In The Supreme Court of Bermuda

CIVIL JURISDICTION

2013: No. 288

DENISE RIBAROFF

Plaintiff

-v-

(1) BASIL WILLIAMS

(2) CHRISTOPHER DILLON

(3) JOHN ECKERT

(4) ARUN PURI

(5) JAMES WISE

Defendants

FIDUCIARY PARTNERS TRUST COMPANY LIMITED
(as Trustee of the Concordia Employee Benefit Trust)

Third Party

RULING

(in Chambers)

Date of hearing: February 7, 2013
Date of Ruling: February 20, 2014

Mr. Timothy Frith, MJM Limited, for the Plaintiff
Mr. Martin Ouwehand, Appleby (Bermuda) Limited, for the Defendants

Introductory

1. On August 22, 2013, the Plaintiff issued a Generally Endorsed Writ of Summons against the Defendants seeking damages estimated at approximately $4.8 million for breach of a Sale and Purchase Agreement dated December 22, 2009 in respect of the sale of Concordia Advisors (Bermuda) Ltd. ("the SAPA"). A Statement of Claim was filed on September 5, 2013. There were three limbs to the damages claimed:

    (1) Damages flowing from the Defendants' alleged failure to recover "the deficit";

    (2) Damages flowing from the Defendants' alleged failure to pay "trailer fees";

    (3) Damages flowing from the Defendants' alleged failure to pay an "enterprise payment".

2. After entering an appearance on or about September 12, 2013, the Defendants on October 15, 2013 issued a Third Party Notice against Fiduciary Partners Trust Company Limited ("Fiduciary"). This sought a contribution in respect of any damages which might become payable to the Plaintiff by the Defendants on the grounds that Fiduciary was jointly or jointly and severally liable under the SAPA with the Defendants in respect of the relevant obligations. The following day, October 16, 2013, the Defendants filed their Defence.

3. After entering an appearance on or about October 24, 2013, Fiduciary filed its Defence and Counterclaim to the Third Party Notice on November 14, 2013. In the interim, on October 31, 2013, the Defendants issued a Summons seeking directions under Order 16 rule 4 ("*Third Party Directions*"). Paragraph 4 of Fiduciary's Defence admitted that the Third Party "*owed joint or several obligations to the Plaintiff…as alleged in paragraph 2 of the Third Party Notice.*"

4. It should be noted that Fiduciary's participation in the proceedings was, from the outset, through the agency of the same attorneys retained by the Plaintiff. So paragraph 4, in light of the controversy which subsequently emerged, initially appeared to me to be designed to signal the following. There is no conflict of interest between the Plaintiff and Fiduciary so they may share the same attorneys. This is because Fiduciary accepts it is jointly or severally liable with the Defendants under the SAPA. It follows that Fiduciary will be bound by any finding as between the Plaintiff and the Defendants that the Defendants are liable to pay damages to the Plaintiff for breach of the SAPA.

5. The present application, however, assumes that Fiduciary's admission does not have the aforementioned legal and/or practical effect. By a Summons issued on December 9, 2013 under Order 15 rule 4(3), the Defendants sought an Order:

> "*1. …that these proceedings be stayed until Fiduciary…is joined as a Defendant on the grounds that there are causes of action relied upon by the Plaintiff based on contractual obligations for which the Defendants and Fiduciary….would be jointly, but not severally liable, namely those referred to in paragraphs 16 to 20 of the Statement of Claim as based on clauses 3.3 and 9.1 of the Sale and Purchase Agreement dated 22 December 2009.*"

6. The claim in respect of the deficit appeared on the face of the SAPA to be a joint obligation. The trailer fees and enterprise payment obligations appeared on their face each to be a joint and several one.

