26 calculated as follows:

(1) The sum of $183,641.24 for faulty and defective appliances being:

(i)	Toasters	404 units @ $32.18	$13,000.72
(ii)	Deep Fryers	1005 units @ $92.86	$93,324.30
(iii)	Food Processors	68 units @ $80.59	$5,480.12
(iv)	Irons	846 units @ $52.95	$44,795.70
(v)	Kettles	233 units @ $30.38	$7,078.54
(vi)	Espresso Machines	94 units @ $185.89	$17,473.66
(vii)	Rice Cookers	60 units @ $41.47	$2,488.20

Plus -

(2) The sum of $73,456.50 being the profit margin on the goods referred to above.

Less -

(3) The sum of $12,194.47 paid for by the defendant for the following goods.

(i)	Toasters	104 units @ $32.18	$3,348.72
(ii)	Kettles	124 units @ $30.38	$3,827.88
(iii)	Rice Cookers	121 units @ $41.47	$5.017.87
			$12,194.47

Total $244,903.26

(a) Claim for indemnity

[53] 53
I turn now to consider the first aspect of the plaintiffs claim. This is an allegation that the defendants (or the first defendant at least) agreed to indemnify the plaintiff in relation to any loss which it might suffer as the result of the supply of faulty products.

[54] 54
In my view the evidence demonstrates that there was no standing arrangement or general agreement that the defendants would indemnify the plaintiff in respect of all faulty products. Ad hoc arrangements were entered into as and when problems arose. I am satisfied that such an arrangement was in place between 1998 and 1999 in respect of rice cookers, kettles and toasters. This remained an outstanding issue when the distribution arrangement was terminated in July 1999. It was at least partially resolved in September 1999 when compensation was paid for 121 toasters, 76 kettles and 104 rice cookers. I have already noted that the plaintiff made it clear at that time that it did not accept that this payment was made in full and final settlement of all claims in respect of faulty products. The amended statement of claim contains a further claim in respect of loss suffered as a result of the supply of faulty toasters and rice cookers. To that extent I am satisfied that the plaintiff does have a good arguable case in respect of the claim for indemnity, although the amount claimed in respect of these items is not large.

[55] 55
In reaching this conclusion I bear in mind MS Troup's submission that the plaintiffs present claim appears to be at odds with correspondence which it sent to Groupe SEB in July 1999. In that correspondence Mr Metzger advised Groupe SEB that up until the end of July 1999 it had given credit to its customers for 104 rice cookers, 126 kettles and 121 toasters. It agreed to accept compensation for those items and did not indicate that further claims were in the offing. I accept that the plaintiff will need to explain why further faulty products came to light after July 1999. I consider, however, that that is a matter which will need to be dealt with at trial. It should not be determinative at this stage of the proceeding. The fact remains that an arrangement was in place pursuant to which the plaintiff was to receive compensation for faulty toasters and rice cookers, and the plaintiff now alleges that it has not been compensated in full in respect of them. To the extent that the claim relates to allegedly faulty toasters and rice cookers I accept that the plaintiff has a good arguable case.

(b) Implied term as to merchantable quality

[56] 56
There is presently no evidence to suggest that any indemnity arrangement was in place in relation to the other items which are now the subject of the plaintiffs claim. The plaintiff must therefore establish its claim against the defendants in respect of those items on one or other of the alternative bases which are pleaded. Each of these involves an allegation that the contractual arrangement contained an implied term that the products which were to be supplied by the defendants would be of merchantable quality.

[57] 57
MS Troup for the defendants submits that no term as to merchantable quality can be implied into the contractual arrangement between the plaintiff and the defendant. She says that any such term would directly contradict the express term of the arrangement which required the plaintiff to be responsible for all warranty issues which were, raised by its customers. MS Troup submits that this express term effectively precluded any liability or obligation on the part of the defendants in relation to faulty products. She contends also that if such a term

did exist there would have been no need for the special arrangements to have been agreed upon between the parties in relation to individual products in respect of which faults had become endemic. This is because the plaintiff would have had a contractual right to seek relief from the defendants in relation to losses which it suffered as a result of being supplied with products which were not of merchantable quality.

