Court File No.: CV-11-9283-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

IN THE MATTER OF COMPANIES' CREDITORS ARRANGMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF UNIQUE BROADBAND SYSTEMS, INC.

SUPPLEMENTAL BRIEF OF AUTHORITIES OF UNIQUE BROADBAND SYSTEMS, INC. (Returnable 13 June 2012)

Dated: 11 June 2012

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INDEX

TAB

TAB 1

Case Name:

Diewold v. Cherneski

Between
Kenneth Anthony Diewold, applicant, and
Ruth Ann Cherneski, respondent

[2000] O.J. No. 5693

49 O.R. (3d) 608

Court File No. 97-GD-39521

Ontario Superior Court of Justice

Granger J.

Heard: March 29, 2000.
Judgment: May 3, 2000.

(11 paras.)

Counsel:

David Cavill, for the applicant.
Ronald Burnett, for the respondent.
Tamara Stomp, for Donald Lambier.

---

1 GRANGER J.:-- The Applicant seeks an order to add Donald Lambier as a party Respondent in this application pursuant to Rule 5.03 of the Rules of Civil Procedure.

> Joinder of Necessary Parties
>
> 5.03(1) General rule - Every person whose presence is necessary to enable the court to adjudicate effectively and completely on the issues in a proceeding shall be joined as a party to the proceeding.

(2) Claim by person jointly entitled - A plaintiff or applicant who claims relief to which any other person is jointly entitled with the plaintiff or applicant shall join, as a party to the proceeding, each person so entitled.
(3) Claims by assignee of chose in action - In a proceeding by the assignee of a debt of other chose in action, the assignor shall be joined as a party unless,
(a) the assignment is absolute and not by way of charge only; and
(b) notice in writing has been given to the person liable in respect of the debt or chose in action that it has been assigned to the assignee.
(4) Power of court to add parties - The court may order that any person who ought to have been joined as a party or whose presence as a party is necessary to enable the court to adjudicate effectively and completely on the issues in the proceeding shall be added as a party.
(5) Party added as defendant or respondent - a person who is required to be joined as a party under subrule (1), (2) or (3) and who does not consent to be joined as a plaintiff or applicant shall be made a defendant or respondent.
(6) Relief against joinder of party - The court may by order relieve against the requirement of joinder under this rule.

2 The parties married on October 10th, 1964 and were divorced on January 24th, 1992. On February 13th, 1998, the parties consented to a Judgment, wherein the Applicant agreed to pay support to the Respondent pursuant to the provisions of the Divorce Act, 1985 R.S.C. 1985, c. 3.

3 Paragraph #2 of the Judgment dated February 13th, 1998 provides:

> THIS COURT ORDERS that this order is subject to review upon the expiration of 18 months from today's date without the necessity of a fresh Application before the Court.

4 The Applicant seeks a variation of the support provisions of the Judgment alleging that the Respondent has been cohabiting with Donald Lambier, in his house, since August, 1996. The Respondent denies that she is living with Donald Lambier or is supported by him.

5 The Applicant submits that the Court will be unable to effectively and completely adjudicate the issues herein between the Applicant and the Respondent without Donald Lambier being added as a Respondent, because:

(a) "His testimony is important and relevant with respect to the issue as to whether he is living in a common-law relationship with the Respondent".
(b) "His testimony is important and relevant in determining to what degree, if any, he is financially supporting the Respondent".
(c) "His testimony is important and relevant in determining how permanent the common-law relationship is, and for how long it is likely to last".
(d) "His testimony is important and relevant as to understanding his income and net worth".

6 Although this application for a variation of support is made pursuant to the provisions of the Divorce Act, the Applicant suggests that I should follow the procedure found in s. 33(5) and (6) of the Family Law Act R.S.O. 1990, c. F.3 and grant him leave to make Donald Lambier a party Respondent to these proceedings.

7 Section 33(5) and (6) of the Family Law Act provides:

> S. 33(5) Adding party. - In an application the court may, on a respondent's motion, add as a party another person who may have an obligation to provide support to the same dependent.
>
> (6) Idem. - In an action in the Ontario Court (General Division), the defendant may add as a third party another person who may have an obligation to provide support to the same dependent.

