IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

CLAIM NO. 2006 HCV 03983

BETWEEN	DORETT O'MEALLY JOHNSON	CLAIMANT
AND	MEDICAL AND IMMUNIODIAGNOSTIC LABORATORY LIMITED	DEFENDANT
	(Timos Trading Ltd. – Proposed Ancillary Defendant)	

Ms. Tanya Mott instructed by Marion Rose-Green & Co. for the Claimant (present at initial part of hearing).

Mr. Vincent Chen instructed by Chen Green & Co. for Defendant/Ancillary Claimant

Mr. Jalil Dabdoub instructed by Dabdoub, Dabdoub & Co. for proposed Ancillary Defendant.

Heard 5th October 2009

Judgment delivered 16th November 2009

Master George (Ag.)

Background/Facts

The Claimant claims against the Defendant for damages for personal injuries she allegedly received following sitting in a chair in the waiting area of the Defendant's medical facilities, which collapsed or broke, causing her to fall.

The Defendant contends that the chair was bought from the proposed Ancillary Defendant and as such any monetary compensation that flows from any injury sustained as a result of the chair being defective should rightly come from the proposed Ancillary Defendant as the chair was delivered in the same condition as at the time of injury.

The Court is not being asked to make a ruling as to whether the claim will succeed against the proposed Ancillary Defendant or even as against the Claimant and the Defendant. This would be a matter to be determined at trial should it reach that stage.

Mr. Dabdoub opposes the application for his client to be joined as Ancillary Defendant on the following grounds:

(i) The proposed ancillary claim is for indemnity not contribution –Indemnity does not arise as there is no contract and the Defendant is seeking to sue for an indemnity. In any event any indemnity would have to be expressly provided for in a contract.

(ii) The remedy which the Claimant claims against the Defendant is a different legal remedy than that which it is seeking to claim against the proposed Ancillary Defendant.

(iii) The facts which give rise to Claimant's claim are different from those which give rise to the Defendant's claim against the proposed Ancillary Defendant.

(iv) The Limitation of Actions Act limits any claim in contract or tort to six years. The ancillary claim form is not yet issued and six and three quarter years have passed, therefore the claim is statute barred.

The Civil Procedure Rules Governing Ancillary Claims

Before considering these grounds, I would like to look at the rules governing ancillary claims. **Part 18 of the CPR 2002 as amended in 2006 governs such claims.**

By Rule 18(1)(2) an ancillary claim is defined as **"any claim other than a claim by a Claimant against a Defendant or a claim for a set off contained in a defence and includes:**

(a) a counter-claim by a Defendant against the Claimant or against the Claimant and some other person.

(b) a claim by a Defendant against any person (whether or not already a party) for contribution or indemnity or some other remedy; and

(c) a claim by an Ancillary Defendant against any other person (whether or not already a party).

The Defendant is seeking to join Timos Trading Ltd. as Ancillary Defendant as provided by **Rule 18(1)(2)(b)** above.

The CPR in its wisdom establishes via **Rule 18.5** the procedures for making an ancillary claim and the circumstances in which this may be done without the Court's permission. By **Rule 18.5 (1)(a)** – A Defendant may do so if it is a counter-claim and it is filed with the defence or by **Rule 18.5 (1)(b)** in any other case, the ancillary claim form is filed before or at the same time as the defence is filed.

Application for permission

Mr. Vincent Chen, Counsel for the Defendant has made this application seeking the Court's permission to file an ancillary claim and to join the proposed Ancillary Defendant in these proceedings. Mr. Justice Anderson struck out the initial ancillary claim on the 12th February 2009. A chronology of events discloses that the initial ancillary claim was filed on the 20th February 2007, the same day as the defence was filed. The proposed Ancillary Defendant sought to have this struck out and in pursuit of this filed an application to do so on 22nd September 2007. The grounds stated in the affidavit in support of the application to strike out are that the ancillary claim form was served more than 14 days after the filing of the defence, contrary to the provisions of **Rule 18.6(1)** and there was no accompanying acknowledgement of service nor statement of case as between the Claimant and the Defendant as required by **Rule 18.6(2).** This application to strike out, initially laid dormant and was eventually re-filed on 15th July 2008. This was heard on the 12th February 2009 and found favour with Mr. Justice

Anderson. The ancillary claim being struck out on the 12th February 2009 now placed the Defendant in a difficult position, because now any re-filing of the ancillary claim would not be before or at the same time as the filing of the defence and so permission of the Court was now required. It is for this reason that this application for permission is before the Court in accordance with the order of Mr. Justice Anderson on the 12th February 2009. According to the affidavit of Eunice Griffiths in support of this application for permission,

