NMG

JAMAICA

COURT OF APPEAL

SUPREME COURT CIVIL APPEAL NO: 3/99

BEFORE: THE HON. MR. JUSTICE FORTE, PRESIDENT
THE HON. MR. JUSTICE BINGHAM, J.A.
THE HON. MR. JUSTICE PANTON, JA.

BETWEEN	**ESSO STANDARD OIL S.A. LTD**	**DEFENDANT/ APPELLANT**
AND	**JOHN AIRD**	**PLAINTIFF/ RESPONDENT**

Gordon Robinson with David Henry instructed by **Donovan Jackson** of **Nunes Scholefield & DeLeon** for Appellant

Dr. Lloyd Barnett with **Alton Morgan** instructed by **Lancelot Cowan** of **Alton Morgan & Co** for the Respondent

November 8, 9, 1999 & February 9, 2000

FORTE, P.:

This action arose out of a lease agreement between the parties for the lease of the appellant's service station which occupied three premises at 58, 60 & 62 Gilmour Drive in the parish of St. Andrew. As the geographical addresses mentioned formed an integral part of the arguments and decision in the case, more will be said about that later in this judgment.

The parties had executed yearly lease agreements dated January 2, 1989, December 21, 1989, March 31, 1995 expressed to commence on January 1, 1995 and culminating in the agreement, the subject matter of the present dispute. This latter agreement was dated on the 25th March, 1996, for a period of one year, expressed to commence on the 1st January, 1996.

The action had its beginnings on the 10th September 1996, when the appellant served a "Notice to Quit" on the respondent, indicating that the lease of '96 would not be renewed, and requiring the respondent to vacate the premises by the 31st December, 1996, the date of the expiration of the lease. After several communications by letter, and meetings between the parties, the respondent on the 17th December, 1996 filed a Writ of Summons, claiming on the indorsement the following orders:

> (1) A Declaration that the Plaintiff has held over on the terms of the 1995 lease of 60 Gilmour Drive and that insofar as termination of the 1995 lease is concerned, Clause 5 governs the relationship between the parties
>
> (2) A Declaration that the Notice to Quit dated the 10th day of September 1996 under the 1996 lease of 60 Gilmour Drive is defective and invalid.
>
> (3) A Declaration that the Plaintiff is entitled to a minimum of three

months written notice in respect to the Plaintiff's tenancy or such reasonable statutory or proper notice as the Court may deem fit or applicable

(4) An Injunction to restrain the Defendant it's agents and servants from re-entering service station situated at 60 Gilmour Drive, for the purposes of taking possession, or doing any act whatsoever calculated to interfere with the Plaintiff's continued use and quiet enjoyment or to compel him to give up possession of the premises and in particular any act intended to disrupt the continuation of the normal business of the Plaintiff at the service station.

(5) An Injunction to restrain the Defendant it's agents and servants from taking any action whatsoever against the Plaintiff on or pursuant to the purported Notice to Quit dated the 10th day of September, 1996."

In his Statement of Claim dated 16th January, 1997 the respondent, pleaded that the Esso Service Station "is located at the intersection of Washington Boulevard and Molynes Road in the parish of St. Andrew and situated on adjoining parcels of land at 58 Gilmour Drive, registered at Volume 808, Folio 85 of the Register Book of Titles, 60 Gilmour Drive registered at Volume 956 Folio 126 of the Register Book of Titles, and 62 Gilmour Drive, registered at Volume 956 Folio 125 of the Register Book of Titles." He then alleged in paragraph 17 that his occupation of the

service station is protected by the provisions of the Rent Restriction Act, and that the "Notice to Quit" served on him by the appellant was in breach of the said Act and is therefore illegal and void.

He alleged in paragraph 20, that the appellant "threatens and intends to interfere with or interrupt the Plaintiff's lawful enjoyment or occupation of the said service station unless restrained by this Honourable Court from so doing."