8 As this is an application pursuant to the Divorce Act, the procedure to be followed must be governed by the provisions of the Divorce Act and the Rules of Civil Procedure. The Divorce Act as indicated by its title regulates the dissolution[1] of marriages and as a corollary, allows for support orders to be made. The Divorce Act does not provide for support orders to be made between parties who have never been married as does the Family Law Act. Accordingly, Donald Lambier has no obligation to provide support for the Respondent in this application. If Donald Lambier was added as a party Respondent in these proceedings, there would be no jurisdiction to make an order against him. As I understand the effect of s. 33(5) and (6) of the Family Law Act, the court has the jurisdiction, after a person is added as a party Defendant or as a third party, to make a support order against such person. A person who is being sued for support under the provisions of the Family Law Act could ask that another person, who has an obligation to provide support, be made a party Respondent in order that the support obligation could be shared by the respondents, or the support obligation could be lessened by a third party order. Under the provisions of the Family Law Act a support order can only be made where a person is not supporting a dependent. The sole issue before this court, pursuant to the provisions of the Divorce Act, is whether the amount of support to be paid by the Applicant to the Respondent should be varied. As Donald Lambier is neither a spouse of the Respondent or a former spouse of the Respondent, a support order cannot be made against him under the provisions of the Divorce Act.

9 If leave is to be granted to add Donald Lambier as a party Respondent in this application, the Applicant will have to establish that the presence of Donald Lambier as a party Respondent is "... necessary to enable the court to adjudicate effectively and completely on the issues ...". In this application, the Applicant is entitled to examine Donald Lambier prior to the hearing of the application pursuant to Rule 39.03(1) and (2) or at the hearing pursuant to Rule 39.03(4).

> Evidence By Examination of a Witness
>
> Before the Hearing
>
> 39.03(1) Subject to subrule 39.02(2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing.
>
> (2) A witness examined under subrule (1) may be cross-examined by the examining party and any other party and may then be re-examined by the examining party on matters raised by other parties, and the re-examination may take the form of cross-examination.

...

(4) At the hearing - With leave of the presiding judge or officer, a person may be examined at the hearing of a motion or application in the same manner as at a trial.

10 Accordingly, the evidence of Donald Lambier will be before the Court if he is examined pursuant to Rule 39.03, or with leave of the presiding Judge if he is called as a witness to give viva voce evidence. If Donald Lambier is providing the Respondent with support either directly or indirectly, this evidence will be before the Court, if either the Applicant or the Respondent wishes to place such evidence before the presiding Judge. In my view, any evidence that could be placed before the Court by making Donald Lambier a party Respondent to these proceedings can be placed before the Court pursuant to Rule 39.03. As a result, it is not necessary to have Donald Lambier as a party Respondent to adjudicate effectively and completely the issue between the Applicant and the Respondent.

11 Accordingly, the motion to add Donald Lambier as a party Respondent is dismissed. Counsel may make brief written submissions on costs within 15 days.

GRANGER J.

cp/s/np/qlala

1 This word replaces "disillusionment" which appeared in the original Reasons for Order released on May 2nd, 2000.

TAB 2

Case Name:

Johnston v. Sheila Morrison Schools

Between
Greg Johnston and Tim Williamson, Plaintiffs/Appellants, and
The Sheila Morrison Schools and Scott Morrison,
Defendants/Respondents

[2012] O.J. No. 915

2012 ONSC 1322

289 O.A.C. 177

Court File No. 304/11

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

K.E. Swinton, S.E. Pepall, A.L. Harvison Young JJ.

Heard: February 6, 2012.
Judgment: February 24, 2012.

(18 paras.)

Counsel:

Kirk M. Baert and Celeste Poltak, for the Appellants.

Steven Stieber and Elizabeth Bowker, for the Respondents.

ENDORSEMENT

The judgment of the Court was delivered by

1 K.E. SWINTON J.:-- This is an appeal of a July 7, 2011 decision of Perell J. in a class action in which he granted leave to the Respondent/Defendants to issue third party claims for contribution and indemnity against the parents and guardians of students in two of the Plaintiff Classes.