> **"The Claimant was a visitor to the Defendant's premises ...on the 3rd day of June 2005 and whilst sitting on one of the chairs purchased from the Ancillary Defendant that was at the Defendant's premises the said chair suddenly collapsed without warning causing the Claimant to fall to the floor. The Defendant purchased the chair on the 28th of March 2003 from Timos Trading Ltd.....The Ancillary Defendant carries on business as retailers of haberdashery and household items including but not limited to chairs and tables for general use and are dealers in the said chair...the said chair was one of three which were purchased....The Defendant purchased the goods...in the reasonable expectation that the seller knew that Defendant intended to use the chairs to sit on or to permit its lawful visitors to sit on the said chairs and the Ancillary Defendant knew that the Defendant and other purchasers of these chairs which were offered for sale in the Ancillary Defendant's store relied upon the Ancillary Defendant's skill or judgment in selecting the chairs for sale in its stores and that they were reasonably fit for such purpose.... At the time of purchase of the chairs the .....deponent , inspected the chairs and could see nothing wrong with them and they did not have any sign of any defect.....The Defendant wishes to join the Ancillary Defendant as the seller of the chairs to it and relies on a warranty that the chair was reasonably fit for the purpose intended, to wit for persons to sit thereon."**

Counsel's objections to being joined as an Ancillary Claimant

1. (a) **Indemnity or Contribution**

Counsel, Mr. Dabdoub, seemed to have been of the view that the Court is unaware of the fact that indemnification and contribution are separate and distinct legal concepts.

However, it is not the definitions which are in issue – the meanings are clear. What Mr. Dabdoub seemed to have overlooked is the concept of implied indemnity. **"There are two types of indemnity. Express indemnity is based upon a written agreement between the parties, while implied indemnity is based upon the relationship between the parties."** Contribution and indemnity between tortfeasors 81 U. Pa. L Rev 130, 146 (1932).

The proposed ancillary claim is for indemnity and not contribution. According to Counsel, indemnity arises by way of contract and this does not arise as there is no contract between the Defendant/Ancillary Claimant and the proposed Ancillary Defendant. In fact, it is trite law, that even if not written, any sale of goods transaction gives rise to a contractual relationship between the buyer and the seller. Counsel made much ado about the distinction between contribution and indemnity. I do not accept this as a valid ground for opposing any application for joinder as an Ancillary Defendant. The issue of whether or not it is a contribution is really one to be left for determination at trial after hearing all the evidence. In any event, an application can be made to amend if this is deemed necessary.

Further and particularly, I do not accept that an indemnity cannot arise in this situation. In fact, an indemnity is nothing more than an obligation to compensate or reimburse for loss suffered by another usually to restore that other party to the same position as before the loss. This may arise by way of an express clause in a contract or it may arise by implication from the circumstances of a particular claim or the relationship between the parties, hence it is possible to have "implied indemnity." The concept of indemnification involves making a distinction between "equitable" or "implied"

indemnity claims from "contracted indemnity" claims, as indemnification can arise from a multitude of factual situations. Equitable or implied indemnity involves a claim where the law implies a right of indemnification. Contractual indemnification is, on the other hand, in contrast to indemnification implied by law, based on agreement of the parties. Indemnity can be defined as:

(1) A compensation to make a person whole from a loss already sustained.

(2) A contract or assurance by which one engages to secure another against an anticipated loss.

In this case it is the definition at (1) above which is applicable and this will be guided by the principles of equity and any resulting implications. This is for the trial Judge. If a buyer reasonably expects a product to be safe when used, the product is defective if it does not meet his expectations – the Defendant is alleging that, he bought the chair from the proposed Ancillary Defendant and that any defect that might be found in the chair becomes the responsibility of the seller, the proposed Ancillary Defendant. The Defendant therefore seeks to link the Ancillary Defendant in the chain of claim by alleging that if the Claimant succeeds, it is due to this defect that any injury to the Claimant was sustained and that he had received the chair from the proposed Ancillary Defendant in the same condition as it was at the time of the injury. Proof of all of this might be difficult but to this I will return.

Claims of indemnity are allowed when a contract of indemnity is implied. The indemnitee has a right of action against the indemnitor. Here the Defendant is saying, I bought the chairs from you – there is, in that contract between us, at the very least an implied term that it would be fit for its purpose – that is, to be able to sit on. If this is not so, and I have used it for the purpose for which it was bought and I am now sued as a

result of injury caused and this is as a result of an unseen defect; then, as I have bought it from you, you ought to reimburse me for any money that I paid to the Claimant as you had sold me a defective product.

