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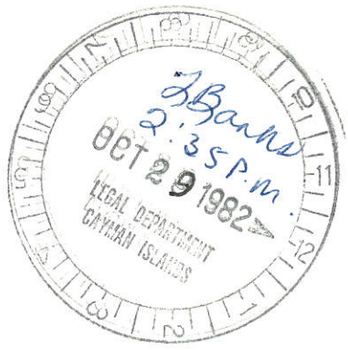

IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN

CAUSE NO. 355 of 1981

BETWEEN	RAWSON TRUST COMPANY LIMITED	PLAINTIFF
AND	G.C.T.C. LTD. (In Voluntary Liquidation subject to the supervision of the Court)	DEFENDANT
	and	
	JORDAN BITTEL	THIRD PARTY
	and	
	MARSHALL J. LANGER	THIRD PARTY
	and	
	STEPHEN A. BLASS	THIRD PARTY

Mr. N. Williams for applicant (Third Parties)
Miss R. Irving for defendant
Mr. J. Goodwill for plaintiff

JUDGMENT

This is an application to set aside an order giving leave to serve third party notices on three third parties resident in the United States of America.

The plaintiff company, as successor trustee of a trust (the trust), is suing the defendant company (now in liquidation), the former trustee of the trust, for a variety of breaches of trust in relation to the trust and for related relief. The third parties were the shareholders of the defendant company and the sole directors of it. They were to all intents and purposes the defendant company or, put another way, the defendant company was their vehicle, completely under their control, for anything they wished to accomplish through it.

By the third party notices the defendant company claims indemnity against the plaintiff company's claim, with costs, or contribution to the extent of the whole of the plaintiff company's claim, on the grounds that at all material times each of the third parties, co-members of their law firm in the United States of America, as director of the defendant

company, with full knowledge of all the company's affairs and in complete control of the defendant company, "wrongfully caused the defendant company to act in breach of its fiduciary obligations as trustee of the (trust)". It asserts, further or in the alternative, that the defendant company requires that the questions and issues raised in the writ of summons should be determined not only as between the plaintiff company and the defendant company but also as between either or both of them and each of the third parties.

An affidavit was filed in support of the original application which referentially brought on the file earlier affidavits with supporting exhibits setting out in detail the defendant company's case against the third parties. The defendant company is registered in these Islands. It operates in and from these Islands. The allegation against the third parties, in these affidavits, is that they, as directors, manipulated the defendant company to commit a series of breaches of trust in relation to the trust. Some of those alleged breaches of trust amount to torts e.g. misappropriation and conversion of trust properties. Implicit in the allegations is that the third parties were in breach of their contractual relationship, as directors, with the defendant company. Prima facie those torts and breaches of contract occurred wholly or partly in these Islands. They have a close connection with the operations of the defendant company in these Islands.

No affidavit has been filed challenging any of the facts in the affidavits in support of the order. Learned counsel for the applicant stated that there was not full disclosure of the facts in the supporting affidavits. No affidavit has been filed setting out the material facts allegedly omitted from the supporting affidavits. The onus is on the applicant to show that the order was wrongly made and should be set aside.

The first point to be made is that no new material has been brought before the court to justify setting aside the order. The applicant can rely only on the facts in the original supporting affidavits and argue

that on those facts the order ought not, in law, to have been made. This he has attempted to do. In particular, he has argued that by virtue of rule 62 (2) of the Grand Court (Civil Procedure) Rules, as contained in the Grand Court (Civil Procedure) (Amendment) Rules 1980, O 11 r 1 of the English Rules of the Supreme Court 1965 applies (Perhaps the new rule contained in the 1980 amendment should have been numbered 63 because there appears to be another rule 62).

It is contended that none of the cases set out in O 11 r 1 are applicable to the third party notices issued.

Two points can be made at this stage. O11 r1 does not purport to be exhaustive. Secondly, prima facie the case can be brought within the provisions of O 11 r 1. It should be remembered that the third party notice is the equivalent of a writ of summons with the claim framed in general terms.

