TE'O (TITO SIMO'O) v KAMU (LEVAULA SAMUELU) AND RETZLAFF (H T)

Supreme Court Apia
Sapolu, CJ
20 July, 26 July 1993

THIRD PARTY PROCEDURE - Rules 43 (1)(c) and 44 of the Supreme Court (Civil Procedure Rules) 1980 - S8(1)(c) Law Reform Act 1964.

Third party unsuccessful in moving to have the Defendant refused leave to issue third party notice.

CASES CITED:

- The Kounsk [1924] P.140
- Jones v Manchester Corporation [1952] 2 Q.B. 852
- Ryan v Fildes [1938] 3 All E.R. 517
- Wah Tat Bank Ltd v Chan Cheng Kam [1975] A.C. 507
- Morton v Douglas Home Ltd [1984] 2 N.Z.L.R. 548

P A Fepulea'i for Plaintiff
K M Sapolu for Defendant
T Malifa for Third Party

Cur adv vult

The Court is really concerned here with a motion by the intending third party (hereinafter called "the third party") to refuse leave being granted to the Defendant to issue a third party notice to join the third party to proceedings between the Plaintiff and the Defendant. The two grounds advanced in support of the motion by the third party are that there is no cause of action between the Defendant and the third party, and that on the basis of the affidavits filed by the Defendant and the third party, there is no room for contribution or an indemnity.

For the purposes of this judgment, the relevant facts to be gathered from the documents filed in Court appear as follows. The defendant was employed as a salaried solicitor by the third party in his law office. The Defendant although he left the law office of the third party on 14th July 1987 did not cease to be in the employment of the third party until 20 July 1987 when he resigned from the third party's law office. The Defendant then subsequently set up a law office with his wife who is also a solicitor.

Now the Plaintiff has a sister who is employed at a private dental clinic. In the first half of 1987, the employer of the Plaintiff's sister contacted the third party's law office for a lawyer to enable the Plaintiff's claim which appears to have been for personal injuries arising out of a road accident. A letter dated 2 April 1987, as it appears from the affidavit of one of the third party's former employees, was sent to the employer of the Plaintiff's sister by the Defendant's wife who was also a salaried solicitor employed by the third party. In that letter more details about the claim were requested. It appears from the affidavit of the Plaintiff's sister that after the contact made by her employer with the third party's office, the Plaintiff's mother visited the third party's law office and talked with the Defendant's wife. On 22 April 1987, the Plaintiff's sister then paid a deposit of $125 for the Plaintiff's claim and a receipt for that deposit payment was issued under the name of the third party's solicitor trust account.

In one of the Defendant's affidavits, he says that it was not until May or June 1987 that the Plaintiff's sister saw him about the Plaintiff's claim. At that time he was not aware that another member of the Plaintiff's family had already seen his (the Defendant's) wife about the Plaintiff's claim. The Defendant then says that he advised the Plaintiff's sister about the details that were required before he could proceed with the claim. He also advised the Plaintiff's sister that he wanted to talk to the Plaintiff personally. The Plaintiff's sister makes no reference in her affidavit to a meeting with the Defendant in May or June 1987.

The Defendant then says that when he left the employment of the third party on 14 July 1987 and resigned on 20 July 1987 he had still not seen the Plaintiff's sister again but the file on the Plaintiff's claim was left with the third party. On 21 July 1987, the Defendant received a letter from the third party advising the Defendant that all files from the third party's law office were the property of the third party and were not to be removed. That letter further says, that a letter was required before a client could remove a file from the third party's law office. The Defendant further says that the Plaintiff's sister came to see him again in September 1987 when he had set up his own practice with his wife, and he told her to see the office of the third party as the Plaintiff's file was still with that office. The Plaintiff's sister makes no reference in her affidavit to a meeting with the Defendant in September 1987. The Defendant then says he sent an authority to the third party's office to uplift the Plaintiff's file. Affidavits from two former employees of the third party are to the effect that they did not receive such authority from the Defendant. It then appears from what the Defendant says that he did not see the Plaintiff again until June 1988 by which time any action on the Plaintiff's claim was time barred. So followed the present

action in professional negligence by the Plaintiff against the Defendant and the consequential motion by the Defendant for joinder of the third party.

In her affidavit, the Plaintiff's sister says that the deposit payment of $125 was made in April 1987. Then sometime in 1988 she went to the third party's law office to see the Defendant's wife as her employer had told her to see the Defendant's wife and the Plaintiff's mother had also told her that it was the Defendant's wife she talked to when she went to the third party's law office. However, when she came to the third party's law office, she was told that the Defendant's wife had already moved out of that law office. Sometime later in 1988 she went to the Defendant and his wife's new law office and saw the Defendant's wife who advised her that the Plaintiff's claim had been transferred to the Defendant. Then followed visits by the Plaintiff's sister to see the Defendant at the Defendant's office. It is not clear whether the visits made by the Plaintiff's sister to see the Defendant were made before or after any action on the Plaintiff's claim was time barred as it appears from the statement of claim any such action was time barred in January 1988.