This Court is not making a pronouncement as to the validity of the claim, nor has it fully examined the merit of the claim either as between the Claimant and the Defendant nor as it relates to the proposed Ancillary Claim. The Court at this juncture is concerned with whether the Defendant can join the proposed Ancillary Defendant in the proceedings and although the merit or real prospect of success of the case might be a consideration, it is only a factor to be considered. In fact it is not listed as one of the factors for consideration in Part 18.9, unlike the provisions of Part 13.3(1) which makes it necessary and important when considering whether to set aside a default judgment. I acknowledge that the considerations listed in **Rule 18.9(2)** (matters relevant to the question of whether to permit an ancillary claim to be made) are not exhaustive and that in seeking to promote the overriding objective of the civil procedure rules, my considerations must also take into account factors which allow for this and this may also be whether there is any merit in the claim.

1. (b) **Contribution on the other hand**

One of the essential differences between indemnity and contribution is that contribution is not usually for a full recovery of all damages paid by the party seeking contribution. In the contribution scenario, the loss is shared. The Ancillary Claimant is not accepting any responsibility for any defect that there may be to the chair. He is not saying, I am partly to blame and so I will pay some of the damages equal to my share and you pay your share. He is seeking full reimbursement for any financial loss that he might

suffer. The Court can always decide at trial that the true position ought to be one of contribution, if the evidence indicates this, but it cannot be said at this stage, based on the pleadings, that the Defendant is precluded from joining the Ancillary Defendant on a claim for indemnity. It is surely open to him to make an application to do so. This is because as I said earlier, a buyer who does not contribute to the defect in a product may have an implied indemnity remedy against the manufacturer and or the person from whom he bought the product when he is sued by a user. He can choose who to sue and in fact it is a reasonable expectation that he would sue the one closest to him. This could, in a sale of goods/product liability case, extend along a chain of distribution and ultimately to the manufacturer. In fact, there is no reason why Timos Trading, if joined, could not also claim against the person/entity from whom they bought the chairs. This person could then bring into the action, the person from whom they bought the chair and so on.

In a case such as this, where the claim is that the chair was defective, if in fact there is an inherent, hidden defect, the manufacturer is often the culpable tortfeasor as a result of conduct associated with designing or manufacturing a defective product. However, strict liability in tort relieves the plaintiff from proving the manufacturer was negligent and instead permits proof of the defective condition of the product as the basis for liability. The product manufacturer is often remote from the Plaintiff and so the law allows for strict liability to extend to those in the product's chain of distribution. Therefore, an innocent seller can be subject to liability simply by virtue of being present in the chain of distribution of the defective product. In extending liability to those in the chain of distribution in this manner the law extends the equitable proposition that an

injured party should not have to bear the cost of his injuries simply because the manufacturer is not within his direct ambit.

> **"The liability of a party in the chain of distribution is based solely upon its relationship to the product and is not related to any negligence or misfeasance and it is for this reason that in these circumstances, there is an acknowledgement of the right of implied indemnity."**

See **Dunn and Dunn et al v County Board of Education et al Supreme Court of Appeal/ West Virginia (1995) No. 22550.**

2. **Remedy sought against the Ancillary Claimant is different from that sought by the Claimant from the Defendant**

Mr. Dabdoub's second ground of submission in opposition of the application is that the remedy which the Claimant claims against the Defendant is a different legal remedy than that which the Defendant is seeking to claim against the proposed Ancillary Defendant. Let us examine this proposition. The remedy sought by the Claimant and the Ancillary Defendant is monetary in nature; money in the form of damages for personal injury and money in the form of an indemnity for breach of contract. The causes of action are different but the remedies sought are essentially the same - **Rule 18.9(2)(b).**

3. **The facts which give rise to the Claim are different from those which give rise to the Defendants claim against the proposed Ancillary Defendant.**

Mr. Dabdoub's objection is that the facts which give rise to the Claimant's claim are different from those which give rise to the Defendant's claim against the proposed Ancillary Defendant in that the Claimant's claim is a claim for personal injuries via the Occupier's Liability Act; the Claimant being a patron at the Defendant's premises. It is of course true that the Defendant is being sued in negligence/via the Occupier's Liability

