



[2020] JMSC Civ 14

IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN THE CIVIL DIVISION

CLAIM NO. 2012HCV04442

BETWEEN	LYNETTE BUTLER – GILPIN	CLAIMANT
AND	CLEVELAND RESORTS LIMITED T/A EL GRECO RESORT	1ST DEFENDANT
AND	VANGUARD SECURITY LIMITED	2ND DEFENDANT

IN CHAMBERS

Ms. Alexandria Fennell instructed by Nigel Jones and Company for the Claimant.

Christopher Dunkley instructed by Phillipson Partners for the 2nd Defendant.

January 9, 21 and February 5, 2020

Whether the 1st and 2nd defendants were joint or concurrent tortfeasors – classification of the defendants as joint or concurrent tortfeasors is ultimately not significant in this case – critical factor in determining whether settlement with 1st defendant bars continuation of the claim against the 2nd defendant is the nature and intent of the settlement – no evidence to substantiate that settlement was in partial not full satisfaction of claim – basic rule/principle, that settlement extinguishes claim against other tortfeasor, which prevents the injustice of double recovery, is not displaced – 2nd defendant's security guards presence based on contract between the 1st and 2nd defendants which created and delineated their duties – security guards have no general duty to prevent crime over and above that of ordinary private citizens – absence of privity of contract between the claimant and the 2nd defendant – tortious liability in the circumstances of this case cannot exist independently of, or exceed that based on contract – discontinuance against 1st

defendant and the absence of privity of contract between the claimant and the 2nd defendant fatal to the claim against the 2nd defendant

D. FRASER J

Introduction and Background

- [1] The following are the reasons for the decision of the court given on the 21st day of January 2020.
- [2] By this claim the claimant alleged that on or about December 4, 2011 whilst she was vacationing at El Greco Resorts she was assaulted and robbed by a man who entered her room by a ruse, alleging that he had come to provide “room service”.
- [3] In the Further Amended Particulars of Claim filed January 22, 2013, the claimant maintains that she suffered loss and incurred expenses as a result of the defendants’ breach of statutory duty, breach of contractual duty and negligence.
- [4] The 1st defendant filed an amended defence on October 18, 2013 and an Amended Ancillary Claim on October 28, 2013. The 2nd defendant filed a defence to the amended ancillary claim on December 12, 2013. The 2nd defendant not having filed a defence to the Further Amended POC, the claimant obtained judgment in default of appearance by the 2nd defendant.
- [5] The 2nd defendant applied to set aside the default judgment and the application was heard and refused by Anderson J on February 14, 2014. On March 3, 2017 the 2nd defendant brought proceedings *de novo* to set aside the default judgment.
- [6] Pursuant to a settlement between the claimant and the 1st defendant, a joint notice of discontinuance was filed by the claimant and the 1st defendant on July 20, 2017, which indicated that, “the Claimant **HEREBY WHOLLY DISCONTINUES** the claim against the 1st **DEFENDANT** and withdraws same.”
- [7] The first defendant’s amended ancillary claim against the 2nd defendant however remained and remains extant before the court.

- [8] After becoming aware of the filing of the Joint Notice of Discontinuance, on July 28, 2017 the 2nd defendant filed an amended NOACO to set aside the default judgment asserting inter alia that, i) settlement of the claim for damages as distinct from a liquidated sum is treated in law as a compromised substitution of a judgment of a court, fixed at the compromised settlement sum and ii) The settlement and subsequent discontinuance of the claim for unliquidated damages against the 1st defendant extinguished the claim against the 2nd defendant, leaving only the 1st defendant's ancillary claim, itself limited to an indemnity, which remains live before this Honourable Court.
- [9] On the 9th day of February 2018 Dunbar-Green J set aside the default judgment obtained against the 2nd defendant as of right and ordered that the Defence to Further Amended Claim form filed July 31, 2017 should stand as if filed in time.
- [10] The 2nd defendant in this Defence asserted that it was contracted by the 1st defendant to provide two static guards; one for the main entrance to manage ingress and egress and the other to provide security for users of the main office. The 2nd defendant therefore denies that either of its two guards failed to perform duties to safeguard the claimant, as it maintains that based on its contract with the 1st defendant and the static positioning of the two guards in the locations previously indicated, the 2nd defendant's guards had no duty to safeguard the claimant.