The application for injunction was heard on the 31st December, 1996 when Ellis J at an inter partes hearing granted an interim injunction for 14 days. Then at another inter partes hearing over four days between the 16th January, 1997 and the 31st January, 1997 Courtenay Orr J refused the grant of an interlocutory injunction. In coming to his conclusion Orr, J found, inter alia, that damages would be a sufficient remedy. In doing so, he considered the respondent's claim that he was entitled to "good will". The respondent had argued that to reject the plaintiff's application would undermine his ability to negotiate the amount of "good will" to which he was entitled, with the third party to whom the appellant had granted the lease of the property. The learned judge found that the third party, Melvin Chung, had accepted the respondent's method of calculating the good-will and therefore concluded that since the ascertainment of the value was a matter of mathematics, damages would be a sufficient remedy. For that and

other reasons relating to the question of 'hardship' he refused the injunction.

The injunction having been refused the appellant on the 31st January, 1997 evicted the respondent from the premises. It appears that sometime thereafter, which is not ascertainable from the documents before us, the respondent, amended his statement of claim to add two further claims as set out hereunder:

> (4) Damages for wrongful termination of the lease of 60 Gilmour Drive.
>
> (5) Damages for wrongful interruption of the Plaintiff's business carried on by him at 60 Gilmour Drive.

In the event that these two claims are consequent upon the eviction which took place on the 31st January, 1997 there was no amendment to the particulars of the claim to allege any facts surrounding what the plaintiff claimed were wrongful acts by the appellant. Nevertheless, on the 6th November, 1998 the respondent filed a "Notice of Motion for Judgment" in the suit, asking by virtue of Title 37, Sections 442-448 of the Judicature (Civil Procedure Code) Law for the following orders:

> 1. Consequent upon the Order on Summons for Directions directing issues to be tried and issues or questions of fact to be determined in a manner and on the determination of the issues of fact by the Defendant's Answer to Interrogatories and Affidavits of

Documents filed herein, the Court is satisfied that it has before it the materials necessary for finally determining the questions in dispute, or any of them, or for awarding any relief sought and may give judgment accordingly.

2. Judgment be entered for the Plaintiff against the Defendant for:

   (a) The sum of $37,904,423.77, plus interest thereon at a commercial rate of interest, being special damages due to the Plaintiff from the Defendant for the wrongful interruption, seizure and delivery to the third parties of the Plaintiff's business carried on by him at 58 to 62 Gilmour Drive, Kingston 20 St. Andrew, by the Defendant itself or its servants and or agents on the 31st January, 1997; and

   (b) General Damages plus interest awarded to the plaintiff against the Defendant, for the Defendant's wrongful recovery of possession of premises 58 and 62 Gilmour Drive Kingston 20 St. Andrew on the 31st January 1997 without an order of the Court permitting same in breach of the provision of the Rent Restriction Act such damages to be assessed.

   (c) Such further or other relief as this Court deems just.

This notice of motion in effect alleges that the issues of facts, directed to be tried by the Summons for Directions were determined by the answers

to the interrogatories, and consequently prayed that on that basis judgment should be entered for the respondent.

It should be noted that this procedure was purported to be brought under the provisions of sections 442-448 of the Civil Procedure Code. Mr. Robinson referred to the incorrectness of this procedure, but did not make an issue of the irregularity, preferring to argue the appeal on its substance, and to make his submissions based on sections 307 and 323 of the Code, upon which it will be seen, Dr. Barnett based his application at the hearing of the motion. On his part Dr. Barnett seeming to concede the irregularity directed the Court's attention to sections 678 and 679 of the Code on which he relied.

Section 678 reads 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."

He pointed to the fact that no objection was taken to the procedure at the hearing, and indeed, the appellant filed affidavits in order to contest the hearing, and participated fully at the hearing. He called in aid the provisions of section 679 of the Code which reads:

> "No application to set aside any proceeding for irregularity shall be allowed unless made within reasonable time, nor if

> the party applying has taken any fresh step after knowledge of the irregularity."

