SC GV 95 027

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

CV 02081

SILVER STREAK HOLDINGS LTD.

Plaintiff

- and -

ANDO ENTERPRISES LTD. and DOUG ZUBERNICK

Defendants

- and -

CARADAN LIMITED

Third Party

- AND -

BETWEEN:

CV 03738

CARADAN LTD.

Plaintiff

- and -

SILVER STREAK HOLDINGS LTD. and ANDO ENTERPRISES LTD.

Defendants

AND BETWEEN:

SILVER STREAK HOLDINGS LTD.

Plaintiff by Counterclaim

- and -

CARADAN LTD., ANDO ENTERPRISES LTD., DOUGLAS ZUBERNICK and DANIEL STRELIOFF

Defendants by Counterclaim

Applications to strike out third party notice, to have trials heard concurrently, and to amend statement of claim

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REASONS FOR JUDGMENT OF THE HONOURABLE MR. JUSTICE J. Z. VERTES

Heard at Yellowknife, Northwest Territories
on July 7, 1995

Reasons filed: July 18, 1995

Counsel for Caradan Ltd.: Sydney A. Sabine

Counsel for Silver Streak Holdings Ltd. & Ando Enterprises Ltd.: Louis M. H. Belzil

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REASONS FOR JUDGMENT

1 In these two proceedings three motions were argued at the same time:

(1) an application by Caradan Ltd. ("Caradan") to strike out the Third Party Notice in action CV 02081;

(2) an application by Ando Enterprises Ltd. ("Ando") directing that these two actions be tried concurrently; and,

(3) an application by Caradan for leave to amend its Statement of Claim in action CV 03738.

2 The same alleged facts underlie both actions. In 1984 Caradan made an agreement to sell certain real property to Silver Streak Holdings Ltd. ("Silver Streak"). Silver Streak took possession of the property and, it is alleged, is now in default of payments due under the agreement. In 1987 Silver Streak made an agreement to sell the same property to Ando. Ando took possession and then defaulted in its payments due to Silver Streak. Ando alleges that its breach was caused by certain misrepresentations of Caradan and its agents. There is also an allegation of an agreement for sale made in 1989 between Ando and Caradan. It is this agreement that is now in contention between the parties: Caradan denies the existence of this agreement; Silver Streak, in its counterclaim, labelled it as a conspiracy; and Ando calls it a misrepresentation.

3 On December 24, 1991, Richard J. granted in part an application for summary judgment brought by Silver Streak against Ando in action CV 02081. He granted what has been termed an *order nisi*/order for determination which was subsequently confirmed by the Court of Appeal. Caradan appeared at the hearing before Richard J. but chose to make no submissions.

4 Discoveries common to both actions have been held although there has never been an application for directions as to the trial of the third party proceedings in action CV 02081. In 1994 a settlement agreement was reached between Silver Streak and Ando, particulars of which have been disclosed to the court and to Caradan.

Motion to Strike out Third Party Notice:

5 Counsel are in agreement that the guiding legislative principle is s.25(1)(b) of the *Judicature Act*, R.S.N.W.T. 1988, c.J-1: "A court may grant to a defendant...all relief relating to or connected with the original subject of the cause or matter, and in like manner claimed against any other person, whether or not already a party to the same cause or matter...". Accordingly the only requirement is a connection to the original subject of the cause. Once that connection is established then all common issues should be tried and disposed of at the same time. The object of third party proceedings is to avoid multiplicity of proceedings and inconsistent findings: Modern Construction Ltd. v. Centennial Properties Ltd. et al (1979), 106 D.L.R. (3d) 619 (N.S.C.A.); Canadian Commercial Bank v. Carpenter. [1990] 1 W.W.R. 323 (B.C.C.A.).

6 The operative provisions of the Rules of Court are:

> 137.(1) Where a defendant claims against any person who is or may be liable to him for all or part of the plaintiff's claim against him (whether or not that person is already a party to the action) he may serve a third party notice.
>
> ...
>
> 138. Copies of all third party notices and pleadings in the proceedings shall be served upon the plaintiff's solicitor within 10 days after the filing thereof.
>
> 139. A third party may at any time before he defends, and the plaintiff may at any time after service of the notice, move to set the notice aside.

7 It should be apparent that subrule 137(1) is framed in much narrower terms than is s.25(1)(b) of the *Judicature Act*. The rule refers only to the situation where the third party may be liable to the defendant for all or part of the plaintiff's claim against the

defendant. This suggests that the procedure is limited to claims strictly for contribution or indemnity. But the statute has a wider scope since it refers to "all relief relating to or connected with the original subject of the cause or matter". The emphasis is on the connection in subject-matter not the type of relief sought. The provision of our *Judicature Act* is in the same wording as the applicable provision in the *Law and Equity Act* of British Columbia (R.S. 1979, c.224, s.6). And in that province the test is whether there is any question or issue relating to the original subject matter of the action between the plaintiff and defendant. Where there is a question or issue common to both the plaintiff's claim and the third party claim and some of the evidence is common to both claims, third party proceedings are allowed: Lui v. West Granville Manor Ltd., [1987] 4 W.W.R. 49 (B.C.C.A.); Eli v. Royal Bank of Canada (1985), 68 B.C.L.R. 353 (S.C.).