The First Preliminary Objection

- [11] The contention that the settlement and subsequent discontinuance of the claim against the 1st defendant had extinguished the claim against the 2nd defendant not having been addressed by Dunbar- Green J, that point was taken before this court on September 23, 2019. An adjournment was granted until the 15th October 2019 to facilitate written submissions on the point as counsel for the claimant was unprepared to respond to the submission.
- [12] On the 15th October 2019 both counsel were invited to consider and respond to each others' submissions and the matter was further adjourned to the 23rd day of

October 2019 for the court's ruling. On October 23, 2019, in a short ruling the court declined to rule on the point, deferring instead to the trial court where the matter was set for hearing on November 4, 2019.

- [13] The court was unfortunately unable to hear the matter as it was engaged with other cases. However, before the matter was adjourned an additional preliminary point was raised for consideration — whether there was any privity of contract between the claimant and the 2nd defendant on the basis of which the claimant could sue the 2nd defendant for breach of contract?

The hearing of January 9, 2020

- [14] On January 9, 2020, the claimant now represented by new counsel from the chambers of Nigel Jones, sought leave of the court to have an affidavit of Nigel Jones filed on January 8, 2020 stand. One main purpose of the affidavit was to provide evidence of the claimant's settlement with the 1st defendant to support the assertion that that agreement was not in full and final settlement of the claimant's claim and therefore the claimant was entitled to proceed against the 2nd defendant to recover the balance of her claim.

- [15] Counsel for the claimant argued that the failure to put forward this evidence previously was an oversight and that the claimant would be prejudice if the matter were to proceed without the evidence being admitted. Counsel further submitted that costs could be awarded to the 2nd defendant if time was required to respond.

- [16] Counsel for the 2nd defendant strongly objected to the affidavit being allowed to stand. While counsel indicated that the affidavit would not be fatal to his submissions, he would need to prepare to deal with it fulsomely and would require the affiant to attend for cross examination. Further he argued that the matter should not be adjourned as the claimant had been well aware of the issue raised for a considerable length of time. Hence counsel asked the court to draw the inference that a tactical decision had previously been taken not to disclose the contents of the settlement, and it appears that decision had not changed. Counsel also argued

that he was unaware of the position of the 1st defendant which might also need to be considered especially as there was an existing ancillary claim brought by the 1st defendant against the 2nd defendant.

[17] I ruled against allowing the affidavit to be used and ordered that the matter proceed. The basis of that ruling was the overriding objective to deal with cases justly. The following factors were taken into consideration:

- i) The claimant had been aware from at least 2017 of the 1st preliminary objection;
- ii) The matter had previously been considered and the point deferred for determination at trial;
- iii) The matter did not proceed on the trial date as it was not being reached;
- iv) Since the trial date the claimant had not sought to file the affidavit until the day before the hearing;
- v) While the court is aware that present counsel was only recently assigned to the matter, the principle of collective responsibility applies, as the same firm has been representing the claimant from the inception of the proceedings; and
- vi) It would be prejudicial to the 2nd defendant and to other cases before the courts that require judicial resources, if against the background outlined, the matter was further adjourned.

The First Preliminary Objection

The Submissions

Counsel for the 2nd defendant

[18] Counsel for the 2nd defendant submitted that the settlement of a claim for unliquidated damages must, as a matter of law, be treated as being in substitution

for a judgment of the court, fixed instead by a compromised settlement sum paid by the 1st defendant.

- [19] Counsel further advanced that the claimant's compromise of her claim for unliquidated damages and the subsequent discontinuance against the 1st Defendant had the legal consequence of extinguishing her claim against the 2nd Defendant as concurrent tortfeasor.
- [20] The position of the 2nd defendant was therefore that the claimant was estopped from resiling from her compromise settlement with and subsequent joint discontinuance filed by her and the 1st defendant. Counsel contended that as a matter of law, the principle of finality demands that there be an end to this litigation between the claimant and the 2nd defendant.
- [21] Counsel relied on the case of ***Jameson and another (executors of Jameson (deceased)) v Central Electricity Generating Board (Babcock Energy Ltd, third party)*** [1998] All ER (D) 740.