No ground of complaint being before us in this regard and for the reasons set out hereunder I would treat the procedure as coming under sections 307 and 323 of the Code the sections upon which the motion was raised at the hearing.

The reasons are (i) failure of the appellant to make application to strike out the motion (ii) the appellant having taken fresh steps in the action, by the filing of affidavits in opposition to the motion (iii) no objection by the appellant to the procedure, but instead fully participating in the hearing.

At the conclusion of the hearing of the motion, the learned judge made the following order:

> "1. That Judgment be entered for the Plaintiff against the Defendant and damages claimed at paragraph 2(a) and (b) of the motion be set down for assessment."

The order thereafter sets out the respondent's claim for special damages of $37,904,423.77 for "wrongful interruption, seizure and delivery to the third parties of the Plaintiff's business carried on at 58 to 62 Gilmour Drive by the defendants itself or its servants and/or agents on the 31st January, 1997." It also sets out the claim for general damages plus interest for wrongful recovery of possession of premises 58 and 62 Gilmour Drive.

The learned judge by that order gave judgment against the appellant in respect of liability, but not in relation to the quantum of damages in respect of both special and general damages, which he ordered to be the subject of assessment. He in effect gave judgment against the appellant in respect of events which took place on the 31st January, 1997, a date subsequent to the date of the writ of summons. This factor has become one of the main issues if not the main issue in the appeal now before us, and will be dealt with later.

I turn now to the areas of complaint raised by the appellant in the grounds of appeal which contain the issues of law argued by counsel. The first reads as follows:

> "The learned trial judge erred fundamentally, in law, in hearing and granting the orders sought under the Motion, as the Writ of Summons and Statement of Claim did not disclose any of the causes of action upon which Judgment was sought and granted by the Court."

In order to determine the validity of this contention an examination of the factual basis of the submission is necessary.

The writ asked for three Declarations i.e (1) a declaration that the respondent held over in terms of the lease of 1995, (2) a declaration that the plaintiff is entitled to a minimum of three months notice, and of greater relevance (3) a declaration that the Notice to Quit is defective and invalid. The grounds on which the plaintiff's allegation that the

Notice to Quit was invalid and defective were detailed in the Statement of Claim. They related to the fact that the service station is sited on three properties i.e. 58, 60 and 62 Gilmour Drive, and that Notice to Quit was received in relation only to 60 Gilmour Drive. He alleged also that his occupation of the service station is protected by the provisions of the Rent Restriction Act and that the Notice to Quit is in breach of the said Act and is therefore illegal and void. He also contested the reason for the Notice to Quit given in the notice by the appellant, and maintained that no notice of any such breach has ever been served on him by the appellant. He makes two other points upon which he claims the declarations which are best set out in full.

> (1) para. 5 "The custom and/or usage in the trade and/or the Plaintiff's understanding of the agreement with the Defendant is that the Plaintiff would be permitted to recover the enhanced goodwill of the said service station on the determination of his operations there.
>
> Para. 16 The Plaintiff has been conducting negotiations for the sale of the goodwill and the Defendant's action threatens to and is calculated to deprive the Plaintiff of this valuable proprietary or financial benefit without compensating him for it.
>
> and (2) The lease agreement on which the defendant relies is void for uncertainty and the Plaintiff therefore occupies the premises either as a statutory tenant or as a tenant from year to year.

It is obvious that none of the remedies asked for in the Writ of Summons or the allegations of fact to ground those remedies related to the "wrongful interruption, seizure and wrongful delivery of the plaintiff's business to third parties," as indeed they could not, as the events which resulted in that claim, did not occur until a date subsequent in time to the filing of the Writ and the Statement of Claim. The learned judge, however in the "motion for judgment" declared liability in the appellant and ordered an assessment of damages alleged to have occurred as a result of its actions on the 31st January, 1997.