In the first place, I am of the opinion that it properly falls within the provisions of paragraph (j), the third parties being necessary or proper parties to the action. In saying this I am well aware of Speller & Co. v. The Bristol Steam Navigation Co. 1884 13 Q.B.D. 96. In a note to this Order in the 1982 edition of the Supreme Court Practice this case appears to be treated as authority for the proposition that a third party is not "a necessary or proper party" to the action between the plaintiff and the defendant within the meaning of this sub-paragraph in any circumstances. In my view this conclusion is not justified from that case. Language to that effect was used in the judgments in the Queen's Bench Division. On appeal, however, the decision turned on quite a different principle. It was not contended in that case that it was one for contribution. In this case it is so contended. That is an important distinction. But the kernel of the ratio decidendi in Speller's case may be summarized thus:

(a) the defendant claimed to be entitled to indemnity against

the third party;

(b) a right to indemnify can only arise if there exists a contractual relationship, express or implied conferring a right of indemnity;

(c) there was no contract to indemnify;

(d) therefore, the defendant was not entitled to issue a third party notice.

Thus the question of whether O 11 r 1(g) of the then English provision (corresponding to O11 r 1(j) today) was by-passed. In view of the grounds on which the decision ultimately turned, the views expressed in the Queen's Bench Division must be treated as obiter dicta. They are not, in any event, binding on this court. I would be disinclined to follow those decisions in the Queen's Bench Division in a case such as this one. It is clear from the facts of this case that the plaintiff could have joined the three third parties as second, third and fourth defendants and then applied successfully under O11 r 1 (j) to have notice of the writ served on the third parties out of the jurisdiction as necessary and proper parties - in particular with regard to the alleged tortious acts of misappropriating trust funds. If that course was open to the plaintiffs I do not see how the defendant can be denied a like remedy. It would be unjust to do so. In view of the fiduciary relationship between the directors and the company, a right to indemnify would arise if the defendant company succeeds in its case. Accordingly, I would in any event resort to the power given expressly by rule 62 (2) to depart from the applied practice and procedure (assuming it to apply).

One further point can be made: if the decisions in the Queen's Bench Division in Speller's case is right,then, it would curtail in part the operation of O 16 r 3 (4) which applies the provisions of O 11 to the service of a third party notice outside the jurisdiction as if it were a writ in a separate action in which the defendant is plaintiff and the third party is defendant. It applies the whole of O 11. It does not excise r 1 (j). In my view, if one construes O 16 3 (4) and O 11 r 1 according to the

normal canons of construction O 11 r 1 (j) does apply to third party proceedings.

Leaving aside the foregoing it is strongly arguable that, additionally, the defendant company inthis case could rely on sub-paragraphs (f), (g) and (h) of O 11 R 1 but I do not think that any useful purpose would be served in developing this aspect.

I can turn now to the more important question of whether rule 62 (2) does have the effect of importing the English practice and procedure.

Rule 62 is in the following terms:

> "62. (1) Where any Law provides for the practice and the procedure to be followed in any particular type of proceeding in the Grand Court that practice and procedure shall be followed in any proceedings of that type.
>
> (2) Subject to subrule (1), the practice and procedure to be followed in any proceeding in the Grand Court shall be that provided for in the Judicature Law, the Evidence Law and these Rules:
>
> Provided that where, in relation to the whole or any part of any proceeding, there is no such provision the practice and procedure followed shall, subject to any directions of the Judge in that particular proceeding, accord as nearly as may be practicable with the practice and procedure in a like proceeding in the High Court of Justice in the United Kingdom.
>
> (3) In this rule, "proceeding" includes every kind of civil proceeding whether the same be by action, suit, petition, motion, summons or otherwise.".

The word "practice" is virtually synonymous with "prodecure". A useful definition can be found in Stroud'sJudicial Dictionary 3rd Ed. Vol. 3 p. 2259:

> "(1) "Practice," in its larger sense, is like "procedure," and "denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right" (per Lush, L.J., Poyser v. Minors, 7 Q.B.D. 333). (2) The "practice" of a court, when that word is used in its ordinary and common sense, denotes the rules that make or guide the cursus curiæ, and regulate procedure within the walls or limits of the court itself, and does not involve or imply anything relating to the extent or nature of its jurisdiction;...."

In other words practice and procedure are concerned with the

machinery governing the journey of any proceeding through the judicial process. It is concerned with processing proceedings. It is not concerned with jurisdiction. O11 r 1 is jurisdictional in nature. It defines the cases in which process of a certain kind is available. It does not spell out any particular procedure or practice.

On that ground alone it can be said that rule 62 (2) does not apply to O 11 r 1.

The matter can be taken further. Section 20 of the Grand Court Law provides:

> "20. (1) Subject to the provision of this or any other Law, the jurisdiction of the Court shall be exercised in accordance with any Rules made under this Law.
>
> (2) In any matter of practice or procedure for which no provision is made by this or any other law or by any Rules, the practice and procedure in similar matters in the High Court in England shall apply so far as local circumstances permit and subject to any directions which the Court may give in any particular case.".