7. There appeared to me to be considerable force to the Plaintiff's counsel's submission that the application was purely tactical and designed to cause delay and additional expense by compelling Fiduciary to retain separate attorneys. This provisional view was not materially changed at the end of an interesting and intricate historical exploration of the origins of Order 15 rule 4 (3) led by the Defendants' counsel. Although his opponent suggested that the application could be dismissed on more workmanlike and modern case management grounds, the quality of the arguments on both sides on a point upon which there appears to be no local authority, persuaded me to reserve judgment.

8. Having taken time to consider the materials placed before the Court, it has become apparent that, on a more studied reading of the Third Party pleadings, there was in fact more substance to the Defendants' application than initially appeared to be the case, based on the Defendants' largely technical arguments.

Order 15 rule 4(3): the rule and counsel's arguments in broad outline

9. The relevant rule provides as follows:

> "*Where relief is claimed in an action against a defendant who is jointly liable with some other person and also severally liable, that other person need not be made a defendant to the action; but where persons are jointly, but not severally, liable under a contract and relief is claimed against some but not all of those persons in an action in respect of that contract, the Court <u>may</u>, on the application of any defendant to the action, by order stay proceedings in the action until the other persons so liable are added as defendants.*" [emphasis added]

10. Mr. Ouwehand's central thesis was that Order 15 rule (4)(3) conferred on the Defendants a positive right to compel the Plaintiff to join Fiduciary as a Defendant in respect of any potentially joint obligation. It was common ground that the Court ought not ordinarily at this stage finally determine whether or not the obligations contended by the Defendants to be joint are in fact joint and not joint and several. The Defendants' counsel submitted that the rule was sufficiently engaged by the mere fact that (a) part of the Plaintiff's claim was clearly based on a joint debt, (b) relief was sought against some but not all of the joint debtors under the relevant contract, the SAPA, and (c) case law demonstrates that in these circumstances the Court's discretion could only be exercised in favour of granting the stay sought. When it was put to him by the Court that some practical benefit ought to be shown to justify the exercise of the discretion conferred by the rule in the Defendants' favour, Mr. Ouwehand insisted that the mandatory nature of the principle governing how the discretion ought to be exercised made such an enquiry wholly irrelevant.

11. Mr. Frith's response was threefold: (a) the rule according to its terms conferred a discretion on the Court; (b) the mischief the rule was designed to avoid, Fiduciary being released from any liability to the Plaintiff and, as a result, any obligation to contribute, did not arise on the facts of the present case, and (c) applying the rule with regard to the overriding objective, the stay ought not to be granted where the result would be added costs with no useful purpose being served.

Findings: case management and the merits of the Defendants' application

12. I dismiss quite decisively the Defendants' suggestion that the way in which a discretion conferred by this Court's Rules should be exercised in making a case management decision can be fettered by guideline cases to such an extent that excludes altogether the Court's ability to consider the practical ramifications of the decision proposed to be made.

13. The essence of modern judicial case management, applying the principles embodied in Order 1A of the Rules to the application and interpretation of the other Rules, is pragmatism and bringing tailor-made decision-making to bear which takes into account the particular factual and legal circumstances of each case. Order 1A/1 provides as follows:

> "*(1)These Rules shall have the overriding objective of enabling the court to deal with cases justly.*
>
> *(2) Dealing with a case justly includes, so far as is practicable—*
>
> *(a) ensuring that the parties are on an equal footing;*
>
> *(b) saving expense;*

(c) dealing with the case in ways which are proportionate—
(i)to the amount of money involved;
(ii)to the importance of the case;
(iii)to the complexity of the issues; and
(iv)to the financial position of each party;

(d) ensuring that it is dealt with expeditiously and fairly; and
(e) allotting to it an appropriate share of the court's resources, while taking into account the need to allot resources to other cases."

14. Order 1A/4 elaborates on what the Court's duty to actively manage cases entails; but it is well settled that the dominant aim of case management is to make civil proceedings more efficient by avoiding the wastage of costs. Wasted costs in the past often flowed from the fact that the parties themselves were largely allowed to dictate the course of litigation, with the Court not required to make any decisions of substance until trial. The parties' role in dictating the course of litigation is still significant, subject to the caveat that the Rules now oblige them to assist the Court to achieve the overriding objective (Order 1A/3).

