(tho94003)

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. SC 69/93
9309094

BETWEEN:

THE NOMINAL INSURER
Plaintiff

AND:

G.F. MORANDINI EARTHWORKS PTY LTD
Defendant

CORAM: THOMAS J

REASONS FOR JUDGMENT

(Delivered 4 February 1994)

This is an application for Summary Judgment by summons dated 28 October 1993 seeking the following orders:

"1. That there be Summary Judgment for the Defendant to this proceeding against the Plaintiff.

2. In the alternative the Statement of Claim be struck out as failing to disclose a cause of action.

3. That the plaintiff pay the Defendant's costs of and incidental to this Summons, on the indemnity basis and certified fit for Counsel.

4. That the Plaintiff pay the Defendant's costs of and incidental to the proceeding, on the indemnity basis.

5. Such further or other order or orders as this Honourable Court deems meet."

The application is pursuant to rules 23.02 and 23.03 of the *Supreme Court Rules*. Rule 23.03 states:

" On application by a defendant who has filed an appearance, the Court at any time may give judgment for the defendant against the plaintiff if the defendant has a good defence on the merits."

Rule 23.02 states:

" Where an endorsement of claim on a writ or originating motion or a pleading or a part of an endorsement of claim or pleading -

(a) does not disclose a cause of action or defence;

(b) is scandalous, frivolous or vexatious;

(c) may prejudice, embarrass or delay the fair trial of the proceeding; or

(d) is otherwise an abuse of the process of the Court,

the Court may order that the whole or part of the endorsement or pleading be struck out or amended."

The defendant relies upon the affidavit of John Michael Neill sworn on 14 October 1993 and annexures thereto and affidavit of Catherine Esther Maree Eagle sworn on 28 October 1993.

The history of the matter is as follows:

On 19 August 1976 a Mr J.B. Robinson was injured in the course of his employment with G.F. Morandini Contracting Pty Ltd.

On 1 July 1979 Mr Robinson became employed by G.F. Morandini Earthworks Pty Ltd, a quite separate company.

In 1983 the company, G.F. Morandini Contracting Pty Ltd, was wound up.

In March 1988, the Nominal Insurer alleged Mr Robinson suffered a further injury in his employment with G.F. Morandini Earthworks Pty Ltd.

On 30 March 1988, Mr Robinson ceased employment with G.F. Morandini Earthworks Pty Ltd.

On 21 December 1990 the Worker's Compensation Court made an award in favour of Mr Robinson. The award was made on the basis that Mr Robinson was totally and permanently incapacitated for work within the labour market in which he formerly worked. This was as a result of the accident on 19 August 1976 in the course of his employment with G.E. Morandini Contracting Pty Ltd. The award was made against the Nominal Insurer on the basis that G.F. Morandini Contracting Pty Ltd, the employer, had been wound up. Section 9B of the *Workmen's Compensation Act* 1981 provided that the Nominal Insurer could be sued in place of the employer company which had been wound up. Mr Robinson, having obtained his award against the Nominal Insurer covering G.F. Morandini Contracting Pty Ltd, was paid by the Nominal Insurer.

On 13 May 1993 the Nominal Insurer commenced proceedings against G.F. Morandini Earthworks Pty Ltd seeking, amongst other things, contribution to the award on the basis that injury in the time of employment with G.F. Morandini Earthworks Pty Ltd contributed to the incapacity.

On 28 October 1993 G.F. Morandini Earthworks Pty Ltd applied for summary judgment.

In the Statement of Claim dated 13 May 1993 the plaintiff claims as follows:

> "(a) The injuries sustained by Robinson during his employment with the defendant caused Robinson to become totally and permanently incapacitated for work within the labour market in which he worked.
>
> (b) In the alternative, the injuries sustained by Robinson during his employment with the defendant contributed to Robinson becoming totally and permanently incapacitated for work in this labour in which he worked.
>
> (c) By reason of the matters set out in paragraphs 8, 9 and 10 hereof, it is contrary to principles of equity and good conscience that the plaintiff should be required to pay and discharge the judgement in favour of Robinson without some contribution being made by the defendant towards the satisfaction of that judgement.

