

ROYAL COURT
24th October, 1990

156A.

Before: The Judicial Greffier

BETWEEN	Angus Fettes Whiteside	PLAINTIFF
AND	Nicholas Kerrell	FIRST DEFENDANT
AND	John Cridland	SECOND DEFENDANT
	(trading as Classic Trading Company)	
AND	Nicholas Kerrell	THIRD PARTY

Application by the Third Party for an Order that the Second Defendant provide security for the costs of the Third Party in respect of the Third Party proceedings issued by the Second Defendant. Decision on the preliminary point as to whether such an Order can be made against a Defendant for the benefit of a Third Party.

Advocate M.St.J. O'Connell for the Third Party,

Advocate A.P. Begg for the Second Defendant.

JUDGMENT

JUDICIAL GREFFIER:

I requested counsel for the Third Party and the Second Defendant to address me upon the preliminary point as to whether the Second Defendant was a plaintiff within the definition contained in Rules 4/1(4) & (5).

Rule 4/1(4) states -

"Any plaintiff may be ordered to give security for costs."

Rule 4/1(5) states -

"A plaintiff for the purposes of paragraph (4) of this Rule is a person (however described) who is in the position of plaintiff in the proceedings in question including proceedings on a counterclaim".

Rule 4/1(5) has some similarities to Order 23 Rule 1(3) of the Rules of the Supreme Court 1965, as amended, which states -

"The references in the foregoing paragraphs to a plaintiff and a defendant shall be construed as references to the person (howsoever described on the record) who is in the position of plaintiff or defendant, as the case may be, in the proceeding in question, including a proceeding on a counterclaim."

The wording "who is in the position of plaintiff, in the proceeding in question, including a proceeding on a counterclaim" is almost identical except that proceeding in Order 23 has become proceedings in Rule 4/1(5).

Section 23/1-3/7 on page 400 of the Supreme Court Practice 1988 volume 1 begins -

"Rule 1(3) has the effect of equating a defendant who is in the position of a plaintiff with that of a plaintiff for the purposes of security for costs. In each case the Court must have regard to the substantial and not the nominal position of the parties, in order to see whether the defendant "is in the position of plaintiff in the proceeding in question".

Rule 6/10(3) of the Royal Court Rules, 1982, as amended, states -

"(3) where a third party has been so convened, he shall from the time of service be a party to the action as if he had been made a defendant

the third party notice, and the issue of contribution between co-defendants in an appropriate case, creates a "lis" between the parties in question, which remains to be disposed of, if necessary by determination by the Court. A contribution notice served by one defendant on another before the plaintiff serves a notice of discontinuance on that other defendant remains effective even after the notice of discontinuance and even if that defendant has ceased to be a party to the action. Indeed, generally speaking, a defendant and the third party stand in relation to one another as if the defendant had brought a separate action against the third party, therefore the costs of the successful third party should normally be ordered to be paid by the defendant, and not by the plaintiff especially if the latter is a legally aided party.

(b) Paragraph 16/1/23 on page 237 of volume 1 of the White Book states:-

"The third party is in the position of a defendant in relation to the defendant who brings him in and so can counterclaim against him."

(c) In section 23/1-3/1 at the top of page 397 is a passage which states:-

"Similarly there is no jurisdiction to order a plaintiff to give security for a third party's costs of defending interlocutory applications for specific discovery and interrogatories made by the plaintiff directly against the third party. The third party is in a position of a defendant in relation to the third party proceedings brought against him by the original defendant, but not in relation to the interlocutory proceedings brought against him

by the plaintiff, because the latter proceedings are not an action or in the nature of an action."

Now if a third party is in a position of a defendant in relation to the defendant who brought him in, then the question arises as to what is the position of the defendant who brought him in as against the third party. I find it impossible to come to any conclusion other than that the defendant who brings the third party in is effectively in the position of a plaintiff in relation to the third party proceedings.

Thus I find on the preliminary point that a third party is entitled to seek security for costs against the defendant who brought him in and that such a defendant is a plaintiff for the purposes of Rule 4/1(4) & (5).

It will now be necessary for the parties to address me further on the merits of the third party's application.

in an original action either by the defendant on whose application he was convened or by the plaintiff". Although at first sight this paragraph might appear only to refer back to the category of third parties envisaged in Rule 6/10(1), namely, where a person not already a party to the action is being joined as a third party, it appears to me that it also extends to the category of third parties envisaged by Rule 6/10(7), namely, persons who are already party to the action, as the last sentence of 6/10(7) states that the provisions of paragraph (2) of rule 6/10 shall apply to a third party joined by virtue of Rule 6/10(7). I take Rule 6/10(3) to refer to all the categories in Rule 6/10(1) and Rule 6/10(2) (including those which come within 6/10(2) via 6/10(7)).

Thus effectively from the time of being joined as a party to the action the third party was in the position of being a defendant as against the second defendant.

That view is reinforced by various sections from the Supreme Court Practice 1988 volume 1 as follows:-

(a) Order 16 deals with third party and similar proceedings and in section 16/1/1 about half way down page 232 of volume 1 of the White Book are paragraphs which read as follows:-

"Moreover, it should perhaps be observed that third party proceedings, including contribution between co-defendants, have or may have as it were, a life of their own, quite independent of the main action, so that, for example, the main action is settled, the third party proceedings already begun can still proceed and so can the issue of contribution between co-defendants and conversely third party proceedings may be dismissed for want of prosecution even though the main action is still proceeding. The service of

Authorities

Royal Court Rules, 1982, as amended: 4/1(4)(5) ; 6/10(3)(7)

R.S.C. (1965 ed'n) : 0.23 r. 1(3)

R.S.C. (1988 Ed'n) : Vol 1 : S.23/1 - 3/7
: 0.16/1/1,23