15. My own approach is to exercise case management powers with some restraint as it is often impossible to have a well-informed sense of the real issues in controversy until the evidence has been filed. More often than not, my case management powers are only deployed when an interlocutory application falls to be decided. The general application of some rules will be strongly shaped by legal principles of general application; the rules governing the grant of leave to serve out of the jurisdiction is one example (Order 11), the test applicable to striking out pleadings is another (Order 18 rule 19). But identifying what general principles govern the exercise of a discretion conferred by the Rules is always simply only a gateway to the ultimate consideration of what the peculiar circumstances of the case before the Court requires.

16. In the present case the Third Party Notice makes the following averments relevant to the present application:

> "[After reciting the percentage contribution sought from Fiduciary if the Defendants are held liable to pay damages to the Plaintiff and pleading in paragraph 1of the Notice the contractual claims asserted by the Plaintiff against the Defendants]...*2. such contractual obligations are owed to the Vendor by the Purchasers jointly, or jointly and severally (as the case may be).*"

17. However, the Defence and Counterclaim to Third Party Notice contains the following denial:

> "*2. If the Claimant is successful in her case against the Defendants for breaches of the Sale and Purchase Agreement...it is denied that the Defendants are entitled to a contribution from the Third Party as alleged in the contribution notice or at all.*"

18. Fiduciary's pleading then goes on to particularize this general case of denial. The principle of joint or joint and several liability is, crucially, admitted:

> "*3. It is admitted that Fiduciary was a party to the Sale and Purchase Agreement...*
>
> 4. *It is further admitted that in such capacity Fiduciary owed joint or several obligations to the Plaintiff...as alleged in paragraph 2 of the Third Party Notice.*" [emphasis]

19. Paragraphs 5 to 17 set out in considerable detail Fiduciary's case as to why it should not be liable to contribute in the event the Defendants are found liable. These particulars dilute the force of the initial admission. When the Third Party's pleading is carefully read, it is true that it is not Fiduciary's case that it will not be liable to contribute because any finding of liability as between the Plaintiff and the Defendants will not be binding on it as a Third Party. On the other hand, it is expressly pleaded that joint liability, or joint and several liability, would only be strict as between Fiduciary and the Plaintiff if the Plaintiff had joined Fiduciary as a Defendant:

> "*8. It is averred pursuant to Order 18 r2 Rules of the Supreme Court (1985) that Fiduciary might have been jointly and severally liable to the Plaintiff if proceedings have been issued against them and that such liability would have been strict. However, it is further averred that the Court should consider the question of liability between the Purchasers inter-se according to the following propositions...*"

20. It is, with careful reading, indeed ultimately clear that the principles of apportionment which are contended for as applying between Fiduciary and its co-purchasers under SAPA are not in any way based on the premise that Fiduciary will not be bound by any finding of liability made against the other purchasers. On the other hand, it is Fiduciary's case that strict liability does not operate as a matter of law to the apportionment of liabilities between joint debtors. The problem for the Plaintiff with this plea, when it is carefully read, is that it entails Fiduciary seeking to deny any liability to contribute at all. And this plea is expressly based on the Plaintiff's decision not to join Fiduciary as a Defendant.

21. The practical result is in substance very nearly the same as if Fiduciary were denying any liability to contribute in subsequent proceedings brought against it by the Defendants on the grounds that it was released from any such liability by the

judgment the Plaintiff had obtained in previous proceedings brought by the Plaintiff. The only difference is that the pertinent defence is not that no liability to contribute can arise because it has not been joined by the Plaintiff as a Defendant. The Defence avers that while it might be strictly liable to contribute if it was a party to the main action, such strict liability does not arise since it has not been joined.

22. For somewhat different reasons than those identified by Mr. Ouwehand in the course of argument, I am bound to accept his submission that the Third Party's Defence and Counterclaim did not contain clear admissions which made his clients' stay Summons wholly academic.

