

COMMONWEALTH OF THE BAHAMAS

IN THE SUPREME COURT

1996

Common Law Side

FP/177/96

FREEPORT COMMERCIAL AND INDUSTRIAL LIMITED

Plaintiff

AND

AUDLEY RUSSELL

AND

RUSSELL CONSTRUCTION (1986) LIMITED

Defendants

**Appearances: R. Rawle Maynard for the Defendant
Jennifer Mangra for the Attorney General
Robert K. Adams for the Plaintiff**

RULING

Estelle G. Gray Evans, Deputy Registrar

This is an application by Summons filed on behalf of the Defendants Audley Russell and Russell Construction (1986) Limited on February 16, 1998, for the following relief.

- (a) That the defendants be at liberty pursuant to Order 69 rule 7 of the Rules of the Supreme Court to issue a Third Party Notice claiming against the Ministry of Works that the Ministry of Works indemnify the Defendants in respect of the plaintiff's claim; and
- (b) The determination not only as between the plaintiff and the defendants but also as between either or both of them and the Attorney General the following question or issue, namely, whether the second defendant as an agent of the Ministry of Works contracted to resurface the Russell Town road, was a trespasser upon land, the property of the plaintiff.

The plaintiff by a generally endorsed Writ of Summons (filed and amended without leave on November 18, 1996), sought the following relief:

1. An Order that the Defendants whether by themselves or by their servants or agents, directors, officers, or otherwise do forthwith vacate any and all parts of the plaintiff's land situate and known as Tract I, Tract H-3 and Tract H-4, containing

approximately 11.85 acres, 17.92 acres and 15.34 acres respectively more or less and situate in that area known as Bittania in the Port Area on the South Shore of Freeport on the Island of Grand Bahama ("the Property")

2. An Order that the Defendants as aforesaid be restrained until judgment in this action or until further order in the meantime from doing the following acts or any of them namely:
 - (i) being or remaining or entering upon the Property
 - (ii) assaulting, molesting annoying or otherwise interfering with:
 - (a) the plaintiff or its enjoyment of the Property
 - (b) the plaintiff's guests, licensees, invitees or permitted users in the enjoyment of the Property
 - (iii) constructing erecting or re-erecting any building or structure upon the Property
 - (iv) cutting, clearing destroying damaging or tearing down any trees bush brush or shrub on the Property; and
3. Damages for trespass and destruction of property
4. Costs
5. And such further or other relief as to the Court may seem just

Dated the 15th day of November 1996
Callenders & Co.

By an ex parte Summons filed on behalf of the plaintiff and heard by Longley, J., on November 18, 1996, the plaintiff sought and obtained injunctive relief against the defendants in the terms of paragraph 1 and 2 of its Writ of Summons. The plaintiff also obtained an order for the costs of its application.

The plaintiff by a Summons filed July 8, 1997, sought leave, pursuant to Order 19 rule 7 of the Rules of the Supreme Court, to enter Judgment in default against the defendants for having failed to enter an appearance and/or file a defence. (Although the defendants had in fact entered an appearance in the Supreme Court Registry in Nassau on December 4, 1996). The summons eventually came on for hearing before Osadebay, J. on September 19, 1997, but was adjourned to a date to be fixed to allow the defendants to file their defence. The matter came on for hearing again before Osadebay, J. on January 29, 1998, and was again, this time at the request of the defendants' then recently-appointed counsel, adjourned to enable the defendants to apply for leave to issue a third party notice and to file a defence. The defendants were ordered to pay (in any event) the

plaintiff's costs occasioned by the adjournment. The defendants filed their Defence and Counterclaim on February 13, 1998.

The defendants in their defence allege that they were on property which they believed to be a public road. Indeed in his affidavit in support of this application, the defendant Audley Russell at paragraph 6 thereof opines that he is "...72 years old. **The roadway on which I was working has existed as a public road all my lifetime.**"

The defendants say their presence on the property was pursuant to a contract they say was entered into with the Ministry of Works. There is no evidence as to whether or not the contract was in writing. However, in paragraph 4 of his Affidavit filed January 29, 1998, the defendant Audley Russell said:

"Sometime about the 1st October, 1996, the Second Defendant entered into a contract with the Ministry of Works of The Bahamas Government for the paving and repairing of roads in Williams Town, Grand Bahama and proceeded with the contract-works being at all times on the public roadway."