It is on that background that the appellant's complaint in ground 1 must be considered. Mr. Gordon Robinson who presented the appellant's case contended that the events of the 31st January, 1997, being subsequent in time to the Writ, formed a separate cause of action and consequently could not be the subject of a judgment in the cause disclosed in the Writ and Statement of Claim in the instant case.

It is a basic principle that amendments to Writs and Statements of Claims can be made at any time during the process of the determination of the matters in dispute between the parties (See Title 27 Section 259 of the Judicature (Civil Procedure Code) Law. Any such amendment, whenever made dates back in time to the filing of the writ. It follows then that amendments must relate to matters, which occurred before the date of the writ. However an amendment may be granted to allege

facts arising subsequent to the Writ or Statement of Claim where the amendment relates to matters going to the remedy claimed. It is on these principles that Mr. Robinson mounted his argument in Ground 1. He maintained that no amendment of the Writ or Statement of Claim could be granted in this case, as the events which would necessitate the amendment were events which created a new cause of action and therefore could not become an issue for decision in the instant case. The respondent would have to bring a new action in respect of his alleged unlawful eviction by the appellant. In any event, the only amendment sought and granted to the Statement of Claim related to the question of damages, without any pleaded facts to substantiate that claim.

A perusal of the transcript before us, discloses the correctness of Mr. Robinson's submission that no pleaded facts appear either in the Writ or Statement of Claim to ground the claim for damages arising out of the alleged eviction on the 31st January, 1997. Any disclosure of such facts finds its place only in the affidavit of the respondent. Dr. Barnett submitted that the circumstances surrounding the alleged eviction of the respondent, and the claim for damages arising therefrom did not constitute a new cause of action, but was only a "new ground of claim" and consequently an amendment to the Statement of Claim was permissible. He relied on Section 179 of the Civil Procedure Code which reads:

> "No pleading, not being a petition or summons, shall, except by way of amendment, raise any new ground of claim, or contain any allegation of fact inconsistent with the previous pleadings of the party pleading the same."

A positive statement of this rule is that an amendment which raises a new ground of claim or contains any allegation of fact which is consistent with the previous pleading could be allowed.

A "ground of claim" would relate to the reason, basis, or foundation of a particular claim and should be distinguished from a cause of action which is the claim itself. See ***Letang v. Cooper*** [1965] 1 Q.B. 232 where at page 242, Diplock L.J. (as he then was) defines "cause of action" as follows:

> "A cause of action is simply a factual situation the existence of which entitles one person to obtain from the Court a remedy against another person."

In the instant case, the cause of action would be the allegation of the invalid and unlawful notice to quit for which the respondent prayed for Declarations which would arise from that cause. If for example some other factors were discovered which would also demonstrate that the notice to quit was unlawful then that would be another ground upon which that cause of action could be established (i.e. another ground of claim). The subsequent action of eviction allegedly done by the appellant is not another ground for claiming that the notice is unlawful,

but another cause of action which is alleged to have arisen because the notice is unlawful. Significantly, no amendment was sought to allege the facts upon which the amended remedies were asked for in the Statement of Claim. This perhaps is consistent with the respondent's contention that the amendment goes to another ground of claim and is not a substantive claim in itself. I disagree with this view. The incidents of the 31st January, 1997 created a new cause of action, and could not form a claim in the present Writ of Summons.

In ***Eshelby v. Federated European Bank Ltd,*** [1931] All E.R. Rep. 840 where "T" was required to pay instalments in relation to certain works undertaken by a contractor, with the bank's guarantee, "T" refused to pay the first instalment. The contractor issued a writ against the Bank claiming the first instalment. The official referee who heard the action gave leave to the contractor to amend the claim by adding the amount of the second instalment which by that time had become due. On appeal, the Divisional Court held: as the claim for the second instalment was a new cause of action commencing after the issue of the Writ the official referee had no power to amend the endorsement to the Writ as he had.

