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IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

30/7

CP NO.2826/88

BETWEEN KUPE GROUP LIMITED & ORS

First to Third Plaintiffs

1123

A N D SEAMAR HOLDINGS LIMITED & ORS

First to Sixth Defendants

Hearing: 31 May 1993

Counsel: R H Hansen for the Plaintiffs/Applicants
R J Asher, QC for the First to Third Defendants/Respondents

Judgment: 2 June 1993.

(RESERVED) JUDGMENT OF MASTER KENNEDY-GRANT

Introduction

In this application the plaintiffs seek orders striking out the fourth defendant, Galex Nominees Limited, and adding Geoffrey Charles Thorpe as the seventh defendant, together with the necessary procedural orders consequent on joinder of Mr Thorpe if ordered.

There is no opposition to the application to strike out Galex Nominees Limited and I make that order accordingly.

So far as the application to join Mr Thorpe is concerned:

(1) The proposed case against him is that he:

(a) Knowingly assisted the breach by Seamar, O'Connor and Geoffco of their fiduciary and other duties to Kupe;

(b) Was a party to the conspiracy to injure alleged against the other defendants.

(2) The argument as to whether or not an order should be made joining Mr Thorpe centres on:

(a) Whether or not jurisdiction to make such an order exists in this case;

(b) If it does, whether or not the discretion as to the making of the order should be exercised in favour of the plaintiff.

(3) The following matters have been argued in relation to the exercise of the Court's discretion:

(a) The strength of the proposed causes of action against Mr Thorpe;

(b) The alleged delay in making the application for his joinder;

(c) The alleged prejudice to the first to third defendants of his joinder;

(d) The alleged unfairness to him of his joinder.

Jurisdiction

The plaintiff's application is brought under r97(1)(b) of the High Court Rules. This reads as follows:

> *(1) The Court may at any stage of a proceeding, either upon or without the application of any party, and on such terms as appear to the Court to be just, order -*
>
> ....
>
> *(b) That the name of any person who ought to have been joined, or whose presence before the Court may be necessary to enable the Court effectually and completely to*

> *adjudicate upon and settle all questions involved in the proceeding be added, whether as plaintiff or defendant.*

Mr Hansen, for the applicants, submits that the jurisdiction to make the order exists both because Mr Thorpe is a person *"who ought to have been joined"* and because he is a person *"whose presence before the Court may be necessary to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the proceeding"* (emphasis added). He relies, in support of his submission, on ***Westfield Freezing Company Limited v Sayer & Company (New Zealand) Limited*** [1972] NZLR 137 (C.A.) and ***Mainzeal Corporation Limited v Contractors Bonding Limited*** (1989) 2 PRNZ 47.

Mr Asher, for the respondents, submits that neither basis for jurisdiction exists in this case because:

(a) The fact that it would have been competent to join Mr Thorpe in terms of r74 of the High Court Rules does not mean that he ought to have been joined in terms of r97(1)(b);

(b) There is no basis for alleging that Mr Thorpe's presence before the Court may be necessary under the second leg of paragraph (b) of r97(1).

He submits that a person "ought" to be joined within the meaning of the rule only if he or she is a person who can be joined under r74 and his or her interests will be directly affected in the proceeding to which it is sought to join him or her. He relies, in support of this submission, on ***Gurtner v Circuit*** [1968] 2 QB 587 and on ***Pegang Mining Co Limited v Choong Sam*** (1969) 2 MLJ 52 at 56 (quoted by Barker J in ***Mainzeal Corporation Limited v Contractors Bonding Limited***, ubi supra, at page 50). With regard to the second leg of paragraph (b) of 97(1) he submits

that the question of whether or not joinder "may be necessary" has to be determined by reference to the questions involved in the proceeding as already constituted, ie as between the existing parties. Mr Thorpe's presence is not necessary for that purpose in respect of either of the causes of action pleaded against the other defendants because:

(a) It is not necessary to prove his knowing assistance in order to establish breach of fiduciary or other duty by the other defendants nor does a finding of breach of fiduciary or other duty by those defendants in any way bind him;

(b) His presence before the Court is not necessary to enable the Court to determine whether or not the other defendants conspired to injure the plaintiff nor does a finding of conspiracy against the other defendants, even if a finding that they were parties to a conspiracy to which he was also a party, bind him.

