

EASTERN CARIBBEAN SUPREME COURT
SAINT VINCENT AND THE GRENADINES

IN THE COURT OF APPEAL

HCVAP 2011/010

BETWEEN:

ORNALD SAMUEL

Appellant/First Ancillary Defendant

JOSETTE TOMMY

Appellant/Second Ancillary Defendant

and

KENDRICK SCARBOROUGH

Respondent/Ancillary Claimant

Before:

The Hon. Mde. Janice M. Pereira

Justice of Appeal

On paper:

Mr. Joseph A. Delves for the Appellants/Ancillary Defendants

Mr. Samuel E. Commissiong for the Respondent / Ancillary Claimant

2012: June 5.

Interlocutory appeal – Defective ancillary claim – Whether trial judge erred in finding that first and second ancillary defendants were liable to indemnify ancillary claimant 30% of damages and costs paid to claimants

JUDGMENT

Background Facts

- [1] **PEREIRA JA:** Two civil claims were commenced in the court below: (1) Claim No. 364 of 2004 by the Estate of Ms. Jasmine Emmanuel against Mr. Kendrick Scarborough (as defendant) and Others; and (2) Claim No. 249 of 2005 by Ms. Dorna Hackshaw against Mr. Scarborough alone as defendant.
- [2] On 16th February 2006, Master Cottle ordered on the application of Mr. Scarborough that:
- (a) the appellants be joined as ancillary defendants to Claim No. 249 of 2005.
 - (b) the defendant (Mr. Scarborough) file and serve the ancillary claim against the appellants;

(c) the ancillary claim be filed and served by 3rd March 2006.

- [3] The ancillary claim was not filed until 6th March 2006, in breach of the order of Master Cottle. No extension of time was sought. A day or two later, the purported ancillary claim was served on the first ancillary defendant. The first ancillary defendant did not acknowledge service or file a defence or participate in the trial.
- [4] On 4th May 2006, Bruce Lyle J made an order ex parte for service on the first ancillary defendant by two consecutive newspaper publications and fixed the time for entry of appearance as being 21 days after the last publication and 14 days after entry of appearance for filing a defence.
- [5] The affidavit of service exhibited one newspaper publication only, dated 16th June 2006.
- [6] None of the ancillary defendants took part in the proceedings. It is not clear whether the second ancillary defendant was ever served with the ancillary claim.
- [7] On 19th January 2011, following a hearing on 18th October 2010 (at which the first and second ancillary defendants appeared neither in person nor by counsel), Thom J entered judgment for the original claimant against the defendant, but ordered that the ancillary defendants are to indemnify the defendant/ancillary claimant as to 30% of the any damages and costs paid by the defendant/ancillary claimant to the claimants. At paragraph 36, the learned trial judge found as follows:

“... The Second Ancillary Defendant in overtaking the bus in an area where the road bends contributed to Mr. Scarborough losing control of his vehicle. I find that the collision was caused as a result of the negligence of Mr. Scarborough and the Second Ancillary Defendant. Mr. Scarborough was seventy percent (70%) responsible and the Ancillary Defendant¹ thirty percent (30%).”

At paragraph 37 she concluded:

“It is ordered that:

- (1) ...
- (2) ...
- (3) ...
- (4) The Ancillary Defendants shall indemnify the Third Defendant 30% of damages and costs paid to the Claimants.”

¹ Presumably meaning the Second Ancillary Defendant.

- [8] The ancillary defendants became aware of their liability on the judgment of Thom J only when they were served with the application for assessment of damages on 1st July 2011.

Discussion

- [9] It must be noted that the claimants in Claim No. 364 of 2004 did not claim against any of the ancillary defendants. They were joined only in respect of Claim No. 249 of 2005. Therefore, they could not be held liable to indemnify in any event in respect of the claim in Claim No. 364 of 2004.

- [10] Further, it is not shown that the learned trial judge was entering judgment against the ancillary defendants for failure to acknowledge service or file a defence. Based on paragraph 36 of her judgment, she appears to have made a factual finding of liability based on the evidence of Mr. Scarborough.

- [11] Further, the finding of liability in respect of the ancillary defendants in favour of the defendant/ancillary claimant was all premised on a defective ancillary claim being issued contrary to the order of Master Cottle of 16th February 2006. It follows that service of the defective ancillary claim would likewise amount to no service on the ancillary defendants. In any event the purported substituted service on the first ancillary defendant was also not in accordance with the terms of the order for substituted service made by Bruce Lyle J. Accordingly, the judgment as against the ancillary defendants in favour of the ancillary claimant cannot stand. The respondent/ancillary claimant has not sought to defend the finding of liability against the ancillary defendants. No skeleton submissions were received from the respondent although he had been served with the notice of appeal since 20th July 2011.

Conclusion and Order

- [12] The appeal is allowed and the trial judge's findings contained in paragraphs 6, 36 and 37 of the judgment dated 19th January 2011 in relation to the ancillary defendants are hereby set aside.

Janice M. Pereira
Justice of Appeal