2 The Respondent School was a day and residential educational facility for students with learning disabilities and behavioural problems and the Respondent, Scott Morrison, was its headmaster. The School operated for about 22 years until 2009. The Appellant/Plaintiffs were students enrolled at the School. They allege that they were abused at the School and that the Respondents were negligent and breached fiduciary duties owed to the Plaintiffs.

3 The action was certified as a class proceeding, on consent, by the Motions Judge on June 7, 2010. There are three sub-classes: (i) the *Resident Class*, comprised of boarding students; (ii) the *Day Student Class*, comprised of students who went home each evening; and (iii) the *Family Class*, comprised of the parents, spouses, children and siblings of the Resident Class. The student sub-classes are estimated to include about 1,650 people.

4 On May 19, 2011, the Respondents sought leave to commence third party claims for contribution and indemnity against the parents and guardians of the student sub-classes, naming the proposed third parties as "G. Wilson, John Doe 1-200 and Jane Doe 1-200". They argue that the parents and guardians of the students in the Resident and Day Student Classes knew and approved of the formal discipline system in place in the Schools, and that the Schools had regular contact with the parents and guardians with respect to student discipline.

5 The Motions Judge permitted the third party claims to proceed but stayed them until after the common issues trial. He also granted leave to amend the Statement of Defence. In addition, he gave directions that notice regarding these issues be given to Class members and that the opt out deadline be extended. Lastly, he directed that the notice contain a recommendation that members of the Resident and Day Student Classes obtain independent legal advice with respect to the liability, if any, of their parents and guardians. Only the third party claims are in issue on this appeal.

6 On September 23, 2011, Hoy J. (as she then was) granted leave to appeal to the Divisional Court.

7 The Appellants submit that the Motions Judge erred in law in that he:

* permitted third party claims to be advanced even though the Appellants only claim several liability as against the Respondents and this is contrary to the Court of Appeal's decision in *Taylor v. Canada (Minister of Health)*,[2009] O.J. No. 2490 (C.A.);
* permitted untenable claims for contribution and indemnity by the alleged abusers against the parents and guardians of those alleged to have been abused;
* permitted third party claims against "hundreds, if not thousands" of unnamed persons; and
* applied an improper procedure by permitting third party claims against individuals who were already parties to the action when the proper procedure is a counterclaim.

8 The Appellants submit that the effect of the Motions Judge's order is to discourage class participation, encourage opt outs and necessitate the retention of separate counsel in light of the resultant conflict of interest between the Plaintiff students and their proposed third party parents and guardians.

9 The Respondents submit that there is no basis to interfere with the Motions Judge's decision. Firstly, the Statement of Claim has not been amended to claim several liability. Secondly, the jurisprudence establishes that there is a tenable claim for contribution and relief over against the parents and guardians of the students. The Respondents state that their investigation suggests that the parents and guardians were aware of, consented to, acquiesced in, or encouraged their children's treatment and education at the School. The allowance of the third party claims was an appropriate exercise of the Motions Judge's discretion. Lastly, the Respondents submit that it was not an error of law to permit members of an already certified Plaintiff Class to also be named as third parties in the same proceeding and to name unknown parties as John and Jane Doe as allowed by the Rules of Civil Procedure.

10 The standard of review on a question of law is that of correctness: *Housen v. Nikolaisen*, 2002 SCC 33.

11 The *Taylor* decision of the Court of Appeal is not referred to in the Motions Judge's decision and it is not clear that it was cited to him. When the Motions Judge's decision is considered in light of *Taylor*, one must conclude that he erred in law in permitting the third party claim.

12 The Appellants' Notice of Appeal requests leave to amend the Statement of Claim in order to limit their claims to the several liability of the Respondents although counsel for the Appellants submitted that amendment was unnecessary. In our view, and as submitted by counsel for the Appellants, the unamended Statement of Claim may already be read as so limiting the Appellants' claims. For instance, paragraphs 33 and 35 speak of the Respondents as being solely responsible and of the students as being in the entire and exclusive power and control of the Respondents. The Appellants have also consistently taken the position that they are limiting their claims to the several liability of the Respondents. This was the case in the hearings before the Motions Judge, Hoy J. (as she then was) and before us.