Counsel for the claimant

- [22] Counsel relied on Section 3(1)(a) of **The Law Reform (Tort-Feasors) Act** which provides as follows:

3 (1) Where damage is suffered by any person as a result of a tort (whether or not such tort is also a crime) —

(a) judgment recovered against any tortfeasor liable in respect of such damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage;

- [23] Counsel argued that the court could treat with the settlement arrived at between the claimant and 1st defendant as akin to a judgment, in which case the statute was clear that the settlement would not preclude the claimant from pursuing action against the remaining joint tortfeasor.

- [24] Counsel however also submitted that the court could also adopt the alternative position that a settlement for unliquidated damages is not deemed in law as a substitution for a judgment of the court. For this proposition counsel cited the case of ***Gardiner v Moore and others*** [1969] 1 Q.B. 55. Therefore, counsel advanced that the settlement agreement between the claimant and the 1st defendant did not extinguish the claimant's right to seek judgment against the 2nd defendant. This in a context where the claimant had only obtained partial recovery of damages from the 1st defendant and could rightfully proceed against the 2nd defendant to recover the remainder of the damages claimed.
- [25] Handicapped by the absence of the affidavit evidence on which to ground the previous submission, counsel argued that the court cannot determine the facts without sufficient evidence, and therefore it would be unfair for the matter to be struck out at this stage. Counsel maintained that it was appropriate for the matter to go to trial so the facts of the case could be ventilated and consequently has asked the court to exercise its discretion to allow any further evidence that could later be put forward.
- [26] As did counsel for the 2nd defendant, counsel for the claimant embraced the case of ***Jameson and another (executors of Jameson (deceased)) v Central Electricity Generating Board (Babcock Energy Ltd, third party)***. Additionally counsel also relied on the cases of ***Williams v Lindo and Anor*** [2016] JMSC Civ. 238 and ***Neville Knowles, Jnr (Administrator of the estate of Neville Knowles) v South Eastern Regional Health Authority*** [2019] JMSC Civ. 3.

The Second Preliminary Objection

- [27] As the analysis of both the first and second preliminary objections will involve some, even if not extensive overlap it will be appropriate to outline the second objection now and then address both together.
- [28] Counsel for the claimant candidly and commendably conceded that there was no contract between the claimant and the 2nd defendant and hence the claim against

the 2nd defendant could not be sustained under a contractual cause of action. Counsel however hung her hat on the tort of negligence as she sought to maintain that the 2nd defendant through its agents had failed to discharge their duty of care to the claimant.

- [29] Counsel for the 2nd defendant maintained that no such duty of care existed outside of the contractual relationship created between the 1st and 2nd defendants. In that context he highlighted what he submitted was the significance of the discontinuance of the matter against the 1st defendant. He argued that there being no contractual relationship between the claimant and the 2nd defendant and the 1st defendant with whom the 2nd defendant had a contractual relationship no longer being a part of the claim, there was no basis on which any duty of care could be imputed to the 2nd defendant and hence not only could no claim be sustained in contract, neither could a claim be sustained in negligence.

Analysis

- [30] Counsel for the 2nd defendant has maintained that the circumstances of the case were such that the 1st and 2nd defendants were sued as joint tortfeasors. The submissions filed on behalf of the claimant, not settled by, but relied on by counsel who argued the matter, at different points cited statute and case law which referenced joint tortfeasors, but eventually concluded that the defendants were concurrent tortfeasors. This conclusion was on the basis that their duties to the claimant were separate, despite the breach of which resulting in the same harm.
- [31] The issue of whether the defendants were joint or concurrent tortfeasors, and what difference in consequences, if any, flows from one designation as opposed to the other, therefore necessarily arises.
- [32] The learned authors of **Markesinis and Deakin's Tort Law** Fifth Edition at pages 850 – 851 explain the distinction between joint and concurrent tortfeasors in the following manner:

Where tortfeasors cause the same damage they may either be *joint tortfeasors* or *several concurrent tortfeasors*. Tortfeasors are 'joint' in cases of express authorisation or instigation; principal and agent; vicarious liability; the liability of an employer and an independent contractor (where the former is under a personal, non-delegable duty of care); the liability of tortfeasors who act in breach of a joint duty; and tortfeasors who act in pursuance of common design. Several concurrent tortfeasors are those who, acting independently of each other, combine in their actions to cause damage to the claimant, for example, where two careless motorists collide and injure a pedestrian. In joint liability each tortfeasor is liable for the full amount of the claimant's loss, but there is only one tort and so the cause of action against each one is the same and is supported by the same evidence.

