

BETWEEN     JOHN FRANCIS CARGILL and  
                  DONNA ANN CARGILL  
Plaintiffs

AND           GARTH HEATING & ROOFING  
                  COMPANY LIMITED  
First Defendant

AND           THE UPPER HUTT CITY COUNCIL  
Second Defendant

AND           MONARCH INSURANCE COMPANY  
                  OF N.Z. LIMITED  
Third Party

In Chambers:

Hearing        10 February 1984

Counsel       P D Green for plaintiffs  
                  G J Thomas for first defendant  
                  J P Gray for second defendant  
                  K B Johnston for third party

Judgment      1 March 1984

---

JUDGMENT OF DAVISON C.J.

---

In this action a third party notice has been issued by the first defendant against the third party and the plaintiffs now seek to have the order directing the issue of the third party notice set aside. The order was made ex parte.

The plaintiffs are home owners who had a Garth woodburning stove installed in their home by the first defendant. They allege that such stove was negligently manufactured, or negligently installed, by the first defendant and that, as a consequence of such negligence, fire broke out in the plaintiffs' home on 4 August 1981 causing considerable damage.

A claim is also made against the second defendant the local authority which issued the building permit for the installation based on negligence and breach of statutory duty.

The plaintiffs issued their writ against the first and second defendants on 29 October 1982. The first defendant filed a statement of defence on 2 December 1982 and applied for an order for the issue of a third party notice against the third party, the Monarch Insurance Company of New Zealand Limited, the first defendant's insurer, which had declined to indemnify the first defendant in respect of the plaintiffs' claim. The order was made on 13 December 1982. On 25 February 1983 the plaintiffs filed a motion for an order setting aside the third party notice.

The issues between the plaintiffs and the first defendant, and the first defendant and the third party are separate issues. The plaintiffs are suing the first defendant in tort and seeking to recover the damage caused by the fire. The first defendant is claiming against the third party in contract to compel the third party as the first defendant's insurer to indemnify the first defendant under its insurance policy in respect of such damages as it may be required to pay to the plaintiffs.

The third party's refusal to indemnify is based on alleged breaches of contract by the first defendant in failing promptly to report the claim to the prejudice of the third party.

The only common ground in the two claims is that both of them are concerned with the same sum of money, that is, whatever sum the first defendant is required to pay to the plaintiffs is the sum it seeks to recover from the third party.

Where the third party is a party to the action then it can be bound by any finding of the Court relating to the quantum damages. If the third party is dismissed

from the suit, however, then in the event of the first defendant having damages awarded against it, it must bring a separate action against its insurer, the present third party and assume the burden of proving those damages. The avoidance of two trials both covering the same issue of damages is the only justification for retaining the third party in the action.

The first defendant's solicitors sought to simplify the matter by asking the third party to agree to be bound by the findings in the plaintiffs' case as to liability for and quantum of damages, leaving only the liability of the third party to indemnify the first defendant in issue in a separate action brought by the first defendant. The third party declined to do so.

The plaintiffs are therefore faced with an action in which they seek to prove negligence against the first and second defendants and then having to sit by and wait whilst the first defendant and third party argue a completely different case concerning the third party's liability under its contract of insurance with the first defendant.

Mr Green for the plaintiffs in support of the motion to set aside the order made ex parte joining the third party relied upon R.99M of the Code. There is no doubt that a Court can in appropriate cases discharge the order joining a third party. Is it appropriate to do so in the present case?

Mr Green first submitted that no grounds existed for the making of the order in the first place and that the application should have been made on notice. I do not agree. The first defendant in its application for the issue of the third party notice set out that there was at all material times in force a public liability insurance policy under which the proposed third party had arranged to indemnify the first defendant in respect of claims such as this one made by the plaintiffs and that the first defendant sought

to be indemnified by the proposed third party against the plaintiffs' claims. Such a ground for the issue of a third party notice is available to the first defendant under R.95(a) and on an ex parte application the making of an order was entirely justified. Rule 96 enables an order to join a third party to be made ex parte unless a Judge directs that notice of the application be given to the plaintiffs and it is the practice of this Court almost invariably to make such orders ex parte.

