2nd September 1985 85/89

	Russell Bell	Plaintiff
AND	**Heating & Ventilating Engineering Company Limited**	1st Defendant
AND	**Gerry McMahon**	2nd Defendant
AND	**Raymond Fitzpatrick**	3rd Party

Advocate J.P. Labesse for the Plaintiff
Advocate R.J. Michel for the 1st Defendant
Advocate C.W.W. Godfrey for the 2nd Defendant
Advocate A.O. Dart for the 3rd Party

DEPUTY BAILIFF: "The matter which is at present before the Court arises from a fire which, according to the Order of Justice which commenced the present case, occurred at some premises called Belmont, Mont au Pretre, St. Helier, on the 24th August, 1979. It is said that the reason for the fire was because two people - one who was an employee of H & V, the defendants, who are plumbers, and another party, a Mr. Fitzpatrick or the third party, who is an independent contractor - together,were negligent in dealing with certain repairs to the roof which required the application of a blow lamp. It is not necessary for the Court to express any opinion on the facts because they are not before it today. The Order of Justice against H & V Limited, the Heating & Ventilating Engineering Company Limited, commonly called H & V Engineers, the first defendant, was signed on the 23rd August, 1982, and served on the following day, therefore just within the limitation period so far as the first defendants are concerned. The Order of Justice was also served on the second defendants and therefore there is no problem about limitation in respect of both the two defendants. At some subsequent date it transpired, and we are not concerned with the details, that Mr. Fitzpatrick - the third party - had jointly carried out the work with Mr. McMahon and he was therefore brought in, and an Order made by consent before the Judicial Greffier on 7th February, 1983 and the papers were duly served on Mr. Fitzpatrick accordingly as a third party.

Now this application comes before us by way of a representation, not so much as to review the Order of the Greffier but to discharge Mr. Fitzpatrick from the action. Now if we were to do that, the position would be that when the main action was heard, the Court would be invited - according to Mr. Dart's argument - would be invited to apply Article 5(2) of the Law Reform Miscellaneous Provisions (Jersey) Law 1960, and exempt any person from liability to make contribution, or direct that the contribution to be recovered from any person shall amount to a complete indemnity. In other words, Mr. Dart is suggesting that the Court would have power, not so much to bring in a third party, but to exempt a defendant from paying some of the damages in respect of the damage which might be found to have been caused by the fire, and attributable to a particular party, in this case the first, or possibly

the second defendant, or possibly both. I'm not prepared to say that Article 5(2) of the Law Reform (Miscellaneous Provisions)(Jersey) Law 1960 applies in such a case at all. The whole of that article is concerned with a contribution between joint and several tortfeasors and proceedings against such joint and several tortfeasors, and Article 5(2) does not start to arise until there is an actual proceedings in train for contribution under the early part of the Article and I don't accept that, with respect, I cannot see that Mr. Dart's argument has force. I do not think the Court could apportion any blame until there was an actual contribution application and there would not be one if his client were discharged. As I understand it, therefore, his argument would be, well, let my client stay on the record but let the Court eventually find, as it might well do, that H & V should not be liable for more than 50% but that 50% should fall, not against Mr. Fitzpatrick if he were found to be liable, but against Mr. Bell who was dilatory in bringing his action and who did not give proper instructions accordingly in his Order of Justice, and therefore Mr. Fitzpatrick was not brought within the statutory period, limitation period of one year. That is as I understand it, the argument of Mr. Dart.