Act. However, the connecting thread is the chair. The rules do not mandate that the cause of action of the main claim and the ancillary claim must be the same. The Claimant does not know whether the Defendant had bought a defective chair nor is she likely to care. What she is claiming to know is that she sat on the chair in the Defendant's waiting room and it collapsed underneath her, causing her to fall and to sustain injuries. She therefore sued the Defendant as this was his chair in his waiting room. The Defendant having bought the chair from the proposed Ancillary Defendant (there seems to be no dispute as to this) does not admit to negligence and may nevertheless be liable under the provisions of the Occupier's liability Act. He asserts that if the chair was defective, he had bought it from the seller in this condition and was unaware and could not have reasonably known of the defect prior to its collapse. Therefore, he says the defect existed at the time of purchase and that defect ultimately amounts to the chair not being fit for its purpose. All of this comes down ultimately to a matter of proof and it may be that the Ancillary Claimant might have some difficulty in proving a case against the proposed Ancillary Defendant but what is clear is that the matters are intricately connected. There is indeed a high degree of connection - **Rule 18.9(2)(a)**. The facts are closely connected with that in the claim; i.e. in the main claim, the facts relate to the state of the chair; in the ancillary claim the facts also relate to the state of the chair and are therefore closely connected - **Rule 18.9(2)(c)**. In considering whether the Ancillary Claimant wants the Court to decide any question connected to the subject matter of the proceedings, not only between the existing parties but also between the Ancillary Claimant and the proposed Ancillary Defendant, I find that this is so.

Matters to consider on application for permission

CPR – **Rule 18.9(1) provides that "this rule applies when the Court is considering whether to –**

(a) permit an ancillary claim to be made . . .

and by:

Rule 18.9(2) the Court must have regard to all the circumstances of the case including -

(a) the connection between the ancillary claim and the claim;

(b) whether the Ancillary Claimant is seeking substantially the same remedy which some other party is claiming from the Ancillary Claimant;

(c) whether the facts in the claim are substantially the same or closely connected with the facts in the claim; and

(d) whether the Ancillary Claimant wants the Court to decide any question connected with the subject matter of the proceedings –

(i) not only between the existing parties but also between existing parties and the proposed ancillary claim Defendant; or

(ii) to which the proposed Ancillary Defendant is already a party but also in some further capacity.

In Barclays Binn Ltd. v Tom (1923) 1KB 221 – in dealing with third party proceedings, a similar concept to ancillary claims, the Court in considering whether permission ought to have been granted for third party proceedings, sets out the functions of third party proceedings as being relevant in its consideration. **Scrutton LJ, at pg 224** explained these functions as follows:

(a) **to safeguard against differing results and to ensure the third party is bound by the decision between the Claimant and the Defendant. If instead separate proceedings are taken, the Court hearing the second action is not bound by the decision in the first action;**

(a) **to ensure the question between the Defendant and the third party is decided as soon as possible after the decision between the Claimant and the Defendant;**

(d) **to save the expense of two trials. A party commencing separate proceedings unnecessarily where an additional claim could have been used may be penalized in costs.**

Rule 18.9(2) along with the functions highlighted in the above passage assist the Court in deciding whether an ancillary claim should be permitted and together they make good sense as ultimately it accords with the overriding objective of dealing with cases justly, thereby promoting expediency and cost effectiveness. The English Civil Procedure Rules (prior to its recent amendment) by **Rule 20.9(2)** provides for similar considerations. They provide that the Court should take into account

(a) the degree of connection between the additional claim and the main claim;

(b) whether the Defendant is seeking substantially the same remedy as is being claimed by the Claimant;

(c) whether the additional claim raises any question connected with the subject matter of the main claim.

It is my view that in this case, the ancillary claim falls within **Rule 18.9(2)(d)(i)**. By that I mean that there are questions or issues to be tried that are related to the original subject matter that should be determined not only between the Plaintiff and the Defendant but also between the Defendants and the proposed Ancillary Defendant.

In exercising my discretion, I consider that the third party is connected with the claim through the product liability chain subject to the test of proof at trial. The issues are fairly simple and uncomplicated and can be tried together over a short period of time.

I have a discretion as to whether to direct that the matters be treated separately. It is my view that the issues relating to the ancillary claim can be tried together because the question as to whether there was some latent defect might well be answered then. I take into account the fact that the purchase of the chair and the alleged incident resulting in the injury occurred several years ago. Memories fade, documents become misplaced; issues of proof become even more difficult. The interests of justice would therefore call for an early trial and the best way of achieving this would be by joining of the ancillary claim and directing that they be tried together.