Mr Green, next, however, submitted that the plaintiffs would be prejudiced by retaining the third party in the action. The alleged grounds of prejudice were:

- (a) The causes of action between plaintiffs and first defendant, and first defendant and third party are entirely different - one lies in tort and the other in contract. The issues are quite separate.
- (b) The delay caused by the third party proceedings will prejudice the plaintiffs in having its action disposed of.
- (c) The retention of the third party will lengthen the trial and increase the costs of the plaintiffs with no benefit to the plaintiffs.
- (d) The situation resulting in the third party disclaiming liability to indemnify has arisen from the first defendant's own inaction in notifying the insurer of the plaintiffs' claim.

Mr Johnston for the third party supported Mr Green's motion to set aside the third party notice on three grounds

- (a) There were no issues in common between the plaintiffs and first defendant and first defendant and third party except the amount of the plaintiffs' loss caused by the fire. This is not likely to be a topic of any great argument.

- (b) There is likely at the trial to be a large amount of technical evidence in relation to the allegations of negligent manufacture and negligent installation made against the first defendant as appears from the statement of claim paras 9 and 10 and the third party is in no way concerned with those.
- (c) The naming of an insurance company as third party is likely to prejudice the third party at the trial.

In respect of this last ground (c) I asked Mr Gre whether the plaintiffs intended to seek jury trial. He has advised me that they do.

Mr Thomas for the first defendant submitted that the first defendant was entitled to retain the third party in the action and relied on Legat v Waianiwa Transport Ltd [1965] NZLR 262, 265. If there is any prejudice to any party, he said, then the first defendant would be prejudiced the greater by having to defend the plaintiffs' action and then bring a separate action for indemnity against the third party, and any prejudice to the third party by being disclosed as an insurer would be countered by it being evident from correspondence to be put in evidence at the trial showing that the plaintiffs were also insured. For the purposes of dealing with this application I must accept that the action will be tried by a Judge and jury.

Rule 99M of the Code relating to discharge of third parties does not define grounds for so doing except in one irrelevant case. The jurisdiction to set aside an order joining a third party is discretionary. The overriding object of joining a third party is to enable all the issues to be dealt with in the one action: Turpin v Direct Transport Ltd [1975] 2 NZLR 172, 175 but in joining or retaining a third party in the action a balance is to be

struck between what is just and expedient to each party: National Bank of New Zealand Ltd v Printwell Products Ltd [1980] B.C.L. 791. In the present case three of the parties claim prejudice in one way or another. (Mr Gray who appeared for the fourth party to the action - the second defendant - made no submissions).

The interests of the three parties claiming to be affected must be weighed. The plaintiffs are entitled to have their action brought to trial and disposed of promptly. They have already been delayed a considerable time and interlocutory matters between the first defendant and the third party will likely delay a hearing further. The issues between the plaintiffs and the first defendant will centre on negligence. The plaintiffs will have no concern with the arguments between the first defendant and the third party as to the interpretation of the policy of insurance and as to whether the first defendant is in breach of conditions of that policy such as to entitle the third party to disclaim liability to indemnify. To retain the third party in the action will certainly extend the time of trial and inevitably increase the cost to the plaintiffs. The third party is likely to spend a large part of the trial whilst the Court hears evidence of a technical nature which may or may not be relevant to the third party's case depending on the manner in which the third party case is conducted.

As contrasted with those matters the prejudice to the first defendant is such as may result in having to conduct two trials. I do not believe that there will be any real prejudice to any party by reason of it appearing that the plaintiffs are insured and that the third party is itself an insurer of the first defendant albeit an insurer which has disclaimed liability.

In my view, in all the circumstances, it is just and expedient that the third party should be discharged from the action and the plaintiffs be allowed to proceed speedily to trial.

There will be an order setting aside the third party notice and discharging the third party from the action  
Costs reserved.



*R. D. Dawson*

Solicitors for the plaintiffs:	<u>Macalister Mazengarb Proth &amp; Co</u> (Wellington)
Solicitors for the first defendant:	<u>Gibson Sheat Thomas &amp; Math</u> (Lower Hutt)
Solicitors for the second defendant:	<u>deJoux &amp; Ryan</u> (Upper Hutt)
Solicitors for the third party:	<u>Watts &amp; Patterson</u> (Wellington)