[58] **58**
I do not accept this submission. It is clear that the plaintiff accepted that it was responsible for dealing with warranty claims which were raised by its customers. However, I do not consider that this fact is inconsistent with an implied term that the products which were to be supplied to the plaintiff were to be of merchantable quality. Indeed, the plaintiff may only have been prepared to accept sole responsibility for warranty issues on the basis that it could be assured that the products which it was to receive would be of merchantable quality. Moreover, the ad hoc arrangements which were reached in relation to faulty products demonstrate that Groupe SEB itself accepted that it needed to provide relief to the plaintiff when serious problems were encountered with the quality of its products. In my view this is entirely consistent with the proposition that both parties accepted that there was an implied term in the arrangement that the products which the plaintiff was to purchase were to be of merchantable quality.

[59] **59**
The insertion of an implied term as to merchantable quality could hardly be described as radical. Contracts for the supply of goods have for many years had such a term implied into them by statute in many jurisdictions. The desirability of such a term is also recognised internationally by the United Nations Convention which forms the basis for one of the plaintiffs claims in this proceeding.

[60] **60**
I have no doubt either that in the context of the present case the insertion of an implied term as to merchantable quality would also satisfy the traditional requirements of an implied term. The material which has been placed before the Court makes it clear that the issue of faulty appliances was a matter of real concern to the defendants. Had they been asked at the outset whether they would be responsible for supplying products of merchantable quality, I have no doubt that they would have categorically affirmed that they were. I therefore consider that the plaintiff has satisfied the Court that it is probably correct in asserting that a term as to merchantable quality was an implied term of its contractual arrangement with the defendants on either of the bases pleaded. I now turn to consider whether there is evidence to support the plaintiffs claim that it has suffered loss.

[61] **61**
There was a suggestion in the evidence of Mr de Veyrac that, as a general rule, Groupe SEB would provide assistance when ten per cent or more of individual products were found to be faulty. There is no evidence to show what proportion of total products purchased by the plaintiff the items which are the subject of the present claim represent. Nevertheless the number and value of those items are reasonably substantial. The claims which relate to faulty deep fryers (1,005 units having a value of $93,324.30) and irons (846 units having a value of

$44,795.70) appear to indicate that there was a serious and obvious problem with the quality of those particular items. I consider that it is at least arguable that the failure rate in respect of these particular items indicates that they were not of merchantable quality.

[62] **62**
For present purposes I am prepared to accept therefore that it is at least arguable both that there was an implied term as to merchantable quality in the contractual arrangement between the plaintiff and the defendants and that that term was breached. The plaintiff has therefore demonstrated that it has a good arguable case against one or more of the defendants. That being the case, I now turn to consider whether New Zealand is the appropriate forum for determining the plaintiffs claim.

3. Is New Zealand a convenient forum?

[63] **63**
In considering this issue the Court is entitled to take into account forum nonconveniens factors.

[64] **64**
I am mindful of the principles referred to by the Privy Council in *Kuwait Asia Bank ECV v National Mutual Life Nominees Limited* [1990] 3 NZLR 513 (at p 524) which is the leading authority in this area. In particular, I bear in mind the overriding principle that a foreigner will not lightly be subjected to the local jurisdiction.

[65] **65**
I have also considered the statements of principle referred to by Master Faire in *Ellison Trading Limited v Liebherr Export - AG* (supra at pp 11–14) and *Society of Lloyds v Oxford Member's Agenq Ltd v Hyslop* [1993] 3 NZLR 135 at 138.

[66] **66**
In terms of practical convenience the considerations are relatively finely balanced. Clearly a significant number of New Zealand witnesses will need to give evidence at the trial. Equally, however, the defendants will be required to call witnesses from overseas including no doubt Mr Grob, Mr Beguin, Mr Legal and Mr de Veyrac. They all reside either in Australia or in Europe, and will no doubt be inconvenienced by having to travel to New Zealand. They will, however, probably have to travel a significant distance regardless of where the trial is held.

[67] **67**
I consider, however, that most witnesses will be resident in New Zealand and that the Court will for the most part hear evidence about events which occurred in this country. I therefore consider that it is likely to be more convenient in practical terms to hold the trial in this country.

[68] **68**
More importantly, however, I bear in mind the important principle that a stay should only be granted on the ground of forum non conveniens where the Court is satisfied that there is some other available forum, having competent jurisdiction, which is the appropriate forum for the

trial of the action: *Ellison Trading Limited v Liebherr Export - AG v Liebherr Australia Pty Limited* (supra at p 14).

[69] **69**
In the present case the defendants contend that the plaintiffs claim should be determined in accordance with the arrangements which were set out in the various invoices which were sent to the plaintiff. These vary, and also have the additional handicap that they are generally in the French language, but three out of the four invoices provide for Courts in France to be the forum of any disputes which arise between the parties. These three invoices provide for the Courts of Dijon, Lyon and Annecy to be the courts of competent jurisdiction for disputes involving the products supplied by SA SEB, Calor SA and Tefal SA respectively. The defendants argue that it would be more appropriate for those Courts to deal with the issues which are raised in this proceeding.