AND the plaintiff claims:

(a) A declaration that Robinson was totally and permanently incapacitated for work as a result of:

(i) the combination of the injuries sustained by Robinson whilst employed by the defendant and Morandini Contracting Pty Ltd; and

(ii) the injuries sustained by Robinson whilst employed by the defendant.

(b) A declaration that the plaintiff is entitled to a contribution from the defendant, or alternatively an indemnity from the defendant, in respect of the judgement awarded to Robinson.

(c) A declaration that the defendant is obliged to contribute to the plaintiff such amount as is just and equitable in the circumstances.

(d) Such other orders as the Honourable Court considers fit.

(e) Costs."

Counsel for the defendant argues that on the face of the Statement of Claim it is fatally flawed. This is because the plaintiff relies upon the award of the Workers Compensation Court to establish its liability. It acknowledges that the award relates to injuries sustained by Mr Robinson whilst he was an employee of G.F. Morandini Contracting Pty Ltd in August 1976. The liability the Nominal Insurer has is a statutory liability pursuant to s9B of the *Workmen's Compensation Act* 1981 to indemnify an uninsured employer in respect of the award against that employer.

Counsel for the defendant argues there is no basis in law or equity for G.F. Morandini Earthworks Pty Ltd to be liable to contribute to the award.

Counsel for the defendant refers to the decision of Mr Gray SM (as he then was) dated 21 December 1990 in the matter of *James Barrington Robinson and The Nominal Insurer*, in which His Worship excluded anything other than the 1976 injury as being the cause of the incapacity which led to the award for which the Nominal

Insurer was responsible. This finding was ultimately confirmed by the Court of Appeal. Included in the reasons for judgment by the three judges of the Court of Appeal was the following statement by Mildren J (paragraph 1 on page 97 of annexure "D" to the affidavit of John Neill dated 14 October 1993):

> " However, the magistrate found as a fact that: 'The appellant's pain, discomfort and disability were all a result of the injury suffered in the 1976 accident'. That: 'The appellant's disability arising from the injury to his back which in turn caused the pain and disability in his legs is all a result of the 1976 accident and not some separate and more recent novus actus'. And that: 'The injury which produced Mr Robinson's incapacity was that sustained by him on 19 August 1976'.
>
> ..... No appeal lies to the Supreme Court on a finding of fact from the Worker's Compensation Court. Clearly the above findings as to causation were findings of fact."

It is well established that if an injury produces total incapacity the worker is entitled to receive compensation notwithstanding that he later suffered a further injury which in itself would result in total incapacity (*Ward v Corrimal Balgownie Collieries Limited* 61 CLR 120 at 131. *Harwood v Wyken Colliery Company* (1913) 2 KB 158).

Counsel for the defendant argues that a court has already ruled that the second accident in 1988 did not contribute to the worker's incapacity.

Accordingly, the defendant states that it cannot be inequitable, or against good conscience, for the Nominal Insurer to have to pay what it has been held solely liable to pay by the court.

> " The element which both attracts the jurisdiction of a court of equity and shapes the remedy to be given is unconscionable conduct on the part of the person bound by the equity, and the remedy required to satisfy an equity varies according to the circumstances of the case." (*Walton Stores (Interstate) Limited v Maher & Anor* 164 CLR 387 Brennan J at 419.)

The defendant seeks summary judgment on the basis that the claim cannot stand. The plaintiff has no cause of action, a court has already specifically excluded the accident in 1988 as contributing to the incapacity.

I agree with the submission of counsel for the plaintiff that "It is a requirement of both *res judicata* and issue estoppel that there be identity of parties." (Cross on Evidence 3rd Australian Edition page 124, 3.9).

I also agree with the submission of counsel for the plaintiff that the test I apply is as follows (Williams Civil Procedure paragraph 23.03.5):

> " .... With respect to disputed facts the court was bound to assume that the plaintiff would be able to establish at trial the case put forward by him, unless there was something in the evidence to show that that was impossible: *Bayne v Baillieu, supra*, at 399. Where the facts were in dispute or where it was clear that all the evidence was not before the court because all the facts were not available, the proper course was to take the facts before the court most favourable to the plaintiff and decide on those facts whether the action was hopeless: ...."

