IN THE SUPREME COURT OF BELIZE A.D. 2004

ACTION NO. 41 OF 2004

	(FULTON DATA PROCESSING LTD.	**PLAINTIFF**
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	(	
BETWEEN	**(AND**	
	(	
	(ATLANTIC INTERNATIONAL BANK	**DEFENDANT**
	(Ltd.	

Mr. Dean Barrow SC for the Plaintiffs/ Respondents
Mr. A. Marshalleck and Ms. L. Barrow for the defendants/applicants

AWICH. J

JUDGMENT

1. *Notes:* *Action by summary procedure under O.74 of the Rules of the Supreme Court: the object is speedy trial and saving costs in small claims; special grounds for converting to extended procedure are only some of the considerations in the exercise of the discretion of court.*
Third party notice: in action by summary procedure under O. 74 r 14 leave is not required to issue third party notice, but leave is required under O. 12 to issue writ of summons intended to be served outside jurisdiction and for service of the writ outside jurisdiction: in Belize the ground for issuing a third party notice is when the defendant claims contribution or indemnity from the third party or the other defendant; modern English cases do not apply because the grounds in Belize have not been expanded beyond a claim for contribution or indemnity.

2. This is judgment in an interlocutory application dated, 6.9.2004, made by the defendants for certain direction orders. The application was presented to the Court the following day, 7.9.2004, when the action came up for trial.

3. ***Background.***

The plaintiffs had a writ of summons issued under ***O. 74 r.1 of the Rules of the Supreme Court, Statutory Instrument Cap 82.*** The rules under the Order authorise a plaintiff to bring an action in " a summary procedure" way. The writ simply commands a defendant to attend court on a specified day to answer the claim made against him. The substance of the case is made in "a claim" a copy of is attached to the writ or is indorsed in the writ. No memorandum of appearance or of defence or other pleadings are required. The procedure is intended for small claims not exceeding $15,000 - see ***S: 70 of the Supreme Court of Judicature Act, Cap 91.*** Action by summary procedure is not common in the Common Law jurisdictions.

4. The plaintiff's claim in this case is for US $4,000 (about Bz $8,000) which they say they had deposited with the defendants' bank in Belize, and that upon demand, the bank refused to pay the money to them. The defendants accept that they received the money on "a demand deposit account". They add that they in turn deposited the money with the International Bank of Miami - IBOM, in Miami, USA, and that monies deposited by the defendants including the money they held for the plaintiffs, had been arrested by a warrant *in rem,* issued by a court in the USA. They say up to US $1 million deposited by them has remained frozen in IBOM on allegation of illegal gambling and tax evasion.

5. ***The Application.***

The defendants have applied to the Court under ***O. 74 r. 21***, for direction

orders that the extended procedure be adopted; and further that leave be granted to them to issue a third party notice joining IBOM, and for related orders as to issue and service of the notice and writ of summons on IBOM outside the jurisdiction. The plaintiffs oppose the application for the orders.

6. It is useful to set out the relevant parts of the defendants' application; it reads:

> "LET ALL PARTIES CONCERNED attend ... in Chambers ... on the hearing of an application on the part of the Defendant for the following Orders:
>
> 1. Pursuant to Order 74, rule 21 that the action be tried in accordance with the extended procedure of the Court on the grounds that the nature of the action, the defence raised and the need to join a foreign entity as third party to the action make it appropriate and necessary to do so;
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> 2. pursuant to Order 17, rule 42, that the Defendant may be at liberty to issue a Third Party Notice claiming against INTERNATIONAL BANK OF MIAMI, N. A. of 121 Alhambra Circle, 15th Floor Coral Gables, Florida 33134 indemnity against the Plaintiff's claim.
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> 3. Leave be granted to issue a Third Party Notice of which notice is to be given against International Bank of Miami, N.A. out of

the jurisdiction on the ground that the Defendant be indemnified against the Plaintiff's claim.

4. Leave be granted to serve notice of the Third Party out of the jurisdiction by sending the notice by mail, addressed to MR. JOSE RAMON FERNANDEZ, SENIOR VICE PRESIDENT, INTERNATIONAL BANK OF MIAMI, N.A. at 121 Alhambra Circle, 15th Floor Coral Gables, Florida 33134;

5. Time be set for 30 days from the date the notice is mailed within which appearance should be entered by the Intended Defendants; ..."

