

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

JOHNSON'S BUILDING SUPPLIES LTD.

- and -

Plaintiff

BERNIE'S LTD.

- and -

Defendant

KARL LUST and NOVA CONSTRUCTION (1987) LTD.

Proposed Third Parties

Application for leave to issue third party notices under subrule 137(4) of the Rules of Court granted.

Heard at Yellowknife on 3rd March 1994

Judgment filed: 21st March 1994

REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE M.M. de WEERDT

Counsel for the Petitioner:  
and for Karl Lust

Lloyd W. Stang, Esq.

Counsel for the Defendant:

Gerard K. Phillips, Esq.

Counsel for Nova  
Construction (1987) Ltd.:

Katherine R. Peterson, Q.C.

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REASONS FOR JUDGMENT

1           Bernie's Ltd., the defendant in this action upon an alleged contract for the sale of goods, seeks an order granting it leave to serve third party notices upon Karl Lust and Nova Construction (1987) Ltd., pursuant to subrule 137(4) of the **Rules of Court**, which states:

137. (4) A third party notice shall be sealed with the court seal and shall, unless the court otherwise orders, be filed with the clerk of the court before the defendant has filed his defence or demand of notice, been noted in default, or has had judgment entered against him, and shall be served within 30 days from filing.

The action was commenced by issuance of the statement of claim on

November 6th 1991. The statement of defence and counterclaim were filed on December 3rd 1991. And a reply and defence to the counterclaim were filed on December 18th 1991, due service being effected two days later.

No further step has been taken in the action other than an *ex parte* proceeding initiated by the plaintiff, Johnson's Building Supplies Ltd., leading to an order granting it leave (on February 7th 1994) to take the next step in the action pursuant to Rule 259 of the Rules of Court.

No limitation of action has as yet arisen with respect to the proposed third party proceedings or the cause or causes of action to which those proceedings refer. Those proceedings, as appears from the affidavit of Noel Sinclair, sworn on February 9th 1994, would seek contribution and indemnity on the part of the proposed third parties under a second alleged contract between the defendant and those third parties to which the plaintiff may also be a party or which may affect the extent of the defendant's liability to the plaintiff in the original action.

The delay in issuance of third party notices as the defendant now proposes has evidently arisen as a result of the delays described in the affidavit of Gary J. Boyd, sworn on January 31st 1994 and filed in the *ex parte* proceedings above mentioned. Apart from that affidavit and the affidavit of Noel Sinclair above mentioned, no additional factual material has been filed in affidavit form.

No prejudice to the plaintiff or third parties is revealed in the material filed, in the event that the order now sought should be granted. Counsel for Karl Lust has

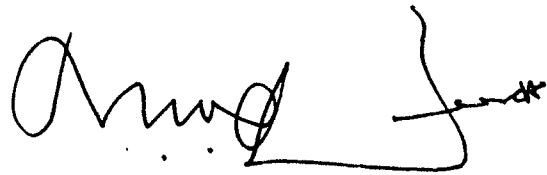
submitted that prejudice to him is inherent in the delay in issuing the proposed third party notice. He therefore does not consent to the order now sought. Counsel for Nova Construction (1987) Ltd. says that there is no prejudice to it resulting from the delay; but that the Court should consider whether the case is an appropriate one in which to permit the defendant to bring third party proceedings on the basis of the material filed.

7           Having now reviewed the relevant **Rules of Court**, the material filed to date in this action and the authorities relied on by the defendant, I have no difficulty in ruling that the proposed third party proceedings are appropriate, are not barred by any statutory limitation to date, and would not be prejudicial to either of the intended third parties. The delay has been sufficiently explained and is, in effect, already excused so far as the plaintiff is concerned by its having sought and obtained leave to take the next step in the action. That step remains to be taken. The action is, to all intents and purposes, at or very close to a stage when third party notices could have issued without judicial leave.

8           It would, it seems to me, only add to the expense of all parties to the litigation to deny the present application, leaving it to the defendant to bring a fresh action against the proposed third parties, with proceedings inevitably following in due course to consolidate the two actions. If that course had been taken, the defendant could rightly have been criticized for adding needless complexity and expense to the litigation. Proceeding as now proposed is not merely sufficient; it is the preferred course of action in terms of reducing litigious complexity and expense. If the matter has to go to trial, there need be no multiplicity of trials or any further interlocutory applications with a view to consolidation of actions and a single trial.

The order sought is therefore granted subject to the defendant amending its proposed third party notice to conform with Form 8 in the **Rules of Court**. Costs of this application shall be in the cause.

I make no order regarding interest claimed under either of the contracts above mentioned, leaving that to be determined in the usual course.

A handwritten signature in black ink, appearing to read 'M.M. de Weerd', with a horizontal line extending to the right from the end of the signature.

M.M. de Weerd  
J.S.C.

Yellowknife, Northwest Territories  
March 21st 1994

Counsel for the Petitioner: and for Karl Lust	Lloyd W. Stang, Esq.
Counsel for the Defendant:	Gerard K. Phillips, Esq.
Counsel for Nova Construction (1987) Ltd.:	Katherine R. Peterson, Q.C.

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