IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C. L. B-233 OF 1988

BETWEEN	BLACK RIVER UPPER MORASS DEVELOPMENT COMPANY LIMITED	PLAINTIFF
A N D	JAMCULTURE LIMITED	DEFENDANT

Enos Grant instructed by Jacqueline Hall of Clough, Long & Company for the Defendant/Applicant.

Donald Scharschmidt instructed by Douglas Brandon of Livingston, Alexander and Levy for the Plaintiff/Respondent.

September 29 and October 14, 1988.

CLARKE, J.

This was an application by summons on behalf of the defendant to have the writ set aside and the plaintiff pay the costs of the proceedings on the ground of misjoinder of causes of action.

Relying on the provisions of Section 155 of the Judicature (Civil Procedure Code) Law the defendant having entered a conditional appearance to the writ contended that without the leave of the Court the plaintiff wrongfully joined in the statement of claim an action for the purchase price (with interest thereon) of goods sold with a claim for recovery of possession of land.

In general the joinder of every cause of action which a plaintiff would ordinarily wish to include in one action against the same defendant is permitted without leave. This is so because an object of our rules of practice and procedure is to ensure that, as far as possible, all matters in controversy between the parties should be determined and all multiplicity of proceedings in relation to any of these matters should be avoided.

Yet, Section 155 of the Judicature (Civil Procedure Code) Law affords an important exception to the litigant's general freedom of joinder without leave. That Section reflects a rule, born out of the peculiarities of the old action of ejectment (now the action for the recovery of land) that in ejectment no other

cause of action could be joined.

The Section provides:

> "No cause of action shall, unless by leave of the Court or a Judge, be joined with an action for recovery of land except claims in respect of mesne profits or arrears of rent or double value in respect of the premises claimed, or any part thereof, and damages for the breach of any contract under which the same or any part thereof are held, or for any wrong or injury to the premises claimed, and except also claims for payment of principal money or interest secured by or for any other relief in respect of a mortgage or charge of such land ..."

The statement of claim specially indorsed on the writ is as follows:

1. "The Plaintiff is entitled to possession of all that property known as Elim in the parish of Saint Elizabeth consisting of 3379 acres of land registered at Volume 181 Folio 24 of the Register Book of Titles and part of Elim, registered at Volume 118 Folio 481 and being the land comprising Blocks 1 - 11; 13 and 14 on the map attached to the lease which were demised to the Defendant by the Plaintiff by virtue of an Agreement dated the 31st December 1985 and a lease dated the 1st February 1988 for a term of 25 years commencing on the 6th January 1986 at the yearly rental of $3,280.24., payable on the 6th day of July and 6th January in each year in arrer from the 6th day of January 1986 subject to a proviso for the forfeiture of the said term should any instalment of rent or part thereof remain unpaid for 21 days after becoming payable whether legally demanded or not.

   The said rent is now $1,941,825 in arrear and the said term became and is forfeited to the Plaintiff by reason of non payment thereof.

PARTICULARS OF CLAIM

2. Rental for 1987 ..... $1,294.550.00

Rental - January to June 1988 ..... 647.275.00

$1,941.825.00

3. And the Plaintiff claims interest on the above sum at 6 percent per annum from the dates same became due or at such higher rate as the Court deems fit, until Judgment.

4. And the Plaintiff also claims possession of the said property and $1,941,825 referred to in Item 2 hereof, with interest referred to in paragraph 3 hereof and mesne profits from the 1st July 1988 at rate at which rent was payable prior to forfeiture of the lease until Judgment.

5. The Plaintiff also claims from the defendant the sum of $2,963,133.00 being principal and interest at 18 percent per annum in respect of crops and spare parts purchased by the Defendant from the Plaintiff pursuant to paragraph 2 of the Agreement dated the 31st December 1985 as follows:

1987 - Principal due	$ 55,157.00
1987 - Interest (to 15/6/88)	1,920,265.00
1988 - (a) Principal	31,355.00
(b) Interest	956.356.00
TOTAL DUE	$2,963,133.00

The Plaintiff also claims interest on the principal sums at 18 percent per annum from the 16th June 1988 until Judgment."

Now, it is plain from the indorsement that there is a claim for recovery of possession of land (see paragraphs 1 & 4). No objection was or could properly be taken to joining therewith without leave the claims for arrear of rent together with interest thereon and for mesne profits (see paragraphs 1,2,3 & 4) because those claims are clearly not caught by Section 155.

Also excluded from the prohibition in the Section are certain other claims including a claim for "damages for breach of any contract under which the /land/ is held." So, Mr. Scharschmidt urged me to say that on the construction of the writ that the land in this matter is held both under the agreement dated 31st December 1985 (pursuant to which the plaintiff claims the purchase price of goods sold) and the lease dated 1st February 1988 because in his view the plaintiff pleaded in clear terms that the land was demised to the defendant by the plaintiff by virtue of the aforesaid agreement and lease.