And in paragraph 8 of their Defence and Counterclaim, the defendants claim:

"On or about the 27th September, 1996, the second defendant agreed with the Ministry of Works of The Commonwealth of The Bahamas to reconstruct and repave a road at Russell Town in the Island of Grand Bahama in accordance with specifications provided. The agreed road works were to begin on the 1st day of October, 1996, and completed by the 30th day of December, 1996, and the contract price was \$112,471.65.

The defendants claim that as a result of the injunction granted by Longley J. on November 18, 1996, they are unable to fulfill their contractual obligations with the Ministry of Works. The defendants say that if they were not on a highway as they believed, then they would wish to be indemnified by the Ministry of Works, by whom they were contracted to pave "the highway." The defendants say it is therefore necessary for the Attorney General on behalf of the Ministry of Works to be joined as a party to the Action in order to provide such indemnity and to resolve the issue of whether or not the defendants were on the plaintiff's property or on a highway (public road) as they believed, hence this application.

It was evident during counsels' submissions that the defendants intended only to proceed with the relief prayed for in paragraph (a) of the Summons, i.e. leave to issue a

third party notice and it was common ground that the determination sought at paragraph (b) ought to be left to a trial of the action.

Generally the rules relating to Third Party Proceedings are to be found in Order 16 of the Rules of the Supreme Court, which states, inter alia,

1. (1) **Where in any action a defendant who has entered an appearance:**
 - (a) **claims against a person not already a party to the action any contribution or indemnity; or**
 - (b) **claims against such a person 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) **requires that any question or issue relating to or connected with the original subject-matter of the action should be determined not only as between the plaintiff and the defendant but also as between either or both of them and a person not already a party to the action;**

then, subject to paragraph (2), the defendant may issue a notice.....(in this Order referred to as a third party notice), containing a statement of the nature of the claim made against him and, as the case may be, either of the nature and grounds of the claim made by him or of the question or issue required to be determined.

(2).....

(3).....

Order 16 rule 2 (1) also provides that an application for leave to issue a third party notice may be made ex parte. However, an exception is made when the notice is in relation to the Crown. In such a case, pursuant to the provisions of Order 69 Rule 7, not only the Crown, but also the plaintiff must be given notice of the application.

Order 69 rule 7 of the Rules of the Supreme Court provides as follows:

- (1) **Notwithstanding anything in Order 16, a third party notice (including a notice issuable by virtue of Order 16, rule 9) for service on the Crown shall not be issued without the leave of the Court and the application for the grant of such leave must be made by summons, and the summons must be served on the plaintiff and the Crown**
- (2) **Leave to issue such a notice for service on the Crown shall not be granted unless the Court is satisfied that the Crown is in possession of all such information as it reasonably requires as the circumstances in which it is alleged that the liability of the Crown has arisen and as to the departments and officers of the Crown concerned**

In response to the defendants' application, Counsel for the Attorney General indicated that in relation to paragraph (b) of the defendant's Summons, the Attorney General intends to rely on Section 12(2) of the Statute of Limitations 1995, which provides:

12 (1) Where any action prosecution or other proceeding is commenced against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the provisions of subsection (2) shall have effect

(2) The action, prosecution or proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or in the case of a continuance of injury or damage within twelve months next after the ceasing thereof

As I understood Counsel for the Attorney General's submission, the defendants were sued as trespassers on land belonging to the plaintiff and when Longley, J. granted the injunction on the November 18, 1996, the act of trespass (if any) committed by the defendants, would have ceased on that date; so that any action to be brought against the Attorney General in relation to the trespass alleged against the defendants, ought to have commenced within 12 months from that date (i.e. by November 18, 1997), otherwise the action would be statute barred by virtue of Section 12(2) above. Therefore on the 23rd April, 1998, when it was sought to have the Attorney General joined as a defendant (some 17 months later) an action in trespass could not be maintained against the Attorney General. Further, that since the determination sought by paragraph (b) of the Summons ought to be left to the trial of the action, and as, based on the authorities submitted by counsel, the action was doomed to fail as against the Attorney General, no useful purpose would be served in joining the Attorney General as a party to the action.

