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IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA

No. 190 of 1991

BETWEEN:

PHONSAVANH PHONESIVORABOUTH
AND SAENGKED PHONESIVORABOUTH
& ORS
Plaintiffs

AND:

TOPS SERVICES PTY LTD formerly
TCHIA ANTHONY TRAVEL
ACCOMMODATION CATERING PTY LTD
Defendant

CORAM: KEARNEY J

RULING

(Delivered 14 April 1992)

The appeal

On 1 April 1992 the defendant filed a summons under Rule 11.05(2)(b) seeking leave to file a third party notice joining the Northern Territory of Australia as a party to this action. The application came before the Master on 2 April. There is no transcript of the hearing

before the Master but in the result orders to the following effect were made:-

1. Defendant granted the leave sought, to be exercised within 14 days;
2. As soon as the third party notice is filed, the Master to hold a Listing Conference;
3. The matter to proceed as soon as possible; and
4. Costs to be costs in the proceeding.

By Notice of Appeal filed 7 April 1992 the plaintiffs appealed against the Master's decision, pursuant to Rule 77.05. The grounds stated are that the Master erred in the exercise of his discretion, in granting leave, in that he failed to take into account "the full extent of the likely prejudice" thereby caused to the plaintiffs.

The appeal came on for hearing before me on 10 April. I reserved my decision and rule upon it today.

It is common ground that the appeal from the Master is by way of a hearing de novo; see Rule 77.05(7) as construed in *Southwell v Specialised Engineering Services Pty Ltd* (1990) 70 NTR 6. As pointed out in that case at

p.8, it is not necessary for the plaintiffs to establish some error by the Master in coming to his decision.

The general background

Mr Farquhar of counsel for the defendant and Mr Waters of counsel for the plaintiffs explained the general background to this action. The plaintiffs are tenants of the defendant, being sub-lessees of market and food stalls on Lot 5345 Town of Darwin. Their sub-leases provided for quiet enjoyment. On 8 November 1990 they all requested that their sub-leases be extended for 3 years from 30 May 1991. They claim that their sub-leases contained implied terms that the premises were fit for the preparation, cooking and sale of food, and that the defendant would comply with statutory requirements relating to the adequacy and sufficiency of the stalls. On 8 March 1991 the Director of the Northern Territory Fire Service ordered the defendant and the plaintiffs to cease operations and close all the stalls forthwith, because of alleged major structural deficiencies in the stalls. As a result, the plaintiffs allege a breach of the covenant for quiet enjoyment and of the implied terms in their sub-leases; they

claim they have been deprived of their livelihood and have suffered loss of profits, and damage. They have other heads of claim as well. Mr Farquhar said that the defendant denied liability; and contended further, that if the stalls were closed, they were closed because of the requirements of the Fire Service. Mr Waters said that the plaintiffs faced defences that they had no on-going rights; that they had not complied with statutory notices; that there were no structural deficiencies; that the defendant had complied with all statutory requirements; and so on.

The stalls closed on 8 March 1991. The plaintiffs issued their Writ on 28 May 1991.

The defendant's supporting material

The defendant's application to have the Northern Territory joined as a third party, was made under Order 11. Mr Farquhar submitted that to do so would avoid unnecessary duplication of litigation and the court having to sit twice to deal with the same issues.

He relied on the affidavit of Mr Henwood of 1 April 1992. In para 4 of that affidavit Mr Henwood deposed, inter alia, to his belief "on the basis of my

instructions" that if the defendant were found to be liable to the plaintiffs, "the defendant will contend" -

(a) That the Northern Territory of Australia, through various named governmental bodies, was responsible for that liability or had contributed to it "by virtue of negligent mis-statements" made by their officers; and

(b) Insofar as the defendant's statements to the plaintiffs were "misleading and deceptive", they were based on advice from these governmental bodies "which advice was negligent"; and, accordingly, insofar as the defendant was liable in damages to the plaintiffs, the Northern Territory of Australia was liable in damages to the defendant "by reason of the negligent advice".

In para 5 Mr Henwood deposed that he believed the defendant wished to claim damages from the Northern Territory of Australia for that "negligent advice", in relation to expenditure it had incurred "in rectifying the alleged defects." It can be seen that the matters in paras 4 and 5 appear to be directed towards satisfying the requirements of Rule 11.01.