13 In *Taylor*, Cullity J. determined that a third party claim was unnecessary in circumstances where the plaintiff was limiting her claim to the several liability of the defendant, [2008] O.J. No. 1299. Put differently, the plaintiff was only seeking that portion of the damages that was attributable to the named defendant. The Court of Appeal upheld Cullity J.'s decision. Writing for the Court, Laskin J.A. stated that apportionment of fault in negligence among parties and non-parties is possible and where a plaintiff limits himself or herself to a several claim, a third party claim is unnecessary. Indeed, in those circumstances, a right of contribution and indemnity does not arise. Accordingly, in that case, the defendant could not advance a third party claim for contribution and indemnity.

14 The Respondents submit that *Taylor* is distinguishable from the case before us. *Taylor* involved a claim against the Government of Canada for failing to regulate the use of certain implant devices. The disallowed third party claim was as against the hospital and the plaintiff's surgeon. The Respondents argue that in that case, the degree of fault attributable to the Government was easily quantified and the conduct of the Government and the proposed third parties took place at different times. Here, in contrast, the damages are not the same, are not the result of one causal event and there is not one identifiable, separate negligent act for which the proportionate liability of the various parties can be identified. They argue that the claims are dependent on the degree of knowledge or fault of each parent and guardian and apportionment would be difficult. The alleged conduct took place concurrently. The Respondents submit that the parents and guardians are necessary parties to

this action and the limitation proposed by the Appellants is unworkable. Furthermore, the limitation of the Appellants' claim to several liability changes the nature of the common issues.

15 In our view, the *Taylor* decision is fatal to the Respondents' position on this appeal. The Appellants seek only that portion of their damages attributable to the Respondents' degree of fault and not the portion that may be attributable to the degree of fault of their parents or guardians. In circumstances where the Appellants limit their negligence claim to the damages caused solely by the Respondents, there is no right to claim contribution and indemnity. An exercise of discretion is not engaged.

16 Furthermore, there can be no right to contribution and indemnity on account of a breach of fiduciary duties. Liability for breach of a fiduciary duty is not subject to apportionment. Accordingly, as a matter of law, the third party claim cannot be advanced. Also, as a matter of fairness, we would also note that the Respondents are not being asked to pay more than their proportionate share of the alleged losses.

17 In light of our conclusion with respect to this ground of appeal, it is unnecessary to consider the other grounds advanced.

18 The appeal is therefore allowed and the order of the Motions Judge permitting the third party claim is set aside. The parties agreed that the successful party would be entitled to costs of $12,500 on a partial indemnity scale consisting of $5000 for the motion before the Motions Judge, $2,500 for the leave motion before Hoy J. (as she then was), and $5000 for the appeal before us.

K.E. SWINTON J.
S.E. PEPALL J.
A.L. HARVISON YOUNG J.

cp/e/qlafr/qljxr/qlbdp/qlced

TAB 3

Indexed as:

Dupont Canada Inc. v. Russel Metals Inc.

Between
Dupont Canada Inc., plaintiff(s), (defendant(s) by counterclaim), and
Russel Metals Inc. c.o.b. Comco Pipe and Supply Company, defendant, (plaintiff by counterclaim), and
J.B. Multi-National Inc. c.o.b. Echanges Multi Nationaux J.B., Inc., and Erciyas Boru Sanayii Ve Ticaret A.S. c.o.b. Erciyas Tube Industry and Trade Co. Inc., third parties

[1999] O.J. No. 3227

Court File No. 98CV-151007

Ontario Superior Court of Justice

Master Clark

Heard: May 25, 27, 1999.
Judgment: August 26, 1999.

(21 paras.)

Practice -- Parties -- Third party procedure -- Third party notice -- Severance -- Counterclaim and set-off -- Counterclaim -- Severability, circumstances when counterclaim may be severed from original claim.

Motion by the plaintiff, Dupont Canada, to sever the third party claim against Erciyas Tube Industry. Dupont was a Canadian company, and the third party was a Turkish company. The main action was a claim for damages for breach of contract. The defendant, Russel Metals, denied liability and claimed against Erciyas, a supplier and manufacturer.