On the other hand, Counsel for the first defendants has pointed out that it is more convenient for the Court to try the whole action together and to have a contribution action tried with the main issue in order that the Court can properly decide who should be liable and in what proportion, and there is much to commend it and we think that is the right approach. We have looked carefully at the decision of the English Court, and as this Court has said on many occasions, that where the English Statute is similar to our Law and the Rules of Court also similar, it is right and proper to look at those Rules of Court. When we look at the English Authorities - I look first of all at an early edition or the 11th Edition, 1954 - Clark and Lindsell on Tort, which sets out the position as it then was at the time the learned author wrote in the United Kingdom which corresponded, of course, to our local law. He deals with the question of the Limitation Act, or the equivalent of our law, on page 111 where he says that similarly if one of the tortfeasors raises a successful defence of the plaintiff's claim under the Limitation Act 1939 the other tortfeasor can recover no contribution from him. Then he goes on below to refer to the case of Littlewood -v- George Wimpy & Co. and I should intervene or interpolate here rather to say that so far as Mr. Bell's direct claim against Mr. Fitzpatrick is concerned, it is accepted that he is out of time as regards sueing Mr. Fitzpatrick direct. The footnote to Lindsell, Clark and Lindsell on page 111 is as follows: Littlewood -v- George Wimpy & Co. & B.O.A.C. [1953 2 Queen's Bench 501]. In this case the plaintiff sued both the tortfeasors more than one year after the accident and the second defendants, as a Public Authority, successfully resisted the claim by virtue of section 21 of the Limitation Act 1939. It was held by Singleton and Morris Lord Justices and Lord Justice Denning dissenting, that having been sued and held not liable they could not be deemed to answer the description tortfeasor is who would have been

sued and been liable. Well this is not the position here of course because Mr. Fitz-patrick has not been sued at all and therefore the case in that respect is not entirely on all fours, and the footnote goes on - "yet if the plaintiff had not been sued" - and this is the point here - "the second defendants and the first defendants would have been able to recover contributions from them". As Lord Justice Denning said on page 517 - the construction of section1(c) of the Law Reform (Married Women & Tortfeasors) Act 1935, adopted by the majority of the Court, would put it in the power of the injured party to decide whether one tortfeasor could get contribution from another or not. Looking at the case itself one reaches the conclusion that it would be right, I think, to have regard to the effect of the case and the issues before this Court and I refer to the judgment of Lord Justice Singleton at the bottom of page 917 of the judgment: "The right to contribution under the circumstances of this case depends on the Law Reform (Married Women & Tortfeasors) Act 1935, Section 6(1) which reads: "that where damage is suffered by a person as a result of a tort, any tortfeasor liable in respect of that damage may recover contribution from any tortfeasor who is, or if sued would have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise, so however that no person would be entitled to recover contribution under this Section from any person entitled to be indemnified by them in respect of the liability and in respect of which the contribution is sought", and that wording is identical - presumably it was taken from it, I don't know, identical with our Law Reform Miscellaneous Provisions (Jersey) Law 1960. Then the learned Lord Justice goes on to say: "the machinery by which the rights can be enforced is provided by Rules of the Supreme Court, Order 16(a)," and we have our own corresponding rules, and again our rules of course in this respect are little more than machinery, in the words used by the Lord Justice, and he goes on to paragraph (c) . "I repeat what I have already said - the position is to be determined by Section 6.1(c) of the Act of 1935. It appears to me that the draftsman of the sub-section had in mind a suit in which there were one or more defendants, and it was sought to provide that after judgment in the action contribution could be ordered as between the defendants, and further, that a tortfeasor who had not been sued in the action, but was brought in as a third party, might be ordered to make a contribution if he would have been liable in respect of the same damage had he been sued", and the finding of the Court was set up clearly in the head note to the case. It was held, with Lord Justice Denning dissenting: "a tortfeasor who is or who would have been sued and been liable in respect of the damage against him, contribution could be claimed under Section 6.1(c) of the Act of 1935 meant, either (a) one who had been sued and held liable for the damage, which is not the case here or (b) one who had not been sued but would have been liable if he had been sued. Sued should not be construed as sued in time", Therefore clearly, the learned Law Lords in that case had in mind the possibility that the case might be

heard and that later a third party might be called in, and again it is said in the second part of the footnote: "The time limit under the Limitation Act 1939, section 21(1)" - which is the same as ours - "for the recovery of contribution to commence to run from the date on which the first defendant's liability was ascertained i.e. when judgment was given against him, the provisions of R.S.C. Order 16(a) which provided for the bringing of the third party being machinery for the convenient determination of the decision contingently on the first defendants being held liable". If in fact that is indeed the position here, and we cannot, Mr. Dart, accept your submissions, however ably or carefully put though they were and accordingly find against you and reject the representation, and costs are in the cause.