

COURT OF APPEAL

McMURDO P
THOMAS JA
AMBROSE J

Application No 3025 of 2000

SOUTHERN CROSS INVESTMENT GROUP
PTY LTD

Appellant (Third Party)

and

MARTIN JOSSELYN

Appellant (Third Party)

and

MARK BORRILL

Appellant (Third Party)

and

JOHN HERBERT COOTE

Respondent (Plaintiff)

and

DIANE NOLA COOTE

Respondent (Plaintiff)

and

MARK CAMERON RICHARDS

Respondent (Defendant)

BRISBANE

..DATE 05/04/2000

JUDGMENT

THE PRESIDENT: Justice Thomas will deliver his reasons first.

THOMAS JA: This is an application for leave to appeal against two orders made by Judge Botting in the District Court at the commencement of a pending trial. The orders concerned the rights of the third parties in the conduct of the trial that was to proceed between various plaintiffs, the defendant and the third parties.

The action was brought by a number of plaintiffs who purchased units in a property which settled in April 1998. The defendant is a solicitor whom they allege made various statements which led to their being improperly advised and to their proceeding with the transaction to their loss. The claims are based upon breach of the retainer, negligence and the Trade Practices Act.

The third parties are described as salespersons who apparently had some initial involvement in the sales scheme. They have been sued in that capacity by the defendant on the footing that they are concurrent tortfeasors and also on the footing that co-ordinate liability in equity exists. Accordingly, the defendant seeks contribution or indemnity from the third parties against any judgment given against him.

At the commencement of the trial, the Judge ordered with all the parties' consent (a) that the third parties be bound by the

judgment given by the Court in the proceedings between the plaintiffs and defendant; (b) that the evidence in the proceedings between the plaintiffs and the defendant be evidence in the proceedings between the defendant and third parties; and (c) that the third parties have leave to cross-examine the plaintiffs.

Apparently by oversight, counsel did not initially seek the more common order of granting the third parties leave to defend the plaintiffs' claims against the defendant. Subsequently, and still before the plaintiffs' opening, counsel for the third parties sought such an order, namely, that the third parties be given leave to defend the plaintiffs' claims against the defendant.

The plaintiff's counsel opposed such an order being made. The learned Judge, in giving his rulings, adverted to the relevant rules. His Honour seems to have been troubled by the question whether under the Uniform Civil Procedure Rules he had jurisdiction to make such an order. His Honour adverted to the former Order 17 Rule 4 subrule 4 which expressly mentioned an order in those terms. His Honour said:

"I have doubts as to whether the new Rule 203, notwithstanding its general nature, would in fact authorise an order of the type contemplated by the old Order 17 Rule 4 Sub 4."

His Honour, in due course, declined to make the order that was sought. In the course of his reasons for doing so, his Honour further stated:

"If the third parties were to defend the action between the plaintiffs and the defendant, and were to seek to raise new matters of defence, there would be obvious prejudice and hardship to the plaintiffs."

Subsequently, counsel for the third parties indicated and conceded that his client had no wish or intention to litigate any issues other than those that were contained in the existing defence of the defendant. His Honour subsequently referred to that concession but declined to alter the ruling that he had given. In the event, the third party has been granted very limited rights of a forensic nature in the further conduct of the proceedings.

The more conventional formulation of an order giving a third party leave to defend a plaintiff's action was recognised in *Helicopter Sales Proprietary Limited v. Rotor Work Proprietary Limited*, (1974) 132 Commonwealth Law Reports 1 at 4 and 6. It was held there, *inter alia*, that under such an order all parties are bound by the result of the issues that the third party contests. That indeed is one of the objects of such an order being made.

However, as the present order stands, the third party has been given the right to cross-examine. There has been given no right of address. The third party, in the event that the defendants fail to call witnesses whom the third party considers would affect the result of the decision between the plaintiff and the defendant, could not call further evidence in relation to the plaintiff's case. It was also submitted that, as the order stands, it is at least arguable that the third party would have no right of appeal if aggrieved by the decision that eventually results in relation to the plaintiff's claim. The present order also exposes the third party to the danger of being bound by a consent judgment which

does not, so far as can be seen, seem to be a merely fanciful possibility.

In my view, the order that was made falls between two stools. I note that the defendant does not oppose the grant of the relief that was sought. It seems that the learned Judge may have been unnecessarily troubled by a concern about a lack of power to make the order that was sought and may have been to some extent deterred by that concern from proceeding to make such an order. In my view, Rule 203 and its adjunct, 204, plainly retain the power of the Courts which proceed under those rules to make such an order as that which was sought.

I do not propose to canvass the respective arguments which were presented about matters of convenience, inconvenience, loss of advantage and the like. It seems to me that, in proceeding in the limited fashion in which he did, the decision of the Judge was plainly wrong. This is a matter which has been set down for two weeks involving multiple claims. If it proceeds on a wrong basis the entire exercise will be wasted. It is true that the application before us is in relation to a procedural matter, but it is one which has a real potential to affect the result and therefore to cause substantial injustice to the third parties. As I think it was plainly wrong, I think that this Court should in this instance intervene. I regard it as a special case and it should not be thought that leave will be granted to deal with such questions other than in exceptional cases.

I would therefore grant leave to appeal, set aside the rulings that were given and, in lieu, order that there be directions, in terms to be settled by counsel and provided to the President's associate forthwith. It would be my intention that the order should include the concession that was made by the third party's counsel to which I have referred in my reasons.

THE PRESIDENT: I agree.

AMBROSE J: I also agree. I would simply draw attention to the fact that, in giving his reasons for refusing the application, the learned trial Judge adverted to the possibility that giving the third parties liberty to defend might have the effect of compromising the plaintiff's ability to compromise the action with the defendant. This, of course, could only occur if it was compromised by the defendant consenting to judgment. It would not, one would think, have any effect on the ability of the plaintiff or the defendant to compromise the action by means other than the defendant's consenting to judgment, and it seems to me, for the reasons my brother Thomas has given, that that is a matter that really might cause problems in the ultimate determination of the third party proceedings.

THE PRESIDENT: As to costs, we are disposed to make the order of costs in the cause in this case. The orders are: the application for leave to appeal is granted; the appeal is allowed; remaining order is as stated by Thomas JA; the costs of and incidental to this application and the appeal are costs in the cause of the

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action.

The order will be in terms of the draft presented to me in due course and initialled by me, and liberty to apply.