7. ***Determination:*** *Third Party Notice.*

Mr. Marshalleck argues that there are grounds to join IBOM; there is a case between the defendants and IBOM which case arose out of the same facts as the action between the plaintiffs and the defendants, and that the defendants would be entitled to indemnity from IBOM, were the plaintiffs to succeed.

8. Under O. 74 leave is not required to issue a third party notice in an action by summary procedure - see ***rule 14***. In this case, however, the intended third party is outside the jurisdiction, accordingly, the defendants would require leave to issue the accompanying writ of summons and the claim intended for service outside the jurisdiction, and leave to have the processes served outside the jurisdiction. Nothing turns on the unnecessary application for leave to issue the third party notice itself, I shall however, decide the

question as to whether this action is a suitable case in which a third party notice would issue. It is necessary to make that determination because the plaintiffs have expressed opposition to the intended third party notice, and it may be assumed that had the defendants, without leave, issued the notice and sought leave to have the notice and writ of summons served outside the jurisdiction, the plaintiffs would have opposed the application and applied to have the third party notice set aside.

9. In Belize, a third party notice in the usual action by extended procedure, would issue only by leave of Court. Leave is no longer required in England. The grounds upon which the Court in Belize issues leave are laid down in ***O. 17 r. 42,*** as follows:

> "42. Where a defendant claims to be entitled to *contribution or indemnity* over against any person not a party to the action, he may by leave of the Court, (Form No. 40. APP. K), issue a notice (Form No. 1, APP. B. Pt II), hereinafter called the third party notice to that effect sealed with the seal of the Court. A copy of such notice ..... shall be served on such person according to the rules relating to the service of writs of summons. The notice shall state the nature and grounds of the claim, and shall unless otherwise ordered by the Court be served within the time limited for delivering his defence, and therewith shall be served a copy of the statement of claim, or if there be no statement of claim, then a copy of the writ of summons in the claim".

10. Both learned counsel conducted their argument on the footing that the objects of a third party notice are: to prevent multiplicity of actions, to enable the court to determine disputes between all parties in one action, and to prevent the same question being tried twice at the risk of obtaining different results. Sound and loudable as they are, however, those expanded objects became the law in the Rules of the Supreme Court in England only when the 1929 Rules were made and noteably expended and improved by the 1962 Rules, to include in addition to claim for contribution or indemnity as ground for issuing a third party notice; claim for *"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,"* and when the defendant *"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"* - see ***O. 16 r. 1 (a) (b) and (c) of the Rules of the Supreme Court (England and Wales).*** The defendants' intended case against IBOM would fall within the expanded grounds because the case would raise issues "relating to or connected with the original subject matter of the action". The case would qualify for the issue of a third party notice had the Belize Rules advanced as far as the Rules in England.

11. The rule in Belize regarding issuing of a third party notice, has remained grounded on the defendant's claim for *contribution or indemnity.* Those must remain the determining factors. The Belize Rules about third party notice was adopted from the Rules in England between 1883 and 1929.

Accordingly only cases decided by the Privy Council under the old Rules in England which were then concerned only with contribution or indemnity as grounds for third party notice, do apply in Belize. Both Mr. Dean Barrow SC, and Mr. A. Marshalleck, in their arguments cited judgments in the courts in England without warning that only those cases decided under the Rules requiring contribution or indemnity were applicable. I take their arguments subject to that modification.

12. In their application the defendants asserted that the defendants would have a claim for indemnity against IBOM. They did not point out whether the claim would arise under a contract between the defendants and IBOM or under the Money Laundering (Prevention) Act or the Financial Intelligence Unit Act or any other statute or even in equity or under a specified principle of law. The claim for contribution or indemnity would only arise under those heads of law -see ***Birmingham and District Land Company Ltd v London and North Western on Railway Company ,34 Ch D 261.*** Had the defendants identified the law, they would have to present by affidavit, the facts that would establish a *prima facie* case for the indemnity claimed - see ***Furness & Co v Pickering (1902) 2 Ch 224, and Birmingham and District Land Company case*** above **.** Mr. Pelayo's affidavit simply stated that the bank account at IBOM in which the plaintiffs' money was deposited had been frozen on the authority of a warrant *in rem* issued by a court in the USA. That does not go so far as disclosing the law under which IBOM would become liable to indemnify the defendants.

