22/00; [1999] VSC 101

SUPREME COURT OF VICTORIA

READ & READ PTY v McNAMARA & ANOR

Harper J

29 March 1999

CIVIL PROCEEDINGS – SOLICITORS/EMPLOYEE SOLICITOR – CLAIM BY SOLICITORS AGAINST EMPLOYEE ALLEGING NEGLIGENCE – PROFESSIONAL INSURANCE – CLAIM BY CLIENT AGAINST SOLICITORS SETTLED – CLAIM PART-PAID BY INSURANCE COMPANY – BALANCE SOUGHT TO BE RECOVERED FROM NEGLIGENT EMPLOYEE – DEFENCE THAT CLAIM INVOLVED CONSTRUCTION OF TERMS OF POLICY OF INSURANCE – CLAIM BEYOND JURISDICTION OF MAGISTRATES' COURT – CLAIM DISMISSED – WHETHER MAGISTRATE IN ERROR.

R&R sought to recover the sum of $28,000 from McN who was employed by R&R. It was alleged that McN was in breach of his contract of employment both in engaging in work without instructions from R&R and in failing to carry out that work with due skill and care. R&R were insured against professional negligence. An action brought by a client of R&R was settled for the sum of $50,000. In accordance with the provisions of the policy of insurance, the insurer contributed $22,000 of that sum and R&R was required to contribute the balance of $28,000 which in turn was sought to be recovered from McN. On the hearing of the claim in the Magistrates' Court, McN submitted that the claim could not be maintained at law and was therefore an abuse of process. It was submitted that the claim involved the construction of the terms of the insurance policy and that it sought to assert rights arising from the contract of insurance such as the question of subrogation. The magistrate upheld this submission and dismissed the claim. Upon appeal—

HELD: Appeal allowed. Order set aside. Remitted for further hearing in the Magistrates' Court. The causes of action brought by R&R against McN were brought in contract and in tort. They did not involve the construction of the terms of the policy of insurance nor did they seek to assert any rights arising from the contract of insurance. There was no question of subrogation in relation to the $28,000 claimed against McN. R&R were uninsured to the extent of that sum and were seeking to recover that amount from McN in an action in tort and contract.

HARPER J:

1. This matter comes to me by way of judicial review pursuant to Order 56 of the Rules of the Supreme Court. Each party accepts that the matter is properly before me pursuant to that order, and I need deal with that aspect of the proceeding no further.

2. By writ issued on 7 October 1996 in the County Court, the plaintiff, Read & Read Proprietary, issued proceedings against the defendant Michael John McNamara, who is a former employee of the plaintiff.

3. By amended particulars of claim issued after the matter was transferred from the County Court to the Magistrates' Court, the plaintiff seeks to recover the sum of $28,000 from Mr McNamara under what (as I read the amended particulars) amount to two causes of action. First, it is alleged that Mr McNamara was in breach of his contract of employment, both in engaging in work without instructions to do so from his employers, and in failing to carry out that work with the skill and care which the contract with his employers required of him.

4. The second cause of action pleaded is in tort, and alleges that Mr McNamara was in breach of a duty of care to his employers in that he performed the work in question negligently. It is also pleaded that pursuant to Part IV of the *Wrongs Act*, Mr McNamara is liable to contribute to a settlement of litigation brought by a client of the firm in relation to work done by Mr McNamara for that client, ostensibly at least as an employee of the firm.

5. The firm was, in accordance with the relevant law, insured against professional negligence. The relevant policy covered not simply the firm, but also employees of the firm. The relevant policy accordingly covered as an insured, Mr McNamara, he being at the relevant time an employee. The action brought by the client of the firm was settled for the sum of $50,000. In accordance with the

provisions of the policy of insurance, the insurer contributed $22,000 of that sum and required the firm, as the principal insured, to contribute the balance of $28,000. It is that balance which is now sought to be recovered by the plaintiff.