[33] In **Halsbury's Laws of England, Fourth Edition Reissue**, Vol. 45(2), at paras. 346 and 347 the subject is treated in this way:

346. Liability of joint tortfeasors. Each of two or more joint tortfeasors is liable for the entire damage resulting from the tort. The following are joint tortfeasors:

- (1) employer and employee where the employer is vicariously liable for the tort of the employee;
- (2) principal and agent where the principal is liable for the tort of the agent;
- (3) employer and independent contractor where the employer is liable for the tort of his independent contractor;
- (4) a person who instigates another to commit a tort and the person who commits the tort;
- (5) persons who take concerted action to a common end and in the course of executing that joint purpose commit a tort.

347. Several tortfeasors. If each of several persons, not acting in concert, commits a tort against another person substantially contemporaneously and causing the same or indivisible damage, each several tortfeasor is liable for the whole damage. If each of several persons commits an independent tort consecutively against the same person, each is liable for the damage caused by his tortious act, assuming the damage proximately caused by each tort to be distinct. Thus if the second tortfeasor's act caused no further damage or merely duplicated damage caused by the first

tort, the second tortfeasor will not be liable; but if his act aggravated the damage caused by the first tort, each tortfeasor will be liable only in respect of the part of the damage which his tort caused assuming that it is possible to separate and quantify the aggravation of damage.

- [34] The allegation from the claimant is that the omissions of the 1st and 2nd defendants led to her suffering the same harm and damage. In the instant case the 2nd defendant an independent contractor was contracted by the 1st defendant to provide security services. The 1st defendant as a provider of accommodation and other services to the claimant, would it appears, be under a personal non-delegable duty of care. The facts therefore seem to place the defendants in the category of joint tortfeasors based on the relationship of employer and independent contractor that existed between them.
- [35] What therefore are the consequences of the determination of whether the defendants are joint or concurrent tortfeasors? Firstly, if the defendants were joint-tortfeasors, the finality of a settlement for unliquidated damages in certain circumstances, which shall be subsequently outlined, supports the position advanced by counsel for the claimant, that such a settlement could be viewed as akin to a judgment referred to section 3(1)(a) of the **The Law Reform (Tort-Feasors) Act**. So construed, the effect of section 3(1)(a) would *prima facie* be to preserve the action against other joint tortfeasors, even after the claimant has entered into a final settlement with one. The alternative position advanced by counsel for the claimant relying on ***Gardiner v Moore and others***, that a settlement is not a judgment, but an agreement whose effect falls to be construed, achieves the same outcome depending on the nature of the agreement.
- [36] Based on the case of ***Jamieson***, relied on by both parties, a similar outcome may result where there is a settlement with one concurrent tortfeasor and the claimant seeks thereafter to proceed against the remaining tortfeasor(s). Accordingly whether the classification of the defendants as joint as opposed to concurrent tortfeasors is correct is ultimately not of significant moment. As the subsequent analyses of the cases disclose, the critical factor determining whether an action

survives against a remaining tortfeasor who has caused or contributed to the same damage as another tortfeasor with whom the claimant has entered into a settlement, is the nature and intendment of the settlement.

- [37] In *Jamieson*, J brought an action against his employer B claiming damages for his affliction by mesothelioma, allegedly caused by the employer's negligence and/or breach of statutory duty, that resulted in him being exposed to asbestos while working for them. Shortly before he died, he settled his claim for £80,000, though his full claim was for £130,000. The settlement agreement was expressed to be, "in full and final settlement and satisfaction of all the causes of action in respect of which the plaintiff claims in the statement of claim."
- [38] After J's death his widow/executors brought an action against CEGB, another of J's employers, to recover the balance of the value of the claim, on the basis that J's fatal illness might have been caused by similar though not identical acts of negligence and/or breach of statutory duty of either or both B and CEGB. CEGB denied responsibility for J's illness, and also maintained that in any event it could not be liable because of J's settlement with B. However, CEGB joined B as a third party/ancillary defendant, claiming a contribution in the event it was held liable in damages to the plaintiffs.
- [39] At first instance and in the court of appeal, it was held that the prior agreement did not prevent the widow/executors from pursuing CEGB for the balance of the value of the claim and that if CEGB were found liable in damages they could seek to recover a contribution from B. On further appeal to the House of Lords it was held reversing the court of appeal by a majority (4:1) , that 1) once a plaintiff's claim had been satisfied by one of several tortfeasors his cause of action for damages was extinguished against all of them; 2) since the settlement agreement could not be interpreted as meaning that the sum accepted by J was only in partial satisfaction of his claim for damages the effect of the settlement was to extinguish J's claim against any other tortfeasor; and 3) the claim was satisfied from the date the

settlement agreement was entered into between J and B subject to the full payment of the settlement sum which had been made shortly after J's death.