13. The application for leave to issue a third party notice to be served on IBOM,

if it were required, would fail. The application asking for leave to issue third party notice against IBOM fails and the related applications regarding issue of the notice for service outside the jurisdiction and for service thereat also fail. Direction orders regarding issuing and serving a third party notice on IBOM are declined.

14. ***Determination:*** *Conversion to Action by Extended Procedure.*

The application under O. 74 r 21 for direction order to convert the action to action by extended procedure was said to be grounded on: "the nature of the action, the defence .... and the need to join a foreign entity as third party." I have already decided that were leave to be required to issue third party notice in action by summary procedure, I would have refused leave. That ground is rejected.

15. O. 74 r 21 under which the application is brought states:

> "21(1) If, on any special ground arising out of the defence or question raised or the nature of the action or owing to other litigation between the same parties being pending in the Court or for any other reason, the Court is of the opinion that any action or matter although triable in accordance with the summary procedure of the Court ought to be heard, tried or determined in accordance with the extended procedure of the Court, it shall be lawful for the Court to order that the action be tried in accordance with the extended procedure of the Court".

16. The rule specifies only some of the grounds on which the Court may convert action by summary procedure to action by extended procedure. The grounds

include the nature of the action, any special ground of defence and any other reason. But the rule leaves the matter to the discretion of the Court. In exercising its discretion the Court must not lose sight of the fact that O.74 aims at a speedy trial of small claims and mininising costs. In my view the grounds mentioned in r. 21 all point to the need to convert to the extended procedure, that is, full pleading, only if it is apparent to the Court that lack of full pleading will lead to prejudice arising from the fact that parties will have not known fully the case against them until the hearing of the case. Note that even in action by summary procedure, there are requirements to give notice of special defences such as infancy, coverture, limitation of action, equitable defence and counterclaim - see ***rr 10 and 11.***

17. Mr. Marshalleck argues that there is more to the claim for US $4,000; there could be similar claims totalling one million US dollars and because of that full pleading was desireable. I do not think the Court should concern itself with anticipated or possible claims, it should concern itself with "claims pending in the Court" as stated in the rule.

18. That complicated questions of law such as conflict of law and implied facts or terms may arise and that would make full pleading desireable, was an attractive argument. In this case however, I do not think full pleading will make any anticipated complicated questions any easier than when evidence is given without full pleading. I say so because from the affidavits filed the facts are not in dispute, except on the question as to whether there was implied term that the defendants would in turn bank the plaintiffs' money at

IBOM, in Miami at the plaintiffs' risk. I am even of the view that the action could be resolved by deciding only questions of law on stated facts, under ***O. 36 of the Rules.***

19. I accept that the defence of illegality is usually treated as a special defence. I also accept the judgment of Sosa J. as he then was, in ***Action No 9 of 1998. Ellis Arnold v The Belize Times Ltd.*** In that action for libel, it was desireable to convert the action by summary procedure to action by extended procedure so that the defendant could be afforded opportunity to raise the special defences of fair comment and justification. I do not think though that in all cases where special defences are anticipated the Court must convert to action by extended procedure. The defence of illegality is not of the same nature as the defence of fair comment or justification. It is noted that rules 10 and 11 of O. 74 make provisions for special defences to be raised by notice in action by summary procedure. I think the defence of illegality can be adequately raised by notice under r 10.

20. It is my view that the delay that will be occasioned and the additional costs that will be incurred make it unfair to convert this action to action by extended procedure. My decision is that the application for an order converting the present action by summary procedure to action by extended procedure fails.

21. ***Determination:*** *The Order Made.*

In the end the defendants' application for all the orders sought fails and is

dismissed. Costs of the application to the plaintiffs.

22. Delivered this Wednesday the 15th day of September 2004.

At the Supreme Court,

Belize City.

Sam Lungole Awich

Judge

Supreme Court