IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.CL. 1999/B-325

BETWEEN	**DESMOND CLARENCE BENNETT**	**CLAIMANT**
AND	**JAMAICA PUBLIC SERVICE CO. LTD**	**1ST DEFENDANT/ Ancillary Claimant**
AND	**DONALD CARD**	**2ND DEFENDANT**
AND	**CLARENCE BAILEY**	**ANCILLARY DEFENDANT**

Heard: February 6,7,8,9 and 10, 2006; April 3, 2006; June 21 and July 5 and 31, 2006 and April 24, 2009; May 1, 2009

Mr. Ainsworth W. Campbell and Mr. Rudolph Francis instructed by Ainsworth W. Campbell for the Claimant
Mr. David Batts and Ms Daniella Gentles instructed by Livingston Alexander Levy for the 1st Defendant/Ancillary Claimant
Mr. Lowell G. Morgan instructed by Nunes; Scholefield, DeLeon & Co for the 2nd Defendant
Mrs. Jacqueline Samuels-Brown and Ms. H. Johnston for the Ancillary Defendant

Costs; Defendant found not liable; ancillary defendant therefore not subject to any liability; whether costs of ancillary defendant should be payable by claimant directly to ancillary defendant, or be paid by 1st defendant/ancillary claimant and be recoverable from the claimant; relevance of Bullock or Sanderson orders.

ANDERSON J.

On April 24, 2009 when I handed down my judgment in this matter, I invited submissions from counsel on costs given the ruling in favour of the 1st defendant ("JPS). Such submissions were to be submitted on or before May 1, 2009. I also said that I would rule on the issue of costs, whether or not I had received those submissions. I have now received submissions from counsel for the 1st defendant/ancillary claimant and the ancillary defendant.

Counsel for the 1st defendant submitted that JPS, having denied that it was liable for the injuries and damage suffered by the claimant, had sought an indemnity from the ancillary defendant on the basis that the real cause of the claimant's injuries and loss was the negligence of the ancillary defendant. This negligence consisted of extending his building without having secured the relevant planning approvals and without notifying the 1st defendant so that the wires could be re-positioned. It was also submitted that the ancillary defendant had breached the grant of the easement to the 1st defendant by erecting a part of the building closer than five (5) feet from the wires or poles of the 1st defendant as required under the grant of the easement. In light of the 1st defendant's defence, it was submitted that it was eminently reasonable, in order to save costs and judicial time, for the 1st defendant to have joined the ancillary defendant. This had the effect of allowing the court to consider all the issues between the claimant and the 1st defendant as well as those between the defendant and the ancillary defendant in the same hearing.

Counsel also referred to the dicta in my judgment to the effect that, had I found the 1st defendant liable, I would have been prepared to hold that the ancillary defendant was liable to contribute to the significant damages which would have flowed from the establishing of liability, as support for the reasonableness of the decision to join the ancillary defendant. Mr. Batts submitted that, in these circumstances where the 1st defendant has succeeded on the claimant's claim, the court should exercise its discretion to order the claimant to pay the 1st defendant's costs to third parties brought into the suit by a successful defendant. Alternatively, the court could order the claimant to reimburse to the successful defendant any costs that a successful defendant has been ordered to pay to the third party (**Edginton v clark and Another (Nacassey and others (Trustees of Whitely House Trust) Third Parties) [1963] 3All ER 468.**)

The ancillary defendant cites the provision of the Civil Procedure Rules (2002) which codified the general rule that the court must order the unsuccessful party to pay the costs of the successful party (See Rule 64.6(1). The ancillary claimant's counsel concedes that if the normal rule were applied here, the losing claimant would be required to pay all the costs of the successful defendant, including the costs payable by the 1st defendant to the

ancillary defendant. Nevertheless, the court still had a discretion to deviate from the general rule. The ancillary defendant submitted that in the circumstances of the instant case, the court should exercise its discretion and order the 1st defendant to pay the entire costs of the ancillary defendant.

It was submitted that it was the 1st defendant in its ancillary claim that brought the ancillary defendant into these proceedings and the ancillary defendant has been successful in that ancillary claim. It should be noted that this submission, however, ignores the question of whether it was reasonable in all the circumstances, and given the pleadings, for the ancillary to be brought into this suit.

It was also submitted that since the claimant was "insolvent" it would be reasonable to order the 1st defendant to pay the ancillary defendant's costs directly. It is not clear to me that this proposition has been established on the evidence which was before me. Even if he were so at the time of trial, there is no evidence of his situation at present. Counsel submitted that the court could consider a choice between a Bullock and a Sanderson Order and that a Bullock Order would be more appropriate.

Bullock Orders arise from **Bullock v. London General Omnibus Co., [1907] 1 KB 264**, a case in which the plaintiff claimed damages for injuries resulting from a collision between two vehicles. The judge found negligence on the part of one defendant and negatived negligence on the part of the other defendant. The court costs payable by the plaintiff to the successful defendant were ordered to be included in the costs recoverable by the plaintiff from the unsuccessful defendant. Sanderson Orders originated in the slightly older case of **Sanderson v. Blyth Theatre Co., [1903] 2 KB 533**. In this case, the court ordered that a more direct form of payment take place: the unsuccessful defendant was ordered to pay the costs of the successful defendant directly to the successful defendant.

The threshold test that a claimant must meet for the issuance of a Bullock or a Sanderson Costs Order is one of reasonableness: whether it was reasonable to join the defendant and

keep him in the action until judgment. If the action was properly brought, and the plaintiff had legitimate doubt as to which of two or more persons was responsible for the act that caused the injury, then the plaintiff may escape paying the successful defendant's costs.

It is not totally clear to me that in the instant case the real choice is between a Bullock and Sanderson Order, as usually understood, as suggested by the ancillary defendant. Typically that arises where there are two or more defendants and the claimant succeeds against one and fails against another. However, the principles which informed the decisions in the Bullock and Sanderson authorities, are relevant and may be applied here. I am of the view that this was a case where it was reasonable, given the evidence and the pleadings, for the 1st defendant to bring the third party/ancillary defendant into the proceedings and "to keep him in the action until judgment". Accordingly, it is appropriate to make an order which reflects the thinking behind a Bullock or Sanderson Order.

Having considered whether and if so how the court should exercise its discretion, I have formed the view that the following orders as to costs ought to be made.

Costs of the 1st defendant are to be paid by the claimant. The costs of the ancillary defendant are to be paid by the 1st defendant and are to be recoverable against the claimant. All costs are to be agreed or taxed.

ROY K. ANDERSON
PUISNE JUDGE

MAY 1, 2009