IN THE SUPREME COURT OF JUDICATURE OF JAMAICA

IN COMMON LAW

SUIT NO. C.L. F - 090/1999

IN CHAMBERS

BETWEEN	CARLTON FORRESTER	PLAINTIFF
AND	LORNA THOMPSON	DEFENDANT

Mrs. Marvalyn Taylor-Wright instructed by Taylor-Wright & Co. for plaintiff.

Mr. Lawton Heywood for defendant.

Heard on April 17, 26 and July 3, 2002

JONES, J. (Ag.)

The plaintiff in this action applied by way of summons for this court to strike out the defence filed by the defendant on the basis that it is frivolous and vexatious or an abuse of the process of the court. On April 26, 2002, the application was summarily dismissed. At that time the court refrained from giving detailed reasons as it feared by doing so it would assume the role of the trial judge, and may be perceived as providing assistance to a party to the dispute prior to trial.

That was not to be; on May 6, 2002, the plaintiff's attorney requested written reasons for dismissing the summons. These brief reasons are in fulfilment of that request.

The substance of the plaintiff's application is set out in his affidavit supporting his application which is set out below:

1. *"That I have seen and read the Affidavit of the Defendant sworn to on the 22nd day of January 2000 and filed herein on the 23rd day of January 2001.*

2. *That I am informed by my attorneys'- at-law and do verily believe that the said Affidavit has disclosed no reasonable defence to the Claim in the matter for recovery of overpaid rental.*

3. *That I am informed by my attorneys and do verily believe that I am not responsible for the manner in which the rental paid was shared between the Joint Tenants or at all and that whether the Defendant received her share of the rental from her deceased husband is immaterial to the question of her liability to me in law and fact. As against me both the Defendant and her deceased husband enjoys the position of a single owner.*

4. *That moreover the plaintiff has not come into possession since the death of her husband as I am informed by my Attorneys at Law and do verily believe that in order to have a Joint Tenancy there must exist a unity of possession.*

5. *That further service of the Writ of Summons and Statement of Claim on the Defendant was effected as far back as October 20, 1999 and the Defendant entered an appearance since October 29, 1999.*

6. *That this Default Judgment was not entered and obtained by me until January of 2001 well over a year after the entry of Appearance.*

7. *That the unlawful increase in rental, which is the basis of my claim herein, was at all times negotiated by the Defendant and her deceased husband and the amount of such increase was at all material times communicated to me by the Defendant.*

8. *That on several occasions when I spoke to the Defendant's deceased husband about the increases be told me and I do verily believe that he could do nothing as it was the Defendant's decision*

9. *That I believe the Defendant to be guilty of inordinate and/or excessive delay and I say she has acted in a manner that is inconsistent with her having any intention to genuinely defend the action.*

10. *That the defendant has not allowed me to enjoy the fruits of my judgment.*

11. *That whilst the defendant neglected to defend this suit she vigorously pursued an action for recovery of possession in the Kingston & St Andrew Resident Magistrate's Court on the basis that I have not paid rental among other things without paying heed to the claim I have made for the overcharged rental"*

The defendant's defence which gave rise to the plaintiff's complaint is set out below:

"(1) The Defendant was at all material times registered together with Aaron Thompson her late husband who died on the 24 day of April 1998; as joint tenants of all that parcel of land registered at Volume 425 Folio 30 of the Register Book of Titles being all that parcel of land situated at 35 ½ Hagley Park Road in the parish of St.Andrew,

(2) The Defendant and her late husband lived separate and apart for a continuous period of 17 years up to the time of his death,

(3) The Defendant's late husband was at all material times in full control of the said property to the exclusion of the Defendant and carried out all transactions relating to it.

(4) The rental agreement relating to the said property was made between the Plaintiff and the husband of the Defendant and the Defendant was not a party to that agreement, neither did the Defendant receive any benefit from that agreement.

(5) There is no rental agreement between the Plaintiff and the Defendant and during the material time, 1992-1998 the Plaintiff paid no rental to the Defendant,

(6) The Defendant came into possession of the said property upon the death of her late husband in 1998 and since that time has not received any rental from the Plaintiff.

(7) The Defendant denies that she is in breach of the Rent Restriction Act and that the amount of $1,042,000.00 was overpaid to her by the Plaintiff"

Submissions by the Applicant

The foundation of this application was that the plaintiff in his capacity as tenant claimed the sum of $1,042,000 being an overpayment of rent against the

defendant in her capacity of landlord of premises situate at 35 1/2 Hagley Park Road, Kingston 10. The defendant has not denied the claim for overpayment, or that the increases were unlawful and unauthorized. The defendant admits, however, that she was a joint tenant on the premises with Aaron Thompson who is now deceased.