Mr Henwood deposed in para 6 of his affidavit that much of the evidence to be relied on by the defendant in establishing its Defence against the plaintiffs, would be the same as the evidence it would require to establish its

claim against the Northern Territory of Australia. Further, evidence to be called by the Northern Territory of Australia in defence to the claim in the third party notice "would be required to be called in any event" in the trial of the action brought by the plaintiffs against the defendant.

Mr Henwood further deposed that apart from certain interlocutory proceedings in June and October 1991, the plaintiffs had taken no steps to bring their action to trial, until 24 March 1992.

Paragraphs 9-11 of Mr Henwood's affidavit referred to alleged negotiations between the defendant and the Northern Territory of Australia, in which they sought to resolve their dispute "and possibly as between it [that is, the defendant] and the plaintiffs"; and that it was only on 27 March 1992 that "it appeared that the matter was unlikely to be resolved in the immediate future." Hence the defendant's application of 1 April 1992. I consider that the information in paras 9-11 is relevant and admissible on this application.

The plaintiffs' supporting material

Mr Waters relied on Mr Francis' affidavit of 7 April 1992. This affidavit of course had not been used before the Master, but I consider that in light of the history referred to in paras 2-4 the plaintiffs should be granted special leave to rely on it, pursuant to Rule 77.05(7)(b). Para 6 of the affidavit is irrelevant.

Para 12 deposes to the "significant delay" in the determination of the plaintiffs' claim, which would occur if the Northern Territory of Australia were joined, in that the trial date "will be delayed by a minimum of four to six months." I interpose to say that I consider that would be a minimal estimate, based on my experience. It was alleged that if the plaintiffs were then successful in their action, they would then be retaking possession during the Wet season, while their major profit-making period of trading was the Dry season. I observe that it is impossible to be so precise as to when the action will be heard and determined.

Para 13 referred to the delay by the defendant in seeking to join in the Northern Territory of Australia as third party; it could have done so earlier. Mr Francis alleged that the application of 1 April was a "deliberate ploy" to further delay the resolution of the plaintiffs'

claim, thus placing the plaintiffs "under considerable financial strain."

In para 14 Mr Francis considered, contrary to the opinion expressed by Mr Henwood, that the evidence required to be called by the defendant to establish its Defence against the plaintiffs would not be the same as that required to establish its claim against the Northern Territory of Australia, because the issues between the respective parties were "substantially different." He proceeded to spell out some of the details of these different issues. The consequence, he said, of joining in the Northern Territory of Australia as third party would be a "much lengthier hearing" of the plaintiffs' claim, with an increased risk of costs. Mr Francis also observed that the plaintiffs had filed their list of documents on 19 February 1992 while the defendant's list was not filed until 1 April 1992, some 6 weeks later. Mr Francis contended that the fact that negotiations were continuing between the defendant and the Northern Territory of Australia should not have prevented the joinder of the Northern Territory by the defendant within the time specified by Rule 11.05(2)(a); that is, by 2 August 1991.

The defendant's case

Mr Farquhar submitted that the application of 1 April fell within the scope of Rule 11.01(c) which provides:-

> "Where a defendant claims - - -
>
> (c) that a question relating to or connected with the original subject matter of the proceeding should be determined not only as between the plaintiff and the defendant but also as between either or both of them and the third party,
>
> the defendant may join the third party - - -"

He submitted that the crucial matter on the application was the balance of convenience as between the plaintiffs and the defendant. The advantage to the defendant of joining in the third party was clear. The principal disadvantage to the plaintiffs was the alleged delay. He noted that following the delivery of the Defence on 5 July 1991 the plaintiffs were late in giving discovery (19 February 1992); and submitted that therefore they could not now stress the importance of time to them, so as to tip the balance of convenience their way. He submitted that weight should be given to what Mr Henwood had deposed to as to the evidence being the same in the plaintiffs/defendant claims and the defendant/third party claims, whereas Mr Francis was not in a position to say that that was not so. In any event, Mr Farquhar submitted, if delay to the plaintiffs resulted

from the joinder of the third party, and the plaintiffs ultimately succeeded in their action, the result of the delay they had suffered would be that their damages would be increased.