23. On the other hand, Mr. Frith sensibly made it clear that he would agree to any directions which might reasonably be required to eliminate any suggestion that Fiduciary was seeking to deny liability to contribute based on the fact that it had not been joined as Defendant. Although this point was not expressly canvassed at the hearing, it seems to me to follow inevitably from the mere fact of the Plaintiff/Fiduciary's opposition to the stay Summons, that the Plaintiff/Fiduciary cannot, without abusing the process of the Court, both:

    (a) contend that the Defendants have no practical grounds for seeking to join Fiduciary; and

    (b) advance a Third Party defence which denies strict liability to contribute on the grounds that the Plaintiff has not joined Fiduciary as a Defendant.

24. The proposal in a draft Order produced by the Plaintiff and Fiduciary at the beginning of the hearing of the Defendants' application directing that the Third Party proceedings and the Writ Action should be heard together was insufficient to meet the Defendants' legitimate concerns as I have found them to be. The joint hearing proposal probably, just, met the case as put by the Defendants' in their Skeleton Argument. To my mind that proposal combined with the admissions made in the Third Party pleadings made it clear beyond sensible argument that:

    (a) Fiduciary would be bound by any findings of breach of contract reached by this Court as between the Plaintiff and the Defendants; and

    (b) would not be able to re-litigate the subject-matter of those findings; because

    (c) despite having an opportunity to be joined as a Defendant to contest the Plaintiff's contractual claims, it had elected not to do so.

25. But the significance of those admissions is materially weakened by paragraph 8 of the Defence and Counterclaim to Third Party Notice. To properly justify refusing the Defendants' application, this Court would, in addition, have to require the insertion of a recital in the Order dismissing the Summons, in substantially the following terms: "UPON the Third Party undertaking not to pursue the plea set out in paragraph 8 of its Defence and Counterclaim to Third Party Notice that strict liability to contribute is conditional upon its being joined by the Plaintiff as a Defendant to the main action". As long as the relevant plea is maintained by the Third Party, the Defendants are in my judgment entitled to have the relief sought in their Summons granted.

26. Assuming such an undertaking is forthcoming, the only consequence of granting the Defendants' application would be to cause the Plaintiff and the Third Party (which appears to have no or no liquid assets of its own) inconvenience and added expense which could potentially undermine the Plaintiff's ability to prosecute her claim. This would be an unjust result. The Defendants did not advance any corresponding substantive or procedural benefit for granting the relief they sought. Applying the overriding objective, and subject to ascertaining whether or not the Defendants effectively have a mandatory right to a stay which overrides such case management considerations, I would dismiss the Defendants' Summons.

Findings: do the Defendants have a 'mandatory' right to a stay which overrides case management considerations?

27. The captioned question only has to be articulated to illustrate how unattractive the Defendants' contentions as to how Order 15 rule 4(3) ought to be construed are from a modern common law judicial perspective. This Court's Rules have always been designed to facilitate the fundamental fair hearing rights protected by section 6(8) of the Bermuda Constitution, a point which is merely reinforced by the provisions of Order 1A of the Rules.

28. I emphasise the word modern, because the most recent case relied upon by the Defendants' counsel, and cited in the commentary in the 1979 White Book on the English rule from which our own rule is derived[1], was decided in 1918. A significant rationale underlying the rule was the common law principle under which the liability of a joint debtor to a plaintiff who did not sue him was released with judgment in the 'first' trial. If the joint debtor who was sued sought a contribution after the plaintiff obtained judgment against him from a joint debtor who had not been sued, the latter would be able to escape liability to make a contribution on the grounds that he had been released from any primary liability to the plaintiff by the entry of judgment against the defendant the plaintiff had elected to sue. As that common law rule has

[1] Which the Plaintiff's counsel placed before the Court.

