

THE REPUBLIC OF TRINIDAD AND TOBAGO

IN THE HIGH COURT OF JUSTICE

CLAIM NO. CV 2017-01032

BETWEEN

GULF VIEW MEDICAL CENTRE LIMITED

Claimant

AND

DR. LESTER GOETZ

Defendant

Before the Honourable Mr. Justice Frank Seepersad

Appearances

1. Ms Mary O'Rourke QC, Mr Pariagsingh and Mr Anand Beharrylal for the Claimant
2. Mr. Hamelsmith SC, Mr Pantin Inst By Ms Thompson for the Defendants

Date of Delivery: 10th October, 2017

Oral decision reduced into writing

DECISION

1. Before the Court for its determination was the Defendant's Notice of Application filed on 4th July, 2017 to strike out the Claimant's Claim Form and Statement of Case by virtue of which the Claimant sought declaratory relief and an order of indemnity from the Defendant with respect to the whole (or for such part as the Court may direct) of the judgment sum awarded in CV 2009-2051/HCA 542 of 2005 (the substantive matter).
2. The Court felt that it was necessary to undertake a comprehensive view of the procedural history that unfolded in the substantive matter which arose as a result of the death of Russell Tesheira. In that matter the instant Defendant was named as a Defendant but a settlement was effected with the Claimant and he exited the matter. The instant Claimant pursued an application for, *inter alia*, an order that it be granted leave to institute an Ancillary Claim as against the instant Defendant and the grounds upon which the application was premised were expressed as follows:

"(5) The alleged damage to the Claimant arises out of a single incident in which the Defendants, if held liable, would have caused the same damage. Though different tortfeasors, the alleged damage caused was the same. Settlement of the claim against one tortfeasor operated as a bar to the claim against the other tortfeasors... In addition, there will be the issue of indemnity and/or contribution which have to be addressed by way of an ancillary claim against the Second Named Defendant [this Defendant] who was the principal tortfeasor.

(8) The action now stands dismissed as against the Second Defendant [this Defendant] on the basis of the settlement. The Second Defendant will not face trial of liability and this Honourable Court would be unable to apportion liability and even continue the matter with the Claimant having settled against the main tortfeasor. The issue will then be whether the Claimant can continue the action against the other tortfeasors having settled against the main tortfeasor in a medical negligence claim arising out of a single incident which cause the same damage".

3. The Trial Judge refused the relief sought and the Court noted the Judge's statements which were expressed at paragraphs 2, 7, 9, 10, 11 and 25 of his ruling which was delivered on the 25th July, 2013. At paragraph 9 of the ruling, the Trial Judge formulated the issues for his consideration and at paragraph 10 noted that the nature of the claim as against the named Defendants led the Court to conclude that they were concurrent and not several tortfeasors. The Trial Judge's decision was appealed, by the instant Claimant then Appellant.
4. The Trial Judge's decision was upheld and the appeal was dismissed. This Court further noted the dicta of Narine JA and in particular paragraphs 14, 15, 17, 26, 27, 30 and 49 of his judgment which was dated 31st July, 2014.
5. The Court of Appeal considered the issue as to whether the Appellants were entitled to institute an Ancillary Claim as against the then Second Respondent and noted at paragraph 49 that the Appellants in their Amended Defence did not plead any negligence on the part of the then Second Respondent and therefore found that there was no allegation of negligence as against Dr. Goetz upon which an Ancillary claim could have been issued.
6. The issue as to whether the Instant Defendant was to be regarded as a joint, several or concurrent tortfeasor and whether an Ancillary Claim could have been issued, was fully ventilated during the course of the substantive matter.
7. It appears to this Court that the issues raised in the instant action are fundamentally similar to the issues that engaged the High Court and the Appeal Court as aforesaid. The issue therefore to which the Court had to address its mind was whether the continuation of the instant matter would amount to an abuse of the Court's process in accordance with the principles outlined in **Henderson v. Henderson (1843) 3 Hare 100.**
8. In its determination of this issue, the Court considered the dicta the case of **Spire Healthcare Ltd v. Brooke, [2016] EWHC 2828 (QB)**, section 26 of the Supreme Court of Judicature Act Chap. 4:01, section 4 of the Limitation of Certain Actions

Act Chap 7:05 and the correlation between the aforesaid pieces of legislation with Part 18.3 and Part 18.4 of the Civil Proceedings Rules 1998 (as amended).

9. In the substantive matter, the Instant Claimant in its Defence made no admission with regard to the particulars of negligence that were outlined as against the Instant Defendant, the then Second Defendant and it was open to the Instant Claimant, from the onset of the substantive matter, to allege negligence and or contribution as against Dr. Goetz, however this was not done.
10. Having read **Spire v. Brooke**, this Court formed the view that the said decision did not suggest that an abuse of process consideration in accordance with the principles of **Henderson v. Henderson** does not apply in relation to a claim for contribution or indemnity that is founded in statute as opposed to the common law.
11. The Court formed the view that issues pursued in the instant claim were actively considered during the course of the substantive matter and the continuation of the instant matter would occasion unfairness and prejudice upon the Defendant and would not accord with the Court's obligation to allocate its limited resources in a manner that is proportionate.
12. In the circumstances this Court found that the Defendant's application was not devoid of merit and that the claim should not be entertained as it amounts to an abuse of the Court's process. Accordingly the claim was struck out.
13. By consent the parties agreed that the costs payable to the Defendant associated with the notice of application would be \$10,000.00 and that costs on the substantive claim would be \$15,000.00.

FRANK SEEPERSAD
JUDGE