8 In my opinion, because of the wording of s.25(1)(b) of the *Judicature Act*, third party proceedings in this jurisdiction are not limited to claims strictly for contribution or indemnity. If there is a conflict between the rule and the statute, then the rule must give way.

9 The same question confronted the Nova Scotia Court of Appeal in the Modern Construction case noted above. That court held that the Nova Scotia rule, in similar wording to subrule 137(1), is not confined to contribution or indemnity. Hart J. A. (at page 629) wrote:

> All the defendant must show is that the plaintiff is claiming against him something for which the third party is liable to the defendant and it then becomes convenient to have the common issues tried at the same time unless good reason is shown by one of the parties to convince the Court that it would be unfair to have a joint trial of the two causes...

> The only real limitation on the use of third party proceedings is contained in the *Judicature Act* where the second cause of action must be "relating to or connected with the original subject of the proceeding", but once that connection is established then procedurally all common issues should be tried and disposed of at the one time.

10 The applicant Caradan argues a number of grounds in support of the motion to strike the Third Party Notice. I will address first, however, a preliminary issue arising from Rule 139 (quoted above). The Third Party Notice was issued on July 10, 1990. Caradan's defence to that notice was filed on August 27, 1991, and amended in March of 1995. Ando's counsel argues that Rule 139 should bar this application.

While the rule sets a requirement that this application be brought before the defence is filed, no doubt so as to avoid the expense of continued litigation, I am of the view that there is some discretionary power in the courts to waive this restriction. In Stevenson & Côté, Civil Procedure Guide (1992), at page 247 of Volume 1, the authors note a connection between this rule and Rule 124A providing for the striking out of "any pleading in the action" at "any stage of proceedings". A third party notice is a pleading. Therefore they point out that the same principle applies, to wit, that the notice should not be set aside if there is any doubt or a point which could succeed on appeal. I do not find Rule 139 to be a bar to this application in the absence of overt prejudice attributable directly to the delay in bringing on the application.

Caradan's counsel submits that Silver Streak should have obtained directions as to the trial of the third party issue prior to the summary judgment granted by Richard J. He relies on a number of cases for the proposition that in the absence of such directions

prior to judgment in the main action the defendant loses any right of contribution from the third party and the third party claim is subject to dismissal.

13 The requirement for directions is set out in Rule 146:

> 146. (1) If a third party defends, the defendant shall apply on notice for directions and the court may
>
> (a) where the liability of the third party to the defendant is established on the application, give such judgment as the nature of the case requires for the defendant against the third party;
>
> (b) order the question of liability between the defendant and the third party to be tried in such manner and at such time as it directs; and
>
> (c) generally make such orders and give such directions as appears proper for having the rights and liabilities of the parties conveniently determined and enforced, and to determine the extent to which the third party is to be bound by any judgment or decision in the proceedings.
>
> (2) If a third party defends and denies the liability of the defendant to the plaintiff, the court may, in addition,
>
> (a) give the third party liberty to defend the action, either alone or jointly with any defendant, upon such terms as may be just, or
>
> (b) give the third party liberty to appear at the trial and take such part therein as may be just.

14 I note that the Alberta rule, on which Rule 146 was modelled, was amended in 1981 so that now in Alberta there is no requirement to obtain directions and the third party automatically becomes a full party to the main action in most respects. I think this amendment reflects what is now a broader application of third party procedures.

15 In my opinion there is much guidance to be found in the case of Allan v. Bushnell T.V. Co. Ltd. et al, [1968] 1 O.R. 720 (C.A.). In that case, Laskin J. A., writing on behalf of the court, stated that "there must be a connection of fact or subject-matter between the cause of action upon which the plaintiff sued and the claim of the defendant for redress against the third party" (pg. 723). This is in accord with s.25(1)(b) of the

Judicature Act entitling the defendant to "all relief relating to or connected with the original subject of the cause". Hence, as stated in the *Allan* case (at page 722), no objection can be taken to third party proceedings if there is no similarity in the forms of action (such as one sounding in contract and the other in tort) or if there is no equivalence in the measure of damages. These are the complaints of Caradan's counsel here. But these complaints are very much based on the cases cited by him where a very narrow approach was taken to third party proceedings.

16 The requirement for directions is very much premised on the narrow (and older) view of third party proceedings. I do not view the failure of the defendant to obtain directions to date as being fatal to the third party proceedings in this case. First, there has as yet been no trial of all of the issues. The summary judgment was granted in part only by Richard J. in 1991. Second, Caradan was not a stranger to the summary judgment application. It was represented by counsel but simply chose to make no submissions. Whether Caradan is bound by that judgment is an issue that is certainly not free from doubt and one that could be best argued at the trial of the third party notice.