In his affidavit, the third party says that during the period from February 1986 and July 1987 the Defendant and his wife looked after the private practice as at that time he was holding the Office of Attorney-General. The Defendant and his wife would only discuss matters with him when they considered it necessary.

I come now to the motion for the issue of a third party notice which has been filed under Rule 43 of the Supreme Court (Civil Procedure Rules) 1980. In that motion the Defendant claims firstly, contribution from the third party for the whole or part of any amount which may be awarded against the Defendant in the action by the Plaintiff; secondly, indemnity by the third party in respect of the amount that may be awarded against the Defendant in the action by the Plaintiff; and thirdly, that the question or issue whether the third party is obliged to contribute to or indemnify the Defendant against any award in the action by the Plaintiff should properly be determined as between the Plaintiff, the Defendant and the third party.

Dealing first with the first part of the motion for a third party notice which relates to the question of contribution, it is clear from the affidavit facts as above stated that when the defendant was first instructed about the Plaintiff's claim for personal injuries in May or June 1987, he was employed by the third party as a salaried solicitor in the third party's law office. I do not think that the fact that the third party was Attorney-General at the time and the Defendant and his wife looked after the third party's law office and discussed matters with the third party when they considered it necessary will alter the fact that the

Defendant was an employee of the third party until he left the third party's employment on 14 July 1987 and resigned on 20 July 1987. It is also clear that when the Plaintiff's sister first saw the Defendant in May or June 1987 about the Plaintiff's claim, that occurred within the course of the Defendant's employment with the third party.

The claim by the Plaintiff alleges professional negligence against the Defendant. The particulars of negligence allege, inter alia, that the Defendant was instructed on behalf of the Plaintiff about the end of July 1987. However, the Defendant says he was instructed in May or June 1987 and that he left the third party's law office on 14 July 1987 and resigned on 20 July 1987. Be that as it may, I am satisfied that when the Defendant was first instructed about the Plaintiff's claim, the Defendant was still an employee of the third party, and the Defendant was instructed within the course of his employment with the third party. So the Plaintiff's claim relates in part, to the time when the Defendant was an employee of the third party. I have formed this view on the basis of the Defendant's affidavit. If the Court were to go by the affidavit of the Plaintiff's sister, then it appears that she only instructed the Defendant about the Plaintiff's claim sometime in 1988 and that could well have been after January 1988 when the Plaintiff's action was already time barred so that no negligence in this case could have been alleged against the Defendant.

Having formed this view of the affidavit facts, it appears to me that if negligence is established against the Defendant during the period of his employment with the third party, then the third party being the employer of the Defendant, will be vicariously liable for that negligence of the Defendant. That being so, in the eyes of the law, the employer is also a tortfeasor as well as the employee, and they are called joint tortfeasors: see for instance The Kounsk [1924] P.140 especially the judgment of Scrutton L.J. and Jones v Manchester Corporation [1952] 2QB 852 especially the judgment of Denning L.J. Being joint tortfeasors, the defendant in this case may bring an action against the third party for contribution under section 8(1)(c) of the Law Reform Act 1964. That provision insofar as it is relevant, states:

> "Where any damage is suffered by any person as a result of a tort any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is, or would if sued in time have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise....."

Section 8(3) of the Act insofar as it is relevant then provides:

"In any proceedings for contribution under this section the amount of the contribution recoverable from any person shall be such as may be found by the Court to be just and equitable having regard to the extent of that person's responsibility for the damage; and the Court shall have power ..... to direct that the contribution to be recovered from any person shall amount to a complete indemnity."

For some English authorities on the corresponding English provisions under the Law Reform (Married Women and Tortfeasors) Act 1935 see Jones v Manchester Corporation (supra) and Ryan v Fildes [1938] 3 All ER 517. See also Wah Tat Bank Ltd v Chan Cheng Kam [1975] Ac 507.

If in this case, the Plaintiff's action in negligence succeeds in respect of any negligent act committed by the Defendant as an employee in the course of his employment with the third party, it is open to the Defendant to bring a subsequent action for contribution against the third party. That will be a multiplicity of proceedings but that is what the third party procedures are designed to prevent so that all related issues between the parties are decided in one action.

