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IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. A-196/1987

BETWEEN	ERIC ANTHONY ABRAHAMS	PLAINTIFF
A N D	THE GLEANER COMPANY LIMITED	FIRST DEFENDANT
A N D	DUDLEY STOKES	SECOND DEFENDANT
A N D	ASSOCIATED PRESS	THIRD DEFENDANT

Motions to set aside Third Party Notice

R. N. A. Henriques Q.C., and A. Wood for Associated Press.

W. Spaulding Q.C., B. Scott Q.C., for Plaintiff.

E. George Q.C., and R. Ashenheim for first and second Defendants.

HEARD: 22nd and 23rd September, 1994  
 18th and 19th October, 1994  
 and 25th November, 1994.

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ELLIS J.

Before me are two Motions by Associated Press - Third Party and the plaintiff Abrahams to have set set aside leave for the issuance and service out of the jurisdiction of a Third Party Notice dated 20th April, 1994. The Motions are dated 23rd June, 1994 and 30th August, 1994 respectively.

The Motion by Associated Press in addition to the seeking of an Order to set aside the Third Party Notice, seeks a declaration that the Court has no jurisdiction over the Third Party in respect of the subject matter of the Third Party proceedings and consequentially a dismissal of Third Party Proceedings.

In the alternative, that the Third Party Proceedings be stayed since the State of New York in the United States of America is the forum conveniens for a determination of the issues between the Third Party and the defendants.

The plaintiff in his Motion, contends that the defendants have no authority for the issuance of Third Party Notice which will allow Associated Press to dispute the plaintiff's claim. Each motion was supported by affidavits.

The Facts Which Have Given Rise  
To These Motions

In 1987, the plaintiff sued the first and second defendants claiming damages for a libel against him published in The Daily Gleaner and The Star News Papers.

By a Defence as late as 18th December, 1991 the defendants pleaded justification and qualified privilege and denied plaintiff's entitlement to any damages. The defendants also stated that the words which formed the alleged libel were received from Associated Press pursuant to an agreement between them.

Between 1991 and 1994, several interlocutory proceedings were prosecuted culminating in a hearing by The Court of Appeal (S.C.C.A. No. 98 of 1992). That court on the 24th January, 1994 after five days of hearing ordered that the defendants' defences of justification and qualified privilege be struck out and remitted the matter to The Supreme Court for an assessment of damages.

There has been no challenge to the decision of The Court of Appeal and on April 20, 1994 the defendants by ex-parte summons sought and obtained leave to issue Third Party Notice and to serve it out of jurisdiction. It is to be noted that this was after a Summons had been filed on the 2nd February, 1994 by the plaintiff seeking directions as to assessment of damages. The third party and the plaintiff now challenge the validity of The Master's order of 20th April, 1994.

Let me at the outset state that I have not written on the arguments in relation to the prayer for a stay and the issues of Conflict of Laws which were advanced by Counsel for and against the Motions. That is/<sup>so because</sup> in my opinion, the issues can be determined by a consideration of sections 45 and 126 of The Judicature Civil Procedure Code.

#### The Issues

As I see the matter, I find that the issues are:-

1. Is the defendants' claim within the limits of Section 126 of the Civil Procedure Code of Jamaica?
2. Is Associated Press the Third Party, a proper or necessary party within section 45(g) of The Civil Procedure Code of Jamaica?
3. Will the plaintiff be embarrassed in the due prosecution of his remedy against the defendants were the joinder of the Third Party be made to stand?

The procedure for the issuance of Third Party Processes is to be found in Section 126 of The Civil Procedure Code as follows:-

- 126(1) (a) "Where in any action a defendant claims as against any other person not already a party to the action (the third party) that

he is entitled to contribution, or indemnity or,

- (b) that he is entitled to any relief or remedy relating to or connected with the original subject matter of the action and substantially the same as some relief or remedy claimed by the plaintiff, or,
- (c) that any question or issue relating to or connected with the said subject matter is substantially the same as some question or issue arising between the plaintiff and the defendant and should be properly determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and third party or between any or either of them, the court or Judge may give leave to the defendant to issue and serve a "third party notice."

In the Third Party Notice dated the 22nd April, 1994 the defendants claim to be indemnified by the Associated Press against the plaintiff's claim and that Associated Press pay the costs of the action. Alternatively, they claim equitable contribution from Associated Press towards a satisfaction of plaintiff's claim.

The claims open to a defendant in section 126 of the Code on which an application for third party proceeding may be founded are three. They are not cumulative and an application on only one of the claims excludes the others.

The defendants therefore based the application solely on the claim to indemnity or contribution.

It is therefore necessary to consider the competence of the defendants to claim an indemnity in this matter.

A party may claim to be indemnified by the terms of an express contract. Also statute may confer a right to an indemnity, or the right to be indemnified may be implied from law or equity.