[40] In **Jamieson**, it was agreed between the parties that the case was concerned with concurrent rather than joint torts as the claim against B and CEGB reflected separate causes of action each allegedly contributing to the same damage. Therefore Lord Hope of Craighead at page 472 noted that, “...*the causes of action against each of the concurrent tortfeasors are separate, not single and indivisible as is the case with joint tortfeasors.*”

[41] Earlier at page 471 – 472, Lord Hope of Craighead dealing with the effect of the satisfaction of a claim by any one of several tortfeasors had stated that:

The basic rule is that a plaintiff cannot recover more by way of damages than the amount of his loss. The object of an award of damages is to place the injured party as nearly as possible in the same financial position as he or she would have been in but for the accident. The liability which is in issue in this case is that of concurrent tortfeasors, because the acts of negligence and breach of statutory duty which are alleged against Babcock and the defendant respectively are not the same. So the plaintiff has a separate cause of action against each of them for the same loss. But the existence of damage is an essential part of the cause of action in any claim for damages. It would seem to follow, as a matter of principle, that once the plaintiff's claim has been satisfied by any one of several tortfeasors, his cause of action for damages is extinguished against all of them.

[42] Accordingly in **Jamieson** the critical factor was not that the defendants were concurrent tortfeasors, nor that the claims were brought sequentially, it was that the nature of the settlement entered into between the claimant and the 1st defendant was essential to the determination of its effect. As Lord Hope of Craighead later stated at page 476, “*The question...is...not whether the plaintiff has received the full value of his claim but whether the sum which he has received in settlement of it was **intended** to be in full satisfaction of the tort.*” (emphasis supplied).

[43] At Page 484 – 485, Lord Clyde had this to say on the same point:

In principle it seems to me that where settlement is sought with one alone, where the others are not involved in the proceedings, the intention of the parties should usually be taken to be that they are achieving a complete termination to any claims by the creditor and a complete freedom for the future for the debtor. On the one hand the creditor is being fully compensated for the value of his claim so as to exhaust any right to pursue it further in any direction. On the other hand the debtor is being discharged from any possible liability in contribution so that the creditor would be in breach of the agreement were he to sue a third party and create such a liability. Particular circumstances and particular terms in the agreement may obviate such consequences, but, where the matter has been left open and unclear, it seems to me that those are the consequences which should follow upon the settlement of one co-obligant in a joint and several obligation which has been carried out in the absence of any other co-obligant.

[44] Though Lord Clyde expressed the principle in the context of *Jamieson* where at the time of the settlement no proceedings were in being for the concurrent tortfeasor, it was not expressed in such a fashion that precluded its application in circumstances where, as in the instant case, the concurrent tortfeasor was charged jointly with the defendant with whom the claimant entered into a settlement. Also tellingly, Lord Hope did not introduce such a limitation.

[45] It appears therefore that what can be gleaned from the extracts, is that a settlement with one tortfeasor where there is another concurrent tortfeasor who may also be liable to the claimant for damage caused, may or may not have the effect of extinguishing any claim against that other tortfeasor who was not a party to the agreement. If the intention was to fully satisfy the claim it does. If there is evidence to show that the settlement was not intended to and did not satisfy the full extent of the claimant's claim the claim survives against the other tortfeasor. This principle is to prevent the injustice of double recovery, which could occur without that safeguard.

[46] Based on the court's ruling, adverted to earlier, by which permission was refused for the claimant to rely on the affidavit filed January 8, 2020 at the hearing on

January 9, 2020, the claimant was unable to put before the court any evidence to substantiate her argument that the settlement was partial and not in full satisfaction of her entire claim. Absent that evidence, in the words of Lord Clyde the circumstances of the settlement are such that “*the matter has been left open and unclear*”. By default there is therefore nothing to displace the basic rule or principle that the settlement between the claimant and the 1st defendant extinguished the claim against the 2nd defendant.