Now turning to the events that occurred after the Defendant left the employment of the third party, the file on the Plaintiff's claim was retained in the law office of the third party 'as property of the third party' and that file could only be uplifted by an appropriate letter of authority. The third party was most likely to have had no actual knowledge of the Plaintiff's file and nowhere in the affidavit filed by the third party does he say that he had such knowledge. However, without deciding the question of negligence on te whole of the evidence, it may arguably be said that the third party's actions contributed to the fact that when the time limit for filing the Plaintiff's action expired, no action had been filed. This question will finally be decided at the substantive hearing. For the purposes of this judgment, however, I am of the view that it is open to the Defendant to allege that the third party by his actions contributed to the fact that the Plaintiff's action was not filed in time. That being so the only question that may arise is whether the third party is a potential joint tortfeasor or a potential concurrent tortfeasor. I have given much consideration to this question, but I have come to the view that it is immaterial for these proceedings whether the third party is a potential joint tortfeasor or a potential concurrent tortfeasor in relation to the events which occurred after the Defendant left the third party's employment.

If I may quote section 8(1)(c) of the Law Reform Act 1964 again it provides:

> "Where any damage is suffered by any person as a result of a tort ..... any tortfeasor liable in respect of that damage may recover contribution from any other tortfeasor who is ..... liable in respect of the same damage, whether as a joint tortfeasor or otherwise....."

I think the words "as a joint tortfeasor or otherwise" clearly show that the provision is not to be restricted in its application to cases of strict joint tortfeasors alone. And in my view the provision covers this case. After forming this view of section 8(1)(c) of our Act, I find that in Morton v Douglas Home Ltd [1984] 2NZLR 548 at 613 Hardie Boys J in the High Court of New Zealand came to a similar view on the interpretation of section 17 of the New Zealand Law Reform Act 1936 which is very similar if not identical to section 8 of our own Act.

So it is also open to the Defendant, if the Plaintiff's claim against him succeeds, to bring an action for contribution against the third party for what happened between the time he left the third party's employment and when the Plaintiff's action was time barred. But as I have said, this will be a multiplicity of proceedings which is what the third party procedures are designed to prevent so that all the related issues between the parties are decided in one action

Turning now to the second part of the motion for a third party notice which relates to the question of indemnity, it appears that this part of the claim relates to two matters. Firstly, the Defendant is claiming full indemnity against the third party for any award of damages that the Court may make against the Defendant in the Plaintiffs action. Now, section 8(3) of the Law Reform Act 1964 gives the Court power to make an order that contribution to be recovered from any person shall amount to a complete indemnity. Whether the Court will do so or not depends on the circumstances of each case. What is important for our present purposes is that, it is open to a tortfeasor from the wording of section 8(3) of the Act, to claim full contribution which amounts to an indemnity, from another person against whom contribution may be claimed under the Act. That being so, it will avoid a multiplicity of proceedings if the Defendant's claim for indemnity against the third party is dealt with together with other related issues in one action.

The second matter in relation to the Defendant's claim for indemnity has given the Court some difficulty. This is the question whether in the contract of service between the Defendant and third party, there was an implied term that the third party will indemnify the Defendant against any successful claim brought against the Defendant by a client of the third party in tort or

contract. After much research, I have not been able to come across any authority on the point. However, this point appears to me to be related to the third part of the motion for a third party notice. They are therefore dealt with together.

Under Rule 43(1)(c) of the Supreme Court (Civil Procedure Rules) 1980 where the motion for a third party notice has been brought, it is provided:

> "Where a defendant claims against any person not already a party to the action ..... that any question or issue in the action should properly be determined .... as between the Plaintiff, the Defendant, and the third party, or as between any or either of them, the Defendant may move the Court on notice for leave to issue and serve a third party notice ....."

The question now raised by the Defendant about an implied term in his contract of service with the third party wherein the third party is obliged to indemnify the Defendant if the action by the Plaintiff against the Defendant succeeds, is clearly a question between the Defendant and the third party. And I think if the question is valid, then it is relevant and should properly be decided in the present proceedings. As I have said, I have not been able to find any authority on the question raised and counsel did not refer to any authority. In such circumstances, and bearing in mind the wording in Rule 43(1)(c), I am of the view that the proper thing to do is to allow the question to be tested and fully argued in the present proceedings. To leave it for any separate proceedings to be brought by the Defendant against the third party will only result in a multiplicity of proceedings, the very thing that the third party procedures are designed to prevent.

For all these reasons, leave is granted to the Defendant to issue and serve the third party notice. The third party is granted 10 days under Rule 44 from the date of service to file a statement of defence. This matter is adjourned to 9 August 1993 for re-mention. The question of costs is reserved.