The plaintiffs' case

Mr Waters submitted that the material in Mr Henwood's affidavit did not go far enough to establish that any question to be determined as between the defendant and the Northern Territory of Australia, fell within the terms of Rule 11.01(c). I agree that the material in Mr Henwood's affidavit is not very specific in that regard, and that a draft third party notice, drawn in accordance with Rule 11.02, might usefully have been annexed to his affidavit; this would have enabled a proper analysis of the nature of the questions arising, to determine whether they fell within the scope of Rule 11.01(c).

Mr Waters noted the conditional phrasing of para 4 of Mr Henwood's affidavit - that he believed "that the defendant will contend" for the matters there referred to - as further illustrating his point that Mr Henwood's affidavit was inadequate to raise fairly the issues required by Rule 11.01(c) to be determined on this application.

Mr Waters submitted that the relief sought by the defendant against the Northern Territory of Australia was very different to that sought by the plaintiffs against the defendant; the former sounded in tort, while the latter sounded in contract.

At best, Mr Waters submitted, for reasons which he spelled out, only a small part of the damages which the defendant might recover from the Northern Territory of Australia, would relate to the damages which the plaintiffs would recover from the defendant, if they were successful. He submitted that the two sets of claims were not substantially the same; however, I observe that the former requirement under the old Rules (Order 20 Rule 1(1)(c)) that the questions be "substantially the same" does not obtain under the modern terminology of Rule 11.01(c), which requires only that there be a "question [with the third party] relating to or connected with" the subject-matter of the plaintiffs' claim.

Mr Waters submitted that the balance of convenience favoured the plaintiffs. The defendant had not given a proper explanation why it had taken so long for the question of joining in the Northern Territory to surface,

since its defence was filed on 5 July 1991; he pointed to the 28-day requirement of Rule 11.05(2)(a).

Conclusions

The public policy sought to be advanced by allowing a third party to be joined in an action is the need to ensure finality in litigation and to avoid multiple proceedings with their associated extra costs. Further, by preventing the same questions being tried twice, the possibility of different decisions on the same issues being given by differently-constituted courts is avoided, that possibility being a matter calculated to bring the administration of justice into disrepute.

The grant of leave under Rule 11.05(2)(b) to file a third party notice out of time is discretionary. In general, there is a strong argument against granting such leave where the effect of doing so would be to embarrass or delay the plaintiff. Nevertheless, it is a matter of balancing the inconvenience to the plaintiffs of the inevitable delay which will be caused by a late joinder in this case, against the inconvenience to the defendant of not

having the claims of the plaintiffs and its claim against the Northern Territory of Australia heard at the same time.

In the light of the material adduced it is not clear to me that this is a case where the public policy which lies behind Order 11 would be advanced by granting the application of 1 April. The information in Mr Henwood's affidavit is insufficiently specific. It may be that it will later become clear that litigation between the defendant and the Northern Territory of Australia could most usefully and economically be heard and determined with this action. However, I see no reason at this stage why the plaintiffs' legitimate interest in avoiding the delay which will unquestionably result if the third party notice is filed, should be infringed. It is possible that if the defendant institutes proceedings against the Northern Territory of Australia promptly, and prosecutes those proceedings diligently, it may later be in a position to seek to consolidate that action with this action, or to have the two actions tried together, under Rule 9.12.

In other words, at this stage and on the material before me I consider that the balance of convenience as regards granting leave to file a third party notice, favours the plaintiffs. If the plaintiffs become dilatory in bringing their action to a hearing, while the defendant is

diligent in instituting and prosecuting an action against the Northern Territory, it may be possible later to see that it is clearly desirable that the actions be heard together; that can only occur when the matters in issue between the defendant and the Northern Territory of Australia are more clearly seen.

In light of the foregoing I allow the appeal, and set aside the Master's decision and orders of 2 April 1992. In lieu thereof, I order:-

1. That the defendant's application of 1 April 1992 be refused.

2. That the plaintiffs have their costs of the hearing before the Master of 2 April 1992, and of this appeal, in any event. I certify for counsel.