I agree with Mr Asher that it is not sufficient to bring a party within the first leg of paragraph (b) of r97(1) that he or she should be a person who could be joined under r74. More is obviously needed, else the word "ought" would not have been used. The question is, How much more? The answer may be derived from a consideration of the ordinary meaning of the word "ought" and from the distinction in paragraph (b) of r97(1) between the first leg, now under discussion, and the second leg, in which the alternative basis for jurisdiction under the rule is stated in terms of possibility: *"may be necessary ..."* (emphasis added). Approached in this way, the first leg of paragraph (b) of 97(1):

(a) covers those cases in which the person sought to be joined "should" have been joined because it is impossible to do justice between the existing parties without the joinder (eg where the party sought to be joined is jointly interested with either the

plaintiff or the defendant in the subject matter of the dispute); and so:

(b) Is the converse of (a), that is to say is directed to the joinder of persons improperly or mistakenly omitted as parties.

The joinder of Mr Thorpe does not, in my view, come within the first leg of paragraph (b) of 97(1).

In order to determine the scope of the second leg of paragraph (b) of r97(1) it is necessary to determine, first, whether the test by reference to which the possible necessity of joinder is to be judged is the adjudication of the questions involved in the proceeding without regard to the identity of the existing parties or the adjudication of those questions as between the existing parties. It is my view that it is the wider meaning of the phrase *"all questions involved in the proceeding"* which should be adopted. I am of this opinion for two reasons:

(a) The phrase is not qualified by any reference to the existing parties;

(b) The decisions allowing joinder are inconsistent with the narrower interpretation; see, for example, ***Westfield Freezing Company Limited v Sayer & Company (New Zealand) Limited***, ubi supra, (where the question involved in the proceeding as between the existing parties was whether or not the existing parties were the parties to the contract sued on and an order was made joining other companies as alternative plaintiffs and defendants respectively); ***Taylor v McDougall & Anor*** [1963] NZLR 694 (where in a claim for specific performance of a contract for the sale of shares in a company a third party to which the defendant alleged it had given a first option to purchase the shares was joined as a party); and ***Gurtner v Circuit,*** ubi supra, where the Motor Insurers' Bureau was added as a defendant to a motor

accident claim because it had an obligation to the Minister of Transport to satisfy all unpaid damages awarded to a plaintiff in an action against an insured motorist and the identity of the driver defendant's insurer was not known).

So interpreted, the test of jurisdiction under the second leg of paragraph (b) of r97(1) is whether or not the joinder may be necessary to enable the Court effectually and completely to adjudicate upon and settle the questions involved in the proceeding, not simply as between the existing parties to the proceeding, but altogether. Support for this approach can be found in the judgment of Henry J in ***Taylor v McDougall & Anor***, ubi supra, at page 696/13-23, where the Judge said:

> *Now I pose the question: Can the Court effectually and completely adjudicate upon and settle the existence and validity of the said prior covenants in the absence of the intervener? The answer I think is in the negative. It can adjudicate but not so as to be an adjudication which effectually and completely settles the question. As I said, the settlement of the issue is not merely as between the plaintiff and the defendant, because, if that were so, the rule would be otiose. Any properly constituted cause of action can be adjudicated upon between a plaintiff and a defendant. The rule contemplates the necessity for the presence of a further party to enable the adjudication to be effectual and complete and one which settles the issue.*

This approach is also in my view consistent with the principle that the Courts will not permit repeated litigation of the same dispute between the same parties. (In coming to this conclusion, I am aware that I am adopting a wider test than that of "direct affection" adopted by Lord Denning MR in ***Gurtner v Circuit,*** ubi supra, but I believe the wider test to be justified by the wording of the rule).

In the light of the above matters, I conclude that the Court has jurisdiction in this case to order the joinder of Mr Thorpe under the second leg of paragraph (b) of r97(1).

Discretion

Should the Court exercise its jurisdiction in favour of joinder?

I consider below the matters which have been argued in relation to the exercise of the Court's discretion:

(a) The strength of the proposed causes of action

In their amended notice of opposition the first to third defendants alleged as a ground of opposition that:

> *"the causes of action pleaded against [Mr Thorpe] cannot succeed."*

This suggested that the defendants would argue that no reasonable cause of action was disclosed by the proposed pleading. That has turned out not to be the case. Instead the argument is directed to the weakness of the case against Mr Thorpe.

That weakness cannot, in my view, be judged in this case. Certainly, it cannot be said that the causes of action are so weak that it would be an improper exercise of the Court's discretion to order joinder.