Swift, J summed up the reasons for the decision as follows:

> "The court has amended the statement of claim, which is endorsed upon the writ, but it has not amended the writ itself; and, indeed, it could not have done so,

> because in order to make this action on the second instalment one which would come within the writ, the date of the writ would have had to be altered from November 27, 1930 upon which it was issued and soon after which it was served, to some date after Jan. 15, 1931. I do not think the court could possibly alter the writ in that way. It could not make an amendment to say that the writ had not been issued until some date after Jan. 15, 1931."

This dictum of Swift, J accurately states the law, as it presently exists, that is to say that a Statement of Claim cannot be amended to include a cause of action which arose on a date subsequent to the issue of the writ. As the alleged eviction of the respondent created a new cause of action and relates to facts arising after the issuing of the Writ, no amendment could properly be made to include that cause in the present action.

How does this conclusion affect the finding of the learned judge in the Motion?

As his order directs that an assessment of damages be undertaken in respect of the eviction on the 31st January, 1997 to that extent it cannot be upheld as that claim was not properly before the Court. Assuming that the provisions of Section 307 and 323 of the Code could be applied in the circumstances of the case, on questions of fact and law respectively then any order arising therefrom, would have to relate to the matters claimed in the Writ and unamended Statement of Claim.

Although the learned judge made no finding in that regard confining himself by inference to the question of damages arising out of the alleged eviction, I will nevertheless examine the other issues raised in this appeal.

I turn now to ground 2 concerning the exercise of the powers of the learned judge under section 307 of the Civil Procedure Code. This ground reads:

> "The learned trial judge erred, in law, in relying upon section 307 of the Judicature (Civil Procedure Code) Law, as forming the basis for the Order made. For the Order made by the Learned Trial Judge to have been made, the Defendant would have had to admit the Plaintiff's claim which claim has not been admitted by the defendant."

A good starting point is to look at Section 307 which states:

> "Any party may, at any stage of a cause or matter where admissions of facts have been made, either on the pleadings or otherwise, apply to the Court or a Judge for such judgment or order as upon such admissions as he may be entitled to, without waiting for the determination of any other question between the parties and the court or a judge may, upon such application, make such order or give such judgment as the Court or Judge may think just."

The section clearly gives the court or judge, where there is an admission of fact, the power to make any order, or give any judgment to which any party would be entitled upon such admission. Any such

entitlement would of course be conditional upon questions of law, either not arising or having been decided by a court under the provisions of section 323 to be considered later.

In the case under review, the respondent in his motion contended that there were admissions made in the answers to interrogatories given by the appellant, which entitled him to a judgment. He made this submission on the basis that no notice to quit had been served on him in respect of Nos. 58 and 62 Gilmour Drive which were protected by the Rent Restriction Act.

To understand this point, a brief rehearsal of the admissions needs to be undertaken. In short it needs only be stated that the appellant admitted that the service station occupied all three properties. It however, produced a certificate of exemption from the Rent Restriction Board for premises 60 Gilmour Drive. The notice to quit served on the appellant related only to 60 Gilmour Drive. On that basis, the respondent contended that there was no "notice to quit" served upon him in respect of properties Nos. 58 and 62 Gilmour Drive. He further argued that where as here, a tenant is a statutory tenant, any notice given to end the tenancy or his occupation must satisfy the requirements of sections 25 and 27 of the Rent Restriction Act.

The provisions of sections 25 and 27 upon which the respondent relied, show clearly that the purpose of the "motion" was to secure a judgment arising out of the eviction carried out on the 31st January 1997.

Section 25 provides that no order or judgment for the recovery of possession of any controlled premises, or for the ejectment of a tenant therefrom shall be made except in circumstances detailed in the section. Section 27 prevents the forcible removal of a tenant from the premises or the interference of his quiet enjoyment except under an order or judgment of a competent court for the recovery of possession.

