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IN THE GRAND COURT OF THE CAYMAN ISLANDS

HOLDEN AT GEORGE TOWN, GRAND CAYMAN

BEFORE THE HON.KIPLING DOUGLAS, ACTING PUISNE JUDGE

CAUSE NO. 359 of 1985

AG	
LD	
SCC	
CC1	
CC2	10
CC3	PLAINTIFF
CC4	DEFENDANT
LE	
PS	
For Action To	AG.
NFA Put Away	

9th January 1986.

BETWEEN ELSWORTH DONNELL

AND J.G.M. BANK

Mr. A. Jones for applicant

Mr. R. Alberga Q.C. and Mr. Ritchie for defendant/respondent

RULING

This is an application by an Intervener seeking an order pursuant to Grand Court Rules Rule 26 that its name may be added as a defendant in this action and that the Writ of Summons be amended accordingly by adding its name as a defendant and that it be at liberty to enter an appearance thereto forthwith.

In this cause the plaintiff is claiming that the defendant agreed to employ him as a Financial Advisor and to appoint him a director of the applicant company. That in breach of the terms of this agreement the defendant wrongly determined the said agreement and dismissed the plaintiff from its employment, and has wrongly refused to employ the plaintiff since November 1984. This claim for loss and damage is the result.

An Appearance has been entered by the defendant, and a proposed defence and counterclaim in which he is joined as co-defendant, has been

submitted by the Intervener in support of this application.

The issue before me now is whether or not this application under the Grand Court Rules Rule 26 should be granted.

This rule reads inter alia:

> "26.....
> The court may at any stage of the proceedings, either upon or without the application of any party and upon such terms as may seem just, order the names of any parties added who ought to have been joined, whether as plaintiffs or defendants or whose presence before the court may be necessary to enable the court to effectually and completely Adjudicate and settle all questionsinvolved in the cause or matter:.....".

This rule is similar to the Old English Rules Supreme Court Rules which have been replaced by Rules of Supreme Court (Rev) 1962 Order 15 Rule 6.

In his submission learned attorney for the Applicant, Mr. Jones, referred to paragraph (2) (b) (ii) of this rule and submitted that although the Grand Court Rules Rule 26 has not yet been updated to provide it with the wider scope of the English Rule, its provision should be taken into consideration in dealing with this matter. This paragraph widens the Rule to include:

> "Any person between whom and any party to the cause or matter there may exist a question or issue arising out of or relating to or connected with any relief or remedy claimed in the cause or matter which in the opinion of the court it would be just and convenient to determine as between him and that party as well as between the parties to the cause or matter".

I have no doubt that the incorporation of this paragraph into our Grand Court Rules would be a desirable step and one to which due consideration ought to be given. However, I am bound by Section 20 (1) of the Grand Court Law, Law 8 of 1975 "The jurisdiction of the court shall be exercised in accordance with any rules made under this Law." The conditions under which the English Rule could be applied are provided for by Section 20 (2).

The Defendant is a company incorporated under the Laws of the Cayman Islands, licensed as a bank. The plaintiff claims that in 1983 by an agreement with two representatives of the company he started operating

McRae Financial Services the applicant company which is a U. K. based wholly owned subsidiary of the defendant. In November 1984 his employment was terminated and as a result this Writ of Summons claiming damages for wrongful dismissal has been filed.

This is an application on behalf of McRae Financial Services to have its name joined as a co-defendant to enable a counter-claim to be filed. A proposed defence and counterclaim has been submitted naming the applicant as second defendant. In this proposed cross action the applicant claims that it was he and not the defendant who employed the plaintiff and that the dismissal was a result of the plaintiff's repudiation of this agreement along with other breaches. Although denying any liability the defendants have put forward a similar claim in the alternative.

The issue now before me is whether McRae Financial Services should be joined as co-defendant to enable it to counterclaim.

A number of cases have been cited in which the principle governing such joinders remains clear, i.e. before the joinder ought to be ordered the third party's presence before the court must be necessary. Of the cases before me Montgomery v Foy, Morgan & Co. 2 Q.B.D 1895 P 321 was the only case in which a successful application was made to a Judge in Chambers by the defendant to have a third party joined as a co-defendant to enable the said third party to file a counterclaim.

In his judgment Kay L.J said "I wish to guard myself against being supposed to decide that in all cases it would be a sufficient reason for joining a person as defendant that, if joined, he would have a counter-claim. This is a peculiar case." And, indeed it was, as it would have been impossible for the court to determine what sum ought to be paid over to the plaintiff for freight until it was determined what, if anything, was due to the shippers (the third party) in the cross action. In his ratio decidendi Kay L.J. stated: "Substantially the question raised by the cross-action must be determined in order to determine the question of what amount the plaintiff is entitled to receive in respect of his freight."