(b) The alleged delay in making the application for joinder

The grounds on which Mr Thorpe's joinder is sought are set out in paragraphs 3 and 4 of Mr Arasaratnam's affidavit in support. These read as follows:

> *3. I believe that Geoffrey Charles Thorpe should be joined as an additional defendant. He was a partner in the firm of Earl Kent Alexander Bennett until his retirement on 30 June 1987. The firm acted for the defendants other than Galex. Mr Thorpe personally acted for the defendants in relation to most aspects of the transactions which are the subject to these proceedings. He was until 21 March 1988 a director of the third defendant.*

> *4. DOCUMENTS disclosed and evidence given in the course of discovery by non-parties show that Mr Thorpe advised on and implemented arrangements which resulted in the defendants (other than Galex) receiving almost $5 million from funds paid by Kupe Group Ltd to Earl Kent Alexander Bennett for the purchase of properties in Wellington. I believe that Mr Thorpe knew or should have known that these arrangements involved a breach of trust by the first, second and third defendants and that his presence before the Court is necessary to enable all questions involved in the proceedings to be disposed of.*

Mr Asher, for the defendants, submits that the matters alleged in paragraphs 3 and 4 of Mr Arasaratnam's affidavit were all known to the plaintiffs from the time proceedings were issued and that Mr Thorpe should have been joined in the proceedings from the outset or, at the very least, an application for his joinder have been made long ere now.

Mr Hansen, for the plaintiffs, submits that it is only now, after there has been extensive third party discovery, that the plaintiffs have known sufficient of the facts for it to be proper for them to make the allegations now sought to be made against Mr Thorpe.

I have not had the benefit of additional evidence on the question of the extent of the plaintiff's knowledge nor of detailed submissions with respect to each of the matters alleged to have been known by the plaintiffs.

There is no doubt from the affidavits filed in this proceeding that the plaintiffs knew that Mr Thorpe was a partner of Earl Kent Alexander Bennett and was acting for Mr O'Connor, Seamar Holdings Limited and Geoffco Management Consultants Limited; but I do not recall any evidence that Mr Thorpe's involvement on behalf of Larick Limited and

Wakejet Limited was known to the plaintiffs until after third party discovery or, possibly, inspection of the third party documents.

It does not follow from Mr Thorpe's involvement as solicitor for the first to third defendants that he was aware of, let alone that he participated in, the alleged breach of fiduciary or other duty or conspiracy to injure alleged against those defendants, Larick Limited and Wakejet Limited.

Mr Asher relies, in support of his submission that the plaintiffs knew or ought to have known before instituting these proceedings that Mr Thorpe could properly be joined as a defendant, on the following matters:

(a) His letter of 20 January 1987 to Kupe (see pages 60-61 of my judgment of 8 March 1993); and

(b) His involvement in the discussions which took place in June and July 1987 with a view to settlement of the dispute between the parties and at which the question of the alleged breach of fiduciary duty was raised.

The writing of the letter and the making of certain representations in the course of discussions are two of the allegations of assistance made against Mr Thorpe in the proposed cause of action for knowing assistance in a breach of fiduciary duty. Clearly the plaintiffs knew of the acts; but the question is, Did they know that those acts could amount to knowing assistance in a breach of fiduciary duty or form part of a fraud? I do not think so.

I am accordingly not satisfied that the plaintiffs have delayed in making their application to join Mr Thorpe.

(c) The alleged prejudice to the first to third defendants of joinder

Mr Asher, for the defendants, submits that the joinder of Mr Thorpe will inevitably lead to substantial delays and additional costs. He suggests that it is significant that Mr Thorpe only is joined and not his firm and submits that he may wish to join his firm and possibly his indemnifiers.

There is no doubt that the joinder of Mr Thorpe, if ordered, will delay the proceedings and involve the defendants in additional cost. The question is, Will that delay and that additional cost be unreasonable given the stage which the proceeding has reached and the desirability of avoiding a multiplicity of proceedings?

The present status of the proceeding is as follows:

(a) Pleadings

The plaintiffs have filed an amended statement of claim dated 16 May 1991.

The first to third defendants and fifth defendant have filed statements of defence to the original statement of claim but have not filed statements of defence to the amended statement of claim.

(b) Discovery by the parties

Discovery by the parties is complete.

(c) Discovery by non-parties

Discovery, but not inspection, is complete. The right of the plaintiffs to inspect certain documents discovered by the defendants was the subject of my judgment of 8 March 1993 referred to above. That judgment is subject to an application to review, which has been adjourned sine die for allocation of a two day fixture. I understand that the parties intend to delay

proceeding with the application until after disposal of the application to strike out the plaintiffs' pleading referred to in (e).