[47] The reliance of the claimant on the cases of ***Williams v Lindo and Anor*** and ***Neville Knowles, Jnr (Administrator of the estate of Neville Knowles) v South Eastern Regional Health Authority*** cannot assist her, as in both of those cases as in ***Jamieson***, the terms of the settlement agreement were before the court. In this case for the reasons already outlined, the terms of the settlement agreement are not before the court. The importance of the basic rule that prevents double recovery is emphasised by the outcome in the ***Neville Knowles, Jnr (Administrator of the estate of Neville Knowles) v South Eastern Regional Health Authority*** case, where, though the learned judge allowed the claim to proceed it was but a pyrrhic victory, but for costs awarded to the claimant. This was so as the court found that the fact that the amount of the prior settlement was in excess of that awarded against the remaining defendant, had “extinguished the awards” made by the court. It may well be that based on the previous analysis that court could properly have found that it was not just the awards, but the claim itself that had been extinguished.

[48] The matter does not end here however. At this point it is important to note that, even if the court had exercised its discretion differently, and permitted the claimant to adduce evidence tending to show that the settlement was intended to be partial and not full and final, the claimant’s case would still have been unable to proceed due to the implications of the second preliminary objection. The ability of the claimant to proceed against a tortfeasor in respect of whom there has been no settlement, is also necessarily dependent on it being possible for the claim against that tortfeasor, to stand and be prosecuted against that tortfeasor alone.

- [49]** This is where the significance of the discontinuance of the claim against the 1st defendant in the context of the second preliminary objection looms large. It was in a word injudicious. The 2nd defendant's guards were only on the premises due to the contract between the 1st defendant and the 2nd defendant. The duties that the guards had on the premises therefore arose by virtue of the contract that caused them to be there. Security guards are not police officers. They have no general duty to prevent crime over and above the responsibilities imposed on ordinary private citizens. Their duties are linked to and delineated by their contracts.
- [50]** Without the 1st defendant being a part of the case, even if the 2nd defendant was in breach of its contractual duty to the 1st defendant as a result of which the claimant received injury and suffered damage, the absence of privity of contract between the claimant and the 2nd defendant, puts the 2nd defendant beyond the contractual reach of the claimant. This is the position even taking the most favourable view of the case for the claimant, and proceeding for the sake of argument, on the assumption that the contract between the 1st and 2nd defendants was such, that it could rebut the defence of the 2nd defendant, that its guards had no responsibility in relation to the area in which the unfortunate incident took place, that led to the claimant's injuries, loss and expense.
- [51]** In the absence of a contractual peg on which to hang the case for the claimant, which was conceded by counsel for the claimant, counsel proposed to proceed against the 2nd defendant on the basis of negligence and indicated that leave would be sought to further particularise the offending acts of negligence. However the claimant would have to be contending in that regard, that the 1st defendant sought to discharge its obligations to the claimant at least in part by the engagement of the 2nd defendant. Again, assuming for the benefit of argument that the contract between the 1st and 2nd defendant could serve to rebut the defence of the 2nd defendant, it is still difficult to conceive of a situation where any duty of care that might have been owed to the claimant by the 2nd defendant could either exist independently of or exceed that which would have been based on the 2nd defendant's contractual obligation.

[52] Absent contractual underpinning, it therefore would be nigh impossible to fix liability in tort, especially in a context where, from the pleadings, the overriding complaint in negligence relates to acts of omission not acts of commission in that the defendants “failed to put in place the necessary security measures to ensure the Claimant’s safety.” It appears therefore, that this is an insuperable hurdle for the claimant. The discontinuance of the claim against the 1st defendant has left the claimant without a means to anchor her claim against the 2nd defendant, either in contract or in tort.

Conclusion

[53] In light of the determination of the court in relation to both preliminary objections, the court makes the following orders:

- (1) The 2nd defendant’s application succeeds and the claim is struck out as disclosing no reasonable cause of action against the 2nd defendant at this point.
- (2) Costs of the application to the 2nd defendant to be agreed or taxed.
- (3) Leave to appeal refused.
- (4) Counsel for the 2nd defendant to file and serve the formal order.