

## CASE COMMENT AND NOTES

### THIRD PARTY NOTICE—RULE 75

#### *NEON PRODUCTS LTD. v. ST. MARTIN AND BEAVER*

A recent decision of the Alberta Appellate Division, *Neon Products Ltd. v. St. Martin and Beaver*, S.C.A.A.D. No. 9758, Sept. 10, 1974, warns the Bar of the necessity of complying with Rule 75 requiring a Defendant whose third party notice has been defended to take out an order for directions.

The consequences of the decision itself are proof of the difficulties that can be encountered. The Plaintiff sued the Defendant on debt and the Defendant issued a Third Party Notice. The Third Party disputed the liability of the Defendant to the Plaintiff, but not that of himself to the Defendant. No order was obtained under Rule 75, nor was any agreement reached, although it was apparently informally agreed that the action and the Third Party proceedings be tried together. The trial judge found the Defendant liable to the Plaintiff and the Third Party liable to the Defendant. Two formal judgments were entered, one in the main action and one in the Third Party action. The Third Party sought to appeal the judge's finding as to the liability of the Defendant to the Plaintiff. He was, however, out of time as the judgment roll in the action had been served some time before he was served with the formal judgment in the Third Party action. His application to extend the time in which he could appeal was struck out and his Notice of Appeal was struck out.

The Court held that the Third Party was not a party to the judgment in the action: he was a stranger to the main action in the absence of an order giving him status. The status might have been implicitly acquired if there had been one judgment roll, and he clearly would have had status if there had been a proper order. Moreover, the court pointed out that in the absence of an order under Rule 75 the Third Party was not bound by the judgment in the action between the Plaintiff and Defendant. The Court applied *The Millwall* [1905] P. 155 in reaching this conclusion. Had an order been obtained binding the Third Party by the Rules and giving him leave to defend the action, the Third Party would have had a right of appeal: *Swanson Construction v. Manitoba and Dominion Structural Steel* (1963) 43 W.W.R. 399. The Third Party could not claim any right by subrogation because the person in respect of whom it was subrogated had lost the right of appeal.

While on the face of it the Third Party is the victim of the Defendant's failure to obtain an order, the Defendant is also faced with the proposition that the Third Party is not precluded from challenging, by appeal, the liability of the Plaintiff to the Defendant.

The Court expressed the view that the Third Party procedure was cumbersome and some automatic rule might be preferable. However, a main thrust of good Third Party rules is to prevent the Plaintiff from being unduly inconvenienced by proceedings and the intervention of a judi-

cial officer on the application for directions is a protection for him as well as a means of ensuring that the real issues are litigated. It ought to be easy to obtain a consent order in cases where the Plaintiff is not inconvenienced, or to place an agreement in lieu of an order on the record.

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