I am not pursuaded that the writ should be so construed. In my opinion, on the true construction of the writ the land is not held under the agreement and the lease but under the lease alone. The lease is dated subsequent to the agreement. It is the lease, and only the lease, that creates the term of years for which the land is to be held (a term of 25 years) and fixes the date of the commencement of that term (6th January 1986). It is the lease that sets the yearly rental ($3,280.24) and contains a proviso for the forfeiture of the term if the rent is unpaid for 21 days after becoming payable. Indeed, as Mr. Grant submitted, once the lease is pleaded, as it has been, it supercedes any other earlier agreement in relation to the holding of the land by the defendant.

Still looking to the true construction of the words used in the indorsement, it is plain that the claim for the purchase price of goods sold pursuant to the agreement represents, as Mr. Grant submitted, a cause of action separate and distinct from the action for recovery of possession of land. It is a new and independent cause of action and not ancillary to the claim for recovery of the land.

In Gledhill v. Hunter (1880) 14 CH.D. 492, relied on by Mr. Scharschmidt, the writ was indorsed for a declaration of title, a declaration that a lease was granted under a mistake, recovery of rents and profits, and a receiver, and the statement of claim asked for possession.

Jessel M. R. held that this was an action for recovery of land and nothing else, and that there was no joinder of any cause of action which required leave. At page 500 of the Report the learned Master of the Rolls said this:

> "Now, what does 'an action for the recovery of land' mean? It means the recovery of possession, and you combine with a claim for that a claim for the rents. Then does the fact of the machinery, so to speak, being stated in the statement of claim make any difference? Does it make any difference as regards the cause of action - for that is what we must look at? It is not a new cause of action: it is the same cause of action. The Plaintiff says, 'I am entitled to a freehold estate: I ask for my title to be declared, and I ask for possession to be given to me.' The claim for a declaration of title and the claim for possession are not the cause of action: they are only a statement at full length of what the cause of action really is, namely, to recover the land. Therefore, the mere fact of a claim for a declaration of title preceding the demand or claim for the recovery of possession does not make it less an action for the recovery of land: there is no new cause of action joined."

> "... this part of the claim is ... mere machinery; it is part of the judgment which the Plaintiffs want to enable them to recover the land; it is not a new cause of action, for the whole cause of action is their title."

Mr. Scharschmidt argued ingeniously that just as in that case title and possession were asked for, so here all the plaintiff has done is to ask for its entitlement under the agreement and lease. That, he said, is not a new cause of action but just states at full length what the cause of action is.

The Gledhill v. Hunter case is manifestly not this case because whereas in that case the claim for declaration of title was merely machinery for getting possession, in the case before me the claim for the price of goods sold pursuant to the agreement stands independently of the claim for recovery of land and can in no way be said to be machinery for getting possession of the land. It is not part of the judgment which the plaintiff needs to enable it to recover possession of the land.

Then again, although the submission of learned counsel for the plaintiff that the effect of the judgment in Kelly v. Incorporated Trustees of Church of England (1959 - 60) 2 W.I.R. 478 that, without leave, a plaintiff may not join with an action for recovery of land other causes of action that are totally inconsistent therewith, is correct as far as it goes, it is a non sequitur, in my view, to contend, as he did, that as there is nothing inconsistent in what is asked for in the writ in the instant case, there may, without leave, be joinder of the claim for the price of goods sold pursuant to the agreement with the action for recovery of the land. It is true that in the Kelly case the Supreme Court of Trinidad and Tobago in its Appellate Jurisdiction found that on the true construction of the indorsement on the writ the plaintiffs' claim against the defendant for an injunction restraining breaches of covenants against erecting fixtures on lands of which he was tenant, was inconsistent with their claim for possession of the said lands. Yet, it is to be observed that the inconsistency was, on the pleaded facts as construed, only a circumstance to be taken into account when applying the test in cases of joinder without leave.

At page 483B of the Report Corbin J. delivering the judgment of the Court propounded the true test:

> "... is the claim in question a new and independent cause of action or is it in substance a claim for relief ancillary to the claim for possession?"

and added:

> "If the former, joinder without leave would constitute a breach of /the order/ If the latter it would not."

Upon construing the writ in that case the Court held (see page 484D) that the claim for injunctive relief in the terms sought was a new and independent cause of action inconsistent with, and not ancillary to, the claim for possession and joined without leave.

For the reasons given I hold that in this case there is a misjoinder of causes of action in the statement of claim specially indorsed on the writ, occasioned by the plaintiff joining without

leave the claim for the purchase price of goods sold with the action for recovery of land.

Finally, should the writ be set aside for the irregularity? I think so. I bear in mind that Section 678 of the Judicature (Civil Procedure Code) Law provides as follows:

> "Non compliance with any of the provisions of this Law shall not render the proceedings in any action void unless the Court shall so direct; but such proceedings may be set aside either wholly or in part, as irregular, or amended or otherwise dealt with in such manner, and upon such terms, as the Court shall think fit."

Nevertheless, no application was made to me by the plaintiff to amend the writ of summons. As Corbin J. pointed out in the Kelly case at page 484H, while every Judge of the Supreme Court has power to amend the proceedings before him whether or not he is asked to do so it should be remembered that it is not his duty to force upon a party amendments not asked for.

In the result the writ is set aside with costs to the defendant to be agreed or taxed.