been repealed in England and Wales by statute[2], Mr. Frith rightly submitted that the need for Order 15 rule 4 (3) in England and Wales has fallen away. However, he primarily relied on this distinction to buttress his argument that the main function of Order 15 rule 4(3) is to avoid the potential mischief flowing from the release by judgment rule. That point is supported by the commentary explaining the revocation of the English counterpart rule in the 1999 White Book at paragraph 15/4/14:

> "*The effect of s.3 of the Civil Liability (Contribution) Act 1978 is to abolish the common law rule of what is called 'release by judgment',…thus negativing the rule in King v. Hoare (1844) 13 M& W. 494, and such cases as Kendall v. Hamilton (1879) 4 App.Cas.50, and Goldrei Foucard & Son v. Sinclair [1918] 1 K.B. 180….The former practice regulating this procedure has ceased to apply…*"

29. It is against this pragmatic policy background that that the principle contended for by Mr. Ouwehand must be construed. Paragraph 15/4/10 of the 1979 White Book summarised the case law (the most recent of which was decided 96 years ago) as illustrating the following rule:

> "*A defendant has a prima facie right to have his co-contractor joined as a defendant and in the absence of special circumstances showing that the order should not be made, it is the practice to make it; the order will be made without prejudice to the consideration of the question of whether the contract was in fact joint…But if it is shown that there is any good reason to the contrary…then the action may be allowed to proceed without joinder.*"

30. If one resists the temptation to brush aside the careful submissions of the Defendant's counsel on the actual cases cited in deference to a superficial acceptance of the commentaries to the 1979 and 1999 White Books, the analytical route changes although the ultimate legal destination remains the same. The following points arise from the cases Mr. Ouwehand took the Court to:

    (a) prior to the Judicature Acts, a plea of abatement based on the release by judgment rule created the imperative to allow one joint debtor to join another as a co-defendant : *King v. Hoare* (1844);

    (b) this imperative, and the dominant rationale for allowing one or more joint debtors who were sued to compel the plaintiff to join all joint debtors as defendants, no longer existed after the Judicature Acts when the plea of abatement could no longer be made. However, the subtleties of this

[2] Civil Liability (Contribution) Act 1978 (UK).

analysis were not necessarily universally accepted. Nevertheless, the distinction was appreciated by:

(i) Lord Penzance (dissenting) in *Kendall et al-v-Hamilton*(1879) 4 App.Cas. 504 at 524 *et seq;*

(ii) Earl Cairns (Lord Chancellor) in the same case (at 515) sought to justify *King-v-Hoare* on the distinct basis that it was "*the right of persons jointly liable to be sued together*"; and

(iii) Lord Esher (MR) in *Wilson, Sons & Co.-v- Balcarres Steamship Co.* [1893] 1QB 422 at 427 and in *Robinson-v-Geisel* [1894] 2 QB 685 at 687 opined that the Court post-the Judicature Acts had a discretion to compel a plaintiff to join all joint debtors as defendants, which should be exercised in the absence of good reasons for not doing so; and

(iv) The Court of Appeal adopted a similar approach in *Norbury Natzio & Co.-v-Griffiths*[1918] 2K.B.369.

31. Far from suggesting that Order 15 rule 4(3) created a mandatory inflexible rule, the authorities support a flexible approach designed to do justice on a case by case basis. While the preponderance of persuasive authority may suggest a strong steer in favour of a presumption that all joint contractors ought to be sued together, I do not find such authority to carry much persuasive weight today, in the post-overriding objective era. The observations of Scrutton LJ in *Norbury Natzio & Co.-v-Griffiths*[1918] 2K.B.369 at 379, perhaps, sum up the position best for present purposes:

> "*It seems to me that the Judicature Act and the Rules have undoubtedly given the court a discretion as to whether or not it will order that the joint contractors be joined as defendants.*"