It is alleged in paragraph 9 of the Statement of Claim:

> "During the time Robinson was employed by the defendant, Robinson sustained injuries in the course of his employment."

It is further alleged in paragraph 11 of the Statement of Claim:

> "Between 21 March 1988 and 30 March 1988, Robinson carried out duties in the course of his employment with the defendant and in doing so sustained further injury."

These matters are taken to be admitted for the purpose of this application.

I adopt the statement of principle expressed in *Dey v Victorian Railways Commissioners* 78 CLR 62, Dixon J at 91:

> " ..... A case must be very clear indeed to justify the summary intervention of the court to prevent a plaintiff submitting his case for determination in the appointed manner by the court with or without a jury. The fact that a transaction is intricate may not disentitle the court to examine a cause of action alleged to grow out of it for the purpose of seeing whether the proceeding amounts to an abuse of process or is vexatious. But once it appears that there is a real question to be determined whether of fact or law and that the rights of the parties depend upon it, then it is not competent for the court to dismiss the action as frivolous and vexatious and an abuse of process."

and apply the test as set out in *General Steel Industries Inc v Commissioner for Railways (N.S.W.)* 112 CLR 125 Barwick CJ at 130:

> " ..... great care must be exercised to ensure that under the guise of achieving expeditious finality a plaintiff is not improperly deprived of his opportunity for the trial of his case by the appointed tribunal. On the other hand, I do not think that the exercise of the jurisdiction should be reserved for those cases where argument is unnecessary to evoke the futility of the plaintiff's claim. Argument, perhaps even of an extensive kind, may be necessary to demonstrate that the case of the plaintiff is so clearly untenable that it cannot possibly succeed."

The decision of Mr Gray SM on 21 December 1990, followed a hearing between James Barrington Robinson (the worker) against the Nominal Insurer in the Workers Compensation Court. His Worship found that as at the date of his accident on 19 August 1976, Mr Robinson was employed by G.F. Morandini Contracting Pty Ltd. This company was later wound up and accordingly the claim by Mr Robinson was brought against the Nominal Insurer.

The defendant in these proceedings before the Supreme Court, G.F. Morandini Earthworks Pty Ltd, was never a party to the proceedings brought in the Workers Compensation Court.

The payment by the Nominal Insurer has discharged the liability of both the plaintiff and the defendant in these proceedings toward Mr Robinson.

The *Workmen's Compensation Act* 1981 is legislation designed to enable a worker to easily identify a responsible party to enable him to recover for a compensable injury without having this purpose clouded and delayed by argument as to contribution. This right of recovery by the worker does not "necessarily exclude a right of recovery by him from another employer or be decisive of the right and liabilities of employers inter se" (*Floreani Bros. Pty. Ltd. v Woolscourers (S.A.) Pty. Ltd.* 13 SASR 313 Bray CJ at 319: See also *Floreani Bros. Pty Ltd v Woolscourers (S.A.) Pty Ltd* 13 SASR 313 Walters J at 327).

> " It is my opinion that where total or partial incapacity has been caused to a workman as the result of two successive injuries independently sustained by him in his employment with two different employers, and each of those injuries represents a separate event in the chain of causation leading to the incapacity ultimately resulting, then if the workman has succeeded in obtaining compensation from one employer alone, general principles both of law and equity should entitle that employer to recover contribution from the other in respect of the compensation paid. Cases in which apportionment might be ordered as between two employers were foreshadowed by Bray C.J. in *Bratovic v. Rheem (Aust.) Pty. Ltd.*, ((1971) 2 SASR 33 at pp 41-42) and the existence of the right to contribution was, as it seems to me, explicitly recognized by the Full Court in *Adelaide Assemblers Ltd. v. Kutos and Freeway Motors Ltd.* ((1974) 9 SASR 102 at pp 104-105).

I consider the plaintiff has established that there is an arguable case against the defendant for contribution.

Accordingly the defendant's application for Summary Judgment, or in the alternative that the Statement of Claim be struck out as failing to disclose a cause of action is dismissed.

I grant leave to the parties to apply in respect of the question of costs.