6. In my opinion the policy of insurance is relevant to the proceedings between the plaintiff and the defendant only in that the policy and its operation in the circumstances which obtain here, had the effect (in practice if not in strict legal theory) of reducing the amount that the plaintiff can now claim against Mr McNamara from the full settlement sum of $50,000 to the amount which the plaintiff contributed to that settlement, being $28,000. It is that sum which determines the amount by which the plaintiff is out of pocket. The loss does not exceed the $28,000 contributed by the plaintiff and accordingly the plaintiff could not claim against Mr McNamara any greater sum.

7. The cause of the plaintiff's loss nevertheless remains (assuming without of course deciding that the plaintiff otherwise has good causes of action against Mr McNamara) that Mr McNamara was either negligent or in breach of contract or both. The cause of the plaintiff's loss does not arise from any provision of the contract of insurance or pursuant to the operation of that contract upon the circumstances of this case.

8. In my opinion, the submissions put on behalf of Mr McNamara to the effect that the true cause of the plaintiff's loss arises from the operation of the policy of insurance, are not correct. In my opinion, the cause of the plaintiff's loss, assuming that the cause of action can otherwise be made out, is either in breach of contract or in tort, or both, and the policy of insurance is not relevant to either of those causes of action.

9. I have not read with care the pleading upon which the plaintiff now relies. As I understand it, however, the particulars of claim do not put forward the policy of insurance as constituting an element in the cause or causes of action upon which the plaintiff now relies. Although pleaded with perhaps unnecessary prolixity, the relevance of the policy of insurance remains as I have already stated, that is, it limits the amount which the plaintiff can now claim, to the sum of $28,000.

10. The matter coming before the Magistrate sitting at Melbourne, the Magistrate upheld submissions then put before him by counsel for Mr McNamara. In my opinion the Magistrate was wrong so to do. His Worship was, as I understand his reasons, influenced by the consideration that there was reference in the particulars of claim to the fact that the plaintiff had suffered, at least on one view, a loss of $50,000. When one separates the plaintiff from the insurer, it is on this view possible, indeed proper, to say that the plaintiff's loss was $50,000. It may be that the particulars of claim were inaptly worded in their treatment of that part of the allegations put forward in that document. However that may be, it seems to me clear that the plaintiff was asserting before the Magistrate, and as I understand it the plaintiff now asserts before me, that its claim is in fact limited to the sum of $28,000. There is in my opinion no possible basis for a defence constructed merely on the circumstance that the particulars of claim allege a loss of $50,000 with an abandonment of all but $28,000 of that sum.

11. The Magistrate was also influenced by what he saw as a relevant clause in the contract of insurance, that being clause 4(f). That clause deals with the question of subrogation.

12. In my opinion it is not relevant to the issues between the plaintiff and Mr McNamara however, because there can be no question of subrogation in the circumstances of this case. The insurer has not lost more than the sum of $22,000 being its contribution to the settlement with the client of the firm. There is no question of any claim of subrogation in relation to the $28,000 now claimed by the plaintiff against Mr McNamara. Accordingly, to the extent that he was influenced by what he saw as the applicability of clause 4(f) again it seems to me that the Magistrate was wrong.

13. In my opinion, it is clear that in this case, the causes of action brought by the plaintiff against the defendant are brought in contract and in tort. They do not involve the construction of the terms of the policy of insurance; they do not seek to assert any rights arising from the contract of insurance. The plaintiff seeks to do no more than recognise the effect of the operation of that policy on the quantum of the plaintiff's claim. In my opinion the plaintiff is correct in

submitting that it was uninsured to the extent of $28,000. It now seeks to recover that sum from the defendant in an action in tort and contract.

14. In those circumstances it seems to me that the plaintiff should be entitled to litigate whatever claims it has against Mr McNamara in contract and in tort, and to do so before the Magistrates' Court. In my opinion the Magistrate was wrong to hold that the cause of action could not be maintained at law and was therefore an abuse of process. In my opinion it must follow that the matter should be remitted to the Magistrate to be dealt with by him in accordance with law and in accordance with these reasons.

APPEARANCES: For the plaintiff Read & Read Pty: Mr G Uren QC with Mr D Masel, counsel. White Cleland, solicitors. For the defendants: Mr T North, counsel. Barker Gosling, solicitors.