32. Some of the reasoning in these cases suggests that the release by judgment rule had, by the end of the nineteenth century, been either displaced or supplemented with another rationale for enabling a defendant to compel the plaintiff to join his joint contractors. This was the right of a defendant to have his liability for a debt ascertained in a single proceeding. The better view appears to be that while the plea of abatement was no longer possible after the Judicature Acts of 1873 and 1875, a joint

debtor who was not sued in one action could still claim under the still developing doctrine of *res judicata* that his liability was extinguished by the judgment in the first action and that his co-contractor could not seek a contribution from him in a subsequent action. However, in exercising the joinder discretion conferred by rules of court thereafter, judges began to have regard to why it might be appropriate to permit a defendant to compel a plaintiff to join a co-contractor not before the court to the proceedings. This new analytical approach ultimately undermines, rather than supports, the Defendants' thesis that their entitlement to a stay arises from a rigid and inflexible rule. It confirms that common law judges, invited to join a defendant the plaintiff has not sued to an action at the instance of an existing defendant, will not lightly exercise the discretion without finding pragmatic reasons for doing so.

33. It cannot be denied that the common law release by judgment rule continued to be viewed by key English legal policymakers in the latter 20th century as the main basis for Order 15 rule 4(3). This is seemingly why the rule was revoked after the enactment of the Civil Liability (Contribution) Act 1978, which explicitly abolished the release by judgment rule as it applied to joint liabilities. Lord Hatherley's observations in *Kendall-v-Hamilton* (1879) 4 App.Cas.504 at 519, upon which Mr. Frith relied, were quite propitious:

> "*Now if King v. Hoare is to subsist as authority-and having stood so long I apprehend it would be difficult to shake it as authority now-then the Plaintiffs in this case having sued two of the partners and having omitted to sue the other partner…having proceeded against two partners and obtained a judgment against them, their co-contractor could not, according to King v. Hoare, be sued, because the debt, which was a simple contract debt in the first instance, contracted by the firm, had passed into res judicatem under the operation of the judgment which had been obtained against the two.*"

34. For the above reasons, I find that Order 15 rule 4(3) does not create a mandatory right for the Defendants to compel the Plaintiffs to join Fiduciary as a Defendant without regard to ordinary case management considerations. As discussed above, there was a practical justification for compelling the Plaintiff to join Fiduciary as a Defendant to the present action, albeit one upon which the Defendants did not positively rely.

35. To the extent that no pragmatic justification for joinder existed, the Defendants' application would on this alternative basis be refused.

Conclusion

36. The Defendants' Summons is liable to be dismissed provided that Fiduciary (the Third Party) undertakes not to pursue the plea in paragraph 8 of the Defence and Counterclaim to Third Party Notice that it can only be strictly liable if the Plaintiff joins it as a Defendant to the main action. The Plaintiff/Third Party's joint counsel informally undertook in the course of the hearing to accept whatever procedural direction might be required to make the joinder sought unnecessary.

37. Order 15 rule 4 (3) of the Rules of the Supreme Court confers on this Court the discretionary power to stay an action, on the application of a defendant, where the plaintiff refuses to join as a defendant a party not before the Court which is jointly liable with the defendant in respect of the claim before the Court. A defendant is not entitled to such relief as of right where the existence of a joint debt can be demonstrated. The exercise of the relevant discretion will be fact-sensitive and subject to the usual case management powers conferred by Order 1A of the rules.

38. The English rule from which Order 15 rule 4(3) is derived was revoked over 25 years ago and so no post-CPR persuasive authority exists which sheds light on the way in which the Court's powers under this rule should be exercised. The Court was assisted by the researches of counsel but in broad terms opted for the flexible modern case management approach contended for by Mr. Frith and rejected the more rigid historical approach contended for by Mr. Ouwehand.

39. It is hoped that the present decision will enable similar joinder issues to be resolved more expeditiously and pragmatically in the future.

40. I will hear counsel as to the terms of the final Order required to give effect to the present Ruling and as to costs, if required.

Dated this 20th day of February, 2014, _____

IAN R.C. KAWALEY CJ