[2015] JMSC Civ. 225

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2011HCV00361

BETWEEN	**DONOVAN MINOTT**	**CLAIMANT**
AND	**NORVEL DERVIN NEVINS**	**1ST DEFENDANT/ 1ST ANCILLARY CLAIMANT**
AND	**CHENLEY NEVINS**	**2ND DEFENDANT/ 2ND ANCILLARY CLAIMANT**
AND	**OSWALD REID**	**ANCILLARY DEFENDANT**

Mrs. Nicosie Dummett for Applicant/ Ancillary Defendant

Ms. Sheryl Richards instructed by Murray & Tucker for Respondent/1st and 2nd Defendants/Ancillary Claimants

Civil Procedure - Application to Strike out Ancillary Claim - Whether Ancillary Claim Statute Barred - CPR Rule 18 - Whether Ancillary claim filed in keeping with the Relevant Rules - Summary Judgment - CPR Rule15 -Test to be applied

Heard on the May 21, 2015 and November 18, 2015

In Chambers

Bertram-Linton, J. (Ag.)

BACKGROUND

[1] The claimant says that on the 28th September, 2005, the first defendant who was the agent of the second defendant was at fault for the collision, which occurred along the Orange Valley main road in St. Ann. The claim which was filed on the 27th January, 2011 and was acknowledged as served on the 15th February, 2011. With the consent of the claimants a joint defence was filed out of time on the 18th October, 2011.That defence blamed the accident on a third party, but it was not until January16, 2013 that

an Ancillary Claim form and Particulars of Claim was filed naming the ancillary defendant as the cause of the accident.

[2] This application is by that ancillary defendant who seeks the following orders:-

1. Summary Judgment against the Ancillary Claimants.
2. That the Ancillary Claim Be struck out
3. Costs to the Ancillary defendant to be agreed or taxed
4. Such further and/or other relief as this Honourable Court deems just grant.(sic)

The court is grateful for and has had the benefit of both sets of submissions filed by the parties.

[3] The main contention by the applicant is that the ancillary claim is both statute barred and that it was filed, without the ancillary claimant having obtained the permission of the court. The accident took place in 2005 and the ancillary claim was not filed at the same time that the defence was filed. Ms.Dummett contends that the ancillary claim is grounded in tort of negligence and as such relies on the judgment of Harrison, JA in ***Medical and Immunniodiagnostic Laboratory Limited v Dorett O'Meally Johnson Civil Appeal No.154/2009 delivered December 3, 2010,*** at paragraph 7 where Harrison JA says:

> "*In the tort of negligence the cause of action arises when the damage is suffered and not when the act or omission complained of occurs. It is alleged that the claimant in this matter suffered damaged on 3 June 2005, when a chair on which she was sitting in the appellant's place of business suddenly collapsed. The cause of action in tort would therefore expire on 3 June 2011."*

The CPR Rule 18.5 allows;

> "(*1) A defendant may make an ancillary claim without the court's permission if-*
>
> *(a) In the case of a counterclaim, it is filed with the defence; or*

(b) In any other case, the ancillary claim form is filed before or at the same time the defence is filed.

(This rule does not apply to an ancillary claim under 18.4)

(2) Where either-

(a) Rule 18.3; or

(b) paragraph (1) does not apply, an ancillary claim may be made only if the court gives permission.

18.4 "(*1) Where the defendant says that someone else is liable on the counterclaim as well as the claimant, the defendant may add that other person as a defendant to the counterclaim*."

"18.3 (1) A defendant who has filed an acknowledgment of service or defence may make an ancillary claim for contribution or indemnity against another defendant by-

(a) filing a notice in form 10 containing a statement of the nature and grounds of the claim; and

(b) serving the notice on the other defendants

(2)Rule 18.5 ***does not (****emphasis mine****)* *apply to an ancillary claim under this rule.*

CPR Rule 15.2 provides:

"The *court may give summary judgment on the claim or on a particular issue if it considers that-*

(a) the claimant has no real prospect of succeeding on the claim or issue; or

(b) the defendant has no real prospect of successfully defending the claim or issue.