4. **Statutory Limitation/Statute Barred**

Mr. Daboub's final objection relates to the issue of the ancillary claim being statute barred. He submits that the Limitation Act stipulates that any action in tort or contract must be taken within six years. He states that the ancillary claim form is not yet issued and some six and three quarter (6 ¾) years have passed since the chair was bought from the proposed Ancillary Defendant. He submits that the claim as between the Ancillary Claimant and the proposed Ancillary Defendant is one founded in contract (note here that Mr. Dabdoub admits to the existence of a contract on this limb) and as such the relevant limitation period is six years.

"Time runs from the point when facts exist establishing all the essential elements of the cause of action." See Blackstone's Civil Practice 205, paragraph 10.12, page 104, making reference to the pronouncements of Lindley LJ in Reeves v Butcher [1891] 2QB 509.

I fully agree that the ancillary claim relates to a claim in contract and that, therefore, any action must be brought within six years of when the cause of action arose.

The difficult question is when did this cause of action arise? Was this at the time of discovery that the chair was defective or at the time when the contract was completed? **In Battlay v Faulkner (1820) 3B & ALD 288 it was stated that "In claims for breach of the implied terms as to satisfactory quality (fitness for purpose) ...time normally starts running on delivery of the goods."**

It therefore follows that in this case time would begin to run from the date of sale if this was also the date of delivery and it is assumed that this is so. In some jurisdictions, statutory provision provides for the discovery of the latent defect as the effective date when the limitation period starts to run, even in a contract for the sale of goods.

As stated earlier, if the effective start date is the 28th March 2005, then the limitation period would have expired, which means the action would be statute barred. The matter being statute barred is a defence to be raised at trial but in considering whether or not to grant permission to file the ancillary claim; it is my view that this would be a relevant consideration at this stage as the Court is obliged to promote the saving of time and expense in dealing with cases justly.

The allege incident with the Claimant is said to have occurred on 3rd June 2006. There is no dispute that the Defendant bought the chair from the proposed Ancillary Defendant on the 28th March 2005. The main claim was filed on 9th November 2006 and the initial ancillary claim on the 20th February 2007. This ancillary claim was subsequently struck out on 12th February 2009 and permission given to the Defendant to apply to file the ancillary claim, and to join the Ancillary Defendant and to serve the ancillary claim. This is the subject application and was filed on 27th February 2009. This

was very shortly after the ancillary claim was struck out. Also bear in mind that the lateness in the determination to strike out was as a result of the tardiness of the proposed Ancillary Defendant to prosecute the application and the slowness of the administrative arm of the Court. It seems unjust therefore that the Defendant should be penalized and the proposed Ancillary Defendant be left to benefit from his tardiness, whether such tardiness was deliberate or otherwise. My view is that as permission was being awaited to file this application, the claim was not yet filed/issued against the Ancillary Defendant although one was filed along with the application in support thereof. Therefore if time began to run from 28th March 2003, it would now be statute barred. As Lord Diplock succinctly puts it;

> "a claim is brought for limitation purposes when the claim form . . . is issued by the . . . High Court and not by when it is brought to the knowledge of the defendant by service upon him." **Thompson v Brown (1981) 1 WLR 744**

The Defendant has sought, since 20th February 2007, some three months after the filing of the initial claim, to join the proposed Ancillary Defendant to this action, and it appears unjust to allow the Ancillary Defendant to escape the reach of the Defendant on a technicality. However, although the filing of the second ancillary claim form was before the expiry of the relevant limitation period, albeit a mere one month, this was filed as an appendage to the application for permission and not as a claim to be issued against the Ancillary Defendant. Since then, there have been several adjournments of the application and this has contributed to the passing of the six (6) year mark. There is almost an analogous situation in the case of applications to extend the life of a claim form. The application is made prior to the expiry of the claim form but often by the time of Hearing,

the claim form has long expired. The distinct difference here is that this ancillary claim has not yet been issued and the Court has no discretion as to statute barred claims except in limited situations, not found here. This ancillary claim had been brought to the attention of the proposed Ancillary Defendant since February 2007. This is more than two and a half years ago and as stated earlier the proposed Ancillary Defendant's tardiness has significantly contributed to the present state of affairs. At the time of the Hearing of the application the limitation period had expired. In these circumstances and in considering the overriding objective of giving justice to the case, I will make no order as to costs.

Orders on notice of application filed 27th February 2009

1. Permission refused, for the Defendant/Ancillary Claimant to file ancillary claim and to join Timos Trading Ltd as Ancillary Defendant in these proceedings.

2. Application dismissed.

3. No order as to costs.

4. Defendant/Ancillary Claimant's Attorney to prepare, file and serve order herein.