HELD: Motion allowed. The Rules provided broad powers to protect a plaintiff from prejudice or delay by reason of a third party claim. Dupont had been delayed by being tied to the third party claim and cross-claims. An order severing the actions would not work any injustice on Russel or the third parties.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 29.09.

Counsel:

Robert C. Taylor, for the plaintiff(s).
Barry Bresner, for the defendant(s), plaintiff(s) by counterclaim.
Enio Zeppieri, for J.B. Multi-National Trade Inc.

---

1 MASTER CLARK:-- This is a motion by the plaintiff to sever the third party claim brought against the third party (other than J.B, Multi-National Trade Inc. ("J.B.")) hereinafter referred to as Erbosan.

2 The plaintiff is a Canadian corporation, as is the defendant. J.B. is a Quebec corporation and Erbosan is a Turkish company.

3 In the main action the pleadings closed in October, 1999. The third party claim was issued on September 2, 1998 and served according to the Hague Court on April 7, 1999. That fact of service was not in evidence when the motion was heard, counsel having informed the court since, by mail. In this case, I am of the view that it was proper for Mr. Taylor, counsel for the plaintiff to inform me of the service because a large part of his argument on May 25 and 27th was based on the fact that although service had been expected by April 30, 1999, no word of service had yet reached him, and he pointed to that as delay causing his client severe prejudice in the main action.

4 Further, I am of the view that it would be silly for this Court not to consider the fact of service of the third party claim on Erbosan even though the information was not properly before me, because to do otherwise would confound reality and produce a decision based on fiction.

5 Neither has counsel for the defendant written to object to Mr. Taylor's writing to the Court, or to dispute the information regarding service of the third party claim.

6 Finally, J.B. has defended the main action, and the third party action, and in this latter defence has included a cross-claim against Erbosan. On June 16, 1989 counsel for J.B. made it known that he intended to serve its cross-claim on Erbosan pursuant to the Hague Convention.

7 The one issue before me is whether or not to sever the Third Party claim. In his factum, Mr. Taylor argued that it was inappropriate for J.B. to have defended the main action, but the notice of motion seeks no relief in that regard nor was an amendment sought to add a claim for such relief.

8 Rule 29.09 stipulates that "A plaintiff is not to be prejudiced or unnecessarily delayed by reason of a third party action ..." and provides the court with very broad powers to protect the plaintiff in that regard. The rule looks forward, it does not look backward. The rule does not require certain events to have occurred before the court may act to protect the integrity of the main action.

9 I should say in passing that I do not accept Mr. Bresner's submissions that the plaintiff must show prejudice and unnecessary delay on this motion. That would limit the court to looking backward, and as I have already held, rule 29.09 requires the court to look ahead.

10 Rule 29.09 requires the court to look into the present circumstances of the main action and the Third Party action and assess, whether or not the main action is, or may be, put in jeopardy by the

Third Party action. The words of rule 29.09 are "the court may make such order or impose such terms ... as are necessary to prevent prejudice or delay ...". (emphasis added).

11 It is important to note the caveat that any such order must avoid "injustice to the defendant or the third party."

12 The plaintiffs claim is for damages for breach of a contract for the defendant to supply specialized piping. Russel Metals denies any breach and blames the problem on the supplier, J.B. While in the Third Party Action Russel Metals claims breach of contract by J.B., Russel Metals also alleges negligence in the manufacture of the pipe. The pipe was made by Erbosan.

13 As noted above, there will be cross-claims between J.B. and Erbosan in the third party action. Therefore the pleadings in the Third Party action, including the cross-claims, are far from closed.

14 While this court cannot foresee with certainty when the Third Party action will "catch-up" with the main action, (so that common discoveries could be scheduled), it is obvious that already, the plaintiff has been delayed and it is obvious that the plaintiff will continue to be delayed in its discoveries so long as it is tied to the third party claim and cross-claims between the defendants to the third party action.

15 I should say in passing that I do not accept Mr. Bresner's submissions that the plaintiff must show prejudice and unnecessary delay on this motion. That would limit the court to looking backward, and as I have already held, rule 29.09 requires the court to look ahead.