In this case, there is a contract between the defendants and Associated Press. That contract at clause 10 expressly denies any liability on the part of Associated Press to indemnify the defendants against any loss or damages they may suffer as a result of user of the subject matter of the contract. The validity of the contract is subject to and is to be construed according to the laws of the State of New York.

There is contractually, no express entitlement to indemnity.

Is there anything in the relationship of the parties from which a right to indemnity may be implied?

In the case of Eastern Shipping Company v. Quah Beng Kee [1924] AC 177 at 182 Lord Wrensbury stated that "a right to indemnity exists where the relation between the parties is such that either in law or equity there is an obligation upon the one party to indemnify the other."

In the case cited, the Judicial Committee of the Privy Council implied a right to indemnity because the damage was occasioned by a ship which was being operated for the benefit of the "third party."

No such circumstance exists here. In this case, the defendants by contract obtained something from Associated Press and on their own volition used it for their own benefit so as to attract a claim for damages from the plaintiff and seek to say they are to be indemnified.

The defendants claim alternatively, a contribution from the third party. It has been stated that a right to contribution may arise as between joint debtors, joint contractors or joint tortfeasors.

To my mind, the defendants and the third party are not joint contractors. They have not jointly contracted to do anything. They are not joint tortfeasors. The only tortfeasor is the defendants jointly. There is no circumstance between the defendants and third party in which justice could demand or dictate a contribution from the third party.

The rules for service out of the jurisdiction are contained in Section 45 of the Civil Procedure Code, S. 45 is as follows:-

"Service out of the jurisdiction of Writ of Summons may be allowed by the Court or a Judge whenever:-

- (a) .....
- (b) .....
- (c) .....
- (d) .....
- (e) .....
- (f) .....
- (g) any person out of the jurisdiction is a necessary or proper party to an action properly brought against some other person duly served within the jurisdiction."

It is to be noted that the section cited speaks to service out of the jurisdiction on a necessary or proper party. The section also indicates that service

out of the jurisdiction is at the instance of a plaintiff and does not contemplate service of Third Party processes by a Defendant.

Paragraph (g) of Section 45 of The Civil Procedure Code required that the person to be served must be a "necessary or proper party to an action properly brought against some other person duly served within the jurisdiction." Is Associated Press a necessary or proper party here?

In Spellers case (1884) 13 Q.B. 96 at page 98 Grove J. was of opinion that the words "necessary or proper party" do not describe a person who may be collaterally brought into an action but describe a person who is a necessary or proper party against whom the action is brought. He went on to say that a third party is not a defendant nor a person against whom a verdict may be obtained although he is competent to appear and cross-examine witnesses and may be bound by a verdict against the defendant. The opinion was supported by Baron Huddleston and leave for the issuance of a third party notice was set aside as not coming within Order 11 (1) (g) which is of a similar wording as S. 45 (g) of the Civil Procedure Code. That decision went on appeal and the appeal was dismissed.

In MaCheane v. Gyles (1901) 1 CL. 287 at page 300 Romer L.J. in dealing with the validity of the grant of leave to serve a third party notice out of the jurisdiction posed this question:

"Is this third party notice were it a Writ of Summons, capable of being served out of the jurisdiction upon a third party?"

In considering the question he said "one must have regard to the parties not to the claim of the plaintiff in the action but to the claim of the defendant against the third party. For the purpose of considering whether service of a third party notice out of jurisdiction should be allowed, you have nothing to do with the subject matter of the claim in the action itself, you can only look at the nature of the claim made by the notice and the position of the person who is sought to be served."

I respectfully adopt the above statement and when I apply it to this case, I find that the defendants' claim against the third party does not come within S. 45 (g) of the Judicature Civil Procedure Code and therefore Associated Press is not a necessary or proper party.

The third issue involves the question of the plaintiff being delayed or

embarrassed in the prosecution of his claim. I have already recited the history of this matter.

The defendants have no defence to the plaintiff's claim. That is the unchallenged ruling of the Court of Appeal (Supreme Court Civil Appeal No. 98/92).

If third party service is allowed to stand, the third party would be competent to participate fully in the matter. Why should the plaintiff in the circumstances be delayed in obtaining the "fruits of his litigation" while the defendants and the third party have their respective claims determined?

I have no doubt that any entry of a third party at this stage would certainly delay the plaintiff's claim to his ultimate embarrassment. In any event, such third party entry where the third party would be competent to raise a defence to the claim would be a challenge to the Court of Appeal's decision. That would be a negation of the primacy of The Court of Appeal in the heirarchy of our courts which cannot be countenanced.

On the facts and on a consideration of the cases referred to, I am attracted to the Defendants' arguments and I accept those of the third party and the plaintiff on the issues I have stated.

In that light I am constrained to hold that the Motions succeed. The leave granted to issue third party notice dated 20th April, 1994 is hereby set aside with costs to the third party and the plaintiff to be agreed or taxed.