Mrs. Taylor-Wright submitted that the issue for the court to determine is whether in the face of the admission by the Defendant of a joint tenancy, it is reasonable, sustainable or appropriate for the defendant to defend the action by pleading privity in the landlord and tenant agreement.

Applicant's Submissions on the Law

In support of the application, Mrs. Taylor-Wright submitted that the claim was made pursuant to Sections 191 and 238 of the Judicature Civil Procedure Code and the inherent jurisdiction of the Court.

Section 191 confers jurisdiction to:

> *"Strike out or amend any matter in any endorsement or pleading which may be unnecessary or scandalous, or which may tend to prejudice, embarrass or delay the fair trial of the action and may in any case, if they or he shall think fit, order the costs of the application to be paid as between solicitor and client"*

Section 238 empowers the court to strike out whole pleadings which disclose no reasonable cause of action or answer or is frivolous/vexatious. Order 18 Rule 19 (1) sets out the position at common law, which vests powers in the court under its inherent jurisdiction to stay all proceedings before it, which are

obviously frivolous vexatious or an abuse of process: see page 334 of the Supreme Court Practice 1997 Vol. 1.

The plaintiff's attorney submitted that a reasonable cause of action means a cause of action with some chance of success when only the allegations in the pleading are considered: see Order 18/19/11 of the Supreme Court Practice 1997. She then concluded that a reasonable defence means a defence with some chance of success.

She claimed further, that there was no question of the defence being weak. The defendant's admission of the joint tenancy in paragraphs 2, 3 and 6 of the defence was inconsistent with her refuting possession of the premises. She argued that the basis of the defence was incompatible with the unity of possession: see ***Megarry & Wade, 6th Edition at pages 299.***

She asserted that the defendant and her late husband were responsible in law and are treated as one owner in possession. Similarly, paragraphs 4, 5 and 7 of the defence, must fail, as one joint tenant is the agent of the other. She said that the landlord/tenancy relationship bound the defendant in her capacity as surviving co-owner and there was no defence in the face of the joint tenancy.

On these grounds she concluded that the defence filed was unreasonable, unsustainable, frivolous, vexatious, and an abuse of process of the court. I was referred to the case of ***Norman v. Mathew's 1916 KBD pg. 857*** in which Lush J. in considering the meaning of frivolous and vexatious said:

> *"In order to bring a case within the description it is not sufficient merely to say that the Plaintiff has no cause of action. It must clearly appear that his alleged cause of action is one, which on the face of it is clearly one, which no reasonable person could properly treat as bona fide, and contend that he had a grievance, which he was entitled to bring before the court. Of course it is a question of degree, but I think this is a case which falls within that description"*

She submitted that the present case falls squarely within the principles of those expounded by Lush J, in that the defence of the defendant cannot be considered as being bona fide by any reasonable person as it deliberately flies in the face of the principles of law pertaining to joint tenancies and co-ownership.

Mrs. Taylor-Wright also cited ***Wenlock v. Molony and Others*** *(1965) 2* ***ALL ER*** *871.* In that case Millett J at first instance pointed out that even if an application may pass the test of disclosing a reasonable cause of action:

> *"if the claim has no foundation in fact and is not made in good faith with a genuine believe in its merits but has been manufactured to provide a vehicle for a further public denunciation, it is an abuse of process of the court and will be struck out".*

Wenlock v. Molony and Others (supra) was cited with approval by Harrison J in ***Financial Institutions Services Limited vs. Donald Panton et al*** at page 10. Reference was also made to ***Ashmore vs. British Coal Corporation*** *1990* ***QBD*** *338;* ***Mackellar vs. Romsey*** *(1901)* ***The Weekly Reporter, page*** *301.*

These propositions advanced by Mrs. Taylor-Wright are based on the cases that have been decided in this area, and do not involve very complex questions. In view of that, counsel appears to be so convinced that these questions must be

answered in favour of the applicant, that it would amount to an abuse of the process of the court to allow the case to proceed for determination by trial.

Respondent's Submissions

The defendant's attorney Mr. Lawton Heywood, in what could be termed a spirited response to the plaintiff's application, argued that the basic question to be decided by the court on an application to strike out a pleading is whether or not the cause of action is known to the law. He referred to the case of ***Mc Cook vs. Hammond (1988) JLR 296*** in which the Court of Appeal in Jamaica held that a reasonable cause of action means one with a reasonable chance of success.