17 Caradan's counsel submits that the third party claim cannot stand because there can be no potential liability of the third party to the plaintiff. The main action between Silver Streak and Ando is based on an agreement to which Caradan was a stranger.

18 Caradan's counsel relies on the judgment in Izzard Estate v. Lyle, [1992] N.W.T.R. 205 (C.A.), to argue that there can be no third party proceedings when the third party could not be liable to the plaintiff. That case, however, turned on the interpretation of

the *Contributory Negligence Act* and the right of one joint tortfeasor to bring a third party claim against the other. The court there held that a claim for contribution cannot be made unless each of the two tortfeasors were under a liability to the plaintiff. In that case there was a statutory bar under the *Workers' Compensation Act* to liability because the intended third party was the employer of the plaintiff and therefore could not be sued. The case is not analogous to the present one.

19 In this case the defendant Ando seeks contribution and indemnity on the basis of an alleged misrepresentation inducing Ando to breach its contract with Silver Streak. But it also claims damages and other relief under different contingencies. The fact that there may be no privity of contract as between Silver Streak (as plaintiff) and Caradan (as third party) in action CV 02081 is not decisive of this issue if there is a connection of fact or subject-matter between the principal action and the third party claim. I find there is such a connection. Furthermore, in this case, there can be said to be a link between all claims in both actions. Caradan alleges a contract with Silver Streak; Ando alleges a representation by Caradan that Silver Streak had no interest in the property; Ando alleges a contract with Caradan; Caradan alleges misrepresentation and undue influence by Ando; Ando has obtained partial summary judgment against Silver Streak. There is a circuitous connection between all of these claims and they all arise from the same subject, the dealings with the property in question. There is merit in Ando's counsel's argument that all of these issues should be resolved in the same litigation.

20 Essentially the defendant Ando seeks relief from Caradan now that part of its liability to Silver Streak has been determined by the judgment of Richard J. I have no doubt that Ando could bring a separate action for the same relief it now seeks in the third party claim. To have to do that seems to me to be a needless duplication of effort and expense.

21 Finally, Caradan's counsel submits that the settlement reached as between Silver Streak and Ando forecloses any further third party proceedings since Caradan was not a party to the settlement and did not consent to it. I do not agree.

22 The settlement was described by Ando's counsel as a "Mary Carter" agreement. This type of agreement usually contains the following features:

(a) the contracting defendant guarantees the plaintiff a certain monetary recovery and the exposure of that defendant is capped at that amount;

(b) the contracting defendant (Ando in this case) remains in the law suit; and,

(c) the contracting defendant's liability is decreased in direct proportion to the increase in the non-contracting (in this case Caradan) party's liability.

See comment on "Mary Carter" agreements by H. David in (1994) 16 Advocates' Quarterly 266. These types of agreements have been held valid as an aspect of the policy of encouraging settlement.

23 In my opinion the fact of the settlement has no bearing on the third party proceedings. Similarly, the fact that Ando and Silver Streak may be co-ordinating their efforts in this litigation should also have no bearing. The issues are identified in the pleadings; they arise from the same underlying subject-matter as before; and the evidence relating to all issues will still have to be tested in court.

24 In the British Columbia case of Allied Land Services Ltd. v. Bobey (1980), 22 B.C.L.R. 143 (S.C.), it was held that, when the plaintiff's claim is settled, it is not unfair or inconvenient for the defendant to proceed against the third party, as opposed to the inconvenience of requiring the defendant to pursue the claim in a separate action. The same principle applies in the case before me.

25 For the foregoing reasons, the application to strike out the Third Party Notice is dismissed.

Motion Directing Trial of Actions Concurrently:

26 The subject-matter of actions CV 02081 and CV 03738 arise from dealings with the same property. The parties are the same in both. The same facts will be material in both. Common discoveries have already been held. For these reasons, pursuant to Rule 250, I direct that these two actions be tried at the same time or one after the other subject to the direction of the trial judge.

Motion to Amend Statement of Claim:

27 No position was taken on behalf of Ando or Silver Streak on this application. The proposed amendments derive from evidence given at discoveries. Accordingly, I grant leave to Caradan to amend its Statement of Claim in action CV 03738 in accordance with the draft amended Statement of Claim attached as a schedule to the affidavit of Peter C. Fuglsang filed on June 22, 1995.

28 Costs of all of these applications will be left to be determined by the trial judge.

29 I thank both counsel for their able submissions.

John Z. Vertes
J.S.C.

Dated this 18th day of July, 1995.

Counsel for Caradan Ltd.: Sydney A. Sabine

Counsel for Silver Streak Holdings Ltd. & Ando Enterprises Ltd.: Louis M. H. Belzil

CV 02081/CV 03738

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN: CV 02081

SILVER STREAK HOLDINGS LTD.
Plaintiff

- and -

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Defendants

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Reasons for Judgment of the Honourable Mr. Justice J. Z. Vertes

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