

IN THE SUPREME COURT OF FIJI (WESTERN DIVISION)

AT LAUTOKA

Appellate Jurisdiction

Civil Appeal No. 22 of 1980

Between

QANTAS AIRWAYS LIMITED

Appellant

- and -

DUKHI alias VISHNU PRASAD

s/o Bhagelu

1st Respondent

- and -

JOGENDRA SINGH trading as

PACIFIC TRAVEL SERVICE

2nd Respondent

M/S Anand, Tappoo, Krishna & Co. Solicitors for the Appellant

M/S Koya & Co.

Solicitors for the 1st Respond.

M/S G.P. Shankar & Co.

Solicitors for the 2nd Respond.

J U D G M E N T

This is an appeal against an interlocutory ruling given by the magistrate in a case in which the plaintiff Dukhi is claiming damages from one Jogendra Singh trading as Pacific Travel Service and the appellant in this case Qantas Airways Limited, jointly and severally. Dukhi originally made his claim against Jogendra Singh alone, but Jogendra Singh alleged that in the matter complained of he was acting as the agent of Qantas. Qantas was then joined as second defendant. In its defence, Qantas denies that in this particular transaction Jogendra Singh was acting as its authorised agent, and has also entered a defence on the merits.

But Qantas wish to go further so that even if the court finds the two defendants jointly and severally liable, it will ask the court for an indemnity against Jogendra Singh in accordance with the terms of their agency agreement. Qantas has therefore issued a Third Party Notice addressed to Jogendra Singh. If the proceedings had been instituted in

the Supreme Court, Order 16 Rule 8 of the Supreme Court Rules would apply and the Third Party Notice could be issued and served on Jogendra Singh without leave. Although the matter is not entirely clear it would appear under Order 16 Rule 8(4) that Qantas must also serve a summons for directions on Jogendra Singh and the court, and without such summons for directions the claim for indemnity could be refused. The purpose of the summons for directions is to give the 1st defendant a chance to object that there was no case for indemnity or that the notice was improperly issued.

What occurred in the magistrate's court is not altogether clear from the record. If Qantas were asking leave to issue Third Party notice that was not necessary. If the application was for directions then I think that there was merit in it. In fact since all the parties were present it could well have been treated as a summons for directions which would have been of assistance to everyone including the court. It is certainly desirable that the whole matter be dealt with together so that it would be unnecessary for Qantas to institute fresh proceedings. So the court must be put in a position to determine not only the issues between the plaintiff and the two defendants, but also between the defendants themselves. The first defendant must know the extent and grounds of Qantas' claim against him and Qantas must know if the first defendant intends to defend its claim, and if so on what grounds.

The magistrate seems to have decided merely to dismiss the application on the grounds that it was not necessary. He has based his ruling on Order VIII rule 4 of the Magistrate's Court Rules saying:

"Order VIII rule 4 is clear. When a person is not a party, then Defendant may make him a party if he needs indemnity. But the person sought by the Second Defendant to be made a party is First Defendant who is already a party. The pleadings are clear. The issues are clear. Second Defendant's defence is clear."

The position may be so so far as the plaintiff is concerned, but the issues between the two defendants are not so clear, or at least it is not clear whether the first defendant has any reply to the second defendant's claim for indemnity. Little time would be lost and the plaintiff would not be prejudiced if the third party notice is served on the first defendant and the first defendant is given time to file a reply if necessary.

The magistrate has clearly considered that Order VIII rule 4 of the Magistrate's Courts Rules is a complete answer and there is no need to refer to the Supreme Court Rules. Order III rule 8 of the Magistrate's Courts Rules provides that where the Rules do not cover the particular circumstance the Court should be guided by the relevant provision in the Supreme Court Rules. I am by no means as confident as the magistrate seems to be that Order VIII rule 4 of the Magistrate's Courts Rules covers the particular circumstances of this case. Rule 8 covers the position where indemnity or contribution is claimed from someone who is not already a party to the suit need not be served with a third party notice, need not be made fully aware that a claim for indemnity is being made against him, need not be made aware of the basis for that claim, and need not be given an opportunity of making a written reply?

To say the least the position is far from satisfactory and it is natural that Qantas would want to play safe and serve a third party notice on the first defendant and would want to ask the court for directions. I consider that this is the correct line to take, that Order VIII rule 4 is far too vague to be of any assistance in the circumstances and the court should have been guided by the Supreme Court Rules.

As I have said I do not consider that it is necessary for Qantas to seek leave of the Court to serve third party notice on the first defendant, but in case I am wrong on that point leave will be given. So far as the need for directions is concerned, in the event that the first defendant

wishes to challenge the second defendant's claim for indemnity, the first defendant should file and serve a reply within ten days of service of the third party notice.

I think the fairest order I can make as to costs is that they should be costs in the cause.

LAUTON
13th February, 1981

sgd (G O L Dyke)
Judge