In the circumstances, it is reasonable to conclude that the respondent was seeking on the motion a determination that not having been served a notice under the provisions of the Rent Restriction Act, in respect of premises 58 & 62 Gilmour Drive and his removal not being the result of an order or judgment of a competent court his forcible removal from those premises was unlawful, and that he was entitled to the damages detailed in the motion. That the learned judge understood that that was what was requested of him, is not only reflected in the Order he made, but also in the following passage taken from his judgment:

> "The answers to the interrogatories clearly admit that the service station was sited on three separate pieces of land each with a registered title. Those admissions do not per se allow for any remedy under section 307 of the Code. They form the basis for

> the plaintiff saying that in law 58 and 62 Gilmour Drive were not exempted from control under the Rent Restriction Act. On that ground the plaintiff says that in law he was unlawfully evicted from 58 and 62 Gilmour Drive."

Nevertheless, he made no specific finding contenting himself with recognizing that a question of law arose "in the circumstances" which I understand to mean, having regard to the answers to the interrogatories. Having done so he went on to enter judgment against the appellant in relation to liability and ordered assessment in relation to the damages claimed as a result of the alleged unlawful eviction, which as we have seen related to a new cause of action, which was not properly before him.

Significantly, the amendment to the Statement of Claim claimed damages "for the wrongful termination of the lease of 60 Gilmour Drive" and for wrongful interference of the Plaintiff's business carried on by him at "60 Gilmour Drive". No mention is made therein of premises 58 and 62 Gilmour Drive, which the respondent maintained had the protection of the Rent Restriction Act. It would appear, on the face, that 60 Gilmour Drive being exempt from the Rent Restriction Act, the legality of the eviction of the respondent from those premises, would have to be decided without the benefit of the provisions of that Act. Dr. Barnett cited two cases to support his contention that in circumstances such as existed in this case, a notice for one of the premises would not be

adequate. I make no comment on these cases, as it is not necessary for these purposes. The reference to the amended claim, is to demonstrate that even at the time of the amendment, the respondent was ironically claiming damages in respect of premises described as "60 Gilmour Drive" and makes no mention of 58 and 62, the eviction from which was more likely to attract damages if his contentions are correct. As a consequence of that the learned judge has ordered assessment of damages in respect of those premises, which is not even by amendment a subject of the claim.

In my judgment, though the admission on the interrogatories, disclose that the premises in fact consisted of three separate parcels of land, that in itself was not sufficient in order to obtain a judgment even on the unamended Statement of Claim. I say so because the admission still left several questions of facts to be determined. It is agreed on both sides, that the lease agreements between the parties all referred to the premises as 60 Gilmour Drive and the area of land leased comprising the 3 lots was accepted as the subject of the lease. The lease agreement of 1996, described the leased premises as "all that parcel of land situated at 60 Gilmour Drive Kingston 20 in the parish of St. Andrew together with the Service Station and fixtures thereon." Indeed, all the correspondence from the respondent described the leased premises as 60 Gilmour Drive. It would be reasonable to infer without evidence to the contrary that the

notice to quit which describes the leased premises as "60 Gilmour Drive together with service station and fixtures thereon" must have been understood by the respondent to refer to the whole premises, which also includes 58 and 62. The certificate of exemption under the Rent Restriction Act declares premises "60 Gilmour Drive" to be exempted on the grounds that "it is of such a valuation as to warrant it being let at six dollars ($6.00) or more per sq. ft." This exemption was granted obviously by virtue of the proviso to Section 3(1) of this Act which exempts a public or commercial building which, pursuant to an application by a landlord for a certificate of exemption, an Assessment Officer certifies:

> "(e) (ii) is of such a valuation at the prescribed date as to warrant being let at such standard rent (exclusive of any amount payable for service) as the Minister may, by order prescribe."

It would appear that the Assessment Officer would have had to visit the premises in order to do his assessment as required by sub-section (e)(ii) of the proviso to section 3(1) (supra). As the whole premises has been loosely described as 60 Gilmour Drive, some enquiry should be allowed before final determination as to whether the premises described as "60 Gilmour Drive" on the certificate of exemption was not understood by the Assessor also, to include the "whole premises" that is to say also, Nos. 58 and 62 a factor which having regard to the physical lay out may not have been known to the Assessor.