Counsel for the defendants submitted that the application to join the Attorney General as a defendant was not so that he could stand in the shoes of the defendant but so that he could indemnify the defendants against any damages the defendants may suffer by virtue of the alleged trespass as a result of the defendants carrying out their contractual obligations to the Ministry of Works.

Counsel for the defendants was of the view that the Statute of Limitation did not apply to the instant case as the defendants were not making a claim against the Attorney General for damages in tort or for a breach of contract. He later pointed out in a letter written after the matter had been adjourned for a ruling that the relief sought by the Summons was not one contemplated by Section 12(1) of the Statute of Limitations and therefore Section 12(2) was not applicable.

The authorities cited by Counsel for the Attorney General were to the effect firstly that no useful purpose would be served in joining a party when the Statute of Limitation has run in his favour (Riches v. Director of Public Prosecutions (1973) 2 All E.R. 935); and secondly that where a person was added as a defendant to an action, the joinder did not relate back to the issue of the Writ against the original defendant. Instead the action was deemed to have been brought against the added defendant on the date when that defendant was joined as a party to the action. (Liff v. Peasley and Another (1980) 1 All E.R. 623) and (Ketteman and Others v. Hansel Properties Ltd. (1988) 1 All E.R. 38)

Counsel for the defendants expressed his surprise at what he called "the posture" taken by the Attorney General as he was of the view that it ought to be in the interest of the Attorney General as the "protector of the public's property" to have the matter of whether or not the property on which the defendants were working was private property or a public road finally determined.

He submitted that the issues to be determined were: were the defendants, acting in pursuance of a contract with the Ministry of Works, trespassers? And, if so, would the defendants, as agents of the Ministry of Works, be entitled to an indemnity by the Attorney General (Ministry of Works) against the plaintiff for any loss they may suffer as a result of the plaintiff's injunction. (I note here that two (2) orders for payment of costs have already been made against the defendants). Those issues he said could only be properly determined if the Attorney General were joined as a party to the action.

Counsel for the defendants was also of the view that as principal, the Attorney General's only defence to this application would be that the defendants were not agents of

the Ministry of Works, but that this was not alleged, nor has the existence of the alleged contract been denied.

On the other hand, counsel for the Attorney General submitted that whatever the defendants may be entitled to, they are estopped from making a claim against the Attorney General because they waited too long to join him and their claim is barred by virtue of the provisions of Section 12(2) of the Statute of Limitation 1995.

I accept the submissions of counsel for the defendants that, if there is in fact a contract in the terms alleged, the defendants would be entitled to be indemnified by the Ministry of Works and would therefore be entitled pursuant to Order 16 rule 1 (1) to issue a third party notice.

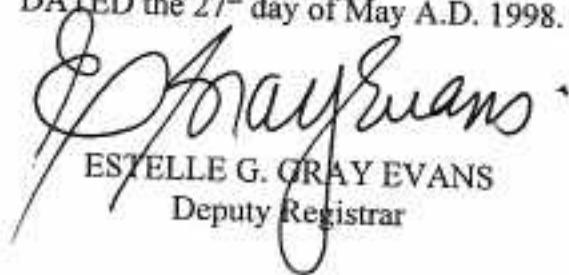
Having heard and considered the evidence, submissions and authorities cited by counsel, I am of the view that if the defendants were on the property claimed by the plaintiff as its private property under the terms of a contract with the Ministry of Works (which has not been denied) then the Attorney General through the Ministry of Works is or should be in possession of the information as is reasonably required to determine the question raised by paragraph (b) of the defendants' said Summons.

Further, I am not persuaded that it is clear that the defendants' application to be indemnified by the Ministry of Works will be defeated by the Statute of Limitations as submitted by counsel for the Attorney General.

The defendants are therefore given leave to issue a Third Party Notice in this action against the Attorney General.

Costs will be in the cause.

DATED the 27th day of May A.D. 1998.


ESTELLE G. GRAY EVANS
Deputy Registrar