He further submitted that the mere fact that a claim or a defence is weak is not a sufficient ground for striking it out: see ***Maragh vs. Money Traders Investments Ltd. (1997) C.L.M 207/1977*** per Wolfe C. J.

Mr Heywood said that the court has an inherent jurisdiction to stay all proceedings before it, which are obviously frivolous or vexatious or an abuse of its process: see ***Rev. Oswald Joseph Reichel, Clerk (Pauper) vs. Rev. John Richard Magrath, Provost of Queen's College, Oxford University [1889] 14 App. Cases 665.*** Frivolous or vexatious means cases which are obviously frivolous or vexatious or obviously unsustainable: per Lindley J in ***Attorney General for the Duchy of Lancaster V L. And N. W. Railway [1892] 3 CL. 274 at P.277).*** A defence is frivolous and vexatious if it does not have any serious purpose or value and "*one which on the facts of it was so unreal that no reasonable or sensible person could possibly bring it*" (per Kush J. in ***Norman vs. Matthews (1916) 32 TLR***

303 at pg. 204). A vexatious pleading is one which is "*brought without sufficient grounds for winning and purely to cause annoyance to the defendant*". (Concise Oxford Dictionary).

Mr Heywood contended that the defence has raised an arguable case, which has a real prospect of success. He also submitted that the plaintiff has not demonstrated that the defence is frivolous and/or vexatious and/or an abuse of process of the court as defined in the authorities cited.

He pointed out that the defence has a serious purpose: to resist an action based on a contract to which the defendant was not a party. He said that the action should properly have been brought against the party to the rental contract or his estate. He asserted that the defence of the absence of privity is very serious and is a matter upon which the trial judge should be allowed to decide.

Mr Heywood concluded that the application brought by the plaintiff ought to be dismissed, as ill conceived, and the case be allowed to proceed to trial on the issues raised by the defence.

Discussion

The issues before this court can be summarised thus: first, in the light of the admitted joint tenancy between the defendant and the landlord, is the assertion by the defendant of a lack of privity in the landlord and tenant agreement between the defendant and the plaintiff, a defence known to the law? Second, has the defence answered the case raised by the plaintiff?

The assertion of lack of privity is relevant to the defendant's defence if it can be established that the joint tenancy was severed. It is well established that a joint tenancy is severable. In ***Williams v. Hensman [1861] 1 John & H 546 at*** 557 Page Wood V.-C., in the course of his judgment, said:

> *"A joint-tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share. The right of each joint-tenant is a right by survivorship only in the event of no severance having taken place of the share which is claimed under the jus accrescendi. Each one is at liberty to dispose of his own interest in such manner as to sever it from the joint fund - losing, of course, at the same time, his own right of survivorship. Secondly, a joint-tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common..."*

In the present case where one of the joint tenants leases the premises to a third party, and there is evidence that it was without the consent of the other joint tenant, it is at least arguable that the joint tenancy was severed in one of the ways referred to in ***Williams vs Hensman*** (supra). That proposition is supported by the following passage which appears in Woodfall's Law of Landlord and Tenant 27th Edition at pages 60-61:

> *"At common law a joint tenant could make a lease of his share alone (constituting a tenancy in common during the term between the lessee and the other joint tenants)... If one of two joint tenants made a lease of the whole, his moiety only would pass with the result that a lease purporting to be made by both and executed by one only was a good lease for the moiety of him only that executed."*

The vital issue to be determined is whether or not the joint tenancy was in fact severed - allowing the defendant to raise the question of privity. From the authorities referred to, the issue raised by the defence, if true, is unquestionably a

defence known to the law. Consequently, the court concluded that it could not be seriously argued that the defendant did not have a realistic prospect of success, or that the defence has not answered the plaintiff's pleadings.

It is axiomatic that the power conferred on a court by virtue of Sections 191 and 238 of the Judicature Civil Procedure Code and the inherent jurisdiction of the court, ought not to be used in cases of uncertainty or obscurity, or where the pleading raises an arguable issue of law. In the judgment of this court, it is important to maintain the principle that litigants are not to be deprived of the right to submit real and genuine controversies to the determination of the courts by trial unless the case was utterly unsustainable.

For all these reasons this court summarily dismissed the plaintiff's application to strike out the defence. The court ordered cost to the defendant, to be taxed if not agreed.