In conclusion on this aspect, I would find that in spite of the admission on the interrogatories, there were still issues of facts which would better be decided at a trial, where oral testimony could be heard and tested before coming to a determination on these issues.

Having regard to that finding, it may be unnecessary to examine the arguments which called in aid the provisions of section 323 of the Civil Procedure Code and which formed the complaint in grounds 3 to 5.

Nevertheless, I make some comments. The section reads:

> "If it appears to the Court or Judge that there is, in any cause or matter a question of law, which it would be convenient to have decided before any evidence is given or any question or issue of fact is tried, or before any reference is made to an arbitrator, the Court or Judge may make an order accordingly, and may direct such questions of law to be raised for the opinion of the Court, either by special case, or in such other manner as the Court or Judge may deem expedient, and all such further proceedings as the decision of such question of law may render unnecessary may thereupon be stayed."

This section clearly gives the court or a judge where any question of law arises in any cause or matter which it would be convenient to have decided before issues of fact are tried, the power to make an order for that question of law to be first decided. If therefore the circumstances of the cause or matter is such that a determination of that question of law would result in the resolution of the issues joined between the parties, then the court or judge should exercise its/his discretion,

under the section so as to save judicial time and expense. See the case of ***Ferrari v.John Issa & Middle East Ventures Ltd*** SCCA 56/95 (unreported) delivered 6th November, 1995 in which this Court per Carey J.A. cited with approval the following dicta of Lord Denning *in* ***Carl Zeiss Stiftung v Herbert Smith & Co.*** [1968] 3 WLR 281at page 285:

> "The true rule was stated by Romer L.J. in ***Everett v. Ribbands*** (see [1952] 1 K.B. 112) 'where you have a point of law which, if decided in one way, is going to be decisive of litigation, then advantage ought to be taken of the facilities afforded by the Rules of Court to have it disposed of at the close of pleadings, or very shortly after the close of pleadings.'
>
> I have always understood such to be the practice." ...

The section gives the court or a judge the discretion to make such an order given the particular circumstances of each case. As the court or judge would not in ordinary circumstances raise the issue, it would be expected that one of the parties, as in this case, would raise the question. The section permits the court or judge to "direct such question of law to be raised for the opinion of the court either by special case or in such other manner as the court or judge may deem expedient." In my view, the underlined words are sufficiently wide in meaning to include, the determination of the question of law by the judge before whom, the question is raised, without the necessity of that judge sending it for decision to another judge. In the instant case the procedure for raising

the issue was by motion, which in my view was appropriate in the circumstances. The respondent, however had to make the application using both sections 307 and 323 together, the former to establish that the admission in the interrogatories avoided the necessity for a trial on issues of fact, and that being so, by virtue of the latter a decision in law, as to the validity of the notice or the lack of notices in respect of Nos. 58 and 62 given the provisions of the Rent Restriction Act. The applicant would have to show that such conclusions on questions of fact and of law would result in the final determination of those issues. It follows from my earlier conclusion, that the circumstances of this case still admits of hearing and testing of evidence before a definitive finding of fact can be made. Because of this and because the determination of fact (section 307) and of law (section 323) are dependant on each other for a resolution of the issues, no definitive conclusion can be arrived at by this process. In my judgment, the learned judge fell into error, firstly in treating with the claim for damages which are the result of a new cause of action for which the respondent may file a claim, and secondly in coming to a determination of liability in circumstances where there still remain questions of facts to be determined. In the event, I would allow the appeal, set aside the order of the court below, and order that the case be returned to the Court below for the issues to be tried. The

appellant should have the costs both here and below, such costs to be taxed if not agreed.

BINGHAM, J.A.

I agree.

PANTON, J.A.

I agree.