[4] In the case at bar the defendants allege that the ancillary defendant hit the rear of the 2nd defendant's car, causing it to collide with the claimant's car.

The ancillary claim requests;

"*1. Contribution and indemnity against any successful judgment obtained by the claimant against the Ancillary claimants; and*

2. Costs;

3. Such further and other relief as this Honourable court deems just."

[5] Ms. Richards argues that the ancillary claim is neither out of time or statute barred and she relies on Section 3(1) (c) and 3 (2) of the Law Reform (Tort-feasors) Act, which provides;

> "3 (1) *Where damage is suffered by any person as a result of tort…*
>
> *(c) any tort feasor liable in respect of such damage may recover contribution from any other tort –feasor who is, or would if sued have been, liable in respect of the same damage, (whether as joint tort-feasor or otherwise) so, however, that no person shall be entitled to recover contribution under this section from any person entitled to be indemnified by him in respect of the liability in respect of which contribution is sought."*
>
> *(2) 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."*

[6] Issues

1. Was the court's permission needed to file the Ancillary claim?
2. Is the Ancillary claim filed out of time and as such statute barred?
3. Should summary judgment be granted to the ancillary defendant?

Discussion and Analysis

Was Permission Needed?

[7] The CPR is very clear as to when no permission is needed to file an ancillary claim. It specifically exempts the situation where a defendant (under Rule 18.3) is claiming contribution or indemnity from a co-defendant; and the situation where a defendant is being added as a defendant to a counterclaim (under Rule 18.4).

[8] It is my finding then that the ancillary claim filed in this matter which seeks to add Oswald Reid and to claim contribution and or indemnity from him, is subject to Rule 18.5 (2), and can only be made if the court gives permission.

Is the Ancillary claim statute barred?

[9] The Defendants in this case are seeking to attribute liability to the ancillary defendant as the person who should indemnify them, or contribute to liability in the event of a judgment against them in the action by the claimant. In this regard Ms. Richards cites the case of **Mervis Taylor v Lowe, Constable Paul O'gilvie and the Attorney General Suit CL 1995/T188 delivered May 9, 2006.**

[10] In this case the court looked at the effect of the provision in the Law Reform (Tort-feasors) Act and the effect of the sections on which Ms. Richards is relying. The situation there involved a collision; the claimant sued the defendant as his motor vehicle was hit by the vehicle being driven by Mr. Lowe; who in turn denied liability and joined the constable and the Attorney general as third parties to the claim and as the cause of the accident. At the time the suit was filed, The Public Authorities Protection Act stipulated a one year limitation period for suits against the crown. The Attorney General argued that the claim was statute barred as it was filed after the requisite period. Sykes, J in his judgment examined the provision and the circumstances of the amendment and case law and observed at paragraph 18 that;

"The statute was passed to create a right for the defendant (not to give the claimant an additional person to sue) since the claimant could have done that in any event before the statute"

[11] He goes on to cite Lord's Keith's reasoning in **George Wimpey& Co Ltd v B.O.A.C [1955] AC 169 at 196, where he said;**

" It is to be observed further that the construction of the statute contended for by the respondents would put it in the power of the injured party, whether by accident or design, to determine in many cases whether contribution could be got or not."

In fact this could be said of the claimant/applicant in this case; who would want the court to see the limitation for the third party as applicable from the date of the cause of action. I agree with Sykes, J (at paragraph 21) that this is unacceptable position and that;

"…*third party actions are suis generis in that they arise by virtue of statute and not common law; the liability of the third party does not arise unless the defendant is found liable; the date of judgment against the defendant is the date on which the defendant's claim for contribution from third parties arises, and that is the date from which the limitation period begins to run in favour of third parties. The limitation period for the purpose of third party actions does not run from the date on which the claimant's cause of action arose."*

[12] I find then that in this case, time has not yet begun to run for the purposes of the ancillary claim because the 1st and 2nd defendants have not yet been held liable. The Ancillary claim therefore is not statute barred.