In passing one can note that that section is paramount in relation to any subsidiary legislation. Rule 62 cannot in any way detract from its operation or vary its operation.

The two relevant rules can now be set out.

Rule 13 provides:

> "13. (1) Except where the defendant, in person or by his legal representative, undertakes to accept service or enters an appearance, originating process shall wherever practicable, be served by delivering to the defendant a copy thereof sealed with the seal of the Court, but if the Court is satisfied, on application made by the plaintiff, that service cannot conveniently be so effected, it may make an order for substituted or other service, or for service of any notice by advertisement or otherwise as may seem just.
>
> (2) Substituted service may be ordered to be effected by delivery of the document -
>
> (a) to some adult at the defendant's or respondent's known place of residence; or
>
> (b) to some agent within the Islands of the person to be served, or to some other person through whom it appears to the Court that there is a probability that the document will come to the knowledge of the person to be served.
>
> (3) No such process shall be served outside the jurisdiction

> without the leave of the Court, and no sub-process shall be issued without such leave, if it is apparent from the document that service outside the jurisdiction will be required. When leave to serve outside the jurisdiction is granted a copy of the order for such service shall be served therewith:
>
> Provided that when leave is given for service of process outside the jurisdiction upon a person who is not a British subject nor within Her Majesty's dominions, notice thereof and not the process itself shall be served.".

It can be observed here that that provision is complete in itself. It may not be as detailed as the English provisions; it may not be so sophisticated or polished as those provisions but it is sufficient to cover all foreseeable cases, including this one. That being so, rule 62 (2) does not bite. It is not a question of there being no provision. There is a provision - adequate if not perfect. It is only where there is no provision that rule 62 (2) applies. Section 20 (1) and rule 62 (1) continue to apply and there is no need to look to section 20 (2) or rule 62 (2). Therefore, O 11 r 1 does not apply.

Power to give leave to serve out of the jurisdiction is vested in the court, at large, acting in its discretion. Of course, the discretion must be exercised reasonably and fairly without allowing any abuse. If an Arab resident in the Middle East who has never been to these Islands purports to sue in this court an Eskimo resident in Canada who has never been to these Islands on a contract made in Switzerland for goods to be delivered in Australia, the plaintiff would have an uphill task trying to induce the court to grant leave to serve the writ out of the jurisdiction. There must be no snatching at jurisdiction. The first rule, therefore, must be that the subject matter of the action and/or one or more of the parties have a sufficient nexus with these Islands to make this court an appropriate forum to try the dispute. In this connexion the court will consider whether this is also a convenient forum. The second rule must be that this court will not act in vain. It should not grant leave where the end result would not be enforceable. In this case, there is the opinion of attorneys in the U. S. A. that the judgment of this court could be enforced through the courts of the U.S.A. A further consideration

would be whether the grant of leave to serve abroad would be vexatious, oppressive or unduly onerous on the party sought to be served abroad. Inthis case, the third parties chose to set up the defendant company in this jurisdiction, owned the shares in it, were the sole directors of it and allegedly manipulated the company here to commit the acts complained of. They cannot complain that it is vexatious, oppressive or unduly onerous that they should be compelled to answer for their conduct in relation to that company in this court. Other considerations would be taken into account and obviously this court would take account of O 11 r 1 for guidance without feeling bound by it. The court would certainly consider whether the party sought to be served abroad was a necessary or proper party.

The second relevant rule is rule 28 (1) which provides:

> "28. (1) Where a defendant claims to be entitled to contribution or indemnity by any person not a party to the cause he may, by leave of the Court, file in the Court a notice (hereinafter called a Third Party Notice) to that effect in the prescribed form and such notice shall be sealed and may be served in the same manner as originating process.".

That takes us full circle back to rule 13. Leave to serve the third party notice out of the jurisdiction is vested in the court acting in its discretion on the lines outlined.

Again the same may be said of rule 28 as was said about rule 13. It is in general terms and complete in itself. It is sufficient to meet all foreseeable cases. There is no need to look beyond section 21 (1) or rule 62 (1). Indeed, the court cannot look beyond those provisions because it is not a case where there is "no provision". Provision there is.

I am satisfied that the third parties were necessary and proper parties to the action and that rule 28 (1) was satisfied. It is conceded that the notices were properly issued. I my view leave to serve out of the jurisdiction was justified and nothing has been brought to the attention of the court to justify setting the order aside.

Accordingly, the application is dismissed with costs.

SIR JOHN SUMMERFIELD

27th October 1982.