IN THE HIGH COURT OF THE COOK ISLANDS
HELD AT RAROTONGA
(CIVIL DIVISION)

PLAINT NO. 81/92

BETWEEN BERT EVALD ANDERSON of Seattle, United States of America, Businessman

Plaintiff

AND TIMOTHY PAUL ARNOLD, TINA PUPUKE BROWNE, BRET JOHN GIBSON all of Rarotonga, Solicitors.

Defendants

Hearing: 16 December 1992 and Counsels memoranda of 16 December 1992 and 14 January 1993.
Mr Appleby for Plaintiff.
Mr Arnold for Defendants.
Judgment: 18th January 1993

JUDGMENT OF ROPER CJ

In 1986 the Plaintiff made advances to Auto Marine, a firm in Rarotonga, through his solicitors Short & Tylor. In February 1987 Auto Marine gave a debenture over all its property and assets to secure past and future advances. Mr and Mrs Preston of Auto Marine guaranteed the debenture. Auto Marine failed to meet the Plaintiff's demand for the $82,829 then said to be owing under the debenture and a receiver was appointed. The legality of the debenture was challenged unsuccessfully in the High Court, but on appeal the debenture was held to be unenforceable on the ground that it was contrary to the provisions of the Development Investment Act 1977 in that Mr Anderson had not been registered under the Act. The Defendant

firm acted for Mr Anderson in the proceedings against Auto Marine.

The plaintiff's statement of claim against the present defendants is a rambling, repetitive document but the essence of it is that the plaintiff claims that the defendants were in breach of contract, or alternatively negligent, in not detecting Short & Tylor's failure to comply with the provisions of the Development Investment Act and taking steps to rectify the position.

The defendants have now applied to join Mr Tylor and his former firm as third parties.

The application is opposed by the plaintiff. I hope I am not doing the plaintiff and his advisors an injustice but the relationship between the plaintiff and Short and Tylor seems to be a curious one. The plaintiff actually issued proceedings against Short & Tylor but discontinued in circumstances which suggest that Mr Anderson's present solicitors were acting for both him and Short & Tylor. The plaintiff's determined opposition to the issue of the third party notice also seems a little curious particularly as no specific submission has been made to suggest that the issue of the notice would cause delay to the plaintiff's prejudice.

The present application is made pursuant to S120(1)(c) of the Code of Civil Procedure which provides in short that a third party notice may issue where the defendant claims that there are questions or issues which should properly be determined between the plaintiff, the defendant and the third party, or between any or either of them. The main issue which the defendants say should be so determined is the alleged

negligence of Mr Tylor and his firm to comply with the provisions of the Development Investment Act.

The defendants acknowledge that they have no independant right of action against the third parties whether in contract or tort but rely on S3 of the Law Reform Act 1968, which is almost identical to the New Zealad Law Reform Act 1936. The Act gives the right to contribution to any tortfeasor who is liable in respect of a plaintiff's damage, and it is given to him only against another tortfeasor who is, or would if sued have been liable in respect of the same damage, whether as a joint tortfeasor or otherwise.

Counsel for the plaintiff has submitted that the Law Reform Act 1968 has no relevance, as since the filing of the third party application the plaintiff has filed an amended statement of claim deleting the cause of action based on tort.

I propose to deal with this application on the basis that there is concurrent liability in contract and tort in the solicitor client relationship. This concurrent approach has been resisted in New Zealand but dicta in Rowe v Turner Hopkins and partners [1982] 1 NZLR 178 and Day v Mead [1987] 2 NZLR 443 indicate that in the appropriate case reconsideration is likely in the future.

Counsel for the plaintiff has submitted that any proceedings against Mr Tylor and his firm would be barred by the Limitation Act 1950. That is a matter for another day and I make no decision upon it. Perhaps the case of Steele v L F Grey Limited and another [1972] NZLR 498 is in point.

Justice clearly requires that the third party notice issue.

Leave is therefore granted to issue and serve the third party notice as filed.

Service is to be within 21 days with the hearing at the next session of the Court; but with leave reserved to all parties to apply for a variation of that hearing date. Costs reserved.

I confirm for the record the orders made on the 16th December last:

1. Order against the plaintiff for security of costs in the sum of $12,000 to be secured by a mortgage over the plaintiff's leasehold property at Muri; the mortgage to be prepared at defendants cost.

2. By consent - statement of defence to be filed by 18th December 1992. Defendants affidavit of documents to be filed by 29 January 1993 and plaintiff's affidavit not before that date.

C M Roper
CHIEF JUSTICE