(d) First-third defendants' application for trial of a preliminary issue

This application is adjourned sine die.

(e) First-third defendants' application to strike out plaintiffs' amended statement of claim

The first-third defendants have applied to strike out the plaintiffs' amended statement of claim on the ground that it is an abuse of the process of the Court because the dispute between the parties has been compromised by a deed of restraint dated 2 February 1988. This application has been adjourned for hearing until after I have disposed of this present application.

(f) Miscellaneous applications

There are also applications:

(i) For correction of slips in my judgment of 8 March 1993;

(ii) For an order that the defendants pay the costs of non-party discovery.

The extent of the delay caused by the joinder of Mr Thorpe, if ordered, will depend upon:

(a) Whether or not the first-third defendants are successful in their application to strike out the plaintiffs' amended statement of claim on the ground that it is an abuse of the process of the Court because of the deed of restraint;

(b) Whether or not Mr Thorpe could equally successfully argue that it was an abuse of the process of the Court for the plaintiffs to proceed against him if barred from proceeding against the first to third defendants.

If Mr Thorpe, were he joined, were to apply for an order striking out the plaintiffs' amended statement of claim on the ground that it was an abuse of the process of the Court and if he and the first to third defendants were to be successful in their applications, the disposal of this matter will not have been greatly delayed nor will the first to third defendants have been caused substantial additional cost.

If, however, the first to third defendants and Mr Thorpe were to be unsuccessful in applications to strike out the plaintiffs' amended statement of claim or, as it would be by then, the plaintiffs' amended statement of claim, some delay could be caused. This would not result through the need for discovery because that has already substantially been given. It would occur, if at all, because of an application by Mr Thorpe to join his firm and, possibly, his indemnifiers. The likelihood of his taking those steps and the extent of the delay that would follow from his taking them cannot be judged at this stage. Certainly, any such delay can be minimised by the making of timetable orders.

I conclude that joinder of Mr Thorpe will not inevitably cause delay and additional cost to the first to third defendants and that any risk of delay or additional cost can be minimised by appropriate control of the proceedings by the Court.

(c) The alleged unfairness to the proposed defendant

If this is a matter which it is appropriate for the Court to take into account in determining whether or not to order the joinder of Mr Thorpe, I do not consider that it is a factor that can outweigh the benefit in securing the final disposal of all disputes arising from the business relationship of the parties in 1986-1987.

Orders

I accordingly make the following orders:

(1) That Geoffrey Charles Thorpe be and is hereby joined as seventh defendant.

(2) That the plaintiffs file their second amended statement of claim by 4 June 1993 and serve the same on the first, second, third, fifth and seventh defendants by 11 June.

(3) That the first to third defendants' application to strike out the plaintiffs' amended statement of claim be treated as an application to strike out the plaintiffs' second amended statement of claim.

(4) That the first to third defendants' application to strike out the plaintiffs' second amended statement of claim be set down for a hearing on a date to be fixed by the Registrar after consultation with counsel and myself, taking into account the terms of paragraphs 5 to 7 of this order.

(5) That the seventh defendant file and serve any application to strike out the plaintiffs' second amended statement of claim (whether on the ground that it fails to disclose a reasonable cause of action or on the ground that it is an abuse of the process of the Court) by 2 July 1993.

(6) That the plaintiffs file and serve notices of opposition to the applications to strike out the second amended statement of claim brought by the first to third defendants and, as the case may be, by the seventh defendant and any affidavits in opposition by 16 July 1993.

(7) That the first to third defendants and seventh defendant file and serve any affidavits in reply in respect of their applications to strike out the plaintiffs' second amended statement of claim by 30 July 1993.

(8) That costs be reserved.

(9) That counsel for the plaintiffs and the first to third defendants file memoranda by 11 June 1993 stating:

(a) Whether or not they consent to the hearing of the first to third defendants' application for an order under r418 at the same time as the hearing of the first to third defendants' and, as the case may be, the seventh defendant's applications to strike out the plaintiffs' second amended statement of claim;

(b) If they do not consent, why they do not consent.

I will then make orders accordingly or call a conference to consider the matter further.

T. Kennedy-Grant

MASTER T KENNEDY-GRANT

Solicitors

Simpson Grierson Butler White, Auckland, for the Plaintiffs
Denholm & Co, Auckland, for the First to Third Defendants
Corry Carter, Auckland, for the Fifth Defendant

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