The submission that this case was on all fours with the present matter was vigorously opposed by Mr. Alberga for the Plaintiff/Respondent. What has been conceded is the fact that in both claim and counter-claim the witnesses and evidence would be the same, although the causes of action differ. Certain periphery considerations which do not fall within the ambit of Rule 26 were put forward. The saving of time and cost are not matters which, under the present rule, can now be considered. We can only be guided by the rule as applied in the cases cited. In Atid Navigation Co. vs. Fairplay Towage & Shipping Co. Ltd. 1955 (1) All E. R. P.698 the issue between the plaintiff company and the defendant company could be determined without adding the new defendant, but it was sought to add them so that they might join as plaintiffs on the counter-claim. It was held that an order to add the proposed new defendants should not be made against the wish of the plaintiff company because the reason that they were to join as plaintiffs on the counterclaim was not a sufficient reason, and in fact the issues between the existing parties to the action could be determined in the absence of the proposed new defendants. In the case of McCheane v Gyles 1 Ch. 1902 P.917 Buckley J. said: "Looking at the rule you must, in order to say that a person who is not a party ought to be added, find either that he ought to have been joined or that his presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the matter." This is essentially the same wording as our Grand Court Rules Rule 26.

In the REsult, D.D. 1958 P.174, the words "Cause or matter are defined as: "the action as it stands between the existing parties." Mr. Alberga submitted that the issues in this cause or matter do not require the applicant, McRae Financial Services, to be in the case at all and that its presence would embarrass the plaintiff. In support of this he cited the case of Norris v Beazley 1874 - 1980 All E.R. (Rep) P. 774 in which it was held that the rule was not intended to add a defendant who had no interest in the action for the convenience of another defendant, the joinder sought would embarrass the plaintiff. In that case the defendant was acting as agent for a projected company, the entire transaction was between himself and the plaintiff. Later, he alleged fraud and sought to add the company as a defendant. Here was another

case in which the cause or matter could have been effectually and completely adjudicated without the presence of the third party. As Lord Coleridge, C.J. commented: "The subject of this counter-claim is remote." The questions now for consideration are clear.

(1) Ought the applicant to have been joined as a defendant by the plaintiff? I think not. The plaintiff may choose which defendant he wishes to sue even if their liability is under a joint contract, nor can he be compelled to join. As in the McCheane case (supra) the plaintiff elected to sue one of two executors and the defendant obtained a third party notice claiming contribution from the estate of the other executor, it was held that the third party ought not to have been added as a defendant against the plaintiff's wish.

(2) Is the presence of McRae Financial Services necessary in order to enable the court effectually and completely to settle all questions between the existing parties?

As already stated, it has been conceded by Mr. Jones that the primary reason for this application is to enable McRae Financial Services to file a counter-claim against the plaintiff. This, as was enunciated in the Atid Case (supra), is not a sufficient reason. However, the question remains, is their presence necessary? As has been already stated and which I now re-iterate (a) The witnesses in the cross-action would be the same as in the main issue. (b) The evidence would be the same. (c) That the Applicant is a wholly owned subsidiary of the defendant company.

In perusing the plaintiff's particulars of claim, and the proposed defence and counter-claim, it appears that among the main issues to be decided at the trial of this cause will be

(1) By whom is the plaintiff engaged, was it by the defendant or by the applicant?

(2) For whom was he working, was it for the defendant or the applicant?

(3) Was he wrongfully dismissed?

(4) To what damages, if any, is he entitled?

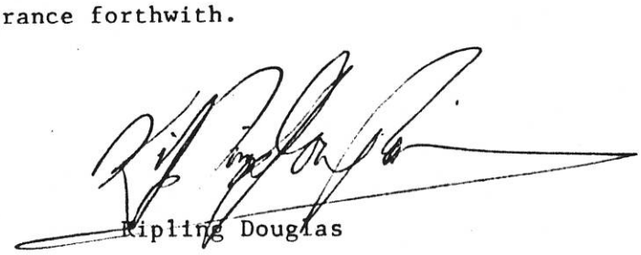
It seems to me that what the plaintiff is in fact saying to the

defendant is: "It is you who employed me to operate the applicant company. It is you who wrongfully dismissed me, it is you from whom I am claiming damages for this tort."

On the other hand the applicant's case is analagous to someone saying: "Why have you only sued my parent and not included me, it is I who engaged you, not he, it is I to whom you were employed, it is I who can attestto your conduct leading up to your dismissal for which you now sue my parent company of whom I am a wholly owned subsidiary. It is I who do not wish to have your services as you have neglected me and breached the trust you owed me. Furthermore, should the court find that you are entitled to any damages as a result of your claim, the questions I will raise in my cross-action must be determined in order to determine the amount, if any, you are entitled to receive."

After careful consideration of all the issues I find:(1) That the proposed cross-action by the applicant is not likely to embarrass the plaintiff in that all the evidence and witnesses will be the same as in the claim. This case differs substantially from that of Norris v Beazley (Supra) in that this proposed counter-claim, though also a different cause from the claim, alleges the issues from which the plaintiff's cause of action flows. It is not merely an unrelated action that the applicant may have had against him. (2) That as was held in the Montgomery v Foy, Morgan case (Supra) the presence of the applicant will be necessary to enable the court to effectually and completely adjudicate and settle all questions involved in the cause, as substantially the questions raised in the cross action must be determined in order to determine what amount, if any, the plaintiff is entitled to in respect of this claim.

In the circumstances it is hereby ordered that the applicant's name be added as a defendant in this action, and that the Writ of Summons be amended accordingly by adding its name as a defendant and that it be at liberty to enter an appearance forthwith.



Kipling Douglas
Acting Judge.

27 January 1986.