- [13] It would seem to me also that the fact of having to seek permission (based on the CPR) to institute it, cannot extinguish the right to bring it, which arises under the statute. Further an examination of Rule 18.9 would seem to suggest that the Rules by requiring permission in those circumstances, seem to setting up

what seems to be control mechanisms in order to weed out irrelevant and unconnected ancillary claims, and in furtherance of the overriding objectives of saving expense, dealing with case justly, and ensuring that cases are dealt with expeditiously and fairly. This is clearly demonstrated by the Rules when it invites the court to adhere to certain criteria when deciding on an application to bring an ancillary claim and where permission has been sought.

Rule18.9 says

"(1) This rule applies when the court is considering whether to-

(a) permit an ancillary claim to be made;

(b) dismiss an ancillary claim; or

(c) require the ancillary claim to be dealt with separately from the claim.

(Rules26.1 (f) and (i) deal with the court's power to decide the order in which issues are to be tried or to order that part of the proceedings to be dealt with separately)

(2) The court must have regard to all the circumstances of the case including-

(a) the connection between the ancillary claim and the claim;

(b) whether the ancillary claimant is seeking substantially the same remedy which some other party is claiming from the ancillary claimant ;

(c) whether the facts in the ancillary claim are substantially the same, or closely connected with, the facts in the claim; and

(d) whether the ancillary claimant wants the court to decide any question connected with the subject matter of the proceedings-

(i) not only between the existing parties but also between existing parties and the proposed ancillary defendant ;or

(ii) to which the proposed ancillary defendant is already a party but also in some further capacity.

Should summary judgment be granted?

[14] The Ancillary defendant says that the ancillary claim should be struck out and summary judgment should be granted to the ancillary defendant against the ancillary claimants. The starting point for the test for granting summary judgment here is CPR Rule 15.2 that requires that the court must have regard to whether in the circumstances of the issues before me I feel that the ancillary claimants have no real prospect of succeeding on the claim for indemnity or contribution from the ancillary defendant.

[15] This was discussed in **Swain v Hillman [2001] 1 ALL ER, 91** where it was said that the word 'real' was in contra –distinction to a fanciful prospect of success. In my view, having reviewed the law and the statements of case and affidavits, the ancillary claimants do have a real prospect of success on the claim for indemnity and contribution. The Ancillary defendant in its defence has admitted running into the rear of the ancillary claimant's vehicle, albeit denying liability. The issues are ones which should be properly investigated at trial. Summary judgment is really designed for cases that do not merit a trial at all. (Per Lord Woolf, MR in Swain v Hillman

[16] In the context of my previous finding that the ancillary claim is not statute barred but that the ancillary claim was of a genre which needed permission to be filed; I am attracted by the urging of Ms. Richards that the court has the power under Rule 26 to correct errors and missteps, where the justice of the situation requires and also by virtue of the overriding objective to save time and expense and to deal with cases justly. Nothing would be gained by requiring the ancillary claimant to go back in time to seek permission for an ancillary claim which already on examination meets every criterion laid down in Rule 18.9.

On the issue of costs

[17] The ancillary claimants did not follow the proper procedure as laid down by the rules as they should have sought the requisite approval before filing. The ancillary defendant in its application sought determination on the single issue of the Limitation

period for filing the ancillary. It was during argument that the issue of permission was raised. As such I do not feel that any party should benefit in costs. Rule 26(2) (t).

[18] I therefore find in keeping with the overriding objective and the circumstances of the case that the ancillary claim is properly before the court and order as follows:-

1. The application by the ancillary defendant to strike out the ancillary claim and for summary judgment against the ancillary claimant is refused.
2. Each Party is to bear their own costs in respect of this application.