[70] **70**
I do not accept this submission. If the evidence of Mr Metzger is accepted (and there seems to be no reason why it should not be accepted on this point), the plaintiff dealt exclusively with the first and second defendants in placing orders for the products which are the subject of this proceeding. The fact that the products were manufactured and delivered by individual product companies nominated by the first and second defendants does not detract from this fact. The trading relationship between the parties ran continuously for a number of years.

[71] **71**
In this regard I bear in mind also the fact that the plaintiff dealt with Mr de Veyrac and not with the individual product companies when the distribution arrangement was terminated in 1999. Mr de Veyrac dealt with the settlement of all outstanding issues, including the re-purchase of unsold new products and spare parts. He also agreed to provide compensation in respect of the toasters, rice cookers and kettles notwithstanding the fact that they had been manufactured by different product companies. I consider that this demonstrates that the plaintiff dealt with Groupe SEB as a single entity, and that there were in reality no separate distribution agreements between the plaintiff and the individual product companies.

[72] **72**
I consider that it is unrealistic to suggest that it is appropriate for the plaintiff to be required to issue separate sets of proceedings in a number of different Courts in France in order to bring what is effectively a single claim against a group of companies, all of which are the wholly owned subsidiaries of the first defendant. The claims should not be considered in isolation from each other and in different locations according to the identity and location of the individual manufacturers of the various products. They should be heard together and in one location.

[73] **73**
MS Troup places emphasis on the fact that three of the four invoices provide that any disputes between the parties are to be determined in accordance with French law. The fourth invoice makes no reference to this subject. Even if the invoices are accepted as having some relevance to the relationship between the parties, their significance in relation to this particular issue in

my view is severely diminished by the fact that it appears that at least some invoices do not require disputes to be determined according to French law. If the defendants adopt the stance that the contractual relationship is defined on an invoice to invoice basis, the potential for difficulty at trial is obvious.

[74] **74**
If French law was to govern each and every dispute between the parties I would have expected that fact to have been discussed by them and agreed upon at the commencement of the trading relationship. There is no evidence that this issue was ever discussed in 1997 when the relationship began. In those circumstances I am not persuaded that the parties did agree that French law should be applied in relation to their trading relationship. Even if it does, the extent to which (and the manner in which) it applies can still be determined in a proceeding brought in this country.

[75] **75**
Moreover, the authorities confirm that one of the most important matters to be taken into account is that the «natural forum» is that with which the claim has the most real and substantial connection. During the course of argument MS Troup accepted that this claim does have a real and substantial connection with New Zealand. I am satisfied that this concession was responsibly made. After all, the plaintiff negotiated the terms of the contractual arrangement from this country. It subsequently ordered products from catalogues which were sent to it in New Zealand. The goods were shipped to this country and distributed to retail customers here. The plaintiff dealt first-hand with those customers.

[76] **76**
At the heart of this proceeding is the plaintiffs allegation that some of the products which were supplied to it by the defendants were faulty. Those faults were discovered by the plaintiffs customers following the distribution of the products within this country. The plaintiff has been required to take back faulty products and reimburse its customers in respect of them. Any loss has therefore been suffered by it in this country.

[77] **77**
When I view the matter overall I am left in no doubt that much of the evidence at trial will deal with events that occurred in New Zealand. I am therefore satisfied that New Zealand is clearly and distinctly the most appropriate forum for the determination of the plaintiffs claims. I am equally satisfied that there is no other convenient forum in which those claims can be determined.

Conclusion

[78] **78**
For the reasons set out above I am of the view that the plaintiff has made out a good arguable case and that the most appropriate forum for the determination of its claims is this Court. The applications must be granted and the appearances under protest to jurisdiction set aside. This proceeding should now proceed to trial in the usual way.

Orders

[79] **79**
The notices of appearance under protest to jurisdiction are set aside.

Costs

[80] **80**
The plaintiff is entitled to costs on a category 2B basis. These are to include appearances on 8 November 2002 and 27 March 2003. The plaintiff is also entitled to any disbursements which it has incurred in relation to the present application.

Next event

[81] **81**
A telephone conference will be held on 17 April 2003 at 9.15 am to discuss with counsel the next steps to be taken to advance the proceeding to trial.