16 That delay satisfies part of rule 29.09, but would an order severing the action work an injustice to the defendant or the third party? In that regard, I do not accept Mr. Bresner's position that since the plaintiff will get interest on his judgment, it is suffering no prejudice in being delayed. The plaintiff has asked the court to intervene with the defendant on its behalf and the defendant has joined issue. The plaintiff is entitled to have its rights determined, and to see the fruits of its litigation (or otherwise) as soon as the system can accommodate the trial. It is no answer to say that prejudgment interest in running and therefore no injustice is occurring.

16a The word "injustice", as Mr. Taylor argued, connotes a higher degree of prejudice, then the word prejudice does, and I accept that submission. In doing so I cannot see any injustice that would occur to the defendant or the third party if a severance is ordered. [The Court did not number this paragraph. QL has assigned the number 16a.]

17 Presently, all the plaintiff has to do is prove a contract, a breach and damages to succeed against the defendant. It ought not to have to deal with the Turkish manufacturer or that manufacturer's exclusive distributor in Canada. These arrangements, and the actual manufacturing of the pipe is of no concern of the plaintiff. It is even difficult to see how such would be of concern to the defendant. Neither is the plaintiff's contract with the defendant any concern of the third parties.

18 Considering that it is always open to the parties to eventually move to have the two actions tried together, I can see no injustice in severing the Third Parties from the main action, and I so order.

19 The Third Party action is to proceed as a separate action, and the main action will now proceed alone subject to further order of the court.

20 Notwithstanding that counsel told the court that there are no cases on point, I do not consider the point to be so novel as to not attract an order of costs in favour of the plaintiff.

21 If the parties cannot agree on the costs they are to make short written submissions, to be received on or before September, 15, 1999 at the Masters Office, 6th Floor, 393 University Avenue.

MASTER CLARK

cp/s/mcc

TAB 4

***Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.**

1.03 (1) In these rules, unless the context requires otherwise,

"action" means a proceeding that is not an application and includes a proceeding commenced by,

(a) statement of claim,

(b) notice of action,

(c) counterclaim,

(d) crossclaim, or

(e) third or subsequent party claim;

...

"plaintiff" means a person who commences an action;

...

29.01 A defendant may commence a third party claim against any person who is not a party to the action and who,

(a) is or may be liable to the defendant for all or part of the plaintiff's claim;

(b) is or may be liable to the defendant for an independent claim for damages or other relief arising out of,

(i) a transaction or occurrence or series of transactions or occurrences involved in the main action, or

(ii) a related transaction or occurrence or series of transactions or occurrences; or

(c) should be bound by the determination of an issue arising between the plaintiff and the defendant.

...

29.02 (1.2) A third party claim may be issued at any time with the plaintiff's consent or with leave, which the court shall grant unless the plaintiff would be prejudiced thereby.

...

29.08 (1) After the close of pleadings in the third party claim it shall be listed for trial as an action as provided in Rule 48 without undue delay and placed on the trial list

immediately after the main action. R.R.O. 1990, Reg. 194, r. 29.08 (1).

(2) The third party claim shall be tried at or immediately after the trial of the main action, unless the court orders otherwise.

29.09 A plaintiff is not to be prejudiced or unnecessarily delayed by reason of a third party claim, and on motion by the plaintiff the court may make such order or impose such terms, including an order that the third party claim proceed as a separate action, as are necessary to prevent prejudice or delay where that may be done without injustice to the defendant or the third party.

Court File No.: CV-11-9283-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c.C-36, AS AMENDED

AND IN THE MATTER OF THE A PLAN OF COMPROMISE OR ARRANGEMENT OF UNIQUE BROADBAND SYSTEMS INC.
(the "**Applicant**")

ONTARIO
SUPERIOR COURT OF JUSTICE
(Commercial List)

(PROCEEDING COMMENCED AT TORONTO)

SUPPLEMENTAL BRIEF OF AUTHORITIES OF UNIQUE BROADBAND SYSTEMS, INC.
(RETURNABLE 13 JUNE 2012)

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